

# The San Diego Union-Tribune

## Opinion: Judges with criminal defense or civil rights backgrounds are rare in federal court. We need more.

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Prosecutors wear more than their fair share of the robes in federal court. It's time to level the field. By nominating more public defenders and civil rights attorneys to the federal bench, President Joe Biden can begin to correct the imbalance in professional diversity in our courts, improve the judiciary's legitimacy and help rehabilitate public perception of our justice system at this critical juncture, when faith in the fair administration of justice is fading.

Following the violent ransacking of the U.S. Capitol by pro-Trump insurrectionists on Jan. 6, national attention has focused on inequity in law enforcement: who's held accountable, who isn't, and why. People thirst for reform and racial justice. A 2020 poll found that nearly all Americans favor at least some change to our criminal justice system.

Judges are key players in ensuring that system is fair. That's why Biden's promise to appoint "the most diverse Cabinet" in history should extend to judicial nominations, too, and include professional background in the calculus. Gavels must be distributed to a broader group of advocates who have represented society's most vulnerable and those facing the highest stakes: the deprivation of liberty.

Judges with criminal defense or civil rights backgrounds are few and far between in federal court. A 2020 study by the Center for American Progress found that only about 1 percent of serving circuit court judges, those sitting just below the Supreme Court, had spent their careers as public defenders or in legal aid. Trump's judicial picks widened the gap. As of August 2020, he nominated 74 former prosecutors but only three former public defenders.

The surest way to become a federal judge? Prosecute first. A 2019 study by the Cato Institute found that the ratio of former prosecutors to former criminal defense attorneys, including public defenders, on the federal bench is four to one. The ratio shoots up to seven to one when

comparing lawyers who previously advocated for the government in civil and criminal cases with those who advocated against it.

The disparity is most striking on the Supreme Court, where eight of the nine justices have worked in prosecutors' offices. In 2016, Justice Sonia Sotomayor, a former prosecutor herself, called attention to the court's glaring lack of professional diversity. As she pointed out, "There is no criminal defense lawyer on the court." That's been the trend. Harvard law professor Andrew Crespo found that since the 1970s, the number of justices who previously worked as a prosecutor has increased threefold.

Indeed, the last justice who had significant experience representing indigent criminal defendants was Thurgood Marshall — founder of the NAACP Legal Defense Fund — who retired in 1991. On the civil rights side, the late Justice Ruth Bader Ginsburg, a prominent women's rights advocate, said in 2011 that if she were considered for a seat on the court today, "my ACLU connection would probably disqualify me."

The professional background of judges matters because it informs public perceptions of the courts and their impartiality, which bears on judicial legitimacy. Further, judges' life experiences may influence their perspectives, and in turn, their decisions. Take it from a prosecutor, who recently wrote that the "lack of professional diversity on the bench has ensured that our courts can disproportionately reflect the viewpoints of the most powerful institutions and individuals in our country."

For too long, lawyers who represent everyday people have been absent from the chambers of power. Public defenders and civil rights attorneys have studied the mechanics of discrimination, seen the pains of poverty, heard stories of false accusations, learned of the unspeakable upbringings that may have influenced later criminal behavior, and know all too well the consequences of locking up vulnerable human beings in a deathly pandemic. In the words of public interest lawyer Bryan Stevenson, we need judges who are "proximate to the people who are suffering." That includes victims of crime, low-income clients and criminal defendants too.

Hearteningly, this is already on Biden's radar. His White House Counsel Dana Remus wrote to Democratic senators in December requesting recommendations of judicial candidates "whose legal experiences have been historically underrepresented on the federal bench," including public defenders and legal aid attorneys. It's up to us to hold Biden, and our senators, accountable as we work to build a more reflective judiciary, one that draws from the rich reservoir of our country's counsel.

While the path to the federal judiciary has been traditionally paved with prosecution, the Biden administration has a unique opportunity to blaze a new trail, one shaped by professionally diverse advocates.

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