COMMERCIAL & BUSINESS LITIGATION

SECTION OF LITIGATION



## Why Diversity on the Federal Bench Matters

Andrea C. Kramer – November 29, 2016

> [A]t the end of the day, on a legal issue, I think a wise old woman and a wise old man are going to reach the same conclusion.
> —Justice Sandra Day O'Connor
>
> I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.
> —Justice Sonia Sotomayor

Not so very long ago, the federal judiciary was entirely male and white. The first African American U.S. district court judge in the continental United States was appointed only a little over 50 years ago, in 1961, to the Northern District of Illinois. (In 1937, William Henry Hastie became the first black federal district court judge, but it was not a lifetime appointment, and it was for the District of the Virgin Islands.) The gender barrier was broken in 1928, when Genevieve Rose Cline was appointed to the U.S. Customs Court (now known as the U.S. Court of International Trade), followed in 1934 by Florence Allen, the first female Article III judge. Not until decades later, in 1966, when Constance Baker Motley became a judge in the Southern District of New York, was there a female federal judge of color. The first Hispanic federal judge, Harold Medina, was appointed in 1947, to the U.S. District Court for the Southern District of New York. (Reynaldo Garza, often wrongly cited as the first Hispanic American federal judge, became the second one when he was appointed to the Southern District of Texas in 1961.) Herbert Y.C. Choy became the first federal court Asian American judge in 1971, for the United States Court of Appeals for the Ninth Circuit.


### News & Analysis

- Practice Points
- Articles
- Spotlight on Pro Bono
- Audio
- Programs & Materials
- About
- Announcements

### Newsletter

» Winter 2017

**Read More Commercial & Business Newsletters**

### Section Publishing

Section of Litigation Publications

Section of Litigation Books

### CLE & Events

**Apr. 27** **ABA Section of Litigation Roadshow 2.0: Precision Advocacy Reinventing Motion Practice to Win- Los Angeles**
In-Person

**May** **Section of Litigation LGBT Forum**
In-Person

Only four years ago, in 2012, Jacqueline Nguyen became the first Asian American female to serve on a federal appeals court.

Despite these breakthroughs, the federal judiciary today remains predominantly male and disproportionately white. According to the Administrative Office of the U.S. Courts, as of 2014, 72.3 percent of Article III judges and 85 percent of Article I judges (magistrate and bankruptcy judges) are white, non-Hispanic; by comparison, the overall population is 62.6 percent white, non-Hispanic. Only about 33 percent of federal judges are women. Still today, there are district and circuit courts where "firsts" are being appointed (or have not yet been appointed), with many appointed just since 2009, when President Obama took office. Diversifying the federal judiciary has been a slow process.

Why does diversity among the federal judiciary matter? There are two overarching reasons generally discussed: substantive value and descriptive or symbolic value. Substantive value refers to the concept that diversity affects outcomes, that including people with different backgrounds brings important viewpoints that might otherwise be unshared, yields fairer results, increases impartiality, and improves the judicial decision-making process. Descriptive value encompasses the view that diversity increases public confidence in the judicial system, increases institutional and social legitimacy, and provides minority role models by making the judiciary more reflective of the population it serves.

Though the growing literature studying the issue of substantive value is not unanimous, one consistent trend has appeared: Where race or gender is a salient issue in the case, the race or gender of the judge—and the racial or gender composition of the appellate panel—yields notable differences in how cases are decided. That is, white judges and male judges tend to vote against minority plaintiffs and female plaintiffs in cases involving race or gender as an issue more often than do their minority and female counterparts. Analyses of how Hispanic/Latino, Asian American, and other racial or ethnic minority judges decide in comparison with their counterparts are limited, in large part because of the small numbers of such judges. Often these groups are aggregated into "non-white" categories. (This article focuses on race and gender because there is not much, if any, literature on various other kinds of diversity, such as disability and sexual orientation.)

In a detailed analysis published in 2010, professors Christina L. Boyd, Lee Epstein, and Andrew Martin found significant differences in how female and male judges decide sex discrimination cases but no discernible difference in the decisions of male and female judges in 12 of the 13 areas of the law they studied, including cases involving the contract clause, piercing the corporate veil, the Environmental Protection Agency, and

May 10
Preparing Witnesses: The 10 Practical Rules Every Attorney Should Know
Web

More Section Events

## Committee Leadership

### Cochairs
Jack Brady
C. Malcolm Cochran
Michael S. Leboff
Mitzi Shannon

### Web Editors
Charles W. Stotter (Editor-in-Chief)
Nathaniel S. Boyer
Selena Molina
Mark A. Romance
Paul M. Kessimian
Jaime H. Scivley
Sara Soto

### Newsletter Editors
Marc Zucker (Editor-in-Chief)
Joseph C. Merschman
Sally K. Sears Coder
Phillip J. Block
Julia Cherlow

## Committee Membership
Membership Roster
How-to Guide: Sorting Committee Membership Roster by Geography

## Follow the Section!

campaign finance. *See* Boyd, Epstein & Martin, "Untangling the Causal Effects of Sex on Judging," 54 *Am. J. Pol. Sci.* 389–411 (April 2010). Their research showed that in terms of what is called "individual effect," the probability of an individual judge deciding in favor of a party alleging sex discrimination decreased by 10 percentage points when the judge was a male. The study also found a "panel effect"—that male judges are significantly more likely to rule in favor of the plaintiff in sex discrimination cases when there is a woman on the panel. Even when the judge's political ideology (measured by who appointed the judge) is taken into account, the likelihood of male judges supporting the plaintiff increased by almost 85 percent when they sat with a female judge. Political scientist Nancy Crowe reported similar findings in her 1999 unpublished dissertation in which she examined race and sex discrimination cases decided by the U.S. courts of appeals between 1981 and 1996, as did Pat Chew, a professor of law at the University of Pittsburgh, in a 2011 article reviewing 14 research studies of the outcomes in employment discrimination cases involving allegations of sex discrimination.

In similar fashion, studies have shown that race affects outcome in employment discrimination cases based on race. For example, in a 2009 study, Pat Chew and Robert Kelley, a professor at Carnegie Mellon University School of Business, found that the win rate for plaintiffs in federal racial harassment employment cases is about half as much when a white judge presides as when an African American judge presides: Plaintiffs win only slightly more than 20 percent of the time when a white judge presides compared with 42.3 percent when an African American judge presides. *See* Chew & Kelley, "Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases," 86 *Wash. U. L. Rev.* 1117 (2009). They further found that differences continue to exist even when political affiliation is taken into account, though the difference is not as great among conservative judges. As they wrote, "Every year, thousands of employees, most of them African Americans, accuse their supervisors or coworkers of racial harassment. Many disputes find their way to the federal courts, where judges, most often white, have to decide whether these claims are credible or not." While individuals across the political spectrum may view the results differently, "one message is clear from the data: race matters in judicial decision making."

Racial differences in decisions in Voting Rights Act cases also exist, according to a 2008 study by University of Chicago Law School professors Adam Cox and Thomas Miles, who examined every published federal case decided under Section II of the Voting Rights Act. *See* Cox & Miles, "Judging the Voting Rights Act," 108 *Colum. L. Rev.* 1 (2008). They reported that after controlling for other factors, including political affiliation, non–African American judges (mostly white) are half as likely as African American judges to vote for liability under Section II of

the Voting Rights Act and that appellate panels are less likely to vote in favor of liability when there is no African American judge on the panel. Specifically, their research showed that a white judge sitting on a panel without any African American judge is 19 percentage points less likely to find a Section II violation than a racially diverse panel.

There also appear to be racial differences in decision making in federal appellate cases involving constitutional challenges to governmental, employer-based, and educational affirmative action programs. According to a 2012 article by Professor Jonathan Kastellec of Princeton University, such programs have been upheld 53 percent of the time overall, but individual African American judges find in favor of such plans 94 percent of the time. *See* Kastellec, "Racial Diversity and Judicial Influence on Appellate Courts," 57 *Am. J. Pol. Sci.* 167–183 (Jan. 2013). Notably, appellate panels are more likely to vote in favor of affirmative action programs when an African American judge is on the panel, and individual non–African American judges are more likely to vote in favor of affirmative action when an African American judge is on the panel. This finding, like others showing panel effect, highlights that decisions are influenced not only by a judge's personal experience and background but also by exposure to different perspectives along with respect for the people offering those perspectives.

Some have suggested that these findings show that woman judges or judges of color (or both) are "biased," at least when it comes to cases involving gender and racial issues, respectively. The Second Circuit discredited such a view in a 1943 decision, explaining that if "lack of 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will." *In re J.P. Linahan*, 138 F.2d 650, 651 (2d Cir. 1943). Stated most directly, if being informed or influenced by one's race or gender is considered biased, then there is no unbiased position because all judges have a race and a gender. Indeed, the notion that judges of color or women judges are "biased" in race- and gender-related cases itself reflects the discriminatory notion that white males are "the norm" and everyone else is "other."

Justice Ruth Bader Ginsburg's dissent and subsequent comments on the Supreme Court's 2009 decision in *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364 (2009), concerning the constitutionality of a strip search of a 13-year-old girl to check whether she had ibuprofen, illustrate how judges' different perspectives can be valuable. Though eight of the nine justices, then all male, decided that the search was unconstitutional, seven of them found qualified immunity, holding that the law was not clear at the time that the search was unreasonable. Dissenting from that section of the opinion, Justice Ginsburg described the

treatment of the female student as "abusive" and stated that it was not reasonable to believe that the law permitted a strip search of a teenage girl for an unharmful drug, given that the Court had already held that searches in schools are unconstitutional when they become "excessively intrusive in light of the age and sex of the student and the nature of the infraction." Regarding her male colleagues, she observed in a subsequent interview that "[t]hey have never been a 13-year-old girl. . . . It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood." As someone who was once a 13-year-old girl, she saw the situation from a different perspective.

In a similar vein, Judge Carlos Lucero, a Latino federal appellate judge, dissented from a denial of a petition for rehearing en banc of a decision upholding summary judgment in a racial harassment case in which the Latina plaintiff's supervisor frequently referred to Hispanics as "wetbacks." After reviewing Supreme Court precedent, he wrote that

> the panel holds that it is per se unreasonable for a Hispanic worker to consider what she describes as her supervisor's "frequent" references to "wetbacks" as being hostile or abusive. I am disappointed that the panel reaches that conclusion; more importantly, I can see no legal or factual basis to support it. . . . The term wetback is severely degrading. . . . Accordingly, its use hardly needs to be pervasive for a Hispanic employee to find her work environment hostile and abusive—and reasonably so.

*Rocha Vigil v. City of Las Cruces*, 119 F.3d 871, 874 (10th Cir. 1997).

He, too, saw the case from a different point of view than most of his colleagues because of his background.

In addition to substantive and descriptive value, racial and gender diversity on the federal courts is important in ensuring equal respect for judges, attorneys, and witnesses. There is evidence that even today, female attorneys and judges and attorneys and judges of color are not treated by other participants in the judicial process in the same manner as their white or male colleagues.

For example, a 2014 study by Mark Blais and Samuel Sinclair, psychologists and professors at Harvard University, of 10 years of anonymous judicial evaluations by attorneys in Massachusetts found that black judges are rated far more negatively compared with their white counterparts. After following up with focus groups, the authors explained, "The general theme that emerged was the idea that persons of color do not match the expectations of what a judge should look like, and therefore confront more

doubt, mistrust, and interpersonal tensions than do non-minority judges." Walker, "Evidence of Bias Against Black Judges," *Boston Globe* (June 11, 2014). The promise of diversity is that the more attorneys see minority judges, the more they will accept and expect that judges will have many different faces—that is, their expectation of what a judge looks like will change. Over time, then, with more and more experiences with minority judges, all of which will be as different from each other as experiences with white judges are, the reported doubt, mistrust, and interpersonal tensions will subside.

Relatedly, Maya Sen, a professor at the John F. Kennedy School of Government at Harvard University, found in a recent study that black federal judges are significantly more likely to be overruled than their white counterparts and that the 10-point gap in reversal rates cannot be explained by neutral factors such as qualifications, type of case, and political views. *See* Sen, "Is Justice Really Blind? Race and Reversal in U.S. Courts," 44 *J. Legal Stud.* (Jan. 2015). Numerically, this differential means that during the period studied, "[c]lose to 3,000 federal court decisions would have been upheld if black judges were overturned at whites' lower rates. At the individual level, black judges on average have up to 20 more cases reversed than do similar white judges, out of an average of 196 cases appealed." As the author notes, these results have an effect on the system as a whole—in terms of extra work and decisions about whether to appeal—as well as on respect for black judges.

With regard to respect for attorneys, the D.C. Circuit Task Force on Gender, Race and Ethnic Bias found in 1995 that 33 percent of minority women lawyers (including 33 percent of African American women lawyers as a subgroup) who responded to the task force's survey had experienced a judge's questioning their status as a lawyer or assuming that they were not a lawyer, whereas only 1 percent of white male attorneys who responded had such an experience. The percentage was about 10 percent for white female lawyers and minority male lawyers. Though the study did not look at the race or gender of the judges making the assumptions, it is not much of a leap to imagine, for example, that African American women judges will be less likely to assume that an African American woman in the courtroom is not an attorney. In that regard, more diversity among the judiciary would add to more respect for attorneys of different racial and gender backgrounds, which might, overall, increase the acceptance and numbers of attorneys of color and women in the legal profession.

In the final analysis, even though there is no research showing any difference in outcome in commercial litigation in federal courts based on the gender or race or ethnicity of the judge, perhaps validating Justice O'Connor's quote about wise female

and male judges, diversity matters for institutional competency, institutional functioning, and institutional legitimacy.

**Keywords:** litigation, diversity, judiciary, minority, bias, judges

Andrea C. Kramer is the founder of Kramer Law LLC in Boston, Massachusetts, former chief of the Civil Rights Division of the Massachusetts Attorney General's Office, and an adjunct lecturer at Harvard Law School.