

## Failure to Progress: A Renewed Call for American Indians and Alaskan Natives on the Federal Bench

**MANY NOTABLE FIRSTS** have happened over the last six years—including the election of the first African-American President, appointment and confirmation of the first African-American U.S. attorney general, and the appointment of two more women to serve as U.S. Supreme Court justices, bringing the total to three women on the

Court for the first time ever. Many key positions within the Obama administration in general are now occupied by women and people of color. Yet, despite this progress in the appointment, confirmation, and election of women and racial minorities within the federal government, one notable void still remains. Even though American Indians and Alaskan Natives are the portion of the American population most significantly affected by decisions made by the federal judiciary,<sup>1</sup> not a single American Indian or Alaskan Native currently serves as an active federal district judge or circuit court judge.<sup>2</sup>

Almost six years ago, I wrote a commentary that was published in *The Federal Lawyer* calling for inclusion of American Indians or Alaskan Natives on the federal bench as district or circuit court judges. As of July 2005, no American Indian or Alaskan Native was actively serving as an Article III federal judge. At that time, American Indians composed approximately 0.9 percent of the overall American population, but only one American Indian was serving as a senior judge on the federal bench.<sup>3</sup> My assumption has always been that the composition of the federal bench should roughly mirror that of the general population of the United States. Relying on this assumption, I concluded in 2005 that “[b]ased on these numbers, 15 American Indian or Alaskan Native judges would have to be appointed and confirmed to the federal bench in order for the percentage of American Indian or Alaskan Native federal judges to adequately represent the population percentage of American Indian or Alaskan Natives living in the United States.”<sup>4</sup> Moreover, in comparison to the percentages of other racial minority groups represented on the federal bench—such as African-Americans, Hispanics, and Asian-Americans—“there appears to be an even greater disparity between the number of American Indian Article III judges and the total population of American Indians as compared

to other racial minority populations.”<sup>5</sup> Underlying this conclusion is the assumption that “[i]n theory, if the judiciary is open to all individuals regardless of race, one would expect minority representation in the judiciary to reflect minority representation in the general population,” but this, in fact, is not the case.<sup>6</sup>

Six years ago, I advanced several reasons why the inclusion of American Indians and Alaskan Natives is so crucial, beyond the fact that federal judges’ decisions disproportionately affect American Indian or Alaskan Natives. For example, “[t]he presence of American Indian judges on the bench will help to sensitize and educate other federal judges to the unique plight of American Indians.”<sup>7</sup> Moreover, “[t]he presence of American Indians on the federal bench is also crucial for increasing the credibility of the federal bench, and, at the same time, destroying stereotypes of American Indians.”<sup>8</sup>

Over the past six years, it has become clear to me that there are additional reasons that necessitate the inclusion of American Indian or Alaskan Natives on the federal bench. Generally,

[s]cholars champion diversity for substantive reasons. When diverse viewpoints are introduced into the judicial decision making, the deliberation of collegial courts is “sharpen[ed].” Assumptions that reflect majority viewpoints are questioned and the “outsider” viewpoint is taken more seriously. An expansion of the dialogic landscape leads to better decisions. Furthermore, when courts are visibly diverse, decisions become more credible and legitimate.<sup>9</sup>

Even James Madison famously stated in *Federalist No. 39* that a republic could not legitimately claim to be representative unless government drew from all sectors of the populace.<sup>10</sup> At least one scholar has noted that three forms of diversity exist: descriptive,<sup>11</sup> symbolic,<sup>12</sup> and viewpoint (substantive).<sup>13</sup> A federal bench that is descriptively diverse lends legitimacy and credibility, buttressing James Madison’s ideal that all citizens should have a role in the adjudicatory process. Symbolic diversity allows for barriers to be broken and role models to be recognized. Finally, viewpoint or substantive diversity allows for the inclusion of the “voice of color,” which, in turn, lends credibility to judicial decisions.<sup>14</sup> As Lawrence Baca, the former president of the Federal Bar Association, stated:

Supreme Court Justices also believe that diversity on the bench improves judicial decision-making. For example, Justice Powell noted that, a member of a previously excluded group can bring insights to the Court that the rest of its members lack. And Justice Ruth Bader Ginsberg has commented that a system of justice is the richer for the diversity of background and experience of its participants.<sup>15</sup>

Some scholars have empirically demonstrated that “data indicate very different decision-making patterns for judges of different races”<sup>16</sup>; yet the “findings also indicate that judges of all races are attentive to the merits of the case.”<sup>17</sup> Moreover, many Americans are generally not familiar with the existence of Indian tribes as separate sovereigns—let alone familiar with federal Indian law.<sup>18</sup> Kevin Washburn, the dean of the University of New Mexico School of Law, has posited that “federal judges tend to be more even-handed to Indian tribes once they become seasoned in their positions.”<sup>19</sup> Many American Indian and Alaskan Native lawyers have had the opportunity to become “seasoned” in the area of federal Indian law and, therefore, would bring an increased knowledge of federal Indian law to the bench.

Having established that there are numerous important reasons for including American Indians or Alaskan Natives on the federal bench, it is also important to consider how such increased inclusion is possible. In 2005, I called for greater participation of American Indians or Alaskan Natives in politics and greater tribal involvement in the selection process for federal judges as potential steps that would lead to naming American Indians and Alaskan Natives to the federal bench.<sup>20</sup> In this regard, we have seen some positive developments: two individuals of American Indian or Alaskan Native ancestry have recently been mentioned as potential judicial nominees to federal circuit courts of appeals, and President Obama recently nominated one man of American Indian ancestry, Arvo Mikkanen, to the U.S. District Court for the Northern District of Oklahoma.

With regard to potential nominations to the federal circuit courts of appeals, Heather Kendall-Miller, a woman of Dena’ina Athabascan heritage, has been mentioned as a potential nominee for the U.S. Court of Appeals for the Ninth Circuit vacancy to be left by the retiring Judge Andrew Kleinfeld.<sup>21</sup> At the General Assembly held at its 2010 Annual Convention in Albuquerque, N.M., the National Congress of American Indians adopted a resolution supporting the nomination and confirmation of Heather Kendall-Miller to the U.S. Court of Appeals for the Ninth Circuit.<sup>22</sup> In addition, Keith Harper, a citizen of the Cherokee Nation, has been mentioned as a potential nominee for a vacancy on the U.S. Court of Appeals for the Tenth Circuit.<sup>23</sup> Harper has actively participated in politics, “serv[ing] as a principal adviser for President

Barack Obama’s campaign in 2008 and later as a member of the Obama-Biden transition team.”<sup>24</sup> Just as the National Congress of American Indians did with Kendall-Miller, the Cherokee National Tribal Council passed a resolution in support of the prospective nomination of Keith Harper.<sup>25</sup> In the case of both Heather Kendall-Miller and Keith Harper, we have seen support for their potential nominations from tribal nations: the National Congress of American Indians and the Cherokee Nation. Moreover, some commentators have suggested that Harper’s active role in politics contributed positively to the suggestion that he be nominated to the U.S. Court of Appeals for the Tenth Circuit. Yet, despite the fact that these candidates are amply qualified, possess tribal support, and have been politically active, they have yet to be nominated.

On Feb. 2, 2011, the White House Office of the Press Secretary announced President Obama’s nomination of Arvo Mikkanen to the U.S. District Court for the Northern District of Oklahoma. In announcing Mikkanen’s nomination along with one other nomination, President Obama stated: “I am confident they will serve the American people with integrity and distinction.”<sup>26</sup> Since 1994, Mikkanen has served as an assistant U.S. attorney for the Western District of Oklahoma. He has also served as a trial and appellate judge for the Court of Indian Offenses and the Court of Indian Appeals for several tribes as well as chief justice of the Cheyenne-Arapaho Supreme Court. Mikkanen is a graduate of Yale University Law School and Dartmouth College.<sup>27</sup> Despite Mikkanen’s exceptional qualifications, Sen. Tom Coburn (R-Okla.) voiced his objections almost immediately, stating that Mikkanen was “unacceptable for the position” and that he was “also deeply disappointed in the White House’s lack of consultation with me [Coburn] on this nomination.”<sup>28</sup> President Obama’s nomination of Mikkanen to the federal bench is certainly a step in the right direction, given the analysis above, but Sen. Coburn’s objections “could seriously hinder Mikkanen’s confirmation because of the deference given by the [Senate] Judiciary Committee to home-state senators in the process.”<sup>29</sup>

The nomination of Mikkanen is a strong indicator of symbolic diversity, as would be the nomination of either Kendall-Miller or Harper, given that “[s]ymbolic diversity is at its most powerful when the President or a state executive names the ‘first’ minority or woman to a bench that was previously all white or all male.”<sup>30</sup> The nomination of either Kendall-Miller or Harper would be the first nomination of an American Indian or Alaskan Native to a U.S. Court of Appeals and, should Mikkanen be confirmed by the Senate, he would be the only active federal district judge or circuit court judge of American Indian or Native Alaska ancestry. Not only are such appointments powerful statements of symbolic diversity, but they also promote descriptive and viewpoint diversity and advance

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those foundational republican ideals espoused by James Madison.

That a significant portion of the American population is not represented within the federal judiciary is deplorable. That this unrepresented portion of the American population is also affected to the greatest degree by the decisions made by federal courts and yet remains unrepresented is unconscionable. We can only hope that the possibility of a nomination (and confirmation) of someone of American Indian or Alaskan Native ancestry—such as Mikkanen, Kendall-Miller, or Harper—will mark a beginning to the end to this unfortunate chapter of the federal judiciary’s history. **TFL**

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**Endnotes**

<sup>1</sup>Elizabeth A. Kronk, *Hundreds of Nations, Millions of People: One Senior Judge on the Federal Bench*, 52 FED. LAW. 16, 17 (July 2005) (“[F]ederal court decisions have a greater impact on the daily lives of American Indians than any other group of Americans. All federal Indian law falls under the jurisdiction of federal courts; therefore, American Indians are disproportionately affected by federal judges’ decisions. In comparison, the decisions of federal judges have an impact on the lives of other minority groups, but state court decisions affect these groups as well.”).

<sup>2</sup>Recently, however, Leo Brisbois, a member of the White Earth Band of Ojibwe in Minnesota, was appointed a federal magistrate judge in the District of Minnesota. Rick Smith, *Ojibwe Appointed First American Indian Federal Judge*, WIN AWENEN NISITOTUNG (Oct. 10, 2010).

<sup>3</sup>As of 2007, it appeared that “[n]o active federal judge was Native American or Pacific Islander,” Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1438 (Fall 2008) (citation omitted); see also Pat K. Chew and Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1123 (2009) (“Currently, no Native American judges sit on the federal judiciary at all, and no Asian Americans sit at the appellate level.”) (citations omitted).

<sup>4</sup>Kronk, *Hundreds of Nations, Millions of People*, *supra* note 1, at 16.

<sup>5</sup>*Id.*; Chew and Kelley, *Myth of the Color-Blind Judge*, *supra* note 3, at 1117, 1126 (“Meanwhile, Native Americans are underrepresented by a factor of ten.”).

<sup>6</sup>Chew and Kelley, *Myth of the Color-Blind Judge*, *supra* note 3, at 1117, 1126. Although one could argue that the lack of federal judges of color is related to the fact that “minority lawyers constituted less than 10% of the bar even though minorities constituted nearly 30% of the general population ... a lack of minority lawyers does not appear to be the real constraint on the appointment of more minority judges. Indeed, there are many minorities in the legal profession who would appear to have the prima facie qualifications to be judges.” *Id.* at 1128 (citations omitted). This may be especially true where many American Indian lawyers also serve as tribal court judges and therefore have judicial experience.

<sup>7</sup>Kronk, *Hundreds of Nations, Millions of People*, *supra* note 1, at 17.

<sup>8</sup>*Id.* at 18.

<sup>9</sup>Vargas, *Only Skin Deep?*, *supra* note 3, at 1423, 1424 (citations omitted).

<sup>10</sup>*Id.* at 1427 (citations omitted).

<sup>11</sup>*Id.* at 1428 (“Descriptive diversity means, as expressed by Bill Clinton, that the judiciary should ‘look like America.’”) (citations omitted).

<sup>12</sup>*Id.* at 1430 (“Symbolic diversity communicates values: what we stand for as a people and—when carried out through presidential appointments—what ideals presidents and political parties champion.”).

<sup>13</sup>*Id.* at 1432 (citations omitted) (“The reason that scholars champion diversity on the bench is that they believe that, at a substantive level, diversity will improve how judges make decisions and will ultimately enhance the quality of justice in our society. There are three values that are promoted by viewpoint diversity: inclusiveness, credibility of the rule of law, and enhanced decision making.”); Chew and Kelley, *Myth of the Color-Blind Judge*, *supra* note 3, at 1117, 1120 (“What difference will it make if we have a more racially diverse judiciary? Some argue that greater diversity among judges would provide minority role models and that public confidence in the judiciary system would be enhanced. Others argue that having more judges of color may substantively improve the judicial decision-making process by increasing judicial impartiality and yielding fairer legal outcomes.”) (citations omitted).

<sup>14</sup>Vargas, *Only Skin Deep?*, *supra* note 3, at 1423, 1429–1437.

<sup>15</sup>E-mail from Lawrence Baca to author (Jan. 31, 2011) (on file with author) (citing Ciara Torres-Spelliscy, Monique Chase, and Emma Greenman, *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE REPORT, 11 (2008)).

<sup>16</sup>Chew and Kelley, *Myth of the Color-Blind Judge*, *supra* note 3, at 1117, 1141 (citation omitted).

<sup>17</sup>*Id.* at 1156.

<sup>18</sup>Kevin K. Washburn, *Keynote Address: The Next Great Generation of American Indian Law Judges*, 81 U. COLO. L. REV. 959 (Fall 2010) (“The central challenge in Indian law is ensuring that Indian law and Indian tribes are not some alien concept, but are a regular part of the cultural and governmental background in the United States.”).

<sup>19</sup>*Id.* at 963. In particular, Dean Washburn points to the increased understanding of federal Indian law as demonstrated by the decisions of U.S. Supreme Court Chief Justice John Marshall, Justice Stevens, Justice O’Connor, and Justice Ginsberg.

<sup>20</sup>*Id.*

<sup>21</sup>Heather Kendall-Miller *Noted for Ninth Circuit Spot* (July 26, 2010); available at [turtletalk.wordpress.com](http://turtletalk.wordpress.com).

<sup>22</sup>National Congress of American Indians, *Support for the Nomination and Confirmation of Heather Kendall-Miller to the United States Court of Appeals for the Ninth Circuit*, Resolution #ABQ-10-019 (Nov. 14–19, 2010). In notable part, the resolution indicates that the National Congress of American Indians supports Heather Kendall-Miller’s nomination and confirmation because “over the course of U.S. history the federal judiciary has established principles of respect for tribal self-government and deference to the political branches and intergovernmental comity in determining the course of the federal-tribal relationship and the scope of recognized tribal authority; and ... the federal judiciary is regularly tasked with making deci-

sions that have a lasting impact on tribal communities and the daily lives of Indian people, including decisions regarding tribal sovereignty, public safety and health on Indian reservations, tribal economic development, generation of tax revenue, and protection of tribal cultures and religions; and ... the U.S. has never appointed a Native American to the federal appellate bench or the Supreme Court, and out of the total 866 federal judgeships, not one is currently occupied by and American Indian or Alaska Native....”

<sup>23</sup>*Keith Harper for the Tenth Circuit Drawing Intense Opposition* (May 23, 2010); available at [turtletalk.wordpress.com](http://turtletalk.wordpress.com).

<sup>24</sup>*Id.*

<sup>25</sup>Cherokee Nation, *Council Passes Resolution to Support Harper for U.S. Appeals Court* (June 30, 2010); available at [www.cherokee.org/NewsRoom/FullStory/3266/Page/Default.aspx](http://www.cherokee.org/NewsRoom/FullStory/3266/Page/Default.aspx).

<sup>26</sup>Executive Office of the President, Office of the Press Secretary, *President Obama Names Two to the United States District Court* (Feb. 2, 2011); available at [www.whitehouse.gov/the-press-office/2011/02/02/president-obama-names-two-united-states-district-court](http://www.whitehouse.gov/the-press-office/2011/02/02/president-obama-names-two-united-states-district-court).

<sup>27</sup>*Id.*

<sup>28</sup>Chris Casteel, *President Nominates Federal Prosecutor to be U.S. Judge in Tulsa*, NewsOK.com (Feb. 3, 2011); available at [newsok.com/president-nominates-federal-prosecutor-to-be-u.s.-judge-in-tulsaarticle/3537611#ixzz1D1KCYff](http://newsok.com/president-nominates-federal-prosecutor-to-be-u.s.-judge-in-tulsaarticle/3537611#ixzz1D1KCYff).

<sup>29</sup>*Id.*

<sup>30</sup>Vargas, *Only Skin Deep?*, *supra* note 3, at 1423, 1430.

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*supra* note 6, at 691.

<sup>11</sup>See Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009).

<sup>12</sup>David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001) (“Tribal interests have lost about 77 percent of all the Indian cases

decided by the Rehnquist Court in its fifteen terms, and 82 percent of the cases decided by the Supreme Court in the last ten terms. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58 percent of their Supreme Court cases.”) (footnotes omitted).

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Court heard, considered, and rejected these arguments by the government in [*White Mountain*] *Apache*”), *rev’d on other grounds*, 129 S. Ct. 1547 (2009); *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) (under *White Mountain Apache*, “once a statutory obligation is identified, the court may look to common law trust principals to particularize that obligation”); *Cobell v. Norton*, 240 F.3d 1081, 1100–01 (D.C. Cir. 2001) (per *Mitchell II*, “[t]he general ‘contours’ of the government’s obligations may be defined by statute, but the interstices must be filled in through reference to general trust law”); *Duncan v. United States*, 667

F.2d 36, 42–43 (Ct. Cl. 1981) (rejecting that “a federal trust must spell out specifically all the trust duties of the Government”); *Navajo Tribe*, 624 F.2d at 988 (“Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute. ...”).

<sup>10</sup>See Remarks by President at White House Tribal Nations Conference (Dec. 16, 2010) (“I want to be clear: What matters far more than words ... are actions to match those words. ... That’s the standard I expect my administration to be held to.”).