



Northern District of New York Federal Court Bar Association
in conjunction with Albany Law School

Present:
**“Views from the Bench: The Value of Diversity in the Legal
Profession and in the Judiciary”**
CLE and Cocktail Reception

Date: October 27, 2021

Time: 5:30 p.m. – 7:30 p.m.

Location: James T. Foley U.S. Courthouse, 445 Broadway, Albany, NY

CLE Credit: 1 credit (Diversity, Inclusion and Elimination of Bias)

Panelists:

Hon. Mae A. D’Agostino, U.S. District Judge

Hon. Wendy A. Kinsella, U.S. Bankruptcy Judge

Hon. Randolph F. Treece, Retired U.S. Magistrate Judge

Moderator:

Associate Dean Antony Haynes, Albany Law School

Our esteemed panel will discuss the value and status of diversity and inclusion throughout the legal profession and in the judiciary, including diversity and inclusion initiatives, serving diverse populations, and sensitivity to cultural and other differences when interacting with members of the public, judges, litigants, attorneys and court personnel. There will be an opportunity for participants to ask questions of the panelists, after which the FCBA will host a cocktail reception.



General Order #61 requires masks be worn in the common areas of the Courthouse. Masking protocols during the presentation and reception will be determined by the presiding judicial officer. Limited seating is available, so please RSVP to Shelly Childers at schilders@ndnyfcba.org by October 22nd and specifically indicate whether you wish to attend the CLE, the reception or both.

Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977 magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers award for distinguished achievement in the art and science of advocacy.

After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault.

Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.

Wendy A. Kinsella was sworn in as a United States Bankruptcy Judge for the Syracuse Division of the Northern District of New York on June 7, 2021.

Prior to her appointment, Judge Kinsella was a partner and the leader of the Financial Restructuring, Bankruptcy, and Creditors' Rights practice group at Harris Beach PLLC. In her practice, she counseled lending institutions and represented secured and unsecured creditors, surety companies, landlords, and parties seeking to acquire companies through bankruptcy or uniform commercial code sales. Previously, her practice focused on serving as debtor's counsel and as counsel to Chapter 7 and 11 trustees, resulting in her expertise in all aspects of Chapter 7, 11, 12, and 13 filings. As a practicing attorney, Judge Kinsella was actively involved in diversity and inclusion initiatives, having served as the Chair of Harris Beach's Council on Inclusion and Diversity from 2014 to 2019, and as Co-Chair up until her appointment.

Judge Kinsella was an associate and then partner at Martin, Martin & Woodard, LLP prior to its merger with Harris Beach.

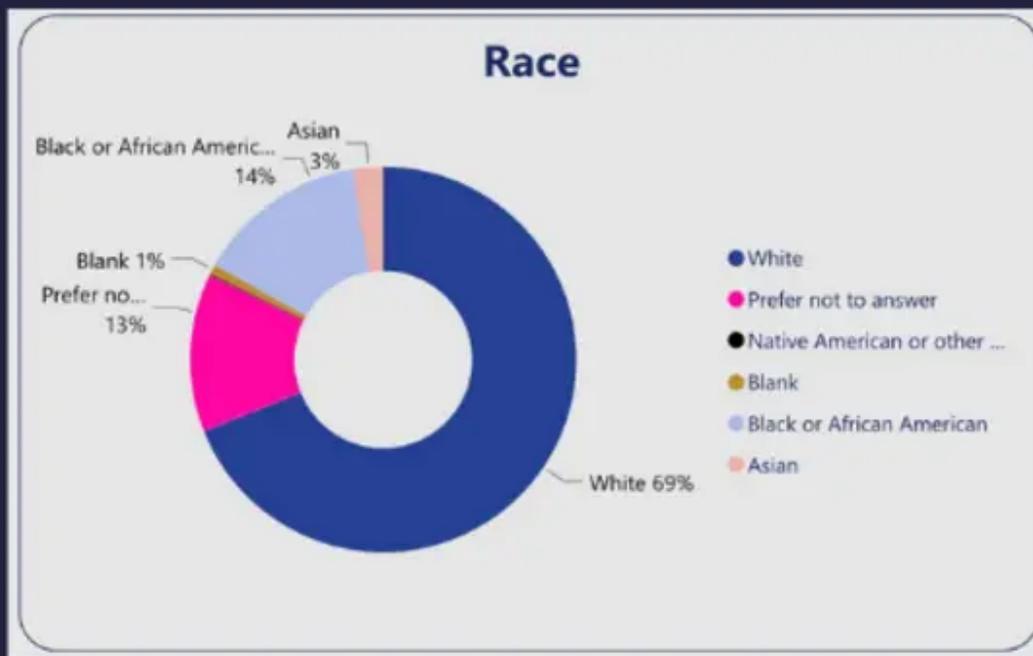
She received a Bachelor of Science degree magna cum laude from Ithaca College, and her Juris Doctor degree cum laude from Syracuse University School of Law.

Randolph F. Treece is a retired federal magistrate judge formerly of the United States District Court for the Northern District of New York. He was first appointed to this position in 2001. Treece was re-appointed in 2009 to a term that was due to expire in 2017. Judge Treece retired in September 2015. On May 10, 2016, it was announced that Judge Treece joined the Albany, N.Y.-based law firm E. Stewart Jones Hacker Murphy as of counsel.

Judge Treece has worked in the following positions:

- Counsel to the New York State Comptroller
- First deputy of the Capital Defender Office
- Assistant New York attorney general
- Partner in the law firm of Fritts, Whiting & Treece
- Assistant public defender in Rensselaer, N.Y.

Prior to his judicial appointment, he was general counsel for the Office of the Comptroller of the State of New York. On May 10, 2016, it was announced that Judge Treece joined the Albany, N.Y.-based law firm E. Stewart Jones Hacker Murphy as of counsel. He also teaches as an adjunct professor at Albany Law School.



Hoylman-Authored Law Reveals Wide Disparities Between Judicial and NY State Demographics

NEW YORK - In accordance with legislation introduced and passed last year (<https://www.nysenate.gov/legislation/bills/2019/s7703>) by Sen. Brad Hoylman, Senate Judiciary Chairman, the New York State Office of Court Administration recently released a “2020 Self-Reported Statewide Judicial Demographics” report (<https://ww2.nycourts.gov/court-research/srjd-report.shtml>). The report, drawn from self-reported data from New York’s judges, revealed glaring disparities between the demographic composition of the bench and the rest of New York State.

With 78% of judges responding to the survey, the report found:

- Non-white persons in New York State comprise 44.6 of the total population but only represent 18% of its judges
 - 2.5% of responding judges identified as AAPI, compared to 9% of the state
 - Only 9% of responding judges identified as Hispanic, whereas 19.2% of the state population identifies as Hispanic
 - 14% of responding judges identified as Black, compared to 17.6% of New York State’s population.
- In New York City, where the non-white population is 67.9%, non-white judges represented only 27% of judges

- Despite making up 51.4% of the New York State population, women hold only 42% of judgeships in the state

Additionally, people of color and women are also underrepresented in *appointed judgeships*. Among respondents that were appointed to their judgeships:

- 47% were women—compared to their 51.4% share of the New York total population
- 66% were white—compared to their 55.4% share of the New York total population
- 11% were Hispanic—compared to their 19.2% share of the New York total population
- 5% were Asian—compared to their 9% share of the New York total population
- 15% were black—compared to their 17.6% share of the New York total population

Senate Judiciary Chair Senator Brad Hoylman said: “Our country and our state are grappling with the consequences of a justice system that - by design - has failed communities of color. We need to explore every option to remedy these historic injustices, and part of that means putting people on the bench who reflect the communities they serve. I am proud to have introduced this law to gather data on who makes up our judiciary - but now it is our job to act on this information.

“Elected officials who appoint judges should look closely at the disparities on our judicial bench - particularly at the disparities in those appointments that he controls. If we want to change the system, we should start by appointing judges who look like our state.”

Subcommittee on Judicial Diversity Chair Senator Zellnor Myrie said: “New Yorkers are entitled to a justice system that reflects the broad diversity of our city and state. A critical step toward building confidence and trust in our judicial system includes elevating New Yorkers of color, women, LGBT candidates and others to the bench who represent the communities they are entrusted to serve. By appointing more diverse judges, New York can begin to dismantle a system that was created in part to enforce racial exclusion, and replace it with one that truly serves our entire state.”

In the judicial system, increased diversity helps ensure impartiality and builds public confidence in the justice system. Hoylman’s 2020 [legislation](https://www.nysenate.gov/legislation/bills/2019/s7703) (<https://www.nysenate.gov/legislation/bills/2019/s7703>) requires the Office of Court Administration to publish an annual report on judicial diversity, which includes demographic information about the race/ethnicity, sex, sexual orientation, gender identity, veteran status, and disability status of New York’s judges and justices.

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Emergency Eviction and Foreclosure Prevention Constituent Resource
([newsroom/articles/2021/covid-19-emergency-eviction-and-foreclosure-prevention-act](https://www.nysenate.gov/newsroom/articles/2021/covid-19-emergency-eviction-and-foreclosure-prevention-act)),



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The State of Diversity in New York's Judiciary

By Hon. Rolando T. Acosta



My colleagues have expertly captured the significance of New York law and recounted our state's storied progression to legal prominence. They rightfully recognize the remarkable history of our jurisprudence, and the role of New York law, and New York judges, at the forefront of some of the most substantial issues and emerging legal questions facing our nation. But that history has, for the most part, fallen short of accurately or adequately reflecting one of the most unique and powerful facets of our legal community – and the public we serve.

Any meaningful view of New York law from the bench requires an honest discussion of *who* is on that bench – the composition of the judiciary empowered to interpret and apply New York law. Diversity and inclusion are not just abstract concepts that warrant lip service in the legal profession; they are at the heart of promoting justice and respect for democratic institutions and the rule of law. It is, therefore, difficult to overstate the importance of ensuring that our judiciary reflects the makeup of the citizenry.

For one thing, diversity on the bench lends credibility to a justice system that underrepresented groups, such as women and people of color, have historically viewed with suspicion and distrust. It is tremendously important for citizens to see themselves reflected in the judges who serve them, because “[a] diverse judiciary engenders confidence that courts – the last bastion of justice – have the requisite moral authority to dispense justice to all.”¹ As former Chief Judge Judith Kaye put it, “a diverse bench gives the public a feeling of inclusion in the justice system, willing to place its trust and faith in it, not alienated from it.”² NYSBA President Henry M. Greenberg has echoed that sentiment, noting that “[i]f the judiciary doesn't change [along with demographic changes], we risk undermining the public's confidence in our justice system and respect for the rule of law.”³ I wholeheartedly agree.

In addition to strengthening public trust in our institutions, a diverse judiciary improves the adjudicative process, as the presence of jurists of various backgrounds “can introduce traditionally excluded perspectives and values into judicial decision-making.”⁴ In other words, “judicial diversity brings a variety of experiences and views to the bench, which . . . trickles down to the [legal and] factual decisions that [judges] make and ultimately to the quality of justice that we dispense.”⁵ At bottom, diversity on the

bench not only legitimizes the third branch of government in the eyes of its citizens, it also brings us closer to achieving true, impartial justice in every case.

So, how is New York doing? By way of illustration, when I became a lawyer in the early 1980s, there were very few judges in New York who looked like me. A photograph I keep in my chambers depicts all the Latino judges in our state in 1985; there are only 13 judges in that photograph. Now, nearly 35 years later, there are approximately 90 Latino judges in New York.

This is progress, but it is not enough – for Latinos or for other underrepresented groups. Though New York is one of the most diverse states in the country, as of December 2014 our state ranked 24th in judicial representativeness with respect to ethnic and racial diversity and 14th with respect to the proportion of women on the bench.⁶ At present, according to statistics collected by the New York State Unified Court System's Office of Court Administration, Latinos represent nearly 20% of the population in New York but only 7% of the judiciary (of the more than 1,270 judges, there are 90 Latinos). Similarly, African Americans make up approximately 18% of the state's population but only 13.7% of its judges, and Asians make up 9% of the population but only 2.7% of judges. Women make up 51% of the population but only 41% of judges, and LGBT people make up only 4.3% of the judiciary. By contrast, Caucasians make up approximately 55% of the state population, yet Caucasian judges make up 76.3% of New York's judiciary.

Upstate, the numbers are startling. Among Supreme Court Justices outside New York City, for example, only 29% are women, 6.5% are African American, 1.4% are Latino, and zero are Asian. By contrast, 91% are Caucasian. Additionally, 100% of Surrogate's Court judges outside New York City are Caucasian, and 75% are men.

In courts to which judges are appointed rather than elected, some historically underrepresented groups fare better, while others do not. At the Court of Appeals (a court of only seven judges), 43% are women, 29% are Latino, 14% are African American, zero are Asian, and 57% are Caucasian. At the Court of Claims (which has 83 Judges), 35% are women, 7% are African American, 8% are Latino, 2% are Asian, and 82% are Caucasian. The Appellate Division is slightly more reflective of the population in New York than the trial courts, but is still not fairly representative of the population it serves. Of the 53 Appellate Division Justices, 27 are women (51%), six are Latino (11%), eight are African American (15%), two are Asian (3.8%), and 37 are Caucasian (70%). Despite recent progress in this regard, it is not uncommon to have appeals decided by all-white panels of appellate judges (particularly in the Third and Fourth Departments, where there are still no Latino or Asian Justices) – something we would never tolerate on state



Rolando T. Acosta is the Presiding Justice of the Appellate Division, First Department. This article has been adapted from Rolando T. Acosta, *Court Consolidation: An Opportunity to Increase Judicial Diversity*, NYLJ, Jan. 24, 2020, at 9 (hereinafter *Court Consolidation*).

juries, especially in our more diverse parts of the state, like Albany, Buffalo and Rochester.

Simply put, despite significant progress, our great state still does not have a fairly representative, sufficiently diverse court system. Or, as the NYSBA noted in 2014, “New York State has one of the most diverse populations in the United States, but the rich multiracial, multicultural tapestry of New York’s people is not adequately reflected in its judiciary.”⁷ Unfortunately, that description of our state still holds true today.

What can we do about this?

First, Chief Judge Janet DiFiore’s court-consolidation proposal, which I have openly endorsed, would be a tremendous stepping stone towards greater judicial diversity. That proposal would not only make the courts more navigable for everyday New Yorkers – many of whom are underrepresented minorities and poor litigants who attempt to navigate the justice system without an attorney – but would also enlarge the pool from which Appellate Division judges are appointed, creating an opportunity to further diversify the appellate bench. While Governor Cuomo has a solid track record of appointing diverse judges, his successors should be similarly encouraged – by, for instance, a clear policy statement in the consolidation proposal’s preamble that unequivocally recognizes the value of diversity, and a biennial reporting requirement or other mechanism to increase account-

ability for achieving the goal of increasing diversity in the courts.⁸

Beyond that, all of us – judges, attorneys, and legal scholars – should seek out ways to further judicial diversity in New York. We should expand and promote educational opportunities to increase awareness on relevant issues – implicit bias, for instance – in order to ensure fairness and impartiality in our justice system. We should improve outreach efforts to women and minority bar associations in order to explain the judicial vetting process. And we should consider creating a statewide Commissioner or Ombudsman of Judicial Diversity.

We have made measurable progress towards greater diversity, but there is much more work to be done. If we continue supporting measures – like the Chief Judge’s court-consolidation proposal – to ensure our “gorgeous mosaic” is fairly represented, we will improve the quality of judicial decision-making while enhancing the legitimacy of the third branch of government in the eyes of everyday New Yorkers. The pursuit of justice demands it.

1. Rolando Acosta, *Justice’s “Gorgeous Mosaic,”* NYLJ, Nov. 14, 2005, at 4 (hereinafter *Justice’s “Gorgeous Mosaic”*).

2. Archibald R. Murray, Judith S. Kaye, et al., *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 Alb. L. Rev. 973, 975 (1994).

3. *Court Consolidation: Joint Hearing Before the New York Senate and Assembly Standing Committees on the Judiciary* (Nov. 13, 2019) (hereinafter *Court Consolidation Hearing*) (statement of Henry M. Greenberg, President, New York State Bar Association).

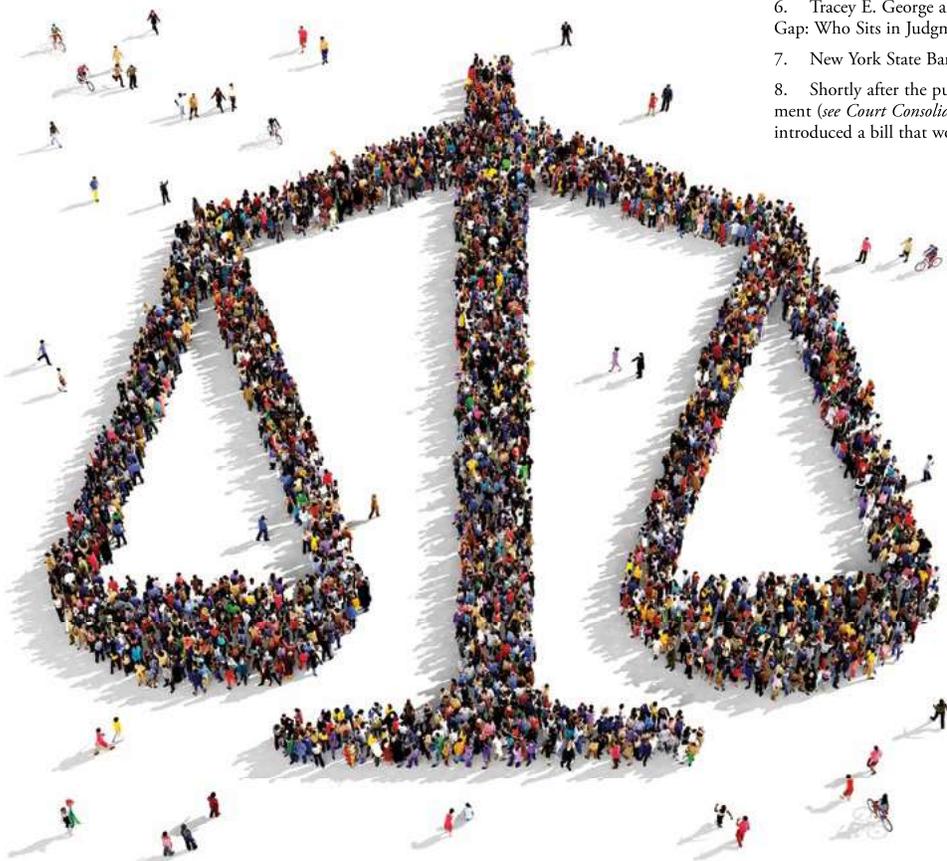
4. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash & Lee L. Rev. 405, 410 (2000).

5. *Justice’s “Gorgeous Mosaic,” supra.*

6. Tracey E. George and Albert H. Yoon, American Constitution Society, *The Gavel Gap: Who Sits in Judgment on State Courts?* 21, 24.

7. New York State Bar Association, *Judicial Diversity: A Work in Progress* 3 (2014).

8. Shortly after the publication of my article proposing a diversity reporting requirement (see *Court Consolidation, supra*), Senators Brad Hoylman and Luis R. Sepúlveda introduced a bill that would codify a similar requirement (S.7703).



Diversity on the Federal Bench Should Be a Priority for the President No Matter His Party

By Carlos Bollar and Anthony Fassano

November 6, 2020

Appears in: The Legal Intelligencer

On the importance of diversity in the judiciary, U.S. Supreme Court Justice Sonia Sotomayor once noted: "a different perspective can permit you to more fully understand the arguments that are before you and help you articulate your position in a way that everyone will understand." The United States has a vast, diverse population with people from many different backgrounds who have gone through many different experiences. The federal judiciary does not reflect this diversity.

A diverse bench affords judges the opportunity to exchange ideas and understand different points of view, a benefit that is impossible when the bench is monolithic. A diverse bench is also a good safeguard against unconscious and institutional biases because it exposes judges to different ways of thinking. Judges make decisions all the time that affect people's lives. A judiciary that reflects the population can garner the respect of the citizenry, lending credibility and fostering the legitimacy of its decisions. In a time when public confidence in governmental institutions is waning, it is important that public trust in the judiciary remain robust. For these reasons, the make-up of the judiciary should reflect the make-up of the people whom the judiciary affects. This is not the case today.

The federal judiciary, like many American institutions, does not reflect the diversity of the country. However, unlike other institutions, such as corporate America and higher education, the fix to creating a diverse federal judiciary is relatively simple: the president should nominate, and the Senate should confirm, diverse judges.

Different administrations prioritize different policy goals. The current administration has prioritized filling as many vacancies in the federal judiciary as possible. With a Republican-controlled Senate, and the changes in Senate rules that have occurred over the past two decades, the Trump administration has substantially remade the judicial branch. District and circuit court judges and Supreme Court justices are appointed for life, so this could be President Donald Trump's most lasting accomplishment.

To put the above in context, as of Oct. 28, just one week before the election, Trump has appointed and the Senate has confirmed 215 federal judges. By contrast, Presidents Barack Obama and George W. Bush each appointed 324 judges over their respective eight years in office. In other words, Trump has appointed 66% of the judges his two predecessors appointed in half of the time.

There are many reasons to explain this result. First, the Republicans have held the majority in the Senate for

the entirety of Trump's time in office. Neither Obama nor W. Bush enjoyed the same advantage. While Democrats were in the majority of the Senate for Obama's first six years, it was not until November 2013 that then-Majority Leader Harry Reid invoked the "nuclear option," which eliminated the filibuster for district and circuit court nominees. Up until that time, 60 votes were required to end debate on a judicial nominee, thus giving the minority party an effective veto over any nominee. So Democrats had the power to fill judicial vacancies that the Republicans now enjoy only for the brief period of time they had 60 senators: from the beginning of Obama's first term until the death of Sen. Ted Kennedy in August 2009. By contrast, the Republican Senate has needed only 50 votes to confirm judges or justices nominated by Trump.

Second, the Senate under Leader Mitch McConnell has changed several rules to speed up the judicial process and reduce the power the minority party has to defeat a nomination. For example, the Senate closed the circle on the "nuclear option" and eliminated the filibuster for Supreme Court nominees. This was necessary to advance the nominations of Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett. Other changes include the drastic reduction in the amount of time to deliberate on district court nominations and the elimination of the "blue slip" rule, which allowed home-state senators, regardless of the party, the ability to veto a nominee from their home state. Although not a rule change, the norm of not considering a new justice during the last part of a president's term was turned on its head by the current Senate.

Taken together, these changes have afforded the Republican Senate unprecedented power to fill the federal judiciary with Trump's nominees. And take advantage of this power they have.

But while it is clear that the appointment of federal judges has been a priority, the Trump administration has not devoted any effort to making the federal bench more diverse. Of the 215 judges Trump has appointed, only 24% (51) are women, according to the Federal Judicial Center. This is in sharp contrast with Obama, for whom women made up 42% (136) of his judicial appointments, including both of the justices he named to the U.S. Supreme Court (Judge Merrick Garland, who never received a vote in the Senate, is not included). On the other hand, women made up 22% (71) of George W. Bush's judicial appointments. Even Obama's appointments did not come close to matching the percentage of women in the United States, but they were unquestionably a step in the right direction.

On race, the differences are just as stark. Obama's appointments comprised 19% (61) African American, 11% (36) Hispanic and 6% (21) Asian. Trump's numbers do not come close to comparing. Of his appointments, 5% (11) are African American, 4% (nine) are Hispanic and 6% (13) are Asian. The same can be said for George W. Bush: 7% (24) African American, 9% (30) Hispanic and 1% (four) Asian.

Data on LGBTQ judges is more difficult to gather. For one thing, the Federal Judicial Center does not collect this data. More fundamentally, members of the LGBTQ community may choose not to publicly reveal that they are members of the community. With those caveats in mind, in examining the available data, the Trump administration's lack of efforts to appoint LGBTQ judges is clear. According to the Minority Corporate Counsel Association, of all of this administration's appointments, just one judge identifies as LGBTQ. Obama appointed

10 judges (3% of his appointments) who are open members of the LGBTQ community, while George W. Bush appointed none.

Thus, it is clear from the above numbers that Trump, with the help of the Republican-led Senate, has appointed significantly more judges than his immediate predecessors did in the same period of time, and as a result, the gains in diversity realized under Obama have been reversed. Given our country's every-changing demographics, the federal judiciary is significantly more white, more male and more straight than the country as a whole. Further, many of Trump's appointments are young, and with lifetime tenure and the country becoming increasingly diverse, the federal judiciary runs the risk of looking less like the people in the United States in the years to come.

This trend has to change. Whichever candidate takes office on Jan. 20, 2021, he should make it a priority to diversify the federal bench. According to the latest U.S. Census estimates, women make up 50.8% of the country's population, yet they represent only 38% of the federal judiciary. African Americans comprise 13.4% of the population, and only 4% of sitting federal judges. The same can be said for Hispanics (18.5% vs. 7%) and Asians (5.9% vs. 3%). The speed and efficiency with which the Trump administration has appointed and the Senate has confirmed judges has resulted in very few vacancies currently pending. However, the next four years will still see turnover in the federal bench, and several judges will be eligible to take senior status. In short, the president in the next four years will no doubt have the opportunity to appoint a number of new judges. In doing so, one goal should be to create a diverse bench.

After years of minority underrepresentation, and especially after the last four years of the Trump administration, it would take a concerted effort by several successive administrations for the federal judiciary to come close to matching the composition of the country. It is a long-term goal, but the next president should make it a point to take the first steps along that path. There is a value to a diverse bench and the breadth of experience it will bring, and that value should be an important consideration when considering judicial appointments in the years to come.

Carlos Bollar *is a partner at Archer & Greiner where he practices environmental law. Bollar handles all types of environmental cases, including single plaintiff cases, mass actions, class actions and defense of clients in state and federal government actions. He is the president-elect the Hispanic National Bar Association and a past president of the Hispanic Bar Association of New Jersey.*

Anthony Fassano, *a 2010 graduate of Rutgers University Law School, is an associate in the firm's business litigation group where he has practiced since 2017. He regularly writes articles on a variety of topics, from cybersecurity to the First Amendment. The views expressed herein are those of the authors and may not reflect those of PDLG and its member organizations.*

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