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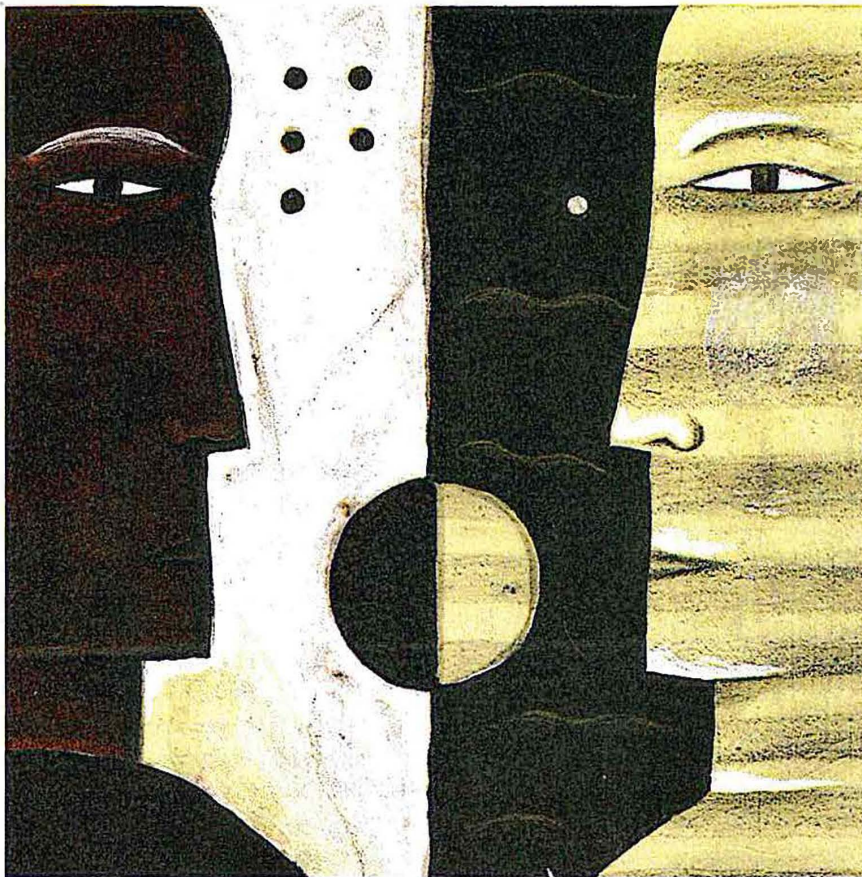
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Blueprint for DIVERSITY

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Does the Federal Article I Bench Reflect the Ethnicity of the Populations that They Serve?

What If the Answer Is No?

By Judge Frank J. Bailey

The federal bankruptcy judge entered the courtroom to handle a motion session. First on the list was a routine motion to reopen a bankruptcy case so that the consumer debtor could add a creditor that he mistakenly left out of his recently closed case. Generally, such a motion would be unopposed and allowed as a matter of course. But here, a pro se creditor opposed the motion. After hearing at length from the creditor that he was disturbed that the debtor could get away with not paying his debts, the judge explained the law to the creditor in calm and simple terms. Then the judge allowed the motion, explaining that if the creditor felt he had a basis to object to the discharge of his claim, he would have a chance to do so later. Well, that is where the hearing went sideways. The creditor, an African American, said in a firm and loud voice that the judge was a racist and that "a black man cannot get a fair hearing in this court." Although racism was hardly established in the handling of this motion (in fact, the dispute involved African Americans on both sides), the judge, upon reflection, realized that it may be daunting for a pro se African American man to enter a courtroom where the judge is white, the courtroom deputy is white, the electronic court records operator is white, the court officers are all white, and, if he took an appeal to the Bankruptcy Appellate Panel, none of the other bankruptcy judges in the circuit would be African American. Where judging relies on fairness, a perception that the process is unfair, even if wrong, is a serious assertion.

Introduction

At a recent program sponsored by the ABA Judicial Division, Judge Andre Davis of the Court of Appeals for the Fourth Circuit, chair of the Judicial Division's Standing Committee on Diversity in the Judiciary, convened a roundtable discussion regarding diversity on the Article I federal bench. ABA President Paulette Brown welcomed the gathering, commended Judge Davis and others for their commitment to a diverse bench, and plainly stated her full support for the work of the Judicial Division in this regard. It was also noted that by far the largest number of cases filed in federal court are those filed in Bankruptcy Court; thus, most American citizens have their federal court experience in front of a bankruptcy judge. Moreover, magistrate judges handle the day-to-day work in thousands of federal cases. Thus, it matters a great deal that those litigants feel they are treated equally when they encounter an Article I judge.

For those who are unaware, federal judges fall into two basic categories defined by the Constitution: Article III judges, who are appointed by the president upon confirmation by the Senate, and Article I judges, who are appointed by other federal judges. The first category, Article III judges, includes federal district and circuit judges who are appointed for life terms. The second group, Article I judges, includes magistrate judges, who are appointed by district judges for eight-year renewable terms, and bankruptcy judges, who are appointed by circuit judges for 14-year renewable terms. It is the latter category—Article I judges—that was the subject of Judge Davis's roundtable discussion.



Judge Frank J. Bailey was appointed as a U.S. bankruptcy judge on January 30, 2009, and served as chief judge from December 2010 until December 2015. His chambers are in Boston and he is assigned to the Eastern Division.

Judge Davis invited several “thought leaders” on diversity in the judiciary to the roundtable. The leadership of the ABA National Conference of Federal Trial Judges (NCFTJ), the Administrative Office of the U.S. Courts, the National Conference of Bankruptcy Judges, the Federal Magistrate Judges Association, the Brennan Center, Justice at Stake, Just the Beginning Foundation (Chicago), and the Institute for the Advancement of the American Legal System were invited. The discussion was divided into three parts: first, there were presentations to explore the racial makeup of the federal courts; second, there were presentations about the reasons that the federal bench, particularly the Article I bench, is nondiverse; and finally, there was a discussion of possible solutions to aid Article III judges in diversifying the Article I bench.

Current State of Diversity

As to the current state of diversity on the Article I bench, the group heard from Nancy Dunham. Dunham, a former civil rights and employment practices attorney in the District of Columbia, is the fair employment practices officer at the Administrative Office of the U.S. Courts. It is her job to advise the Judicial Conference of the United States on the diversity of the federal courts. Dunham comes from a Title VII background. She spent the early part of her career fighting for equal opportunity in the workplace. While Title VII does not ensure diversity, its focus is a pluralistic society and Dunham brings that perspective to her work. The diversity of the federal judiciary should be measured against the diversity of the American people, according to Dunham. She reported that as of 2014, the Article III bench was 72.3 percent Caucasian, 11.6 percent African American, 9 percent Hispanic, 2.4 percent Asian American, and 0.4 percent Pacific Islander, with no Native American judges. In contrast, the Article I bench was clearly much less diverse. The magistrate judges were 82.7 percent Caucasian, 7 percent African American, 4.1 percent Hispanic, 2.9 percent Asian American, 0.4 percent Native American, and 0.2 percent Pacific Islander. **The bankruptcy judge population was the least diverse federal bench: 90.9 percent Caucasian, 2.9 percent African American, 1.6 percent Hispanic, 1.1**

percent Asian American, 0 percent Native American, and 0 percent Pacific Islander.

There is reason to believe that both the Article III and Article I benches have become more diverse in the years since 2014, but turnover is slow among those with lifetime appointments as well as among those with terms of either 8 or 14 years.

Next, on the current state of diversity, was a comparison of the racial and ethnic makeup of the general population with the



makeup of the judiciary. **The Special Committee on Article I Diversity of the NCFTJ, appointed by Judge Charles Day (D. Md.) and chaired by the author, hired two interns to consider whether, on a district-by-district and circuit-by-circuit basis, the federal bench reflects the populations of those federal districts.** The interns first gathered 2013 Census data, which were presented by state and breaks down the data by ethnicity. Then they allocated the population data into federal judicial districts and further accumulated the data into judicial circuits. When this work was done, the interns could identify the ethnic breakdown in each district and circuit. Next, the interns obtained the then-available ethnic breakdown of federal judges from the Administrative Office of the U.S. Courts. With this information, the interns created a database that made it possible to compare the ethnic makeup of the populations in the judicial districts and circuits to the ethnic makeup of the benches in those

locations. The results were revealing.

In the Second Circuit (composed of Connecticut, New York, and Vermont), for example, the African American population constituted 15 percent of the population. By contrast, 15 percent of the district judges were African American. But on the Article I side, only 8 percent of the magistrate judges and 0 percent of the bankruptcy judges were African American. The results in the Third Circuit (composed of New Jersey, Delaware, and Pennsylvania) were quite similar. According to the Census data, the African American population in that circuit was 13 percent, and 15 percent of the district judges were African American. But, again, the Article I bench is lagging: 4 percent of the bankruptcy judges and 10 percent of the magistrate judges were African American. It is worth noting that the Hispanic population in the Third Circuit is 11 percent overall, while Hispanic federal judges were represented as follows: district judges, 11 percent; bankruptcy judges, 4 percent; and magistrate judges, 0 percent.

Moving out of the Northeast and into the South, the Fourth Circuit's (Maryland through South Carolina) population was 22 percent African American and 8 percent Hispanic, whereas the district court bench was 15 percent African American and, statistically, 0 percent Hispanic. The magistrate judge bench, by comparison, was 15 percent African American and 0 percent Hispanic, and the bankruptcy bench was 3 percent African American and 0 percent Hispanic. The Fifth Circuit (Mississippi to Texas) was 17 percent African American, 28 percent Hispanic, and 3 percent Asian American. The district court bench in the Fifth Circuit was 17 percent African American, 9 percent Hispanic, and, statistically, 0 percent Asian American. The Article I bench in the Fifth Circuit was, again, less representative of the general population: The magistrate judge bench was 6 percent African American, 6 percent Hispanic, and 2 percent Asian American, while the Bankruptcy Court bench was 4 percent Asian American, 0 percent African American, and 0 percent Hispanic, for the time surveyed.

The Sixth Circuit (Michigan to

Tennessee) federal judiciary more closely reflected the population that it serves. The African American population was 12 percent, the Hispanic population was 4 percent, and the Asian American population was 2 percent. The district judges in the Sixth Circuit represented the following ethnicities: 17 percent African American, 2 percent Asian American, but 0 percent Hispanic, statistically. Magistrate judges were 6 percent African American, 2 percent Hispanic, and 2 percent Asian American. The Bankruptcy Court breakdown was 10 percent African American, but 0 percent Hispanic and 0 percent Asian American. The reasons for the higher representation of African American judges in the Sixth Circuit is certainly deserving of additional study.

Finally, the Ninth Circuit, a large circuit where the overall Caucasian population was a minority (49 percent), offers interesting contrasts. While the district judge population was only 61 percent Caucasian, the bankruptcy judge bench was 94 percent Caucasian and the magistrate

judge bench was 85 percent Caucasian. Hispanics, with a population of 30 percent overall, were underrepresented in the Ninth Circuit on every bench, especially on the bankruptcy bench.

The foregoing is offered merely as an example of the data available for every circuit and district in the U.S. court system. While the numbers are a bit out of sync because the Census data are from 2013 and the judicial officer data are from a later period, the implications are clear: Overall, the judicial officer population does not reflect the general population that those officers serve. **This does not mean that the judicial officers do not serve the communities faithfully, fairly, and well. It merely means that they do not look entirely like those communities.** And there are potential implications from that fact. **When the entire bench in a district is Caucasian, the litigant from an ethnic minority may feel an implied bias.** When the entire bench in a certain court is Caucasian, **an ethnic minority lawyer may not feel that it is possible to achieve an appointment to the**

bench on that court. When the entire bench on a court is Caucasian, **a newly minted ethnic minority lawyer may not feel it is possible to pursue a practice in the specialty area (e.g., bankruptcy) that is practiced before that all-white bench.** Finally, I hasten to add that new judges are being appointed every day and the evidence is that the **appointments are increasing diversity on the bench.**

How Did the Current Judges Get Appointed?

Malia Reddick is manager of the Quality Judges Initiative of the Institute for the Advancement of the American Legal System (IAALS), a national legal research center at the University of Denver. In 2013, IAALS conducted a study of the selection, appointment, and reappointment process for bankruptcy judges. The study involved interviews with circuit executives, circuit judges, bankruptcy judges, and merit selection panelists in all federal judicial circuits where there are regular vacancies for bankruptcy judges.

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Reddick presented the findings of the IAALS at the roundtable.

Reddick began by noting that while the Judicial Conference of the United States has adopted regulations on the selection of bankruptcy judges, for the most part these regulations merely provide nonmandatory guidance to the judicial councils of the various circuits as to protocols for selecting new bankruptcy judges. In practice, the judicial councils have adopted a wide range of approaches to the selection process. Most (but not all) circuits appoint a merit selection panel to coordinate advertising the vacancy, soliciting applicants, gathering the application materials, conducting interviews, checking references, and recommending a slate of qualified candidates to the circuit judges for appointment. As far as diversity is concerned, the guidelines offer little detail. There is, of course, a requirement that the selection process be free of discrimination, but there is no affirmative guidance in the regulations on methods or practices to increase diversity. Thus, it is up to the circuit court to adopt any requirements that it might deem appropriate to ensure that diverse candidates apply and are given an opportunity at the appointment.

Turning to the diversity issue, Reddick noted that the largest number of citizens that come in contact with a federal court are participants in the bankruptcy system, and by a wide margin. Thus, diversity on the bankruptcy bench is particularly important when perceptions of justice are at issue. The IAALS report noted that the bankruptcy bench is the least diverse federal bench. According to the report, at the time of the study, 72 percent of Article III judges were Caucasian compared to 81 percent of magistrate judges and 89 percent of bankruptcy judges. The study also referred to another study that concluded that when a merit selection panel is itself diverse, the likelihood of a diverse pool of applicants and a diverse appointee is increased. One merit selection panelist noted in response to the IAALS survey that although her panel "noted racial diversity," she did not think it was "determinative or limiting." In addition, it is worth noting that when a merit selection panel consists only of bankruptcy practitioners (and judges), the applicants and

appointees tend to be less diverse because they are regular participants in the practice, which is itself often nondiverse.

As noted above, magistrate judges are appointed by the district judges to eight-year renewable terms. Unlike the case of bankruptcy judges, Judicial Conference rules require that a merit selection panel be established by the district judges to select qualified candidates. The merit selection panel must consist of at least seven members, including two nonlawyers. No district court judge or retired Article III judge may be on the panel. Seemingly in recognition that a diverse merit selection panel will result in a more diverse candidate pool and perhaps a diverse appointee, the rules now state as follows: "To further efforts to achieve diversity in all aspects of the magistrate judge selection process, the court is encouraged to appoint a diverse selection panel." Curiously, the rules for selection of bankruptcy judges do not contain a similar requirement regarding the creation of a merit selection panel for bankruptcy judges. Of course, among the duties assigned by the conference rules to the merit selection panel is a duty to "make an affirmative effort to identify and give due consideration to all qualified applicants without regard to race, color, age (40 and over), gender, religion, national origin, or disability." But this guidance is directed to avoiding discriminatory conduct (a directive that one can imagine is hardly needed). It does not establish a goal for further diversifying the bench.

Thus, with reference to magistrate judge appointments, the Judicial Conference is unambiguous that there must be a merit selection panel, that the panel should include diverse people, and that the panel must attempt to make the appointment in an unbiased manner. These provisions, plainly calculated to advance diversity on the bench, are not featured in the Judicial Conference rules for bankruptcy judges. Perhaps this contributes to the lack of diversity on the bankruptcy bench?

What Can Be Done to Ensure a Pipeline of Diverse Applicants?

Many of the presenters had thoughts on the reasons that Article I judges do not reflect the ethnicity of the populations in

the locations in which they sit. The principal reason cited is that the pipeline of diverse applicants for judicial openings is not robust. Qualified diverse candidates must be encouraged to apply. To become qualified, the candidates must understand the standards that are required to obtain appointment as a federal judge. This requires mentoring and preparation. To determine what is being done to advance the goal of developing a strong pipeline of diverse candidates, Judge Davis reached out to the National Conference of Bankruptcy Judges (NCBJ) and the Federal Magistrate Judges Association (FMJA) to seek their reactions to the data and to hear what they have done to increase diversity on their respective benches. The remarks from NCBJ and FMJA representatives were notable.

Judge Robert E. Nugent, president of the NCBJ, started his comments by noting that the majority of his docket, like almost all bankruptcy judges, involves consumer cases where the debtors are both highly diverse and highly disadvantaged. Judge Nugent said that the NCBJ has long recognized the need to diversify the bankruptcy bench. He committed the NCBJ to doing all it can to ensure that result.

Judge Jeffrey Hopkins, a bankruptcy judge from Cincinnati, Ohio, and former president of the NCBJ, described a long and proud history of judicial outreach into the affinity bar associations and to nonwhite law students in an effort to attract young lawyers and law students into the bankruptcy practice. The NCBJ has created a scholarship program, called the Cornelius Blackshear Scholarship, that invites minority lawyers to attend and participate in the NCBJ annual conference. Those young scholars are offered a chance to attend educational programs and to network with lawyers working in the insolvency and restructuring field. The NCBJ also has outreach programs at each of its annual and midyear meetings calculated to attract law students to the bankruptcy practice. In every city where the NCBJ meets, a group of judges, attorneys, and insolvency professionals arranges a program to introduce the local students to opportunities in the bankruptcy field. In addition, the NCBJ offers a "Next

Generation" program at its annual meetings to help launch new lawyers, including lawyers of color, into the field. There are scholarships for this program as well.

Judge Ramon E. Reyes, a magistrate judge and an officer in the FMJA, echoed his counterparts on the bankruptcy bench. The FMJA has also done outreach to non-white law students and practitioners in connection with its meetings. In addition, there are many local efforts to mentor diverse lawyers so that they are prepared to apply for federal judgeships. Judge Reyes suggested the need to recruit minority law students to internships and clerkships to Article I judges. Through these activities, interns and clerks learn quickly that they can aspire to a position on the federal bench.

Conclusion and Next Steps

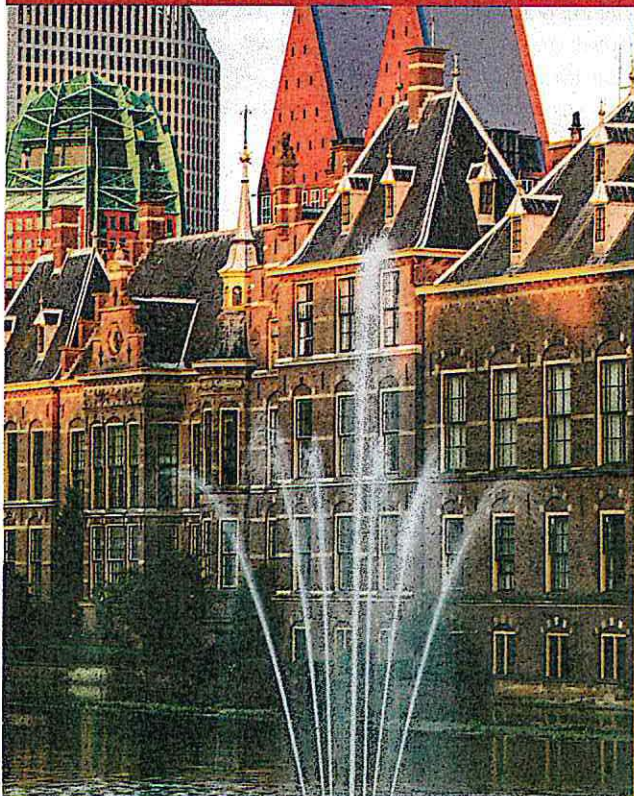
As the roundtable drew to a close, there was discussion about adjusting perceptions of merit selection panels and appointing judges of what qualities are needed to be a successful Article I judge. For example,

is it necessary for a lawyer to be a long-term bankruptcy practitioner in order to be a successful bankruptcy judge? Or should deep bankruptcy experience be only one of the many qualities that the appointing judges consider in selecting a new judge? **Perhaps excellence in other areas of law practice, demonstrated commitment to pro bono and public service activities, management of professional service organizations, teaching and mentoring, community leadership, and other personal and professional distinctions are as valid as bankruptcy experience in predicting a successful career on the bench?** Due consideration should be given to the success of a minority lawyer that has advanced in the profession notwithstanding the barriers nonwhite lawyers face. Just as a newly appointed district judge with a strong history in criminal law can successfully learn to handle complex civil litigation, a diverse lawyer that demonstrated excellence in practicing, say, business litigation should be seen as a strong candidate for the bankruptcy bench.

The Judicial Division has presented a resolution to the ABA House of Delegates in support of the diversification of all federal courts. The resolution will be ready for presentation at the ABA 2016 Annual Meeting. The extraordinary efforts of Judicial Division leadership, including Chair Michael Bergmann, Chair-Elect Judge Linda Strite Murnane, and the Federal Trial Judges Conference Chair Nannette Baker, as well as the vision of Judge Andre Davis and ABA President Paulette Brown, have launched the ABA into the process of ensuring that every American feels that he or she will be treated fairly in our federal courts because the judicial officers look a little more like them. ■

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