THE QUEST FOR A DIVERSE JUDICIARY

By **Carlos Bollar**

The country awaits the imminent nomination of the next justice of the United States Supreme Court. President Biden has promised that the nominee will be an African-American woman, the first in the history of the Nation's highest Court. The Hispanic National Bar Association (HNBA) applauds this historic step and looks forward to evaluating the qualifications of the nominee. This trailblazing nomination is indeed monumental; however, the United States continues to struggle with a federal, state, and local judiciary that do not reflect the diversity of its people. As we have historically described ourselves, the United States is a melting pot of communities and persons of all races, nationalities, cultures, ethnicities, and origins. It is time that the judiciary – the branch of government that serves to protect the rights of its diverse citizenry by applying the constitution and the law in a just and equitable manner – reflects its population.

THE NEED FOR A DIVERSE JUDICIARY

In explaining the importance of diversity in the judiciary, Supreme Court Justice Sonia Sotomayor noted that: "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 backgrounds who live through different life experiences. Thus, if the judiciary seeks to truly apply the law in a fair, just and unbiased manner, as intended, the bench must be diversified to reflect the unique perspectives of all communities that reflect our citizenry.

Indeed, 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 homogenous. Judges make decisions that affect people's lives, and a diverse bench safeguards against unconscious and institutional biases because it exposes judges to varying ways of thinking. A judiciary that reflects the population also garners the respect of its citizenry, lending credibility and fostering the legitimacy of its decisions. In a time when public confidence in governmental institutions is waning, it is critical that we guard our public trust in the judiciary. For these reasons, the composition of the judiciary should reflect the make-up of the people whose lives the judiciary impacts by its decisions. This is not the case today.

The federal judiciary, like most American institutions, does not reflect the diversity of the country. The federal bench remains mostly composed of white men. Less than 27% of sitting federal judges are women. While Americans who are racially or ethnically diverse comprise over 38% of the population nationwide, less than 20% of federal judges are diverse. However, unlike other institutions, in corporate America and higher education, the solution to creating a diverse federal judiciary is relatively simple: the President must nominate, and the Senate must confirm, diverse judges.

THE LACK OF DIVERSE JUDGES AND US ATTORNEYS APPOINTED UNDER THE TRUMP ADMINISTRATION

The Trump Administration made it a priority to fill as many vacancies in the federal judiciary as possible. With the help of a Republican-controlled Senate, led by Senate Majority Leader Mitch McConnell, and the changes in Senate rules that have occurred over the past two decades, the Trump Administration succeeded in its goal of reshaping the judicial branch. District and circuit court judges are appointed for life, so this may be President Trump's most enduring accomplishment.

President Trump appointed 215 federal judges in just 4 years. By contrast, Presidents Barack Obama and George W. Bush each appointed 324 judges over the entirety of their eight years in office. Stated differently, President Trump appointed 66 percent of the judges his two predecessors appointed in half of the time. In so doing, the Trump Administration made the judiciary ***less*** diverse. Of the 215 judges President Trump appointed, only 24% (51) were women. On race and ethnic diversity, the differences are even more stark. President Trump's appointments were comprised of 5% (11) African-American, 4% (9) Latino , 6% (13) Asian and one Native American judge. Put simply, 76% of President's Trump's judges are men, and 85% are white.

Data on LGBTQ+ judges is traditionally more difficult to gather. The Federal Judicial Center does not collect this data and 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 LGBTQ+ judicial appointments are notable and demonstrate a lack of effort. According to the Minority Corporate Counsel Association, only one judge appointed by the Trump Administration identifies as LGBTQ+.

The statistics of U.S. Attorney appointments were even less diverse under the Trump Administration than judicial appointments. U.S. Attorneys have a profound effect on the criminal justice system, especially as the country continues to discuss criminal justice reform. Without a diverse group considering cases, bias can seep unnoticed into charging decisions and sentencing recommendations, undermine federal leadership with state and local law enforcement and chip away at the perceived legitimacy

of the justice system. Over 85% of President Trump's appointments to the U.S. Attorney's Office were white men, notwithstanding the fact that white men constitute less than 1/3 of the nation's population.

THE DEMOGRAPHICS OF PRESIDENT BIDEN'S JUDICIAL AND U.S. ATTORNEY APPOINTMENTS

There is no doubt that, one year into his term, President Biden has nominated a group of judges and candidates that are vastly more diverse than his predecessor's. The statistics discussed below reflect both judges that have been appointed as well as candidates who have been nominated but not confirmed. While some of these nominees might not ultimately get confirmed, there is value in examining the demographics of President Biden's nominees to discern the priorities of the current Administration.

For the Circuit Courts of Appeals, President Biden has appointed or nominated twenty (20) judges to date. The approximate demographics of those nominees are as follows:

- **75% (15) are women;**
- **45% (9) are African-American;**
- **21% (3) are Latino;**
- **10% (2) are Asian;**
- **Zero (0) nominees are Native American; and**
- **10% (2) publicly identify as LGBTQ+.**

To date, the Latino community fared less well with Federal District Court nominations under the Biden Administration. The President has nominated and/or appointed 62 judges for the various district courts nationwide. The approximate demographics of those nominees are as follows:

- **67% (42) are women;**
- **25% (16) are African-American;**
- **19% (12) are Asian;**
- **12% (8) are Latino;**
- **5% (3) are Native American; and**
- **3% (2) publicly identify as LGBTQ+.**

For the position of U.S. Attorney, there are 94 federal jurisdictions. The Biden Administration has nominated 43 U.S. Attorneys as of date this article was written. The breakdown of the Biden Administration nominees for U.S. Attorney is as follows:

- **37% (16) are women;**
- **44% (19) are African-American;**
- **2% (1) are/is Asian;**
- **2% (1) are/is Latino;**
- **Zero (0) nominees publicly identify as LGBTQ+; and**
- **Zero (0) nominees are Native American.**

An examination of the Biden Administration appointees to the judiciary and U.S. Attorney positions leads to a few conclusions. President Biden is appointing women and African-Americans at unprecedented and historic rates. However, the Administration's efforts to appoint diverse candidates from other communities are lagging and insufficient.

THE PATH FORWARD

President Biden's efforts to diversify the federal judiciary and U.S. Attorney offices have been unprecedented. The HNBA applauds the tremendous progress in appointing women and African-American jurists. However, the HNBA is deeply concerned over the Administration's lack of meaningful efforts to prioritize Latino representation in the federal judiciary and U.S. Attorney positions nationwide. Latinos are the largest minority group in the United States at 18.6% of the population. Indeed, Latinos are projected to represent more than 1/3 of the American population by 2060. Yet, Latinos only represent 8% of the federal judiciary, which underscores the dire need for a President and Senate to nominate and confirm Latinos nationwide.

The massive disparity between the statistics in the judiciary and the demographics of the country must change. After years of underrepresentation, and especially after the four years of the Trump Administration, it will take a concerted effort by several successive administrations for the federal judiciary to reflect the composition of the country. While President Biden has taken significant steps to diversify the bench for some groups, most other diverse communities continue to struggle and remain underrepresented. Like the Trump Administration, the Biden Administration must act swiftly to continue to nominate and appoint qualified, diverse attorneys into these all-too-important positions. There is no shortage of Latino or other diverse, qualified candidates, and now is the time for the Biden Administration to act. In order to achieve a truly diverse judiciary, nominees must come from all communities, including Latinos. The HNBA will continue to press our elected officials to do more for the Latino community and will hold them accountable when they fail to do so.

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[1] "Diverse" in this context is intended to include the categories of race, ethnicity, gender, sexual orientation, religion, age and disability. This article focuses on the categories of gender, race, ethnicity, and sexual orientation.

[2] This article uses the author's preferred term "Latino" in lieu of the terms "Hispanic" or "Latinx".