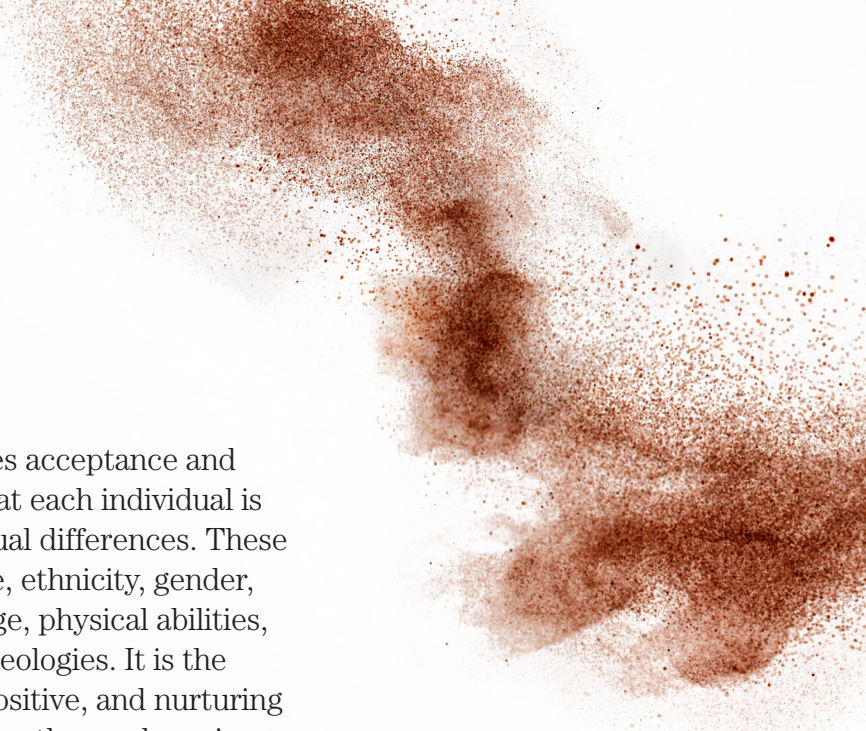


A RECIPE FROM
THE DIVERSITY
COOKBOOK:

'FIRST YOU HIRE
ONE INDIAN'

LAWRENCE R. BACA



The concept of diversity encompasses acceptance and respect. It means understanding that each individual is unique and recognizing our individual differences. These can be along the dimensions of race, ethnicity, gender, sexual orientation, socioeconomic status, age, physical abilities, religious beliefs, political beliefs, or other ideologies. It is the exploration of these differences in a safe, positive, and nurturing environment. It is about understanding each other and moving beyond simple tolerance to embracing and celebrating the rich dimensions of diversity contained within each individual.¹

‘Welcome to the NFL!’²

My first experience as a federal attorney was my “welcome to civil rights enforcement” moment. It was 1977; I’d been out of law school for a minute and a half, a member of the Virginia Bar Association for less than 60 seconds, and I was in Rapid City, S.D., representing the United States in a voting rights case. A young Indian³ man named Frank Rapp had tried to file a petition to run for county commissioner and had been told by the county that he could not because he was an Indian and he lived on an Indian reservation. The United States filed a motion for a temporary restraining order to prevent the county election from going forward until Rapp had an opportunity to campaign and have his name on the ballot.

I was in the United States Attorney’s Office library at the federal courthouse when an assistant U.S. attorney came running in and said, “The judge just called. He wanted to know if you were here—he’s on his way up. He doesn’t sound happy.” About then the judge appeared over his shoulder. He was in full robes; in my nightmares, he is the size of a small mountain. I remember a finger in my face and the words, “Boy, are you Baca? Boy, I saw them papers you filed. And boy, I’m here to tell you that we don’t have any problems with our Indians out here until you people from Washington come out and stir them up. Boy, if you use the word ‘discrimination’ in my courtroom, I’m gonna chew you up and spit you out. Do you hear me, boy?”

Wow. I got five “boys” in less than 30 seconds.

As you might imagine, I had less than full faith that the United States and Frank Rapp were going to get a fair hearing. When we got to the courtroom, the judge was white, the court reporter was white, the county attorney defending the right to prevent Rapp from running for office was white, and the state attorney general arguing that same cause was white. My two supervisors were there to watch me perform, and they were both white. I don’t know how Frank Rapp felt. He had an Indian lawyer trying to get him the right to run for county commissioner.

I felt alone. A primary reason that I have spent so much time and energy fighting for diversity in the judiciary and in the public law office is because of how I felt on that day.

Intellectually, I should have been prepared for that verbal assault by the judge. I was the first American Indian attorney ever hired at the Civil Rights Division (CRD). When you are the “first” or “the only” in any workplace, three things are true. First, when you are the butt of thoughtless racial humor or commentary, you receive it differently, more powerfully than if you have a like-race support group. Sociologists call it the solo effect.⁴ Second, you *will* be the butt of thoughtless racial humor and commentary for the same reason—because you are a solo. Sociologists call that the rarity effect. Your colleagues have no real concept of how to deal with, much less work with, someone of your race. The experience is so rare, they resort to what they believe is “humor.” Third, you must survive. If they are ever going to hire a second Indian lawyer, *you* must survive. Water cooler gossip is unidirectional. If you don’t make it, the word around the water cooler is: “We hired one of them (whoever ‘them’ is) and they just couldn’t cut it here.” There is never talk around the water cooler that, “Hey, we hired that Indian and he’s a really good lawyer, we should hire another.” You never succeed based on your race or ethnicity, but you can certainly be found to have failed because of your race or ethnicity. And you always know that the hiring of the next Indian into that workplace depends heavily on you making it. If you fail, it sets the cause of diversity back a decade because you fail on behalf of your race.

The Purposes of Diversity in the Justice System

When I speak about justice systems I include both the judiciary and the public law office (i.e., the Office of the City Attorney, the State Attorney General’s Office, and the attorneys for the United States Department of Justice (DOJ)). Diversity in the public law office is just as important as it is in the private sector. My experience as a

practitioner was always in the DOJ, so that is the practice from which all of my examples of the importance of diversity derive.

Any attempt to reduce the purposes of diversity to a few lines ultimately falls short of the goal. However, some of the purposes are obvious. The judiciary should reflect the community it serves. Public confidence in the institution is increased when the community sees itself within the legal system.

Diversity invites public confidence in judicial impartiality and fairness, and it amplifies our understanding of the law and justice. As professor Sherrilyn Ifill noted: "First, the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making.... Second, racial diversity on the bench also encourages judicial impartiality by ensuring that a single set of values or views do not dominate judicial decision-making."⁵

Diversity brings with it knowledge. I don't want to be treated differently because of my race and culture, but sometimes you have to understand my race and culture to be able to treat me the same. For instance, if institutions allow members of other faiths to take time off to observe religious holidays, usually in the form of compensatory time, it should be allowed for faiths other than Judeo-Christian ones. But I know that when a Native attorney asks for religious leave to attend Sun Dance, they probably have to explain the religious significance of Sun Dance.

In some cases, diversity in law school serves minority communities. There is a general belief that some racial and ethnic minority attorneys will return to their home communities to offer legal services. There is also a generally accepted belief that, where majority firms hire racial and ethnic minority attorneys, the firms will be able to better serve a racially and ethnically diverse clientele and will in fact attract a diverse clientele, thereby opening new markets for the firm. The same is true for the public law office. Victims and witnesses are less likely to come forward when the institution put in place to protect their rights employs no one of their race or ethnicity. In a state or federal prosecution, it is important to the process, to the appearance of justice, that all involved, whether as plaintiff or defendant, see themselves represented.

The Department of Justice as a Diversity Microcosm

In order to address what I call the diversity factor in actual practice (i.e., when diversity works and when it doesn't), I need to be specific. My law practice was all at the DOJ, where I was assigned to the CRD from 1976 to 2004 and the Office of Tribal Justice from 2004 to 2008. Within the CRD, I was variously assigned to the Office of Indian Rights, the General Litigation Section, the Housing and Civil Enforcement Section, and the Educational Opportunities Litigation Section. My experience was also that of an American Indian attorney trying to bring diversity to the attorney ranks of the CRD, as well as to the case prosecutions of the CRD. Without Indian voices, neither of these things occurred naturally.

Diversity is a process. It doesn't happen by accident. Those who seek to create diversity work at it. The Native American attorney experience at the DOJ is a case study of what can be done. I was hired in 1976 and was the first American Indian ever hired through the attorney general's Honors Program. According to what the attorney general told Congress, the first American Indian lawyer in the history of the DOJ was hired into the Environment and Natural Resources Division (ENRD) in 1975.⁶ The DOJ's Association of Native American Trial Lawyers has always used that date and accepted that statement as true.

I was the first American Indian lawyer hired in the history of the CRD. Assistant Attorney General for CRD Stan Pottinger made a commitment to hiring American Indian lawyers. When he created the Office of Indian Rights (OIR), he issued a press release stating that the CRD would staff the office with Native American attorneys and was committed to recruitment at schools with Native American law students, such as the University of New Mexico and the University of Arizona.⁷

My first supervisor in the OIR routinely sent me to attend the annual meeting of the Native American Law Students Association (NALSA). Separate from that, I attempted to visit law schools in every major city I traveled to while conducting investigations and spoke to American Indian law students about opportunities at the DOJ.⁸ It has always been true for American Indians at the DOJ that we recruit each other. This approach is effective. I recruited an Indian woman to the CRD. She and I both recruited another Indian woman who accepted a position to the ENRD. The two of them recruited as often as possible by school visits and by phone. At one point during the late 1990s, there were five Indian lawyers in the CRD and a total of 19 American Indians working at Main Justice.⁹

The statistical pattern speaks for itself. Between 1976 and 2006, in every year in which an Indian lawyer from the DOJ visited at least five schools attended by Native American law students and went to the NALSA Annual Meeting, there were at least 10 Native American applicants to the attorney general's Honors Program. In every year in which there were at least 10 Native American applicants to the Honors Program, at least one Native American law student was offered a job somewhere in the DOJ. In the years in which Native attorneys did not visit at least five law schools and did not attend the NALSA Annual Meeting, there always were fewer than 10 Native American applicants to the Honors Program. And in no year in which there were fewer than 10 Native American applicants to the Honors Program was any Native American law student offered a position within the DOJ. Diversity outreach works.

To achieve diversity, the concept must be institutionalized. An institution must have support for the concept of diversity at the top; the attorney general must say it is important—but if it isn't implemented at the ground level, then you don't have a systemic effort, and success is difficult without a systemic effort. At the DOJ, attorney travel is controlled by the budgets of your division and section. My own recruitment visits were made by tying law school visits to cities where I was on official business for the DOJ, such as Albuquerque or Phoenix, which added just an extra half day to my travel time. To a section chief, that is a half day of work time and a half day of per diem from the section's budget. So, on some trips, I took personal leave time and paid for meals out of my own pocket. I knew that I and other Native attorneys could talk to Native students about the DOJ on a level a non-Indian lawyer could not. We could be candid about day-to-day issues that a non-Indian attorney would never face. We could discuss on a personal level the rewards that come with being able to survive those issues. More than once, I had supervisors deny me the extra day to make a law school visit, telling me: "It's not your job to recruit for the Department of Justice, it's your job to bring lawsuits." But those of us of color accept that part of the burden of diversity recruitment rests with us.

In the private sector, there is an assumption that a diverse workforce will help the firm's financial bottom line. Racial and ethnic minority attorneys might make clients of color feel more comfort-

able, they might bring with them new opportunities for the firm from communities that the firm previously hadn't represented. Diversity among employees can lead to diversity of legal work.

When I retired in 2008, the then acting assistant attorney general for CRD said that I had filed more civil rights cases on behalf of American Indians than any other attorney in the history of the division. As I mentioned previously, I worked in several units of the CRD. The CRD is broken down into litigation units called sections by area of law. At present, the litigating sections of CRD are criminal, housing, education, special litigation, immigration-related employment discrimination, disability rights, voting, coordination and federal compliance, and employment. There is also an appellate section that does not bring cases at the trial level.

Between the time of its creation by the Civil Rights Act of 1957 and 1973, the CRD filed thousands of cases on behalf of African-American victims of civil rights violations, but it filed only two where American Indians were victims. The OIR was formed to exclusively bring cases where American Indians were victims as a response to that failure. There was also a belief that it was necessary to have a cadre of lawyers develop an expertise in federal Indian law to expertly address those cases where the civil rights laws and federal Indian law intersected.¹⁰ Following the 1973 takeover of the Village of Wounded Knee, S.D., by the American Indian Movement, the CRD came to realize that discrimination against American Indians occurred at a rate far beyond anyone's previous knowledge. The majority of CRD units had never investigated complaints by Native Americans or filed cases on their behalf. Interestingly, the establishment of the OIR altered the vernacular of the CRD—and not for the good. To this day, supervisors and attorneys refer to cases involving Native American victims as “Indian cases,” while cases involving African-American victims are just called “cases.”

Between 1973 and 1980 the OIR filed numerous civil rights cases on behalf of American Indians. In a curious historical turn, Drew Saunders Days III, the first African-American to head the CRD, announced to OIR staff during the first month of his tenure at the DOJ that he thought a one-race unit was inappropriate. Despite the historical record clearly demonstrating a failure of the CRD to act on behalf of American Indians before that unit was created, Days disbanded the OIR on Oct. 10, 1980. Contrary to his own logic, Days had hired John Huerta, a Hispanic attorney, as his deputy assistant attorney general and assigned him to create a Hispanic Outreach Task Force in recognition of the fact that the CRD filed few cases on behalf of Hispanic victims.¹¹

In Days' official announcement of the termination of the OIR, he stated that it would be better to have all 175 CRD attorneys available to bring cases on behalf of Native American victims than just the staff of seven lawyers in the OIR. The actual experience of Native attorneys in attempting to bring diversity to the case prosecutions of the CRD shows a far different result. Over the next decade, the number of cases involving American Indian victims plummeted to pre-OIR levels. In fact, between 1980 and 1990, one American Indian lawyer brought more cases on behalf of American Indian victims than the other 174 CRD attorneys combined.¹²

Cases come to the CRD in several ways. Individuals call or write letters and say they believe they have been the victim of a civil rights violation. Sometimes other civil rights organizations—such as the NAACP, Mexican American Legal Defense and Educational Fund, Native American Rights Fund, or private attorneys—file lawsuits and

request that the DOJ intervene. Other federal agencies may refer violations that they discover in their work and are unable to resolve administratively. And some complaints that lead to investigations and cases come in through personal contacts and the individual initiative of the CRD attorneys themselves. In each of these instances, the “matter,” as it is called, is assigned to an attorney and, after initial review, a deputy section chief approves going forward with an investigation or tells you to write a closing memorandum. I specialized in individual outreach. As I transferred from section to section, I filed cases on behalf of Indians in sections where they had never done so before. My tenure is proof that American Indian victims are out there, but that no one in those units was looking or listening. In every section to which I was assigned, I brought diversity to the workforce, as I was always the only Indian lawyer, and I brought diversity to their case filing by doing outreach to Native American communities and legal organizations that worked with Native Americans. One Indian voice *can* make a difference.

Enforcement of the statutes that forbid discrimination in education is a prime example of the diversity dynamic. After the termination of the OIR, I was assigned to the General Litigation Section, which was at the time a combination of the current housing and education sections. Through my contacts, I received a complaint involving the financing of education in Arizona. The allegation was that the manner by which school funds were allocated in the state discriminated against those school districts with large Native American populations. One of the senior attorneys in the section requested being assigned to the case with me, arguing that I had never filed an education case. During the period of that investigation, a new assistant attorney general reorganized the CRD, splitting the General Litigation Section into what is now the Housing and Civil Enforcement Section and the Educational Opportunities Section. With the split of the staff, I was assigned to the housing section, so the Arizona investigation went with the other attorney to the education section. She closed the investigation within a month. Without an Indian voice in the section, no one pressed for the continuation of the investigation. Fortunately for the victims, the private plaintiffs were able to resolve the issues favorably, but without the participation of the United States.

The education section did not become involved in another Indian education investigation until another Indian attorney was assigned to that section. And yet again, the scenario repeated itself. The Native attorney initiated an investigation of a school district in New Mexico where the complainant alleged that Indian children were segregated by classroom assignment. The same senior attorney who had closed the last Indian country investigation demanded to be assigned to the investigation, saying that she had “Indian country experience.” Midway through the investigation, the Native attorney transferred to the voting section. The senior attorney again closed the investigation within a month of the Native attorney's transfer.

A year later, I transferred into the education section, and the section chief asked me to pick up that investigation and bring it to completion. The settlement in that case marked the first time the education section had ever resolved a case on behalf of American Indian victims. In the six years that I worked in that section, I filed four other cases and enforcement actions on behalf of American Indian students. In the 12 years since my transfer to the Office of Tribal Justice, and subsequent retirement, the education section has not filed a single enforcement action in a case involving Native American victims of discrimination.

When I worked there, the Educational Opportunities Section had over 500 open cases. Every new attorney was assigned 33 cases for oversight and monitoring. These were decrees in cases filed in the 1950s and '60s to desegregate school districts that 30 years later had never attained unitary status¹³ and sought dismissal from their original court order. Whenever the new assistant attorneys general for CRD came to visit the section after a new president was elected, many of the newer attorneys in the section would say they wanted the CRD to pursue new cases and new issues in education discrimination and not devote their careers to cases filed before they were born. Many of the older attorneys argued that the section should not be conducting new investigations and filing new lawsuits because we had an ethical duty to continued enforcement of the old court orders. Knowing that none of the old cases involved any school district where American Indians were being discriminated against, I openly stated that: "I refuse to stand by and watch my race be sacrificed on the altar of history. The failure of the education section to even bring a single case on behalf of American Indians should not now be used as an excuse for never filing cases on behalf of American Indians."¹⁴ Before there was an Indian voice in the section, the unit had never even investigated a matter involving Indian education.

In the pattern you expect from diversity, when the Indian woman who had previously worked in the education section began working in the Voting Rights Section, their work on cases involving the voting rights of Indians expanded exponentially. The hiring of other Native attorneys also became a reality. At one point, three American Indian attorneys worked in the voting section at the same time, a diversity first for the CRD.

The experience of Native American attorneys in the Housing and Civil Enforcement Section was an attempt at reverse diversity (i.e., we were perceived as working on too many Indian cases). With the split of the general litigation section and my assignment to the housing section, I now had enforcement responsibility for the Fair Housing Act and the Equal Credit Opportunities Act (ECOA). Over the next five years, I filed the first five racial redlining cases ever filed by the DOJ under the ECOA, four of them also involving the Fair Housing Act, and all of them involving racial redlining of Indian reservations in various states, including Arizona, New Mexico, and North Dakota. The settlement by consent decree of a case against the General Motors Acceptance Corporation was a nationwide settlement.

The reward for this level of activity was to be called in by the deputy section chief and told that "you do too much work with Indian cases." Perception is everything. That review year I resolved six cases. The entire housing section, consisting of 15 attorneys, resolved a total of 26 cases. Three of my six cases were racial redlining cases by banks involving American Indian victims, one was a housing case involving Hispanic victims, another involved African-American victims, and the sixth was a sex discrimination case. All 20 of the cases filed by the other 14 lawyers involved African-American victims. While only 10 percent my enforcements in the housing section over a five-year period involved American Indians, they accounted for 100 percent of the section's cases involving American Indian victims. Thus, in his mind, I did "too much work" with Indians. I assure you, no African-American lawyer has ever been told by a supervisor in the CRD that they do too much work with their own race. Frankly, no white lawyer has ever been told they do too much work with African-American victims either.

In the CRD you periodically have a docket review in which you

discuss what you are working on and at what stage of development your cases and matters are. In one such review the deputy section chief noted that I had 15 matters listed as investigations that I wanted to start that involved complaints from American Indians. After telling me that I did too much work with American Indians, he said he wanted to reassign all of my investigations involving complaints from American Indians so that other attorneys could have "an opportunity" to work on "Indian cases." I protested that by taking away my matters, he would destroy my potential for case development because, in my estimation, about 1 in 10 complaints actually became a case. He responded, "In my experience with you, Lawrence, one out of every two of your Indian investigations becomes a case." He reassigned all 15 investigations, and not one of them resulted in a new case. He predicted that my work would have generated seven new cases from those investigations, but when other attorneys to whom they were assigned generated no new cases, no questions were asked.

Let me offer an example of the kinds of investigations taken from me that didn't become cases. I received a complaint from a former U.S. attorney in South Dakota. He said that a local bank president had published a column in a local newspaper announcing that it was an official bank policy that the bank would not loan money to any Indian who wanted to buy or build a house. I can only assume that the attorney to which that investigation was assigned never followed up, because that complaint did not generate an enforcement action. Obviously, the deputy section chief reviewing that attorney didn't follow up either. A decade later, and well after my transfer out of the housing section, a bank regulatory agency discovered the bank's policy during an annual review and recommended that the DOJ join them in an enforcement action against the bank alleging race discrimination in lending and also violating the Fair Housing Act.¹⁵

It is against this backdrop that another American Indian attorney was assigned to the housing section. I was the only American Indian lawyer in the DOJ when another Native American attorney was offered a position in the CRD. She asked to be assigned to the Housing and Civil Enforcement Section because she knew there was a senior Native American attorney in that unit, and she wanted professional mentoring from someone of her race. She was, in fact, given the assignment of her choice, and she called to tell me the good news.

I made the mistake of telling the acting section chief that we were being assigned a new attorney. He said that he hadn't heard about the assignment, so I brought him her resume and, when he asked how we'd met, I told him that we had been introduced by another division attorney because she was Native American. He barely paused before he looked up from her resume and said, "I don't think she should be assigned here. It would be inappropriate for the only two Indians in the Department of Justice to work in the same section." I thought he was joking and said, "Hey, it's worse than that. I have the only two-person office in the section with an open desk. She'll be my office-mate." Again, without hesitation, he said, "No, no, we couldn't do that, we wouldn't want to start an Indian ghetto down there."

Yet again, I actually thought he was kidding. Bad joke that it might have been, I still thought it was a joke. I'd been the butt of thoughtless Indian jokes before in the CRD; this didn't seem any further out of line. The day before she started at the DOJ, the acting section chief of my section came into my office and said, "You've probably heard, your friend has been transferred to the education section and we are getting an honors hire instead." I asked him, "Did

you ask for an Indian woman with a year of practice experience to be traded for a white male with no experience because of her race?" He dropped his head, paused for a moment, and when he looked up, he said, "No. I just think that the division needs to spread its Indian resources around."

"Oh, that's different," I thought. "You didn't transfer her on account of race; you had her transferred because she is an 'Indian resource.'"

When such discrimination happens, in that first moment, you are simply utterly humiliated. She was transferred because of her race. You are embarrassed. She was denied the assignment opportunity of her choice because of your shared race. You are disgusted. Neither of you will have the opportunity to work with someone of your race on account of race. Because it is happening in the CRD you are also stunned. And then you feel anger. I left my office and went directly to the executive officer of the CRD and I said, "Hey I'm one really hacked off Indian. Did my section chief come over here and ask for an American Indian attorney to be transferred out of his section because of her race?" He answered, "Well, yes."

After consulting with the new Indian attorney, I wrote a memo to the assistant attorney general stating that she and I were the victims of race discrimination in employment because we had been denied the right to work with someone of our race on account of race, and that she had been denied the section assignment of her choice on account of race. She said that she was prepared to face the worst. Our feeling was that, whatever the cost, it had to be done so that some other Indian lawyer wouldn't have to face the indignity that she had.

When I gave a copy of my memo to the executive officer he cursed me, saying, "Damn you! Why did you put my name in this thing? Now I've got to write a memo." I thought to myself: "Excuse me. I'm a civil rights lawyer, I came into your office asking if a civil rights division section chief had asked you to reassign an Indian woman out of his unit because of her race. What did you think I was going to do with that information?" The assistant attorney general called me in and threw a fit because I'd written it down and now it was subject to being leaked to the press. That, to him, was more important than the victimization.

I can feel right now, over 30 years later, how naked and alone I felt. There was no one between me and the attorney general who was an Indian. There was no government Native American between me and the president of the United States. You are stripped bare in those moments. I still have the memo that the acting section chief wrote in response to mine. It is in my files. I can re-read that memo today and want to throw up. They all had power over me. They had power over her. They had the power to never again hire any other Indian attorney.

But I would do it again. Sometimes diversity has a price, so you pay it.¹⁶

I wish I could tell you that these events were restricted to one political party or another. They are not. They involve a 50-year culture of civil rights enforcement being predominantly on behalf of one racial group, as well as the inability of lawyers who never file cases on behalf of any other race to see the victimization of other races. My work, and that of other Indian lawyers in the CRD, proved beyond doubt that Indian victims are out there and, sadly, plentiful.¹⁷ The CRD could have a diverse caseload, but it doesn't. No current section chief or deputy section chief in the CRD has ever filed a case as a line lawyer on behalf of American Indian victims. Most of them have never even worked with an American Indian lawyer in their section. One of the consequences of that fact is that the CRD to this

day continues to fail to file cases where American Indians are victims of civil rights violations.¹⁸

American Indian attorneys at the DOJ met with every new assistant attorney general that came through with every presidential turnover and raised our concerns, with varying success. One year, we set a meeting with Assistant Attorney General John Dunne. We came early to the CRD conference room where such meetings were generally held. When he was 15 minutes late, we asked his staff to tell him we were assembled in the conference room. When he came into the room, he apologized for being late. He said, "I'm sorry, I was waiting for you over in my teepee and you were here in your wigwam waiting for me." He had with him the career deputy assistant attorney general, Jim Turner, who didn't say anything during the meeting. At the end of the meeting, Dunne looked at Turner and said, "Well, Chief Silent Cloud, do you have anything to add?"

If diversity begins at the top, what hope did we have?

Diversity and the Federal Judiciary

It is imperative that the judicial system reflect the community it serves. When you go into court, whether as plaintiff or defendant, whether as victim or the accused, and you see no one of your race, you ask, "Do I belong here? Can I get justice here?" A diverse judiciary alters the discourse on the development of justice. When Thurgood Marshall was appointed to the Supreme Court, for the first time there was someone at the table when the justices discussed cases about black people who said "we" when everyone else was saying "they." When Sandra Day O'Connor was appointed to the Court, for the first time there was someone at the table who said "we" not "they" when speaking of women's rights. These are sometimes important distinctions. Diversity alters the discussion.

Gender Matters

In 2009, when the Court was hearing oral argument in *Safford Unified School District v. Redding*,¹⁹ a case where a girl and her mother sued the school district because, when the girl was 13, school officials subjected her to a strip-search because they suspected her of hiding ibuprofen in her bra or panties. The majority of the male members of the Court seemed to not take the matter seriously, making joking and other comments minimizing the girl's claims of humiliation during the oral argument. At the time, Justice Ginsburg was the only woman on the Court, and the only member who appeared to grasp the indignity a teenaged girl would have suffered in that event.

Commenting later about the oral argument, Justice Ginsburg stated, "They have never been a 13-year-old girl. It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood." Perhaps she educated them during that week's case conference. The plaintiff, Redding, said the search was "the most humiliating experience I've ever had."²⁰ When the decision was announced, eight justices, including Justice Ginsburg, ruled for the girl and her mother.²¹

Justice Ginsburg has said, when speaking about what it means to be a woman on the Court, "Maybe there's a little more empathy.... Anybody who has been discriminated against, who comes from a group that's been discriminated against, knows what it's like."²²

Race Matters

That concept was never clearer than during the 2003 oral argument in *Virginia v. Black*,²³ a cross-burning case questioning whether

Virginia could forbid cross-burning as hate speech. The Virginia statute made it a felony “for any person..., with the intent of intimidating any person or group..., to burn ... a cross on the property of another, a highway, or other public place” and specified that “any such burning ... shall be *prima facie* evidence of an intent to intimidate a person or group.”²⁴ During oral argument, it became clear that members of the Court disapproved of the part of the statute making cross-burning *prima facie* evidence of intent to intimidate. Justice Clarence Thomas, who is famous for remaining silent during oral argument, found his voice. In an exchange with the lawyer representing Virginia, he delivered an exegesis to the other members of the Court on how a burning cross was seen through the eyes of a black man. No other member of the Court could do that.²⁵ While the diverse voice did not alter the outcome of the case—the Court did strike down that portion of the statute as a violation of the First Amendment—it did change the nature of the debate.

Indian Voices Matter

There was no American Indian voice on the Court when Justice O'Connor wrote about Indian drinking habits in *Rice v. Rehner*,²⁶ a case about whether a package liquor store owner on an Indian reservation in California who had a tribal permit and a federal Indian trader's license was also required to have a state liquor license. Justice O'Connor completely strayed from serious legal analysis when she wrote the following in Footnote 15:

Liquor trade has been regulated among the Indians largely due to early attempts by the tribes themselves to seek assistance in controlling Indian access to liquor. In many respects, the concerns about liquor expressed by the tribes were responsible for the development of the dependent status of the tribes. When the substance to be regulated is that primarily responsible for “dependent” status, it makes no sense to say that the historical position of Indians as federal “wards” militates in favor of giving exclusive control over licensing and distribution to the tribes.²⁷

That was news to Indian law scholars throughout the nation! We did not know the dependent status of Indian tribes had its origins in liquor. We thought the concept came off the quill pen of Chief Justice Marshall. If I recall my *Cherokee Nation v. Georgia*²⁸ correctly, the chief justice was trying to figure out whether Indian tribes were foreign nations within the constitutional framework and he concluded alternatively that “they may, perhaps, best be denominated domestic dependent nations.”²⁹ There wasn't a footnote that said, “It's because their tribal chairmen cannot hold their liquor.” Footnote 15 in *Rehner* is unnecessary to the development of the opinion. It is completely gratuitous and unworthy of the Court. Justice O'Connor cites to a single conversation that one Indian had with Thomas Jefferson about controlling liquor traffic 30 years before the legal concept of “dependent status” was penned by the Court.

So, do you think that Justice O'Connor would have flinched a little when she tossed in the stereotype about Indians and alcohol if an Indian were sitting on the Supreme Court? Don't you think an Indian justice, when her draft opinion was circulated, might have said, “Ahem, Madam Justice, do you really want to say what I think you just said?” Sadly, no one on the Court took her to task.

Without an Indian voice to speak up, Justice O'Connor freely,

thoughtlessly, chucked the stereotype into Footnote 15 without giving any consideration to the long-term consequences of some law clerk reading that footnote 20 years down the road, 50 years down the road, and actually believing that it was alcohol being introduced to Indian tribes that led to the legal status known as “dependent status.”

One is compelled to recall the words of Justice Robert H. Jackson from *Korematsu v. United States*:³⁰

But once a judicial opinion rationalizes ... the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination.... *The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.* Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge [Benjamin N.] Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.”³¹ (Emphasis added.)

Likewise, no modern justice has been critical of the historical Court's demeaning and racialized language, much less registered abhorrence to the possibility that such language might be reflective of extra-legal analysis in federal Indian law cases. It is clear to anyone who understands federal Indian law that the foundational principles of modern federal Indian law are all written in racially biased language that indicates to the reader that the opinions themselves may too be based more on biases than on sound legal principles. The only opinion that I can recall where any justice called out another justice for playing to Indian stereotypes is from the dissent in *Brendale v. Confederated Tribes*.³² The case holds that the tribe has zoning power on one portion of its reservation where only Indians live but not another portion that had been opened up to settlement by non-Indians. The dissenters write:

Moreover, to the extent that Justice [John Paul] Stevens' opinion discusses the characteristics of a reservation area where the Tribe possesses authority to zone because it has preserved the “essential character of the reservation,” these characteristics betray a stereotyped and almost patronizing view of Indians and reservation life.³³

Is it possible to believe that the Court or the law clerks are not influenced, even if only on some subliminal level, by racially demeaning language that they read in earlier 19th century cases? No justice has called the historical Court to task. I would hope that an American Indian justice would.

Lastly, there is *Adoptive Couple v. Baby Girl*,³⁴ in which Justice-

continued on page 76



Lawrence R. Baca was a senior trial attorney with the Civil Rights Division, United States Department of Justice from 1976 to 2008. The founding chair of the FBA Indian Law Section, where he served for 20 years, he was FBA National President in 2009-2010. He served three terms as the chair of the ABA Commission on Racial and Ethnic Diversity in the Profession and was the 2008 recipient of the ABA Thurgood Marshall Award.

Samuel Alito writes as the opening line of the opinion: “This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2 [percent] (3/256) Cherokee.” How marvelously derisive a term he chose, one completely dismissive of the role of the Cherokee Nation in deciding its own membership rules: “classified,” the same as you might to say that your new Jeep Cherokee is “classified” as an SUV. The rest of the opinion and legal analysis are colored by the underlying disbelief by five members of the Court that the child can be an Indian. In his first footnote, Justice Alito admits that the girl is an Indian child by the federal law in the question before the Court and eligible for enrollment by tribal law.³⁵ But he didn’t say, “This case is about an Indian child,” because he doesn’t believe that she is an Indian child. An Indian justice would have pointed out to him that she *is* an Indian. No matter what race Justice Alito ascribes to her, she is eligible to be a citizen of the Cherokee Nation. How much Cherokee blood she has is not relevant. Citizenship is relevant. Under federal law, and by common sense, Indian tribes have the absolute right to set their membership criteria.³⁶ Justice Alito has no significant grasp of the meaning of tribal membership or the fact that, for some Indian tribes, blood quantum isn’t the deciding factor in who is a member. But there is no Indian voice on the Court to tell him that.

Meeting Judge Seay

In 2010, I met my first American Indian federal district court judge, Frank Howell Seay. He was in fact *the* first American Indian federal judge in history. I was absolutely thrilled. In 32 years of representing the United States, I never appeared before an American Indian judge. I assure you that, had I appeared before Judge Seay, I wouldn’t have expected any ruling that was any more or less favorable than a ruling from a non-Indian judge—but it would have made a difference just seeing an American Indian on the federal bench. If Indian people never see a prosecutor of our race, if we never see ourselves in the jury box, if we never see a judge that is a member of our race, how can we ever be expected to believe that we are, in fact, an equal part of the American justice process?

The one thing I would expect is that, if I had filed a case in Judge Seay’s court, he wouldn’t have cornered me in the law library and called me “boy” five times. ☺

Endnotes

¹ *Definition of Diversity*, SUMMER DIVERSITY INTERNSHIPS & OBJECTIVES, UNIV. ORE (Aug. 26, 1999), <http://gladstone.uoregon.edu/~asuomca/diversityinit/definition.html>.

² Commentary often spoken by professional football announcers after a rookie player is laid low by a particularly vicious block or tackle.

³ Throughout this article I use the terms Indian, American Indian, Native American, and Native interchangeably in reference to the peoples indigenous to the part of the North American continent that is now the United States.

⁴ See *Robinson v. Jacksonville Shipyards*, 760 F.Supp. 1486 (M.D. Fla. 1991).

⁵ Hon. Cynthia Diane Stephens, *A Diverse Judiciary?*, MICH. BAR J. (May 2015).

⁶ Oral communication with my section chief, U.S. Department of Justice (1976).

⁷ Press Release, Department of Justice (on file with the author). April

12, 1974.

⁸ I always contacted the placement office for law schools and asked to speak to any student who wanted information about the DOJ. When you represent the United States, it is inappropriate to not speak to any student who may wish to apply to the DOJ. However, I would also say that I wanted to meet specifically with members of NALSA. In addition, I always told school officials that if there were any student groups who didn’t feel comfortable meeting with me in a larger setting, I would agree to also meet with them separately.

⁹ Main Justice consists of those offices, boards, and divisions housed in Washington, D.C., and the term is meant to distinguish from the 94 United States attorney offices throughout the country. Assistant U.S. attorneys are hired locally, while hires to Main Justice come through the centralized hiring program. There were, in fact, several Native American assistant U.S. attorneys not counted in the 19.

¹⁰ Title 25 of the United States Code is “Indians.”

¹¹ In my experience, the CRD also historically brought very few cases where Hispanic or Asians were victims of discrimination. The key difference between American Indians and the other racial and ethnic groups who are underrepresented in the CRD’s enforcement effort is that many attorneys, Indian and non-Indian alike, reported being criticized for bringing cases on behalf of American Indians or being discouraged from doing so. (“Bringing Indian cases is not what is going to get you your next promotion,” one reported.) No Asian-American or Hispanic attorney that I am aware of has ever been criticized for bringing cases on behalf of their own race or ethnicity. As the founder and 30-year chairman of the DOJ Association of Native American Trial Lawyers, I met regularly with the chairs of the other minority affiliated groups and would have heard about it if it had occurred.

¹² Internal DOJ Memorandum to Assistant Attorney General John R. Dunne from CRD Indian lawyers (on file with author). Sept. 17, 1990.

¹³ A legal term of art meaning that they were now operating a school district free of all racial discrimination.

¹⁴ Some of my closest friends in the unit were on the “no new cases” side of the argument and would have stood by never filing a case on behalf of American Indians.

¹⁵ Of equal curiosity is how the regulatory agency missed such a policy for 10 years.

¹⁶ To be completely accurate—the acting section chief was passed over for promotion to section chief. He then took a one-year detail to a state attorney general’s office and, when he returned from the detail, cleaned out his desk and took early retirement. But the Native woman wasn’t offered an opportunity to go to the unit of her choice, and nobody admitted to us that we were right and had been wronged.

¹⁷ It was also reported to me by an attorney that he was told that “we’ve done enough for Indians” when he recommended outreach to Indian communities. (See also n.15, *supra*.)

¹⁸ I would love for the current acting assistant attorney general for civil rights to send a letter to the editor of *The Federal Lawyer* and say: “I protest; Lawrence Baca is wrong. We’ve filed more cases on behalf of Native Americans in the 8½ years since he retired than in the 32 years that he worked here.”

¹⁹ *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364 (2009).

²⁰ *Justice Ginsburg’s Twenty Years on the Supreme Court*, Judges & the Courts Fact Sheet, NAT’L WOMEN’S LAW CTR. (Oct. 2013), <http://>

www.nwlc.org/sites/default/files/pdfs/ginsburg_20_years.pdf.

²¹Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (Oct. 5, 2009).

²²*Supra*, n.21.

²³*Virginia v. Black*, 538 U.S. 343 (2003).

²⁴*Id.* at 343.

²⁵Listen to the arguments at <https://www.oyez.org/cases/2002/01-1107>.

²⁶*Rice v. Rehner*, 463 U.S. 713 (1983).

²⁷*Id.*

²⁸*Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

²⁹*Id.* at 17.

³⁰*Korematsu v. United States*, 323 U.S. 214 (1944).

³¹*Id.* at 245-246.

³²*Brendale v. Confederated Tribes*, 492 U.S. 408 (1998).

³³*Id.* at 465.

³⁴*Adoptive Couple v. Baby Girl*, 398 S.C. 625 (2013).

³⁵It is undisputed that Baby Girl is an "Indian child" as defined by the Indian Child Welfare Act of 1978 because she is an unmarried minor who "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," 25 U.S.C. § 1903 (4)(b). See Brief for Respondent Birth Father 1, 51, n.22; Brief for Respondent Cherokee Nation 1; Brief for Petitioners 44 ("Baby Girl's eligibility for membership in the Cherokee Nation depends solely upon a lineal blood relationship with a tribal ancestor").

³⁶See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).



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