



There Are Way Too Many Prosecutors in the Federal Judiciary

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It's no secret that federal judges do not, by and large, look like the rest of us. They are whiter than average, more male, and more likely to have attended elite schools and worked at big law firms. But there's another quirk of the judiciary that hasn't gotten nearly the attention it deserves: the wild imbalance between judges who used to represent the government in court and judges who used to challenge the government in court.

According to conventional wisdom, the surest way to become a federal judge is to first be a prosecutor. But is that really true? Until now, no one had ever examined the professional background of every sitting federal judge to see whether former prosecutors are in fact overrepresented on the federal bench. So we at the Cato Institute did, and they are—massively. But our study didn't just look at former prosecutors. We also broadened our scope to compare judges who served as courtroom advocates for the government in any capacity—criminal or civil—versus the judges who cut their teeth litigating against the government as public defenders, other criminal defense attorneys, and public interest lawyers.

Focusing just on former prosecutors versus former criminal defense attorneys (including but not limited to public defenders), the ratio on the federal bench is 4 to 1. Expanding the scope to include all former courtroom advocates for the government (but not other kinds of government lawyers, such as agency heads and general counsels), and comparing that to former public defenders, private criminal defense attorneys, and public interest lawyers, the ratio jumps to an astonishing 7 to 1. President Donald Trump's judicial nominees, many of whom are committed originalists and supporters of constitutionally limited government, reflect these same ratios.

What this means is that if you enter the federal legal system as an adversary of the government—including as a criminal defendant or a civil-rights plaintiff—the likelihood that the judge in your case will have previously served as an advocate for government is approximately 50-50.

Meanwhile, the odds of drawing a judge who worked as a criminal defense attorney or public interest lawyer against the government (and never as a government advocate) are about 1 in 16. From the standpoint of someone whose liberty—or even life—hangs in the balance, those are suspicious and troubling odds.

Of course, the fact that someone worked as a prosecutor, a defense attorney, or a public interest lawyer doesn't necessarily mean they will be biased in that direction while serving as a judge. Still, most of us have a strong intuition that a person's prior professional experiences are likely to

influence not only their worldview but also their approach to particular cases. That's why prosecutors routinely use their peremptory strikes to remove defense attorneys from the jury pool in criminal cases—and defense attorneys do the same thing to prosecutors. It's nothing personal; they simply recognize, as we all do, that experience inevitably informs judgment.

Given the government's vast resources, nearly every court case pitting a lone citizen against the state represents a David-versus-Goliath fight for justice. To further stack the deck with judges who are far more likely to have earned their spurs representing Goliath than David is unfair to individual litigants and a bad look for the justice system as a whole.

Fortunately, the solution is simple: a temporary moratorium on nominating former prosecutors to the bench and a strong preference for lawyers with substantial experience representing individuals against the government in criminal and civil cases. If that proposal seems extreme, consider the image of a federal judiciary in which former public defenders outnumbered prosecutors 4 to 1. Notwithstanding the transformative effect that would have on our deeply dysfunctional criminal justice system, not to mention the Bill of Rights, it's probably not a good idea. But neither is it wise to continue doing nothing while the imbalance runs the other way.

It is perfectly understandable that current government officials wish to stock the courts with former government advocates. But it's a bad deal for the rest of us and a doubtful way to ensure equal justice under law.

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