

BY HON. ROBERT A. GORDON

The Unfinished Bench: Fostering Diversity in the Bankruptcy Court

“The thing about him was that he was always doing something for someone else. I know, because he did so much for me.”

— Jackie Robinson, describing Brooklyn Dodger President and General Manager Branch Rickey, the man who gave him a chance at the Big Leagues.



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Hon. Robert Gordon has been a bankruptcy judge for the District of Maryland since 2006. He was previously a partner with Tydings & Rosenberg LLP in Baltimore. He participates in educational programs as a panelist and is a treasurer of the Maryland State Bar Association's Bates/Vincent Foundation, which aids lawyers with substance abuse and mental health problems. Judge Gordon is also a lifelong New York Yankees fan, music lover and amateur musician.

When it was suggested to me that I contribute to the *ABI Journal*, I had no idea that I would begin to write on Major League Baseball's "Jackie Robinson Day," the day we all wear "Number 42" in our hearts, if not on our backs. But, as Mr. Rickey himself famously said, "Luck is the residue of design," and the perfect fit between the occasion and the topic will hopefully be a sign, as with Jackie's first day in the majors, of great things to come per the grand design of the Big Umpire in the Sky. Either way, and just as it was with the Founding Fathers, it is always exhilarating to dream big, because that is where change begins.

I think it must be the rare judge who is able to precisely pinpoint the moment in life where their personal pathway to the bench began. True, a few seem to be born to the job, and of those, some get their opportunity early and leave a long legacy. But scrutinized through my personal rearview mirror, my appointment often seems to be much more the culmination of an unlikely confluence of one serendipitous event after another.

I did not begin planning for it when I first sat down, anxious, worried, yet excited and happy, to begin my first day of law school in the small-section, real property class to which I had been assigned. Arriving at the bench did not happen with the same kind of meticulous planning that this baseball-mad kid growing up in New York devoted to his dreamed-about, "can't miss" career as centerfielder for the Yankees, or, if somehow my first choice in The Bronx did not work out, how my "plan B" career as "standby" guitarist for (or at least, "Official Best Friend of") The Beatles would then take hold. Nevertheless, I can identify with certainty the day I took the offramp from the super-highway of indecision to be rocketed into a life-long love affair with our beloved "art" of bankruptcy.

By the time I reached my second year in law school (and although still primed at the drop of a hornbook to dive into the most esoteric classroom debates), I had grown beyond any lingering mys-

tique of the first day. I just wanted to know what lawyers did in court and behind their desks from sun-up to sundown. When Gary Goldstein, who is still the best, most pure attorney (and one of the finest teachers) I have ever met, considered me for my first job in the profession as his law clerk, he did not see color or race. He saw a seemingly qualified student who, with care and a metaphorical kick in the pants every now and again, might one day turn out to be a qualified lawyer. His clear-eyed vision rejected pre-conceived notions, knitted together from stereotypical whole cloth; as with Mr. Rickey, his thinking was not held hostage by outdated beliefs or what might have passed for conventional wisdom. Just as the magnificent John Coltrane heard something special in Rodgers and Hammerstein's deceptively simple "My Favorite Things," Mr. Goldstein liked the impression I made. Beyond that, he only wanted to know whether I was reasonably intelligent, how hard I was willing to work and whether I was able to learn from my mistakes. There would be a lot of those to come, but at least he gave me a chance to fail — or succeed.

This chance quickly blossomed into a career, then a passion. It was an opportunity to be deeply enmeshed in a most fascinating patch of the law's "seamless web." Bankruptcy was then, and still can be, the last outpost of the generalist, albeit against the kaleidoscopic background of the Bankruptcy Code. In the beginning, my mentor, Mr. Goldstein, accepted clients who had problems all over the Maryland, Virginia and Washington, D.C., region, so my bankruptcy education was seasoned by a heavy helping of state court practice, general insolvency, and other areas of the law. Even now, the intriguing surprises and moments of "I've never seen *that* before" continue to roll down the pike — and precious little is boring or mundane.

Only one thing was missing from this script: a statistically representative influx of fellow black lawyers into the practice area. Jackie had his Dodger teammates, Roy Campanella and Don Newcombe, and fellow barrier-buster Larry Doby of Cleveland, in the junior circuit: the American League. In the years to come, others, like Ernie Banks, Bob Gibson, Willie Mays, Roberto Clemente and even the more pedestrian Roy Whites, Mario Mendozas and Ed Charleses of the world, would join the ranks of the big leagues to the extent that, after an approx-

imate score of years following Jackie's "day one," the combined statistical population of African-American and Latino ballplayers would become roughly equivalent to the U.S.'s population statistics overall.

But this was not so in bankruptcy. For years, I was one of only a small group of African-American practitioners in this, a major metropolitan region, and one of only a tiny handful who were able to manage complex cases. Likewise, and viewing the landscape from a national, judicial perspective, you could count on only two hands — Cornelius Blackshear, Guy Cole, Bernice Donald, David Coar, Julie Robinson, Odell Horton and Charles Clevert, to name a few — the number of African-American bankruptcy judges. Yes, it is true that 30 or so years later, there have been more women, black folks and other ethnic minorities appointed to the bankruptcy bench. Indeed, the group includes some like Laura Taylor Swain, **C. Ray Mullins**, **Jeffery Hopkins** and **Erithe Smith**, who have made a lasting, national impact on the evolution and process of our bankruptcy system. Yet now, some 40 years since my first year in law school, the bankruptcy diversity statistics rank woefully behind the statistics for other federal courts and the population statistics in general.

Per the Census Bureau, white Americans account for approximately 76 percent of the total U.S. population. Black Americans account for approximately 13 percent, with American Indian, Pacific Islanders, Asian and those who acknowledge a background of "one or more" races making up the remaining approximately 11 percent. The 18 percent of U.S. citizens who claim Hispanic origin are spread throughout the groups identified above.¹

Of the more than 1 million lawyers in America, only approximately 12 percent are of ethnic minorities. How do the numbers break down when it comes to the federal bench? Since 2000, the percentage of non-caucasians on the federal bench has risen from 12 percent to 16 percent as of 2014 — not a great leap, but it is progress. The forward momentum has been significantly better among Article III judges, who, in 2014, had a non-caucasian membership of 23 percent, while only 14.6 percent of magistrate judges and an almost shocking 5.6 percent of bankruptcy judges were of that category. Generally, the increase in the number of women, who comprise more than half the total U.S. population, has fared much better, and approximately 35 percent of lawyers are now female. In addition, the percentage of women who are federal judges has increased from 20 percent in 2000 to 32 percent as of 2014. On the bankruptcy and magistrate benches, female representation increased overall by 10 percent during the same period.

Does it matter whether judges reflect the communities they serve? Is it plausible to believe that a party from an ethnic minority, or who is female, might feel an implied bias, no matter the outcome, when the entire bench in a district is Caucasian or male? Is it plausible to believe that the otherwise-reasonable judicial aspirations of an ethnic minority, or female, lawyer might wither away at the sight of an entire bench of Caucasian judges? Is it possible that a brand-new "just passed the bar exam" ethnic minority or female young

lawyer might strike "bankruptcy" off the list of potential specialty areas because they would have to practice before an all-white, or all-male, bench?

This is *not* a commentary on how well the judges of the federal bench do their jobs, because justice is normally exquisitely served in the federal courts. Instead, it is a plea in favor of the appearance of justice as seen by our constituency: the citizens of the U.S., and especially those who bring disputes to us for resolution. It is also a plea toward a realization of the American Dream of Democracy: that all qualified will have seats at the tables of justice because our history proves unequivocally, and in every endeavor, that this represents America at its best.

In the 1930s, none but the most optimistic visionary could have imagined black and white ballplayers mixing it up together in major league parks. But in 1947, when Jackie Robinson stepped onto the field, the sea change began, followed not long after by the floodgates opening. Can anyone imagine baseball now without the legacy of Vida Blue, Curt Flood, Maury Wills, Luis Tiant, Joe Morgan or the home run king, Hank Aaron? How about Reggie Jackson or Frank Robinson? When I graduated from law school in 1982, I perhaps could have imagined a more colorful bankruptcy bench. After all, there were a few examples among the Article III judges locally and more on the state courts. But somewhat sadly, that vision would not blossom until my appointment 24 years later. Even now, there is only one other African-American bankruptcy judge, **Kit Kindred**, in this circuit.

What can be done? The short answer is, "a lot." A sincere, concerted effort by first-rate bankruptcy practitioners to recruit young lawyers of all stripes into this area is one option. My youngest daughter is practicing at an international law firm, and I know the firm's clients demand diversity in their attorney representatives now more than ever. An equally strong effort by members of the bench to broaden the search and hiring of interns and law clerks would be another positive approach.

The longstanding and successful law clerk and internship pipeline programs established by the Just the Beginning Foundation were set up for that purpose. Ensuring diversity among members of the circuit merits selection panels that recommend bankruptcy judge candidates. Another good option is the acceptance of the premise that, in the case of an otherwise-strong candidate, a world-class knowledge of bankruptcy might not be a prerequisite. After all, the fact that many Article III judges practiced almost exclusively on either the civil or criminal side, or within a certain specialty, does not prevent them from doing their jobs in a comprehensive fashion.

Whatever the necessary alchemy, the federal bench has decided that diversity on the bankruptcy bench can and should happen, and a powerful, national effort to kick-start that process will be realized on Oct. 24, 2019. With the leadership of Fifth Circuit Judge Catharina Haynes, District Judge Karen Schreier, Bankruptcy Judge **Frank Bailey**, and hundreds of judges and lawyers from around the nation, the Committee on the Administration of the Bankruptcy System of the Judicial Conference has made the decision to "go big" that day with an unprecedented session.

¹ "QuickFacts," U.S. Census Bureau, available at [census.gov/quickfacts/fact/table/US/PST045218](https://www.census.gov/quickfacts/fact/table/US/PST045218) (last visited June 5, 2019).

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In 19 metropolitan regions across America, special “Roadways to the Federal Bench: Who, Me? A Bankruptcy Judge?” roundtable diversity events will be held. The programs will be open to everyone, and attendees will consist of both law students and practitioners. The objective will be to share the various journeys taken to arrive at the federal bench to show attendees that they can reach that goal, and to foster the attendees’ own positive aspirations as good lawyers/citizens, whether they ultimately reach the bench or not.

A panel presentation broadcast live to the participating cities from the Thurgood Marshall Building in Washington, D.C., will begin the affair and will be followed by each venue hosting its own roundtable sessions. At each roundtable, there will be a group of attendees, one bankruptcy judge and one Article III or magistrate judge, and after brief introductions, the attendees will be given the floor to ask questions of the judges. Each discussion will last approximately 20 minutes, at which time the attendees will move to other tables to meet and talk to a different duo of judges. The process will continue until all attendees have had sessions with all the judges.

The discussions will center on bankruptcy practice — its vitality and breadth, and the career springboards that lifted each judge to the bench. While the Article III judges might not be able to offer as much insight into the “nuts and bolts” experience of practicing bankruptcy law, they will surely add a valuable perspective on the ordered steps an attorney can take to enhance the prospect of being appointed to the bench, the process for becoming a bankruptcy judge and the characteristics possessed by a good public servant.

When all the sessions are finished, receptions will follow. “Trial run” sessions have already been held in Washington, D.C., San Diego and Tampa, Fla., and the success of those

sessions, among other things, convinced the leadership to take the idea to the next level. By the time this article is published, a national “Roadways to the Federal Bench: Who, Me? A Bankruptcy Judge?” website should be up and running. It will include information on the program closest to you and how you can get involved. However, any lasting action that you take to expand and diversify the practice of bankruptcy in your community, before or after the event, will be a step in the right direction.

“To do what he did has got to be the most tremendous thing I’ve ever seen in sports,” said Kentuckian and Dodger shortstop Pee Wee Reese, remembering his friend and teammate Jackie Robinson.

My 95-year-old mother is a born-and-bred New Yorker, still broken-hearted over the Dodgers’ flight to the wilderness. She was a fan of “Dem Bums” before Jackie Robinson arrived, but when he did, her joy exploded into something well beyond “fandom.” She went from an outsider looking in to full baseball citizenship, in ways that stretched well beyond the American pastime’s landscape. The simple, but everlasting, impact of what happened in 1947 still reverberates.

So the question is this: Do the bankruptcy courts exist in 2019, or 1947? If the latter, then what barriers are we going to break to ensure that our constituency perceives themselves as full citizens? People do not rush into bankruptcy court with a mustard-covered hot dog in one hand and an ice-cold beer in the other to cheer the parties on. Instead, it is a place to which they do not want to come and into which they are often dragged, kicking and screaming. But when they do appear, they have the right to see themselves as fully represented, just as the folks in Brooklyn and all over America did a long time ago. **abi**

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