

Written Testimony on the Importance of Judicial Diversity

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Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee, thank you for allowing me to be here today to speak with you about the topic of judicial diversity on the nation's federal courts.

I am a Professor of Public Policy at the John F. Kennedy School of Government at Harvard University. I have a Ph.D. in Political Science, an A.M. in Statistics, and an A.B. in Economics, all from Harvard University, and a J.D. from Stanford Law School. I was previously a law clerk for the Hon. Ronald Lee Gilman of the U.S. Court of Appeals for the Sixth Circuit. My research is quantitative in its approach and focuses in part on diversity in the nation's courts and in the legal profession. I have written 34 published papers and two books on these and related topics.

The topic of judicial diversity is an important one, and it has only increased in public salience in the last decade. As I will discuss in this written testimony, our nation's courts are in some ways out of step with our country's demographics. They are also out of step in not reflecting the rich variety of educational and professional experiences the legal profession has to offer. The lack of diversity risks undermining the public's trust in the judiciary.

In what follows, I will describe the current status of diversity in the federal courts across three key categories: (1) demographic diversity, (2) diversity across educational institutions, and (3) diversity in professional experience. I will explain why diversity within the federal courts is important, focusing on what a more diverse judicial body brings to the table and how the courts being reflective of American society can generate more trust in the rule of law and stronger beliefs about the institutional legitimacy of the judiciary.

	White	Black	Hispanic	AAPI	Native American	Women
General Population	60.1%	13.4%	18.5%	5.9%	1.3%	50.8%
Court of Appeals	76.4%	10.4%	6.4%	6.4%	0%	34.3%
District Courts	72.9%	13%	9.6%	3.9%	0.3%	32.6%

Table 1: Basic demographics of U.S. judges compared to the general population (in percentages). Sources: U.S. Census Population Estimates (July 1, 2019), Federal Judicial Center Biographical Database (accessed March 17, 2021). Note: Some judges identify across multiple categories.

Status of Diversity on the U.S. Courts

To give some background, law schools did not admit women, religious minorities, and racial or ethnic minorities for much of American history, making the ability of people from these groups to enter into the judiciary nearly impossible. Thus, the first African American named to the federal bench, William Henry Hastie, was appointed in 1950, but it was not until 1961 that the second African American, James Parsons, was named. The first woman, Florence Ellinwood Allen, was appointed in 1934, and it was not until 1949 that the second woman, Burnita Shelton Matthews, was appointed. The first Mexican-American judge was appointed in 1961, but no Puerto Rican or Cuban-American judges were appointed until 1979 and 1992, respectively (Sen, 2017). The situation today is improved, although the judiciary remains far from reflective of the nation’s population and, in some ways, has become less representative.

Demographic Diversity. On the issue of race and gender, consider Table 1, which shows the basic demographic characteristics of the 172 current active judges on the U.S. Courts of Appeals and the 613 active judges on the U.S. District Courts, as compared to the general population. (We do not know enough to say if the nation’s federal judges are representative of the general population in terms of LGBTQ persons.)

Both appellate and district judges are more likely to identify as white and less likely to identify as Black, Hispanic, or Native American. (The only minority racial or ethnic group with a share larger than its general population share are Asian American appellate judges.) The largest discrepancy concerns the federal judges identified in the data as Hispanic. Here, despite the general population being around 18.5% Hispanic, only about 6.4% of appellate judges and about 9.6% of district judges identify as Hispanic. Also, the federal courts until recently had no judges of Native American descent, and the share of this group also does not reach the population share.

Gender is another area with a large discrepancy between the federal courts and the general population. As Table 1 shows, about half the general population is women, but only about 34% of appeals court judges and 33% of district judges are women. This is also unrepresentative of the gender balance among U.S. law school graduates, where women have

	Harvard	Yale	All “T14” Law Schools	UT-Austin	Univ of Florida
Court of Appeals	15.1%	11.6%	64.5%	0.6%	0%
District Courts	9.0%	5.4%	34.3%	3.8%	2.0%

Table 2: Educational backgrounds of U.S. judges (as the percentage of judges who attended). Sources: Federal Judicial Center Biography (last accessed March 21, 2021).

comprised over 40% of yearly J.D. recipients since at least 1985, or among members of the legal profession writ large, which is approximately 38% women.¹

Educational Diversity. Another area of concern is that many of the judges who sit on our nation’s courts do not represent the life experiences of many Americans. Granted, all judges should have a law degree and professional experience relevant to their work as judges. Even so, a wealth of important educational and professional experiences remain poorly reflected in the judicial branch.

For example, Table 2 shows the educational backgrounds of current active federal judges, which lean very heavily toward the elite Top 14 (“T14”) law schools.² Indeed, about 15% of all active appellate judges attended just one law school, Harvard Law School, and nearly 27% – more than 1 in 4 – attended either Harvard or Yale. Close to 2 out of 3 appellate judges – an overwhelming majority – attended one of the highly elite T14 schools.

Of course, very smart and talented people go to school in cities such as Cambridge and New Haven, but focusing on such a narrow bandwidth of schools overlooks the wealth of experiences from graduates of other excellent universities, especially those that are state flagship law schools or those outside of the I-95 corridor. Consider, for example, the University of Florida Law School. Despite being one of the most prestigious law schools in the third-largest state, no appellate judges and only 12 district judges (2%) attended this law school. Another example is the excellent law school at the University of Texas, which counts among its graduates only one active appellate judge and 23 active district judges (3.8%).

Professional Diversity. Perhaps the most surprising area concerns the professional experience of federal judges, shown in Table 3.³ The table shows that a significant majority of active federal judges come to the bench with private practice experience, many of them

¹<https://www.census.gov/library/stories/2018/05/women-lawyers.html>.

²The T14 law schools are, in alphabetical order, Columbia, Cornell, Duke, Georgetown, Harvard, NYU, Northwestern, Stanford, Berkeley, University of Chicago, University of Michigan, University of Pennsylvania, University of Virginia, and Yale.

³To create the table, I looked for exact phrases used to describe the judges’ professional backgrounds by the Federal Judicial Center. For example, I recorded how many active judges’ biographies contain the expression “Private Practice” in the description of their professional experience. This does not capture all judges with some sort of private practice experience, nor does it perfectly calibrate among different kinds of experiences, but it does capture the prevalence of these exact mentions.

	Private Practice	U.S. Attorney	Attorney General	Professor	Military	Public Defender	Staff Attorney
Court of Appeals	89.5%	28.5%	21.5%	30.2%	7.6%	2.3%	6.4%
District Courts	87.6%	33.6%	9.1%	14.8%	10.9%	7.7%	5.2%

Table 3: Percent of judges with exact phrase mentioned at least once in their Federal Judicial Center professional profile. Sources: Federal Judicial Center Biography (last accessed March 22, 2021). Note: “Military” includes judges whose biographies contained any mention of “Army,” “Navy” (or “Naval”), “Marine,” “Coast Guard,” or “Air Force.”

having previously worked as corporate lawyers. In addition, a large number have some sort of prosecutorial experience – such as experience working as a U.S. attorney, as a assistant U.S. Attorney, in a U.S. Attorney’s office, or in another kind of attorney general’s office (for example, in a state attorney general’s office). Close to a third of appellate judges have experience working in legal academia as full-time or adjunct professors, and, while I like professors very much, this is extremely unrepresentative of the U.S. general population or, indeed, of the legal profession.⁴

While I am in strong support of members of the federal judiciary having these kinds of experiences (including corporate practice and prosecutorial experience), the lack of representation in other areas is striking. For example, consider the proportion of judges whose biographies include the phrase “Public Defender.” Only about 2.3% of federal appeals judges and about 7.7% of federal district judges list this kind of experience in their professional profile, a statistic wholly out of balance compared to the share of judges with prosecutorial experience. Another example is judges whose biographical profiles list “Staff Attorney,” which is a phrase often used to describe legal positions with nonprofit organizations. Here, only 6.4% of appellate judges and 5.2% of district judges list this kind of experience, much lower than those who list private practice, U.S. attorney, or even academic experience.

Importance of Diversity

With these statistics in mind, it is important to explain the reasons why such discrepancies might matter and why a broadly diverse judiciary is a good thing. I consider three reasons, which are that (1) judges of different backgrounds may decide cases differently, (2) evidence shows that diverse groups of decisionmakers reach better-justified decisions, and (3) a diverse judiciary can help strengthen the public’s trust in the courts and in the decisions they reach. I will go through these in order.

⁴The table shows correspondence between the share of judges who are military veterans and the share of veterans in the general population (around 7 percent). This is very important, as military experience brings an important perspective to a body that often rules on the scope of military powers. However, many of these veterans are older judges, meaning that this share is likely to fall over time.

Benefit #1: Judges of Different Backgrounds Bring Different Perspectives

First, diversity broadly impacts the kinds of decisions produced by our nation's courts. The scholarship on this is wide-reaching and varied and, although it points to different contexts and outcomes, the message is that judges from different backgrounds often do rule differently from one another, particularly when cases involve components of those differences. This suggests that we should be thinking of diversity as implicating the entire judiciary, not just individual judges.

Diversity in Racial/Ethnic Background. For example, a large set of papers have compared the decisions of Black judges to those of white judges within the context of criminal justice, finding differences in how these judges sentence criminal defendants. Some early studies have found that Black district judges are harsher on defendants, while later studies mostly find that white district judges are harsher on defendants.⁵ A closely related research area has shown differences in voting in non-criminal issue areas where race or ethnicity is salient. For example, Cox and Miles (2008) find that white federal appeals judges are less likely to vote in favor of plaintiffs in Voting Rights Act cases than are Black judges. Kastellec (2013) finds that white federal appeals judges are less likely than Black judges to vote in support of affirmative action programs. This finding is consistent with Weinberg and Nielsen (2011), which finds that white federal district judges are more likely to dismiss civil rights employment claims than are non-white judges.

There have been fewer studies with regards to Latino/a, Asian American and Pacific Islander, and Native American judges since their numbers are so small. Morin (2014) examines black and Latino/a federal appeals judges' voting in employment discrimination cases, finding that Latino/a judges are less likely than are white judges to rule in favor of claimants. An older study, Holmes et al. (1993) find that Latino/a judges are not impacted by defendant ethnicity, while white judges sentence non-Latinos more leniently. Haire and Moyer (2015, p. 30-32) finds no statistically distinguishable differences between Latino/a and white federal appeals judges on a host of issues after controlling for ideology. To date, there are no studies exploring decision-making by Asian American or Native American judges, again likely due to the relatively low numbers.

Diversity in Gender. There are similar patterns in terms of gender diversity. (We have no information on LGBTQ persons.) For example, Farhang and Wawro (2004) find that, in employment discrimination cases, courts of appeals judges who are men are less likely

⁵The studies here are numerous and have explored different outcomes (Harris and Sen, 2019). Steffensmeier and Britt (2001) finds that Black judges were slightly more likely to sentence defendants to prison, regardless of the defendant's race. Scherer (2004) examines search and seizure cases and finds that white appellate judges are less willing than their Black counterparts to accept Black defendants' claims of police misconduct. More recently, Cohen and Yang (2019) find that white district judges issue longer criminal sentences and that Black judges issue shorter ones. Some studies have found no differences (Abrams, Bertrand and Mullainathan, 2012).

than women to favor plaintiffs, and that having at least one woman on the three-judge panel increases the probability that the panel will rule for the plaintiff. These findings are supported by Peresie (2005), which examines federal appeals judges' voting on Title VII sex discrimination and sexual harassment cases and finds, in addition to effects on the panel, that male judges are less likely than female judges to side with the plaintiff. In another influential study, Boyd, Epstein and Martin (2010), finds that male federal appeals judges are less likely than female judges to vote in favor of women in gender-related cases. Gill, Kagan and Marouf (2019) find that all-male appeals panels hearing immigration appeals are much harsher with male litigants than female litigants (but that mixed-gender panels are not).

However, these are some mixed findings. Haire and Moyer (2015)'s analyses of federal appeals judges' overall voting records concludes that judges' gender has no relationship to voting after controlling for ideology (pp. 47–49). The authors also see no difference across specific issue areas, with the exception of sex discrimination cases, which, interestingly, reveals that older female judges are more sympathetic to plaintiffs than younger female judges.

Diversity Across Other Characteristics. Scholars have examined other kinds of personal characteristics as well. Songer and Tabrizi (1999) find that evangelical state supreme court judges are more conservative across social issue than are mainline Protestant, Catholic, and Jewish judges, while Pinello (2003) analyzes voting on LGBTQ-rights issues, finding that Jewish judges are more inclined to favor these issues and Catholic judges are less so, both in comparison with Protestant judges. Shahshahani and Liu (2017) examine federal courts of appeals cases involving religious freedom claims, finding that Jewish judges are more likely to favor claimants.

In terms of professional experience, the work is more limited, probably owing to the homogeneity in professional backgrounds of federal judges. However, interest in this is growing, and one recent non-peer reviewed study, Shepherd (2021), has found that judges who were previously corporate lawyers or prosecutors are significantly more likely than other types of judges to rule against workers in employment cases.

Benefit #2: Diversity Contributes to Healthy Decisionmaking

A second benefit to greater diversity, broadly construed, is that it can lead to the discussion of more numerous and more varied viewpoints and therefore promote better group decision-making – a consideration particularly salient for the federal courts of appeals.

Much of this research comes from outside the study of the courts, but has strong implications for how the judiciary functions. For example, Sommers (2006) finds that white decisionmakers engage more deeply in factual inquiry, make fewer errors, and were more amenable to the discussion of racism when in mixed-race versus all-white groups. Similarly, Levine et al. (2014) finds that teams tasked to make financial decisions make better choices when their

teams are racially or ethnically diverse. Similar findings extend to gender (as opposed to racial diversity) (Díaz-García et al., 2013) and, presumably, also to different professional and educational backgrounds.

We see suggestive evidence of this on the courts, with studies showing that the impact of people of color and women on the bench can extend to their peers, most apparent for those sitting on three-judge panels in the federal courts of appeals. Studies have shown that appeals panels with no Black judges are less likely to rule in favor of affirmative action programs than are panels with at least one Black judge (Kastellec, 2013); studies have also shown that panels with no women are less likely to rule in favor of plaintiffs in sex discrimination cases than are panels with at least one woman (Boyd, Epstein and Martin, 2010).⁶

Judges have also argued in favor of these points. For example, the first Asian American appointed to the Northern District of California, Judge Edward M. Chen, noted that diversity “affects the direction and effectiveness of any organization by encouraging richer debate and more thoughtful reflection and discussions within the organization. Diversity facilitates the expansion of an organization’s agenda and broadens its perspective” (Chen, 2003, p. 1115).

Benefit #3: Diversity Enhances Respect and Legitimacy

The last and perhaps most important reason for an increasingly diverse judicial bench is the possibility of increased and more widespread respect for the rule of law and of stronger beliefs in the institutional legitimacy of the courts. More diverse courts – ones that reflect the population across demographics, education, and professional and personal experience – have the possibility of engendering greater goodwill from the population they serve.

On this, there is plenty of qualitative evidence. As Judge Chen, observed, “It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority.” How can the public have confidence and trust in such an institution if it is segregated—if the communities it is supposed to protect are excluded from its ranks?” (Chen, 2003, p. 1117).

There is also quantitative evidence that supports these observations. For example, Scherer and Curry (2010) find that greater representation of African Americans on the courts directly leads to greater feelings of legitimacy for the institution among African Americans. Although

⁶In related findings, other studies have considered the positive effect of diversity on judicial processes. For example, Boyd (2013) finds that civil cases assigned to women district judges are more likely to settle, and to settle more quickly, than cases assigned to men. Haire and Moyer (2015, p. 52-53) look at three-judge federal appeals panels and find that opinions authored by women are longer, suggesting a greater attempt to incorporate a variety of perspectives.

this study was focused primarily on representation in terms of race, and on African Americans specifically, I believe that these and other studies are certainly suggestive that we would see similar positive effects for other characteristics, such as gender, educational backgrounds, and professional experience.

Conclusion

It is an honor to speak with you today. I believe that we have an opportunity to make our courts more diverse across a variety of respects – including across race, gender, religion, education, and professional experience. I think that doing so will benefit decisionmaking across the entire judiciary and shore up the institutional legitimacy of courts.

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