

# HOUSTON CHRONICLE



## **We need more public defenders and civil rights attorneys as judges**

Clark Neily and Devi Rao

July 22, 2021

President Joe Biden has been getting a lot of attention — and praise — for appointing a record number of candidates from diverse racial backgrounds. That’s great. But less attention has been paid to a different — and no less important — type of diversity: professional diversity. In short, we need more civil rights attorneys and public defenders on the bench and fewer prosecutors.

Looking at the current federal bench, you’ll notice certain patterns: Going to an elite law school, working for corporate law firms, and spending time as a prosecutor (or otherwise representing the government) are all common career trajectories.

Indeed, as one of us documented in a [study](#) for the Cato Institute — an organization searching for solutions based on the principles of individual liberty, limited government, free markets and peace — lawyers whose formative professional experiences include serving as courtroom advocates for the government are vastly overrepresented on the federal bench. Former prosecutors outnumber former defense lawyers by a ratio of 4-to-1, with those representing government in criminal or civil proceedings outnumbering those litigating against the government by a ratio of 7-to-1.

President Donald Trump only made this imbalance worse, appointing 12 times more judges who had worked exclusively as government advocates than judges with backgrounds in criminal defense or plaintiff-side civil rights litigation. Of the 10 most recent Supreme Court justices, for example, only two — Justice Amy Coney Barrett and Justice Ruth Bader Ginsburg — never represented the government before becoming judges. And there hasn’t been a single justice with criminal defense experience on the court since Thurgood Marshall retired in 1991.

The fact that someone worked as a prosecutor doesn’t necessarily mean they will be biased in that direction while serving as a judge. But people bring all their life experiences to a job, and

judging is no different, meaning a person's prior experiences are likely to influence their worldview and their approach to particular cases. For example, in the snapchatting cheerleader case this past term, Justice Brett Kavanaugh's questions highlighted his experience as a basketball coach and his understanding of the competitive nature of high school athletes.

Judges with a greater diversity of professional experiences would improve judicial decision-making overall. Just as businesses run better when they have a workforce with diverse life experiences, those appointed for life to the federal bench benefit greatly from engaging face-to-face with, and reading the opinions of, colleagues whose personal and professional perspectives provide fresh insights into the law and its practical implications.

Justice Sandra Day O'Connor wrote that Marshall, who came to the court after a career as a civil rights attorney, "imparted not only his legal acumen" to his colleagues, "but also his life experiences, constantly pushing and prodding us" not to ignore the "power of moral truth" in the cases before the court. To take just one example of how the overrepresentation of prosecutors may have influenced decisions, note that judges have interpreted a federal anti-bribery statute to allow prosecutors — but only prosecutors — to pay witnesses for their testimony, with everything from money and jobs to reducing prison sentences and dismissing charges.

Therefore, to ensure better reasoning, more thoughtful deliberations, and better outcomes, the federal judiciary should mirror the professional diversity of the bar itself. It should have judges who have formerly practiced criminal law as public defenders, not just prosecutors, and those with experience as civil rights attorneys, not just former courtroom advocates for government.

So far, Biden has nominated a number of highly qualified federal public defenders and civil rights attorneys to the federal bench. The Senate should confirm them, and we hope this is the beginning of a trend of righting the current imbalance on the courts.

A judiciary with members whose formative professional experiences span the legal profession will be best equipped to handle the diverse range of cases and issues presented to them in a way that fairly and uniformly upholds the Constitution's values.

*Neily is senior vice president for legal studies at the Cato Institute and Rao is Supreme Court and appellate counsel at the MacArthur Justice Center.*