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## ARTICLES

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### “SEVEN YEARS’ WORTH OF OPPORTUNITY”: CHAMPIONING DIVERSITY AND INCLUSION AS CHIEF CIRCUIT JUDGE

*Carl E. Stewart\**

#### INTRODUCTION

A remarkable but largely unnoticed moment occurred at the September 2016 session of the Judicial Conference of the United States. By statute, the Chief Justice of the United States convenes and presides over the Judicial Conference twice yearly.<sup>1</sup> In addition to the Chief Justice, the Judicial Conference consists of the Chief Judge from each circuit as well as the Court of International Trade.<sup>2</sup> In addition, the Judicial Conference is comprised of designated district judges and the Director of the Administrative Office of the United States Courts, who serves as its Secretary.<sup>3</sup>

In September 2016, the Judicial Conference had convened in the Supreme Court’s East Conference Room. The oak-paneled room contains portraits of the nation’s earliest Chief Justices—including Roger Taney, who infamously wrote the majority opinion in *Scott v. Sandford* which declared that African Americans were not citizens under the Constitution.<sup>4</sup> Nearly 160 years later, at the September 2016 meeting, four of the thirteen Chief Circuit Judges gathered before Taney’s ornately-framed portrait were African Americans. These four judges were each tasked with leading their respective circuits and making policy for the federal judiciary.<sup>5</sup> After years of service, they had each earned a seat at the table. This marked an important moment in the integration of the storied third branch and served as a measure of our country’s racial progress.

Serving on the Judicial Conference of the United States is one of the unique requirements of a Chief Circuit Judge. No other circuit judges attend the conference, which is the judiciary’s policymaking arm. Rather, under statute, “the chief judge of each judicial circuit” attends the conference annually for a regular session and for additional special sessions as the Chief Justice designates.<sup>6</sup> Historically, the Chief

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\* Judge, United States Court of Appeals for the Fifth Circuit; Chief Judge, United States Court of Appeals for the Fifth Circuit, 2012—2019. The author thanks his stellar law clerk Donovan Stone for research assistance.

1. 28 U.S.C. § 331.

2. *Id.*

3. *Id.*

4. 60 U.S. 393 (1857).

5. At the time of the September 2016 Judicial Conference, Judges Theodore McKee of the Third Circuit, Carl E. Stewart of the Fifth Circuit, R. Guy Cole, Jr. of the Sixth Circuit, and Roger L. Gregory of the Fourth Circuit—each of whom is African American—served as Chief Judge of their respective circuits.

6. 28 U.S.C. § 331. Also among those required to attend the conference are “the chief judge of the Court of International Trade, and a district judge from each judicial circuit . . .” *Id.*

Justice convenes these meetings in March and September. Statute also exclusively empowers the Chief Circuit Judge to summon and preside over all the active circuit, district, magistrate, and bankruptcy judges for meetings of the Circuit Judicial Conference.<sup>7</sup> The Circuit Judicial Conference “consider[s] the business of the courts and advis[es] means of improving the administration of justice within such circuit.”<sup>8</sup> These are but two examples of the Chief Circuit Judge’s many statutorily-required duties, which in addition to the informal obligations associated with the role, the Chief Circuit Judge must perform on top of his or her case-related responsibilities.

Although Chief Circuit Judges are selected based on seniority, an eligible judge can decline the obligation for any reason.<sup>9</sup> This makes it even more remarkable that four African American judges were simultaneously serving as Chief Circuit Judge during the Judicial Conference’s September 2016 session. For this to have occurred, each Judge needed to have: (1) been the most senior circuit judge in active service who was younger than age sixty-five; (2) served on his circuit for at least a year; and (3) not previously been Chief.<sup>10</sup> Moreover, none of the judges could have reached age seventy or have served as Chief Judge for more than seven years.<sup>11</sup> Further, each Judge must have accepted the role upon becoming eligible. Put simply, for at least four of the thirteen Chief Circuit Judges to be African American, the stars must align perfectly like they did briefly in 2016. And although the stars did so again from 2017 to 2019,<sup>12</sup> the necessary constellation appears unlikely to recur soon.

The historical import of the moment was not lost on the quartet of judges. Thus, a commemorative photograph was taken. The image of four African Americans standing under Chief Justice Taney’s portrait at the Judicial Conference is a powerful reminder that the benefits of serving as Chief Circuit Judge often outweigh the burdens.<sup>13</sup> It also illustrates that, as the proverbial “face of the franchise,” the Chief Judge has an unparalleled opportunity to model a judiciary that reflects our country’s rich diversity. The Chief Judge regularly meets, influences, and learns from other leaders in the judiciary while making decisions that affect the entire judicial system. The Chief Judge recommends individuals to serve on the Judicial Conference and Circuit Conference committees through which those conferences operate.<sup>14</sup> The Chief Judge shapes the tone of and sets the agenda for the Circuit Conference.<sup>15</sup> And the Chief Judge appoints individuals to various intra-circuit committees and to the merit selection panels for high-ranking positions within the circuit.<sup>16</sup>

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7. *Id.* § 333.

8. *Id.*

9. *See id.* § 45(c).

10. *Id.* § 45(a)(1).

11. *Id.* § 45(a)(3).

12. From 2017 to 2019, Judge Lavenski R. Smith of the Eighth Circuit joined Judges Stewart, Cole, and Gregory in serving as Chief Circuit Judges after Judge McKee’s tenure as Chief ended. *See text accompanying supra note 6.*

13. *See infra* notes 51–83 and accompanying text.

14. *See infra* notes 60–62, 73–74, and accompanying text.

15. *See infra* notes 63–68 and accompanying text.

16. *See infra* notes 73–74 and accompanying text.

This essay explains how visionary Chief Judges can use these duties as opportunities to influence the federal judiciary towards a place of greater representation and inclusivity. This essay proposes that these opportunities could convince a judge to serve as Chief despite legitimate concerns about the role’s overwhelming obligations. Judges of color may be particularly interested in this rationale because their backgrounds should result in a heightened sensitivity to issues of diversity and inclusion. But not only judges of color care about these issues. In my view, all judges should be sensitive to diversity and inclusion within our profession. To set the stage for this discussion, Part I of this essay briefly describes the office of Chief Circuit Judge, focusing on its history and current duties. Part II then discusses diversity and inclusion as it relates to the work of Chief Judges.<sup>17</sup>

## I. THE OFFICE OF CHIEF CIRCUIT JUDGE

The office of Chief Circuit Judge grew from humble origins. The Judiciary Act of 1789 established the Supreme Court and several district courts and judicial circuits,<sup>18</sup> but it did not create an independent tier of intermediate appellate courts.<sup>19</sup> An independent tier of intermediate appellate courts did not exist until 1891, when the Evarts Act created a circuit court of appeals for each circuit.<sup>20</sup> The Evarts Act authorized the circuit courts of appeals to decide cases in three-judge panels, but it authorized only two judgeships for each circuit court.<sup>21</sup> The drafters of the Evarts Act contemplated that the third judge would be either a Supreme Court Justice, who would preside over the panel, or a district judge.<sup>22</sup> If no Justice was available to sit on a panel, the Evarts Act provided that “the circuit judges in attendance . . . [would] preside in order of the seniority of their respective commissions.”<sup>23</sup> This new position, the “senior circuit judge,” was “a precursor to the chief circuit judge.”<sup>24</sup> More than half a century later in 1948, Congress coined the term “Chief Judge of the Circuit.”<sup>25</sup>

Although commentators are unsure whether the 1948 change was one of nomenclature or substance, the title of “Chief Judge” certainly befits the judges leading modern circuit courts.<sup>26</sup> Today, Chief Judges manage large budgets and staffs, decide matters of circuit governance, and represent their circuits to the public and the legal community.<sup>27</sup> This is on top of their judicial duties, which include writing

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17. Although this essay focuses on Chief Circuit Judges, many of the basic themes could apply to Chief Judges of all courts, including federal district and bankruptcy courts.

18. Judiciary Act of 1789, 1 Stat. 73.

19. Marin K. Levy & Jon O. Newman, *The Office of the Chief Circuit Judge*, 169 U. PENN. L. REV. 2423, 2431 n.30 (2021).

20. Ch. 517, 26 Stat. 826 (1891).

21. Levy & Newman, *supra* note 19, at 2432.

22. *Id.* at 2432.

23. *Id.* (citing Evarts Act § 3, 26 Stat. 826 (1891)).

24. FED. JUD. CTR. TEMPLATE FOR CHIEF CIRCUIT JUDGES’ DESKBOOKS 2 (2001), <https://www.fjc.gov/sites/default/files/2012/CCJtempl.pdf> [hereinafter FED. JUD. CTR. TEMPLATE DESKBOOKS].

25. Levy & Newman, *supra* note 19, at 2434.

26. *See id.* at 2432–34.

27. *Id.* at 2425–56.

opinions, presiding over arguments, and assigning opinion writing responsibilities when in the majority.<sup>28</sup> The Chief Judge is ultimately “responsible for seeing that the court, and the circuit as an administrative entity, is administered effectively and efficiently.”<sup>29</sup> In executing these duties, the Chief Judge wields “a sizable reservoir of authority,” which Chiefs “can enhance depending on their personal leadership skills and their willingness and ability to capitalize on the prestige of the position.”<sup>30</sup>

Attempts to categorize the Chief Judge’s responsibilities are seldom consistent,<sup>31</sup> likely due to the “incremental evolution of the position” and the “paucity of statutory authority” defining the role.<sup>32</sup> Instead, the Chief Judge has “a patchwork of duties and responsibilities” to perform, resulting from statutes, local practices, and informal customs.<sup>33</sup> Among the Chief Judge’s statutory duties are appointing and removing senior staff attorneys, subject to court approval;<sup>34</sup> appointing bankruptcy judges when the majority of circuit judges cannot agree on candidates;<sup>35</sup> supervising the assignment of visiting district and circuit judges;<sup>36</sup> presiding over court meetings and meetings of the Circuit Judicial Council and Conference;<sup>37</sup> and serving on the Judicial Conference of the United States.<sup>38</sup> The Chief also has important informal duties, including establishing and staffing committees,<sup>39</sup> fostering collegiality on the court,<sup>40</sup> and maintaining the court’s legitimacy.<sup>41</sup> These duties arm the Chief Judge with an immense reservoir of discretion to advance efforts aimed at creating a more diverse and inclusive judiciary.

## II. OPPORTUNITIES TO PROMOTE DIVERSITY AND INCLUSION

To exercise the Chief Judge’s formal and informal powers to shape the judiciary, one must first become Chief. Historically, few people of color have received that

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28. *Id.* at 2426.

29. FED. JUD. CTR. TEMPLATE DESKBOOKS, *supra* note 24, at 6.

30. *Id.*

31. Compare Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 *FORDHAM L. REV.* 369, 374 (1984) (stating that a Chief Judge’s administrative duties fall into three categories: “internal duties” affecting court operations, “systemic duties” relating to “the functioning of the federal judicial system as a whole,” and “external duties” concerning “the public”), with E. Barrett Prettyman, *The Duties of a Circuit Chief Judge*, 46 *A.B.A. J.* 633, 633–36 (1960) (dividing a Chief Judge’s duties into five categories: judicial duties, administrative duties, duties relating to the circuit’s Judicial Council, duties relating to the circuit’s Judicial Conference, and duties relating to the Judicial Conference of the United States).

32. FED. JUD. CTR. TEMPLATE DESKBOOKS, *supra* note 24, at 6.

33. *Id.*

34. 28 U.S.C. § 715(a) (2018).

35. *Id.* § 152(a)(3) (2018).

36. *Id.* § 291(b) (2018) (designating and assigning circuit judges to sit in district court); *id.* § 292(a)–(b) (designating and assigning district judges to sit with the circuit or another district); *id.* § 295 (approving assignments of circuit judges to sit on other circuits).

37. *Id.* § 45(b) (setting forth the chief judge’s precedence in court meetings); *id.* § 332(a)(1) (setting forth the chief judge’s precedence over circuit judicial council); *id.* § 333 (setting forth the chief judge’s precedence in circuit judicial conference).

38. *Id.* § 331.

39. Levy & Newman, *supra* note 19, at 2464.

40. *Id.* at 2466.

41. *Id.* at 2442.

honor. The first person of color to serve as a Chief Circuit Judge was Judge William Hastie, who became Chief Judge of the Third Circuit in 1968. A woman of color did not lead a federal circuit until Judge Mary H. Murguia became Chief Judge of the Ninth Circuit in 2021. According to data from the Federal Judicial Center, just thirteen people of color have ever served as the Chief Judge of a federal circuit court: ten African Americans, two Hispanics, and one Indian American.<sup>42</sup> That comprises only seven percent of the 169 persons who have served as Chief Circuit Judge.<sup>43</sup> Further, the Second, Seventh, Tenth, and Federal Circuits have never had a person of color serve as Chief Judge.

There are many reasons why people of color are underrepresented among Chief Judges. One obvious explanation is that they did not begin serving as federal judges in relatively large numbers until recently.<sup>44</sup> This created a pipeline problem, as being a federal judge is again an obvious predicate for becoming Chief Judge. But there is another reason why people of color—or anyone, for that matter—might not serve as Chief Judge: they might reasonably conclude that the job is not worth the effort. Serving as Chief Judge tasks already overburdened judges with another demanding job. According to one recent study, Chief Judges can spend up to ninety percent of their time working on tasks associated with the role.<sup>45</sup> Most judges prefer to spend their time deciding cases, not handling administrative matters; thus, they may not want to take on the additional burden accompanying the title. Indeed, there is a strong argument that those who dislike administrative work should decline to serve as Chief Judge.<sup>46</sup> Moreover, the job is often thankless. As Judge Wilfred Feinberg, former Chief Judge of the Second Circuit, wrote in 1984, the position is “in many ways an invisible post on an invisible court.”<sup>47</sup> Similarly, others have stated that effective Chiefs “make management invisible to the other judges so that they can do their jobs.”<sup>48</sup> The Chief Judge “keep[s] the trains running on time” and ensures that “the ship is running in the way that the ship is designed to run.”<sup>49</sup> When all goes well, the Chief Judge’s difficult work may go unnoticed, providing another reason why one might decline the job.

Yet there are countervailing reasons why a judge should consider serving as Chief Judge. Some of those reasons, such as a desire to serve honorably or to lead

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42. See *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (click “Court” under “Enter Search Criteria” heading; then click “U.S. Courts of Appeals”; then click “Select All”; then select “Limit to Chief and Presiding Justices and Judges”; then click “Personal Characteristics and Background” under “Enter Search Criteria” heading; then click “Race or Ethnicity”; then click “Select All”; then de-select “White”; and then click “Search”) (last visited Mar. 16, 2022).

43. See *id.* (identifying 169 circuit judges who served as Chief Judge).

44. See, e.g., Danielle Root, Jake Faleschini, & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019) (5 fig.1A documents the racial and ethnic distribution of federal judges appointed from 1930 to 2018).

45. Levy & Newman, *supra* note 19, at 2449.

46. See *id.* at 2479.

47. Feinberg, *supra* note 31, at 369.

48. Levy & Newman, *supra* note 19, at 2439.

49. *Id.*

one's colleagues, have been described elsewhere.<sup>50</sup> But the opportunities for the Chief Judge to promote diversity and inclusion—from making policy and recommendations on the Judicial Conference to planning the Circuit Conference and making appointments, among others—have gone unnoticed as an additional rationale for serving as Chief. Those opportunities couple with the symbolic and representative contributions a diverse judge might offer by serving as Chief, particularly if he or she would be the first Chief Judge from a particular background. This may be enough to persuade an unconvinced judge that accepting the Chief Judge's mantle is worthwhile and can further causes he or she may be passionate about.

#### A. *Judicial Conference of the United States*

The Chief Judge's greatest opportunities to effect broad change come from serving on the Judicial Conference of the United States. Under the statute, the Judicial Conference comprehensively surveys "the condition of business in the courts of the United States"; makes recommendations to "promote uniformity of management procedures and the expeditious conduct of court business"; and studies court rules to ensure "simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."<sup>51</sup> The Judicial Conference also sets personnel, budgetary, and ethical policies for the judiciary and offers a venue for Chief Judges to communicate the concerns and needs of their circuits.<sup>52</sup> Without belaboring the point, "it is almost impossible to describe the broad range of subjects considered" at the Judicial Conference.<sup>53</sup> By serving on the Judicial Conference, a Chief Judge from a diverse background can add perspectives to these conversations that might otherwise be missing. Having a seat at the table where decisions affecting the entire federal judiciary are made is one reason why diverse judges should strongly consider serving as Chief.

Other aspects of serving on the Judicial Conference strengthen the case for becoming Chief Judge. For starters, conference members are eligible to serve on the Judicial Conference Executive Committee, which is the conference's senior executive arm. The Judicial Conference conducts its work primarily through "specialized committees whose membership is appointed exclusively by the chief justice and drawn from the entire federal judiciary."<sup>54</sup> But unlike other conference committees, the Chief Justice draws the Executive Committee's members only from members of the Judicial Conference.<sup>55</sup> The Executive Committee facilitates and coordinates long-range planning across all other conference committees and recommends the

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50. See, e.g., Feinberg, *supra* note 31, at 389 (explaining why one may find the job "irresistible"); Levy & Newman, *supra* note 19, at 2448 (reporting that some judges look forward to the "honor" of serving as Chief Judge); Prettyman, *supra* note 31, at 633 (noting the "fierce pride" one might take in serving as Chief Judge); Patricia M. Wald, ". . . Doctor, Lawyer, Merchant, Chief", 60 GEO. WASH. L. REV. 1127, 1150 (1992) (stating that serving as Chief Judge "is honorable duty").

51. 28 U.S.C. § 331.

52. Wald, *supra* note 50, at 1131–32.

53. Feinberg, *supra* note 31, at 377.

54. Dawn M. Chutkow, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 J.L. & CTS. 301, 302 (2014).

55. *Id.* at 306 n.6.

adoption of the Judicial Conference’s Strategic Plan for the Federal Judiciary.<sup>56</sup> The most recent version of the Strategic Plan adopted, for the first time, “diversity and respect” as one of the federal judiciary’s core values.<sup>57</sup> Under the updated plan, the judiciary strives to maintain “a workforce of judges and employees that reflects the diversity of the public it serves” and “an exemplary workplace in which everyone is treated with dignity and respect.”<sup>58</sup>

Moreover, members of the Judicial Conference may recommend judges to serve on one of the conference’s dozens of committees other than the Executive Committee. Some of those committees directly impact diversity and inclusion within the judiciary. For example, the Committee on the Judicial Branch receives briefings on workplace employment initiatives and the Committee on Judicial Resources maintains a Subcommittee on Diversity, Equity, and Inclusion.<sup>59</sup> The Committee on the Administration of the Bankruptcy System similarly maintains “initiatives to promote and improve diversity on the bankruptcy bench and in the bar through outreach to and education of law students and attorneys.”<sup>60</sup> Further, serving on Judicial Conference committees allows judges to expand their professional networks within the judiciary and broaden their expertise beyond cases and controversies. It also provides “invaluable training” for future service as Chief Judge, as several present and former Chief Judges noted in a recent study.<sup>61</sup> A proactive Chief Judge who knows the judges within his or her circuit can identify a wide array of candidates who might not otherwise be aware of or considered for these opportunities for professional growth.

Additionally, serving on the Judicial Conference affords the Chief Judge a forum to engage in discussions regarding diversity and inclusion in the judiciary. Meetings of the Judicial Conference usually last two days and are followed by a third day on which the Chief Judges meet separately from the other members at the Thurgood Marshall Federal Judiciary Building. At these separate meetings, the Chief Judges consider issues that relate to the circuits only. Some topics on the agenda may concern diversity and inclusion, including discussing best practices employed in individual circuits. After learning about the efforts of other circuits to foster workplaces that are more diverse and inclusive, a Chief Judge can implement those ideas in his or her own circuit. These are all ways that Chief Judges may influence the federal judiciary’s approach to diversity and inclusion by serving on the Judicial Conference.

### *B. Circuit Judicial Conference and Judicial Council*

The Chief Judge can also support diversity and inclusion through his or her systemic work within the circuit, including the Chief Judge’s statutorily imposed duties relating to the Circuit Judicial Conference and the Circuit Judicial Council. Start

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56. JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 26–27 (2020), [https://www.uscourts.gov/sites/default/files/federaljudiciary\\_strategicplan2020.pdf](https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf).

57. *Id.* at 2.

58. *Id.*

59. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 19 (2017), [https://www.uscourts.gov/sites/default/files/jcus\\_sep\\_21\\_proceedings\\_-\\_final.pdf](https://www.uscourts.gov/sites/default/files/jcus_sep_21_proceedings_-_final.pdf).

60. *Id.* at 9.

61. Levy & Newman, *supra* note 19, at 2445–46.

with the Circuit Conference. This is a meeting of the active circuit, district, magistrate, and bankruptcy judges, along with invited guests, which the Chief Judge may convene and preside over annually.<sup>62</sup> Federal law provides that the Circuit Conference may occur “at a time and place that” the Chief Judge designates.<sup>63</sup> In recent years, the Judicial Conference of the Fifth Circuit has taken place in cities across the circuit, including in New Orleans, Louisiana and Austin, Houston, Galveston, San Antonio, and Grapevine, Texas. The conference, which is the only annual occasion for all of the circuit’s active judges to meet each other, includes circuit executive sessions and informative panels of general interest. The Chief Judge, with help from his or her colleagues, is directly responsible for planning and organizing the Circuit Conference. This allows the Chief Judge to facilitate conversations about inclusion by asking panels of judges, academics, and practitioners to present on relevant topics. For instance, in 2019 the Judicial Conference of the Fifth Circuit included a breakout session on implicit bias in the context of jury selection and witness testimony.<sup>64</sup>

The Chief Judge can also invite and encourage the participation of individuals who might not otherwise appear on the guest list. Importantly, the Circuit Conference’s attendees are a select group; one cannot simply buy a ticket to attend. Rather, only guests that federal judges invite to the conference are welcome. Although this is a necessary restriction given resource constraints and other limitations, it can create the impression that the Circuit Conference is only for the privileged. For example, the Fifth Circuit’s internal rules prohibit judges from “invit[ing] the same lawyer-member to the judicial conference for more than three successive conferences,” but that provision is loosely enforced.<sup>65</sup> As a result, repeat attendees usually comprise the guest list, and it can be difficult for others to score invitations. But the circuit, and its conference, should at least strive to reflect and be accessible to the communities it serves. In the Fifth Circuit, the Chief Judge can facilitate that effort because the rules permit the invitation of “such additional guests as authorized by the chief judge of the circuit.”<sup>66</sup>

As Chief Judge, I used this discretion to invite diverse members of the bar, including the leaders of affinity bar associations along with law school deans and professors from historically black colleges and universities located in the circuit. I also invited public defenders, solo practitioners, rural attorneys, and others who might not normally receive invitations. To help identify potential invitees, I solicited input from the nine Chief District Judges from the circuit because their work better informs them about practitioners in federal court.

The Circuit Judicial Council is another area where the Chief Judge may encourage diversity and inclusion. The statute requires that the chief judge semi-annually convene and preside over a meeting of the Judicial Council, which consists of the Chief Judge and “an equal number of circuit judges and district judges of the

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62. 28 U.S.C. § 333.

63. *Id.*

64. Program, U.S. Court of Appeals for the Fifth Circuit, 2019 Judicial Conference of the Fifth Circuit (May 5–8, 2019) (on file with author).

65. U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, RULE ON THE JUDICIAL CONFERENCE OF THE FIFTH CIRCUIT 3 (2006) (on file with author).

66. *Id.*



circuit.”<sup>67</sup> Under the statute, the Judicial Council has broad authority to ensure “the effective and expeditious administration of justice within [the] circuit.”<sup>68</sup> Operating like a “microcosm of the Judicial Conference of the United States,”<sup>69</sup> the Judicial Council engages in long-term planning and policymaking for the courts within the circuit. The Chief Judge can use the Judicial Council to advance initiatives that foster a representative and welcoming judiciary. For example, Judge Patricia Wald, formerly the D.C. Circuit’s Chief Judge, established “a Judicial Council Committee to study gender and racial bias on the [D.C. Circuit].”<sup>70</sup> And like the Chief Judges’ meetings that follow sessions of the Judicial Conference of the United States, Judicial Council meetings provide a space for judges from across the circuit to discuss policies and practices that can improve the workplace environment. Although time-consuming, the Chief Judge’s statutory duties to convene the Circuit Conference and the Judicial Council represent opportunities to empower underrepresented groups and to advance conversations regarding diversity and inclusion.

### C. Appointment Powers

Another way for the Chief Judge to champion diversity and inclusion is by appointing judges and practitioners to serve on circuit committees and merit selection panels. The committees mentioned here are distinct from the Chief Judge’s ability to recommend candidates to serve on committees of the Judicial Conference of the United States. Here, the relevant committees and panels are within the circuit itself. In this context, the Chief Judge has near-exclusive authority to determine what committees are necessary and who will serve on and chair them.<sup>71</sup> The Chief Judge can thus ensure that the committees are, to the extent possible, representative and welcoming environments. The Chief Judge can also task committees with addressing issues related to diversity and inclusion, as Judge Wald did in the D.C. Circuit.

In addition to making committee assignments, the Chief Judge appoints judges and practitioners to various merit selection panels. For instance, the Chief Judge fills the selection panel that interviews and ranks candidates for vacancies on the bankruptcy bench. Similarly, the Chief Judge appoints committees to evaluate whether the circuit should reappoint an incumbent federal public defender and to select senior staff positions, including staff attorneys, the circuit executive, the clerk of court, and the circuit mediator. When making these appointments, the Chief Judge can ensure that a diverse group of individuals—considering many factors such as race, gender, and professional background—are empaneled. These appointments do not guarantee that the panels will select diverse candidates, but they can at least make the process and its scope more comprehensive. Moreover, in the bankruptcy context, the Chief Judge can increase the likelihood that diverse lawyers are present in the candidate

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67. 28 U.S.C. § 332(a)(1).

68. *Id.* § 332(d)(1).

69. Feinberg, *supra* note 31, at 379.

70. Wald, *supra* note 50, at 1127 n.2.

71. Levy & Newman, *supra* note 19, at 2464.

pool by publicizing vacancies broadly. And if a majority of circuit judges cannot agree on a candidate, the Chief Judge then selects the bankruptcy judge.<sup>72</sup>

#### D. Miscellaneous

The Chief Judge has a plethora of other opportunities to promote diversity and inclusion that cannot be easily categorized. This section discusses a few of them. To reiterate, although the Chief Judge must ensure the effective operation of the circuit, determining how to accomplish that goal is largely committed to the Chief Judge's discretion. One example is the Chief Judge's ability to shape aspects of the court's sitting calendar. A computer program randomly assigns judges to oral argument panels to ensure impartiality. These oral arguments generally occur at the courthouse in which the circuit is based; for the Fifth Circuit, that is the John Minor Wisdom United States Court of Appeals Building in New Orleans, Louisiana. But occasionally, circuits hold special oral argument sessions outside of their home courthouse—usually “either at a district court in a city outside of the designated locations for oral argument or at a law school within the circuit.”<sup>73</sup>

In the Fifth Circuit, non-New Orleans sittings usually occur in geographically convenient cities like Austin, Fort Worth, Houston, Jackson, and San Antonio. For similar reasons, those cities also often host Circuit Conferences. This, of course, makes sense. But failing to schedule events outside of these common locations can make judges and lawyers in outlying regions feel excluded. For example, El Paso, Texas, has historically been a distant outpost of the Fifth Circuit, being nearly 1,100 miles away from New Orleans. Coincidentally, El Paso is a Hispanic majority city, and its bar is nearly fifty percent Hispanic.<sup>74</sup> During my tenure as Chief Judge, I sought to encourage and empower members of the El Paso bar by including them in the Fifth Circuit's programming and activities. In September 2013, and at the request of the El Paso federal bench and bar, I scheduled an oral argument session in El Paso and sat on the three-judge panel myself. This was the first time that El Paso had ever hosted a Fifth Circuit panel argument. The three days of panel arguments were well attended by the state and federal bench, bar members, and as well as by students. Additionally, my four-year term as President of the American Inns of Court Foundation overlapped with my tenure as Chief Judge, so I also supported the formation of an American Inn of Court in El Paso and presented the Inn with its charter in 2015. These are illustrative ways that the Chief Judge can creatively exercise his or her discretion to include marginalized communities in bench and bar-related activities.

Finally, when the Chief Judge is from a background that is historically underrepresented among the bench and bar, then he or she can promote diversity and inclusion simply by being present. One of the main justifications for diversifying the federal bench is the need for underrepresented communities to see themselves in

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72. 28 U.S.C. § 152(a)(3).

73. Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 *CORNELL L. REV.* 65, 91 (2017).

74. DEP'T. RSCH. & ANALYSIS, STATE BAR OF TEX., *EL PASO COUNTY: ATTORNEY STATISTICAL PROFILE* (2020–21) at 1 (2021).

positions of power within the judiciary.<sup>75</sup> In fact, some scholars have called the symbolic value of having female and minority judges serve on the bench the "strongest argument" for increasing judicial diversity.<sup>76</sup> Seeing individuals who represent their communities can encourage more diverse lawyers and law students to believe that a career on the bench is attainable for them. Additionally, increased representation can increase public confidence in the judiciary, particularly among marginalized communities.<sup>77</sup> These interests are particularly heightened when a judge would be the first person from his or her background to serve as Chief Judge.<sup>78</sup> Perhaps for similar reasons, at least one Chief Judge has explained that "she wanted to become Chief because there had never been a female Chief Judge in her circuit before and had not been many female Chief Judges generally."<sup>79</sup>

Thus, a diverse judge who wants to model public service for underrepresented communities has at least one more reason to consider serving as Chief Judge if he or she becomes eligible. This relates to what Judge Feinberg called some of the Chief Judge's "external duties," which include his or her interactions with the bar, litigants, public, and press.<sup>80</sup> The Chief Judge has many ceremonial duties that occur before these groups, such as presiding over public investitures of new judges, portrait presentations for senior judges, memorial services for deceased colleagues, and occasionally naturalization ceremonies. And law schools often invite the Chief Judge to participate in moot court competitions, panel discussions, and other events on campus. Similarly, Chief Judges are frequently asked to attend bar association events and public conferences as representatives of their courts. The extent to which a Chief Judge participates in such events largely depends on his or her personality.<sup>81</sup> But for a diverse Chief Judge who is sociably inclined, these events constitute other opportunities to demonstrate that people from underrepresented communities can reach the pinnacle of the legal profession.

#### CONCLUSION

The two periods when four African Americans served as Chief Circuit Judge together—a few months in 2016 and again from 2017 to 2019—probably went unnoticed by many because no revolutionary consequences occurred because of them. The Judicial Conference of the United States went about its business as usual without

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75. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 590 (2011).

76. See Angela Onwuachi-Willig & Amber Fricke, *Do Female "Firsts" Still Matter?: Why They Do for Women of Color*, 2012 MICH. ST. L. REV. 1529, 1542–43 (2012) (focusing on the need for more women of color to serve in the judiciary).

77. See, e.g., Nancy Scherer & Brett Curry, *Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts*, 72 J. POL. 90, 101 (2010) (finding that belief among African Americans in the legitimacy of federal courts increases when more black judges sit on the federal bench).

78. See generally Onwuachi-Willig & Fricke, *supra* note 76 (arguing that appointing federal judges who would be the first from their background—particularly women of color—to serve in a particular jurisdiction remains a worthwhile goal given the important symbolic value of such appointments).

79. Levy & Newman, *supra* note 19, at 2449.

80. Feinberg, *supra* note 31, at 380.

81. See Levy & Newman, *supra* note 19, at 2472.

detracting from its mission to maintain the federal judiciary's reputation for excellence and impartiality. But that does not make those periods any less remarkable. To achieve that unparalleled level of representation in the federal judiciary, each judge had to first attain a Presidential nomination and navigate the Senate confirmation process. Then, there had to have been a vacancy in the office of Chief Judge that each judge was eligible to fill under the statutory age and seniority requirements. What is more, each Judge needed to accept the role of Chief Judge. Again, it is simply extraordinary that the stars aligned to permit four African Americans to serve as Chief Judge at the same time.

It is impossible to know whether four or more African Americans will ever serve as Chief Judge simultaneously again. However, the vicissitudes of judicial appointments and the luck needed to become Chief Judge under the statute make the likelihood seem low. I cannot change the rate at which people of all backgrounds are appointed to the federal bench. Nor can I affect when opportunities to serve as Chief Judge arise or whether a particular judge will be statutorily eligible to serve as Chief Judge at any given time. But it is within my power to persuade my colleagues that serving as Chief Judge is a worthwhile endeavor, notwithstanding the many challenges it presents. It is a privilege to serve as Chief Judge. But more than that, it is a chance to champion diversity and inclusion in a circuit and the entire federal judiciary. Ultimately, a seven-year term as Chief Judge provides seven years' worth of opportunity to make a difference in the lives of others. Absent special circumstances, it is an experience that I would not choose to decline.