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“The Importance of a Diverse Federal Judiciary, Part 2: The Selection and Confirmation Process”
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Mr. Chairman,
Members of the subcommittee,

Thank you so much for this opportunity to testify before you today at this hearing on “The Importance of a Diverse Federal Judiciary, Part 2: The Selection and Confirmation Process.”

It is impossible to address an issue of this complexity with the nuance it deserves in five minutes. Nevertheless, I will try.

First, a fairly-selected judiciary is crucial because of the messages it sends regarding equal opportunity, access to the courts, and the fairness of our judicial system. I am certain that everyone on this panel agrees that absolute equality of opportunity is essential to judicial selection, and to the public’s faith in the judiciary. No American should believe that “someone like me” can’t get fair consideration for *any* position of public service. Because I believe that people of good faith agree with the goal, I want to talk a little about the path to a diverse judiciary, and the collateral consequences of the choices we make along the way.

First, a little about my own path, and then a look to the future.

I am a Jamaican immigrant, of mixed ancestry. My family moved to Miami in the late 1970s. In the early 1980s, we moved again to Wilmington, NC, where I now sit as a federal district judge. I am a wobbler on the color line – there are people eager to place me into a racial category for reasons of their own, but my background and appearance defy simple categorization. When my family moved to Wilmington, I was repeatedly asked “What are you?” This was intended to provide the asker with racial information to fit me for their preexisting pigeonhole. My opportunities and social status were very much dependent on the answer.

The answer “Jamaican” was insufficiently specific for some, and was often followed by the more pointed question – “No, what race?” My answer– “the human race”– was deemed by some people to be too clever by half. But it is and remains my answer. I embody the American motto –“e pluribus unum,” or the Jamaican equivalent “out of many, one people.”

This inquiry into my race has not gone away, although the consequences have changed. I remember friends of different races in law school arguing over *my* race – fortunately, in an attempt to claim me, rather than disclaim me. At every career stop, I was encouraged to select particular boxes on personnel forms to ensure that the organization hiring me got credit for diversity hiring. All of this was troubling to me, because it fostered the perception that I would be treated as a representation of some category, not as a unique individual with my own talents, goals and dreams.

Fortunately, I felt none of this racial pressure when I was selected as a candidate to be a federal judge. At the time, I was a law professor at the University of North Carolina School of Law. I brought a specific kind of diversity there too – I was an outspoken advocate of textualism, originalism and judicial restraint within the increasingly liberal legal academy. Before joining the academy, I served as a federal prosecutor, and as a defense attorney before that. The combination of personal autobiography and legal philosophy has caused whiplash for some people’s preconceptions.

I can happily say that at no time during my selection and nomination process was I asked about my race – until after my confirmation hearing. Ironically, as I was walking out of the hearing, a reporter pointedly asked me what race I was and told me that the President was criticized -- by people who had never met me -- for failing to select a diverse candidate.

Looking forward: Racism is real – I have personal experience with it. But I also believe that justice is blind and all judges wear the same black robes for a reason. We need to strive--self-consciously and mightily – to achieve Martin Luther King’s dream – to create the day when we *all* are judged not by the color of our skin but by the content of our character.

Justice Clarence Thomas’s concurrence in *Adarand*¹ accurately captures my views on this issue. “Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.”

This is my chosen country. I have taken multiple oaths to uphold and defend the constitution of the United States: at my naturalization ceremony, again when I became an Assistant United States Attorney, and yet again when I became a federal judge. We have amended our Constitution multiple times to further commit us to principle that all people are equal before the law. We still have much work to do to fully accomplish that goal. As a judge I strive every day to find neutral principles of law and apply them neutrally -- to *all* of the people who appear before me, without fear or favor.

Discriminating on the basis of immutable characteristics damages and deprives those who choose to discriminate. And it damages those excluded – or chosen – for that reason. If the public reasonably believes that a potential judge was excluded – or chosen – because of an immutable characteristic, then we as a nation lose faith that the choosers understand the real

¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995)(Thomas, J. concurring)>

qualifications they are seeking, and that the judge chosen was truly the best choice among *all* of those available. There are many people in this country, from widely diverse backgrounds, who have the capacity to be great federal judges. I encourage our leaders to remain committed to the proposition that all people are equal before the law, to consider every potential candidate as an individual, with all of the nuance that that requires, and to seek the best candidates without fear or favor. Again, thank you.