



**Written testimony of Jennifer C. Braceras  
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for the U.S. House of Representatives  
Committee on the Judiciary,  
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***The Importance of a Diverse Federal Judiciary,  
Part 2: The Selection and Confirmation Process***

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee on the Courts, Intellectual Property, and the Internet, I am honored to testify today on the importance of a diverse federal judiciary.

I currently serve as the director of the Independent Women's Law Center, a project of Independent Women's Forum. For almost 30 years, IWF has been the leading national women's organization dedicated to enhancing women's freedom and well-being. Independent Women's Law Center supports that mission by advocating for individual liberty, equal opportunity, and respect for the American constitutional order.

Previously, I served as a Commissioner on the United States Commission on Civil Rights and taught courses on federal civil rights law at Boston College Law School and Suffolk University Law School.

**Representation and Legitimacy**

It should go without saying that, in nominating men and women to the federal bench, a president should consider the best and the brightest from *all* walks of life within the legal profession.

A judiciary that reflects the vibrant tapestry of America enhances the legitimacy of our legal system and gives Americans confidence that our system of justice is impartial and accessible to all.

And it is undeniable that historic Supreme Court appointments, such as those of Sonia Sotomayor, Sandra Day O'Connor, Antonin Scalia, Thurgood Marshall, and Louis Brandeis, held deep meaning for Hispanic, female, Italian, Black, and Jewish Americans, respectively. Even at the lower court level, the confirmation of a federal judge from a particular ethnic background is often a source of pride for members of that community, instilling confidence in the judiciary and faith in the promise of America.

Some might argue that considerations of race and ethnicity are never appropriate. Such claims ignore the reality that politics -- whether partisan or ethnic -- will always influence judicial nominations to some degree. Our Constitution anticipates this by allowing politicians to nominate and confirm judges of their choosing from constituencies of their choosing.

But neither politics nor diversity should ever be the *only* factor -- or even the most important factor -- in selecting judges who serve for life.

### **Judicial Qualifications**

All nominees to the federal bench should be people of the utmost integrity who have distinguished themselves professionally as lawyers or legal academics. But, beyond that, the *most* important qualities are not race or ethnicity or sex -- or even an elite educational pedigree -- but rather, **good judgment** and **impartiality**.

Good judgment is not synonymous with knowledge. The most brilliant and well-educated judges do not always exercise sound, decisive judgment.

How can we determine if a nominee meets this test? Resumes are helpful. References, too, are a useful indicator. But the most important evidence of sound judgment and impartiality is a sound **judicial philosophy**.

The best judges are those who understand their limits, who understand that their role is not to correct the world's ills, but to resolve specific disputes according to the law. Good judges act with humility and with restraint, tethering their rulings to the original meaning of the law, not to the political winds of the moment.

A nominee to the federal bench must understand that the role of a judge is to apply the law as written in the U.S. Constitution or in statutes passed by Congress, not to rewrite those laws to achieve specific policy objectives.

Federal judges wear black robes for a reason: to indicate that justice is blind. As Justice Amy Coney Barret explained in her confirmation hearing, the black robe indicates that, regardless of a judge's background, when judges take the bench they are "standing united symbolically, speaking in the name of the law. Not speaking for [them]selves as individuals."<sup>1</sup> And, she might have added, not speaking for their particular ethnic or racial group.

Only by nominating and confirming judges who adhere to these first principles can we be sure that cases will be decided on the relevant facts and law, rather than on the identity of the judge or the identities of the parties.

From a qualified pool of nominees committed to originalism and judicial restraint, politicians can, of course, consider a candidate's racial or ethnic background as a plus.

## **The Data**

So how are we doing on the metric of judicial diversity? Statistics can never tell the whole story. But consider these:

According to the American Bar Association,<sup>2</sup> in 2020 the legal profession was:

- 4.7% African American;
- 4.6% Hispanic; and
- 2.1% Asian American.

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<sup>1</sup> Philip Ewing, *Why Do Judges Wear Black Robes? Amy Coney Barrett Has The Answer*, NPR, Oct. 13, 2020, available at <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923427849/why-do-judges-wear-black-robos-amy-coney-barrett-has-the-answer>.

<sup>2</sup> ABA, *Profile of the Legal Profession 2020* at 109, available at <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>

And, yet, the Washington Post<sup>3</sup> reports that the federal judiciary<sup>4</sup> is:

- almost 13% African American;
- 9% Hispanic;
- almost 5% Asian American.

	Population estimates <sup>5</sup>	Legal Profession <sup>6</sup>	Judiciary demographics <sup>7</sup>	Law School demographics <sup>8</sup>
Black	13.4%	4.7%	12.7 %	7.94%
White (non-Hispanic)	60.1%	85.9%	72%	63.4%
Hispanic	18.4%	4.6%	9%	12.7%
Asian,	6.1%	2.1%	4.7%	6.36%

<sup>3</sup> Adrian Blanco, *Biden nominated as many minority women to be judges in four months as Trump had confirmed in four years*, Washington Post, June 16, 2021, available at <https://www.washingtonpost.com/politics/interactive/2021/biden-judge-diversity/>.

<sup>4</sup> These statistics refer only to active federal judges and do not include those judges who have taken senior status.

<sup>5</sup> United States Census Bureau, QuickFacts United States, Population Estimates: July 2019, available at <https://www.census.gov/quickfacts/fact/table/US/PST0452>.

<sup>6</sup> ABA, *Profile of the Legal Profession*, *supra* n. 2

<sup>7</sup> Blanco, *supra* n. 3.

<sup>8</sup> Enjuris, *Law School Enrollment by Race & Ethnicity (2019)*, available at <https://www.enjuris.com/students/law-school-race-2019.html>.

Hawaiian, Pacific Islander				
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Given the makeup of the legal profession, and the pool of possible candidates, our federal judiciary is, in fact, remarkably representative.

### **Diversity, Yes; Statistical Parity, No**

But in America today, diversity has become a moving target, one that encompasses an ever-expanding list of subgroups, immigrant communities, genders, and religious and sexual minorities -- not to mention various intersectional combinations.

While we should continue our efforts to recruit qualified people from all backgrounds to the judiciary, complete statistical parity is not possible -- nor should it be our aim.

### **Diversity Hypocrisy**

Most importantly, in our quest for diversity, we must not fall victim to the hypocrisy, rooted in racism, that the only legitimate members of an ethnic or racial group are those who expound a particular dogma.

I am old enough to remember how, in 2003, Democrats used the Senate filibuster to block the nomination to the U.S. Court of Appeals for the District of Columbia of Miguel Estrada, one of the most brilliant lawyers in America and the epitome of the American Dream.<sup>9</sup>

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<sup>9</sup> Democrats begin filibuster against Estrada, CNN.com (Feb. 13, 2003), available at <http://www.cnn.com/2003/ALLPOLITICS/02/13/senate.estrada/>; Editorial, 'He Is Latino', Wall Street Journal, Nov. 14, 2003, available at <https://www.wsj.com/articles/SB106877910996248300>.

And I have been around long enough to observe the 30-year campaign, by people who purport to care about diversity, to delegitimize Justice Clarence Thomas as inauthentically Black.<sup>10</sup>

Sadly -- as the examples of Thomas and Estrada make clear -- those who claim to want a more diverse bench often do not.

## **Conclusion**

The goal of judicial selection is not proportional representation, but the creation and maintenance of the most fair and impartial judiciary in the world. As such, the most important qualifications for a judge are, and always should, be fidelity to the text of our statutes and the original meaning of our Constitution and a commitment to the rule of law.

Thank you.

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<sup>10</sup> Danielle Root, Jake Faleschini, and Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, Center for American Progress (Oct. 3, 2019), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> (arguing that Justice Thomas “offers a good lesson” in the importance of “substantive diversity”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405, 481-86 (2000), available at <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1380&context=wlulr> (describing Justice Thomas as not “substantively” diverse; arguing that true diversity means a “willingness to represent outsider voices in judicial decision-making”; and claiming that, in terms of representation, “even white judges will, in some instances, be qualified ‘diversity’ candidates.”)