



With judicial picks, Biden seeks to address disparity in legal experience of federal judges

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In the first five months of his presidency, President Biden has undertaken an effort to broaden the work experiences of judges appointed to the federal courts, addressing a gap in the legal professions represented on the bench that was exacerbated by former President Donald Trump.

Already, Mr. Biden has matched President Barack Obama in the number of nominees to the U.S. Circuit Courts who have worked as public defenders, with five of his seven nominees having represented indigent clients charged with state or federal crimes in the course of their legal careers. Six of the president's judicial picks to serve on the federal trial courts also have worked as public defenders.

In announcing his early slate of judicial nominees, Mr. Biden cheered the "broad diversity of background, experience and perspective" represented by his candidates for the federal bench, and he has been lauded for so far following through on a commitment to appoint judges who span the legal profession.

"What people don't appreciate is that the federal judiciary is almost like an intellectual ecosystem, and there's an ongoing dialogue," Clark Neily, senior vice president for legal studies at the Cato Institute who studied the professional backgrounds of federal judges, told CBS News. "They talk to each other, share cases, they bounce ideas off of each other, and like any kind of ecosystem, when you have a wild imbalance tilted in one direction, one worldview or another, it's hard to measure how that affects the output of that institution, but you know it must."

While Mr. Trump made a significant mark on the federal judiciary, appointing more than 230 judges in his four years in office, his picks were overwhelmingly white and male.

Neily also found the former president appointed over 12 times more judges who worked exclusively as government advocates than those who worked in criminal defense or plaintiff-side civil rights litigation, compounding what was already a substantial disparity in the federal judiciary.

Among Mr. Trump's judicial appointees, former prosecutors outnumbered public defenders and other defense attorneys by over 10 to 1, according to Neily's study, published in May. As a result of Mr. Trump's appointments, the ratio of ex-prosecutors to ex-defense attorneys serving on the federal bench today is roughly 4 to 1.

"It's silly to suppose that somebody would represent the government for five, 10, 20 years and not develop some kind of a worldview," Neily said. "It's not to say you admit it, but of course people are going to internalize the values of their client and view things through a certain lens."

"When judges are discussing issues in criminal cases and there's eight former prosecutors in the room and one to two former defense attorneys, it's going to warp the discussions," he continued.

Mr. Biden has pledged to increase diversity on the federal bench, both in terms of demographics and professional experience. All but one of the president's seven nominees to the circuit courts are women, and the Senate has already confirmed the first Muslim American federal judge in U.S. history. Several of Mr. Biden's judicial candidates would make history on the courts they are nominated to serve on if they, too, receive approval from the evenly divided Senate. The president has also pledged to nominate the first Black woman to the Supreme Court if a vacancy arises.

Judge Ketanji Brown Jackson, confirmed to the federal circuit court in the District of Columbia last week, is considered a likely candidate for the Supreme Court if a seat opens up. In addition to boosting minority and female representation on the nation's highest court, Jackson, who is Black, would also bring professional diversity, since she has worked as a public defender.

In fact, Neily noted that of the 10 most recent Supreme Court justices, only two, Amy Coney Barrett and the late Ruth Bader Ginsburg, never represented the government before becoming judges. Barrett spent her legal career as a professor at Notre Dame Law School before she was tapped by Mr. Trump for the 7th U.S. Circuit Court of Appeals and then the Supreme Court. Ginsburg, too, was a law professor and worked for the ACLU fighting gender discrimination before her appointment to the federal bench.

"It starts at the top where there is this wild imbalance, and it goes all the way down to the federal district courts," Neily said.

A 2016 law review article titled "The New Diversity Crisis in the Federal Judiciary" noted that while federal judges are more diverse when it comes to demographic measures, they're "extremely homogenous with regard to less visible characteristics." Exposure to differences in work experience, educational backgrounds and life experiences, known as deep-level diversity, "enhances the decision-making process," the article's authors, Jason Iuliano and Avery Stewart found.

"The importance of deep-level diversity is by having people who have different backgrounds, life experiences, bringing them all together at the table together, they have different viewpoints so you get more robust discussion," Iuliano, a law professor at Villanova University, told CBS News. "It cuts across political lines as well."

Differences in work experience are especially important on the circuit courts, where cases are heard and decisions made by panels of three judges, Chris Kang, chief counsel of the liberal judicial advocacy group Demand Justice, said.

"You can't have a balanced court unless you have a balance of perspective and experience on it," he said. "If you only have lawyers who have practiced law and seen the law from one side or from one set of clients, whether it's corporations or the government, chances are you're going to miss something."

At the Supreme Court, a 2014 report on professional diversity and judicial nominations from the Alliance for Justice cited the impact Justice Thurgood Marshall had on his fellow justices, as he came to the nation's highest court after fighting for civil rights and leading the NAACP's Legal Defense Fund.

"Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a specific perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used the law to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection," Justice Sandra Day O'Connor wrote of Marshall. "At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth."

There are currently 82 open seats in the federal judiciary, and Mr. Biden has put forth nominees to fill 18 of those vacancies. While he has so far been cheered for selecting candidates with diverse work experiences, fulfillment of his promise for experiential diversity relies also on the recommendations made to the president from home-state senators.

"The default always goes to prosecutors and big-firm corporate law partners," Kang, who oversaw the judicial selection process for Mr. Obama, said of the candidates typically selected for federal judgeships. "Even though they're a small slice of the legal community, people view being a partner at a big law firm or prosecutor as being the height of practice."

But, he said, there is a greater understanding of the imbalance of professional experience across the federal courts and how one's work in the legal profession shapes the way they see the law.

"We're starting to move toward greater diversity," Kang said, "but we're still a far cry from balance."