

Judicial Diversity in Article III Courts: Is It Time for a New Deal?

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Thank you, Cornell, and thank you to the American Association of Law Libraries for having me here today. It is a real honor to be here with these distinguished panelists. Thank you especially to Lauren Collins for inviting me to be here today.

My name is Deanna Dawson, and I am Director of Federal Affairs and Diversity Initiatives for Justice at Stake.

Justice at Stake is a bipartisan, national campaign that works to keep courts fair and impartial. And as a part of that mission, one of our key initiatives is promoting diversity on the bench, because we know that judicial diversity is essential to helping our judiciary deliver equal justice, restoring and enhancing the public's faith in the legal system, and countering perceptions of systemic bias that currently exist.

As Cornell noted, 2010 marked the 60th anniversary of the appointment of Judge William H. Hastie, the first African American to serve as a federal judge, who served here in Philadelphia on the U. S. Court of Appeals for the Third Circuit. And 2011 marks the 30th anniversary of the historic confirmation of Sandra Day O'Connor to the US Supreme Court.

As you all know, Sandra Day O'Connor was first woman to serve as a United States Supreme Court Justice. What you may not know is that there had been 101 men confirmed before Sandra Day O'Connor.

We've certainly come a long way since Sandra Day O'Connor graduated in law school in 1952 when, despite graduating near the top of her class at Stanford Law School and serving on the law review, she was not able to find employment as an attorney because of her gender . . . although some firms did offer her a job as a legal *secretary*.

We have come a long way in a relatively short time, but still we have a long way to go. Today, for the first time, we have three women serving on the Court at the same time. But while 1/3 of the current Justices are women, overall, in the history of the court, only 4 of the 112 Justices have been women. And today, for the first time, we have two judges of color serving on the bench at the same time. But overall, there have been only 3 (out of a total of 112) judges of color to ever serve on the Supreme Court of the United States.

Last week was historic, in that the first openly gay man was confirmed to an Article III judgeship. Judge J. Paul Oetken joins Judge Deborah Batts as one of two openly LGBT judges to serve on the federal district court. And there are three other openly LGBT nominees are currently awaiting confirmation.

But despite these great strides in judicial diversity, we still have far to go. As just one example, there are NO Native American judges actively serving on the Article III courts. President Obama's sole Native American judicial nominee to date has been stalled, despite impressive qualifications, and a resume that frankly looks like a blueprint for what Senators typically look for in a judicial nominee. Aarvo Mikkanen went to Dartmouth and Yale, served as a clerk for two federal judges and has served almost two decades as a federal prosecutor.

So to give you an idea of the big picture, here is a snapshot of what the federal bench currently looks like. According to the most recent data (pulled Friday, July 22, 2011), there are 774 active, sitting judges. 545 (or 70%) are men. 229 (or 30%) are women. 601 (or 77%) are white. 95 (or 12%) are African American. 64 (or 8%) are Hispanic. 14 (or 1.8%) are Asian American. 0 are Native American

Now, contrast this with the overall population in the US. Again, comparing to active, sitting Article III judges, of which 70% are male, and 30% are female. This is in contrast to the population as a whole, which is 49% male, 51% female. 77% of the judges currently serving on the federal courts are white, as compared to the general population of the US per the 2010 census, which was 72% white. 12% of our federal judges are African American, which relatively speaking, is pretty good progress, when compared to the general population, which is 12.6% African American per the 2010 census. Contrast that with 8% of our federal judiciary being Hispanic, as compared to 16.3% of the general population identifying as Hispanic or Latino in the 2010 census, or the 1.8 Asian American percentage on the federal bench, as compared to 5% of the general population.

So in some areas we have made some great progress recently. In others, not so much. The numbers are more stark when you start to slice and dice them. For example, nationwide, there is only one Asian American judge currently serving on the United States Courts of Appeals- Judge Denny Chin in the Second Circuit. As you may be aware, President Obama nominated Goodwin Liu to serve in the 9th Circuit, which has a heavily Asian American population, but that that nomination was blocked.

In another particularly egregious example, there has only ever, in the history of the court, been one woman to have *ever* served on the 8th Circuit Court of Appeals: Judge Diana Murphy. Lest we think this is a problem unique to the federal judiciary, I would note that the diversity numbers on our state courts are even less encouraging. More than half of our State Supreme

Courts have no Justices of color, and three of our State Supreme Courts currently have no women Justices. And two of those (Iowa and Idaho) have neither any women Justices, nor any Justices of color; their entire bench is comprised of white men.

So now that we have an idea of the relative diversity (or in some cases, lack thereof) on the bench, I am going to turn to a discussion of why this matters. Why is judicial diversity important?

We accept as a society that we must follow the rule of law, and adhere to the decisions that courts make, even if we disagree with them. As Justice Frankfurter famously noted in his dissent in *Baker v. Carr*, “The Court’s authority— possessed of neither purse nor sword—ultimately rests on sustained public confidence in its moral sanction.” And a lack of diversity on the bench is a true threat to the public’s confidence in the judiciary, and the public’s acceptance of the legitimacy of the courts.

I did a conference in Washington State recently on judicial diversity. One of our panelists was Associate Chief Justice Charles Johnson, who is Chair of the Minority and Justice Commission. And Justice Johnson was reflecting on why he became so involved in the issue of judicial diversity, even though he is a straight white man. He told a story about a defendant had a court hearing, and then was sent back to jail. The custody officer asked him what had happened in his hearing. And he said, “Well, I was in the courtroom, and the white prosecutor, and my white public defender and the white judge all said a bunch of stuff I didn’t understand, and now I’m back in jail. Figures.”

As a former public defender myself, I can tell you that this is not an uncommon occurrence, nor is it an uncommon perception. When you have a trial or a hearing in a courtroom full of people- none of whom look like you- it is difficult to feel like you are having a fair day in court, and it is only natural to start to question the legitimacy of proceedings.

Justice at Stake has done public opinion research into the public’s perceptions of the legitimacy of the courts, and the results are somewhat startling. While 62 percent of white voters view the courts as fair and impartial, 55 percent of African Americans believe that judges are not fair and impartial. Seventy-seven percent of African Americans believe that judges are controlled by special interests. Eighty-five percent of African Americans believe that there are two systems of justice: one for the rich and powerful, one for everyone else. While a lack of diversity on the bench is not solely responsible for this disparity in perceptions of the justice system, it surely doesn’t help.

Interestingly, it isn’t just in layperson public opinions that you see this disparity. The National Center for State Courts did a survey of the legal profession. According to that research, only 18

percent of African American judges think that African American litigants are treated fairly by the criminal justice system, as compared to 83 percent of white judges.

That is a huge disparity, and that brings me to my second point on why diversity on the bench really matters.

We see things differently based on our own life experiences. And part of our life experience includes our race, our ethnicity, our gender, and our sexual orientation.

An excellent recent example of the importance of judicial diversity (and particularly of gender diversity) came in the 2009 case of *Safford Unified School District v. Redding*, a case that involved the strip search of a 13-year old girl suspected of possession of ibuprofen at school. Ms. Redding described the situation as follows:

I went to the nurse's office. Mrs. Romero asked me to remove my jacket, socks and shoes. The school nurse, Mrs. Schwallier, was in the bathroom washing her hands. When Mrs. Schwalleir came out, they told me to remove my pants and shirt.

I took off my clothes while they both watched. Mrs. Romero searched the pants and shirt and found nothing.

Then they asked me to pull my bra out and to the side and shake it, exposing my breasts. They also told me to pull the underwear out at the crotch and shake it exposing my pelvic area.

Ms. Redding called the search "the most humiliating experience I have ever had." And yet, at oral argument in that case, the then 8 male justices on the court frankly did not appear to take the case very seriously. Justice Breyer joked, "In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, OK? And in my experience, too, people did sometimes stick things in my underwear." At which point, many in the courtroom erupted into laughter.

This angered Justice Ruth Bader Ginsburg, the then sole woman on the Court, who later stated about her colleagues, "They have never been a 13-year-old girl. It's a very sensitive age for a girl. I don't think that my colleagues, some of them, quite understand."

In the end, the Court ruled that search unconstitutional by a vote of 8-1. And I doubt that anyone thinks the result would have been the same but for the presence of the then sole woman on the court.

Likewise, race also makes a difference in decision-making. I would commend to you some recent research on how both race and gender appear to have a statistically significant impact on judges' decision-making:

In a 2009 study published in the *Washington University Law Review*, Pat K. Chew and Robert E. Kelley reviewed over 400 federal cases and found that African-American judges were far more likely than their white colleagues to find in favor of plaintiffs in racial discrimination and harassment cases, and that Hispanic judges, interestingly, were even more "pro-defense" than their Anglo counterparts.

In a 2008 study published in the *Columbia Law Journal*, Adam B. Cox & Thomas J. Miles found that judges of color were twice as likely to find liability in Voting Rights Act cases, and that a white judge is approximately 20 percentage points more likely to find for the plaintiff when she sits on a panel with at least one African-American judge.

And in a 2005 *Yale Law Journal* article, Jennifer Peresie reviewed over 500 federal appellate cases involving allegations of sexual harassment or sex discrimination and found that a plaintiff was twice as likely to prevail on appeal if a woman was on the judicial panel. Peresie's study also found that when a woman was on a panel, the men on the panel were also significantly more likely to rule in favor of the plaintiff than judges on all-male panels.

The research is significant, and judges' own stories about how their views were impacted, and changed, by having diversity on the bench are compelling. Justice Sandra Day O'Connor has spoken very eloquently about how her views were impacted by serving with Justice Thurgood Marshall, the first African American Supreme Court Justice. I'll read you a quote from Justice O'Connor:

Like most of my counterparts who grew up in the Southwest in the 1930s and 1940s, I had not been personally exposed to racial tensions before *Brown*; Arizona did not have a large African American population then, and unlike southern States, it never adopted a de jure system of segregation. Although I had spend a year as an eighth grader in a predominately Latino public school in New Mexico, I had no personal sense, as the plaintiff children of Topeka School District did, of being a minority in a society that cared primarily for the majority.

But as I listened that day to Justice Marshall talk eloquently to the media about the social stigmas and lost opportunities suffered by African American children in state-imposed segregated school, my awareness of race-based disparities deepened. I did not, could not, know it then, but the man who would, as a lawyer

and jurist, captivate the nation would also, as colleague and friend, profoundly influence me.

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

And as Justice Byron White said, Justice Marshall “would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our experience.”

Diversity makes a difference. Courts that lack diversity may be perceived as biased by the communities they serve, which threatens the public’s perception as courts as fair and impartial. Moreover, a lack of diversity on the bench can lead to actual bias, intentional or unintentional. Homogeneity on the bench can lead to “groupthink,” and thus negatively impact the quality of decision-making. Conversely, diversity on the bench can enhance the quality of decision-making by encouraging debate, critical reflection, and the introduction of fresh perspectives.

There is an intersection between these points. Something that we don’t often consider in terms of the importance of judicial diversity is the introduction of a minority perspective- even if in the end, that minority perspective remains just that- the minority perspective, or a dissent. As noted scholar Sherrilyn Ifill notes:

We should remember that dissents also increase public confidence because they allow opportunities for a court to speak from multiple voices, so that even those dissatisfied with the court’s decision will know that their perspective was taken into account, even if it failed to carry the day.

Diversity of race, of gender, of perspective . . . matters.

So what can we do to improve judicial diversity?

Justice at Stake, along with the Lawyers Committee for Civil Rights Under Law, commissioned a research study conducted by George Mason University, to look into what we can do to improve diversity on the bench, and I would commend that study to you. Our partner the Brennan Center for Justice also did a similar study in 2008 that I would recommend to you as well. I will touch on a few of our findings, and some best practices today.

The first thing I would start out by saying is, intentionality matters. We have seen at both the state and federal level that if you have an appointing authority who has a commitment to judicial diversity, then you will in fact achieve greater judicial diversity.

I noted earlier that there are 14 Asian American judges on the federal courts. Half (or seven) of those have been nominated and confirmed during President Obama's less than three years in office. And less striking but still notable is the fact that while 95 of the active Article III judges are African American, 20 of those 95 were nominated by President Obama. A fairly remarkable 22.7 percent of the judges who have been nominated by Obama and confirmed are African American. You can compare that with the president in the last 30 years who had the worst record on promoting diversity on the bench: only 1.9% of President Reagan's confirmed nominees were African American.

This is not just a D versus R issue. Notably, George W. Bush did an exceptional job of nominating Hispanic judges to the bench. The 29 Hispanic judges that Bush nominated and confirmed outpaced the 25 nominated by Clinton, and far outpaced those of his recent Republican predecessors; Reagan and Bush I combined only nominated and had confirmed 22 Hispanic judges.

And lest we think that this is just a trend that keeps going up and up, it is perhaps worth noting that Jimmy Carter nominated and had confirmed 37 African American judges during his one 4-year term in office, as compared to 7 African American judges confirmed during Reagan's 8 years in office.

I mentioned earlier that 2011 is the 30th anniversary of Justice Sandra Day O'Connor's confirmation to the bench. If you look at the history of diversity on the federal courts over the last 30 years, Obama and Reagan are interesting bookends to look at in comparing nominations. 45.5% of Obama's confirmed nominees have been women, and 42% of his confirmed nominees have been judges of color. And while Reagan made the historic nomination of Justice O'Connor to the Supreme Court, his overall record on nominees was somewhat less than stellar: 91.8% Reagan's confirmed nominees were male, and 93.9% of his confirmed nominees were white.

We know that if you don't have a commitment to diversity, you won't get diversity. But we also know that the best-intentioned appointing authority needs a pool of qualified applicants in order

to achieve the goal of judicial diversity. In order to increase the pool, and to increase the pipeline of qualified, diverse candidates, the next best practice that we have identified is the need for additional training and mentoring of aspiring judges from underrepresented backgrounds.

At Justice at Stake, we have launched a pilot project in Washington State, and we will be expanding that project into several additional states over the coming years. Among other projects, we are doing “How to be a Judge Trainings” across the state. We are also establishing formal mentoring programs in conjunction with partners like The Lawyers Committee for Civil Rights Under Law, and Lambda Legal.

Related to this, we know there is a need to demystify the process of how to get on the bench. There is some myth and some reality to the notion that getting on the bench is an “old boys club.” (Or, to be more precise, an old *white* boys club.) But we know that when it is perceived that way, it dissuades highly qualified women and minorities from seeking the bench.

The truth is, there are many excellent judges of color, and women judges on the bench who were not politically connected, who didn’t, as the myth goes, go to prep school with their home state Senator. But again here, perception can be reality, and a perception that the door is closed to qualified women and minorities can become in a sense a self-fulfilling prophecy

So another recommendation is to do more to publicize the accomplishments of judges of color and women judges, and to make known the many, varied paths to the bench. Along those lines, Justice at Stake created this guide in conjunction with the American Constitution Society and the various national minority bar associations on “The Path to the Federal Bench,” and will be doing outreach to attorneys from underrepresented backgrounds around this guide, encouraging them to seek a career in the federal judiciary. (And I’d like to thank Judge McKee for participating in our recent roll out of that guide.)

As noted earlier, we have seen a higher degree of success in getting African American judges confirmed to the federal bench than other judges of color. Part of the reason for this success is due to organized political pressure, and recruitment and training of African American candidates to the bench. Recently, taking a page out of this playbook, we have seen greater organization, coordination, and training of candidates for the bench by groups like NAPABA (the Asian American bar) and the HNBA (Hispanic National Bar Association), which has certainly paid dividends, as we have seen a huge uptick in nominations and confirmations of Asian and Hispanic judges.

The other best practice I would note today is the need for more formal recruitment procedures for judges from underrepresented backgrounds. This can come about from sitting judges, from

minority bars, or from appointing authorities. It can also happen through judicial nominating committees, or Senatorial screening committees, at both the state and federal level.

The Brennan Center's report made an interesting observation. They noted that some Commissioners thought of themselves as "headhunters" and took responsibility for recruiting candidates and keeping an eye on the diversity of the applicant pool throughout the nominating process, while other Commissioners thought of their mission as purely "background-checking" and spent little time actively recruiting candidates. (While the Brennan Center was looking at state court nominating commissions, I would note that there is a similar split in how federal senatorial screening commissions seem to function.)

The Brennan Center's research found that to effectively increase diversity, all nominating Commissions should add systematic recruitment to their practices. As they noted, "expanding the pool of applicants at the start of the process is a key ingredient to ensuring a diverse "short list" and ultimately a diverse bench."

And that should serve as a good segue to Tobey's presentation on the nominating process, and its impact on diversity. I am really looking forward to hearing her insider's perspective on the nominations process, and I applaud her for being here to help "demystify" that process.

Thank you.