

CHANGING BACKGROUNDS OF U.S. DISTRICT JUDGES: **Likely causes and possible implications**

by RUSSELL WHEELER

Justice Sonia Sotomayor's Supreme Court appointment illustrated two demographic trends—the increase in the appointment of women and of racial and ethnic minorities to the federal bench. But Sotomayor, named a United States district judge in 1992 from private law practice, stands outside another trend—the decrease in the appointment of private practitioners as district judges.

This decrease is not news. Sheldon Goldman and his colleagues regularly document federal judges' vocational backgrounds in their biennial *Judicature* reports on the appointment process.¹ Independently, Chief Justice John G. Roberts, Jr. and his predecessor, William H. Rehnquist, have noted the decline in appointees from the private bar. Chief Justice Roberts called it an “important change . . . in where judges come from, particularly trial judges.”²

The costs and benefits of this change are not clear. Some see the change positively, providing what they call a more “professional” federal judiciary. Others believe the district courts benefit from the long-standing practice of appointing mostly private lawyers. This article documents the change in federal district judges' vocational backgrounds since 1953; assesses the normative arguments for continuing the change, and those for reversing it; assesses likely causes of the shift in vocational backgrounds; and suggests areas for further inquiry.

Changes in prior vocations

Federal judges' vocational backgrounds since the Eisenhower administration have changed mainly at the district

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court level and involved a fairly steady decline in the proportion of judges appointed from private practice and a corresponding increase in state judges and U.S. magistrate and bankruptcy judges. By contrast, the proportion of sitting judges appointed to the courts of appeals in the same period has stayed around the 50 percent mark—over 60 percent for H.W. Bush and over 50 percent for every other administration except Carter (46 percent) and W. Bush (49 percent).³ In 2009, the district courts had 678 statutorily authorized district judgeships (including a handful that will at some point lapse unless Congress makes them permanent.⁴)

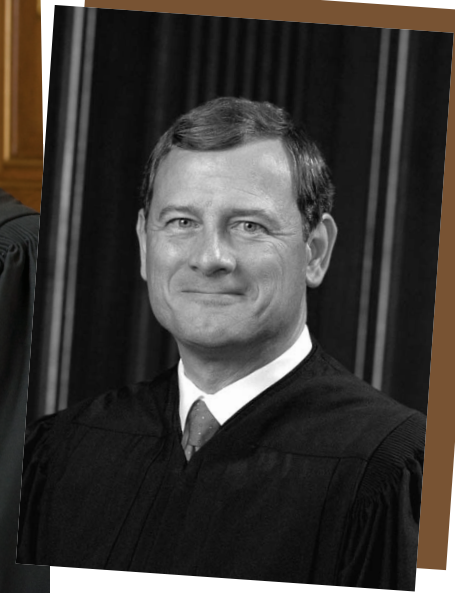
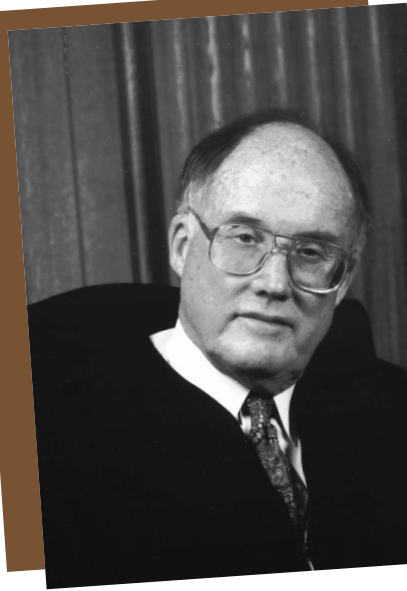
Thanks for comments on an earlier draft to Sarah Binder of the Brookings Institution, Rachel Caufield of the American Judicature Society, U.S. District Judge D. Brock Hornby, Steve Tevlowitz of the Administrative Office of the U.S. Courts, and two anonymous reviewers. Thanks to Steven Saltzger of the Federal Judicial Center for helping me with aspects of the Center's Federal Judge Biographical Database. The analyses and conclusions are mine alone. This is a revision of a paper prepared as background reading for the Sandra Day O'Connor Project's May 2009 conference at Georgetown Law Center.

1. Most recently Sheldon Goldman, Sara Schiavoni, and Elliot Slotnick, *W. Bush's judicial legacy: Mission accomplished*, 92 JUDICATURE 258, esp. at 278 and Table 3 at 279 (2009). For a different approach to analyzing changes over time in federal judges' vocational backgrounds, see Monique Renee Fournet, Kyle C. Kopko, Dana Wittmer, and Lawrence Baum, *Evolution of judicial careers in the federal courts, 1789-2008*, 92 JUDICATURE 62 (2009).

2. John Roberts, “2006 Year End Report on the Federal Judiciary,” (Jan. 2007) viewed at www.uscourts.gov/ttb/2007-01/2006/index.html.

3. See Sheldon Goldman, PICKING FEDERAL JUDGES, LOWER COURT SELECTION FROM ROOSEVELT TO REAGAN 147-149, 189, 227 (1997), and Goldman et al., *supra* n. 1.

4. 28 U.S.C. §133(a)&(b) and Administrative Office of the U.S. Courts, AUTHORIZED JUDGESHIPS FROM 1789 TO PRESENT at 8 (2009), available at <http://www.uscourts.gov/history/allauth.pdf>. There are also four term-limited territorial district judges.



Justice Sonia Sotomayor, who was named a U.S. district court judge in 1992 from private law practice, stands outside a recent trend – the decrease in appointment of private practitioners as district judges.

Former Chief Justice William Rehnquist and Chief Justice John Roberts have both asserted that the federal judiciary has benefited the nation because it has been populated mainly by judges appointed from among private practitioners.

Table 1. Immediate prior position of U.S. district judges, 1953-2008

	State judges	Fed jud.	All judges	Pub. sec. lawyers	All pub. sec	Priv. prac.
All years (1795)	587 (33%)	138 (8%)	725 (41%)	229 (13%)	954 (53%)	841 (47%)
DDE (129)	28 (22%)	0 (0%)	28 (22%)	15 (12%)	43 (33%)	86 (67%)
JFK-LBJ (228)	70 (31%)	2 (1%)	72 (32%)	34 (15%)	106 (46%)	122 (54%)
RMN-GF (231)	65 (28%)	8 (3%)	73 (32%)	35 (15%)	106 (47%)	123 (53%)
JC (203)	85 (42%)	10 (5%)	95 (47%)	14 (7%)	109 (54%)	94 (46%)
RR (290)	96 (33%)	18 (6%)	114 (39%)	41 (14%)	155 (53%)	135 (47%)
GHWB (148)	46 (31%)	20 (14%)	66 (45%)	13 (9%)	79 (53%)	69 (47%)
WJC (305)	114 (37%)	36 (12%)	150 (49%)	35 (11%)	185 (61%)	120 (39%)
GWB (261)	83 (32%)	44 (17%)	127 (49%)	42 (16%)	171 (66%)	90 (34%)

5. My principal data source is the Federal Judicial Center's Federal Judges Biographical Database, available at fjc.gov. The database identifies every good behavior-tenured federal judge since 1789. It enables unique searches for several court, appointment, and demographic variables but not for the pre-nomination vocations listed in each judge's "Professional Background" section, which comes from a variety of sources, including other researchers, forms completed by sitting judges, and some FJC staff review. Vocational background data in my data set come from key word searches graciously undertaken for me by Federal Judicial Center Assistant Historian Steven Saltzger and my own separate review of the "Professional Background" entries of the 1,795 district judges.

I counted as former judges or public sector lawyers those full-time in the position at the time of their district judge nomination as well as the handful who were, at that time, no more than a year removed from their public sector position. I also included among state judges two or three federal administrative judges.

6. An Act to abolish the office of United States commissioner, to establish in place thereof within the judicial branch of the Government the office of United States magistrate, and for other purposes, 82 Stat. 1107. October, 17, 1968.

7. An Act to establish a uniform Law on the Subject of Bankruptcies. (Excerpt: "Title II — Amendments to Title 28 of the United States Code and to the Federal Rules of Evidence), 92 Stat. 2657. November 6, 1978, as amended by An Act to Amend Title 28 of the United States Code Regarding Jurisdiction of Bankruptcy Proceedings . . . , 98 Stat. 333, July 10, 1984.

Table 1 shows the vocational backgrounds of the 1,795 district judges appointed between 1953 and 2008, overall and by administration.⁵ Figure 1 provides a graphic illustration of the changes.

- Private practitioners, who constituted 67 percent of President Eisenhower's appointees, were 34 percent of President George W. Bush's.

- The percentage of former *state* judges jumped from 22 percent under Eisenhower to over 40 percent under President Carter, but has stayed under 40 percent since then, while the increasing number of former U.S. magistrate judges (positions created in 1968⁶) and a handful of bankruptcy judges (positions created in 1978⁷) has driven up the proportion of all former judges to essentially half of Presidents Clinton's and Bush's appointees.

- Twelve percent of Eisenhower's appointees were public sector lawyers, most of them prosecutors. Presidents Roosevelt and Truman appointed much higher proportions of

government lawyers and other officials (44 and 37 percent).⁸ The drop in public sector lawyers under Eisenhower is not surprising; for one thing, few Republican U.S. attorneys were in office after 20 years of Democratic government. It is not so obvious why the proportion of public sector lawyers has never gotten higher than 16 percent (W. Bush).

Variations by region

The process and the product of federal judicial selection is not uniform across the country, certainly as to judges' race and gender.⁹ Variations occur as well in vocational backgrounds. Table 2 shows the largest districts in each regional circuit (today) in ascending order by proportion of private practitioners appointed from 1953 through 2008.

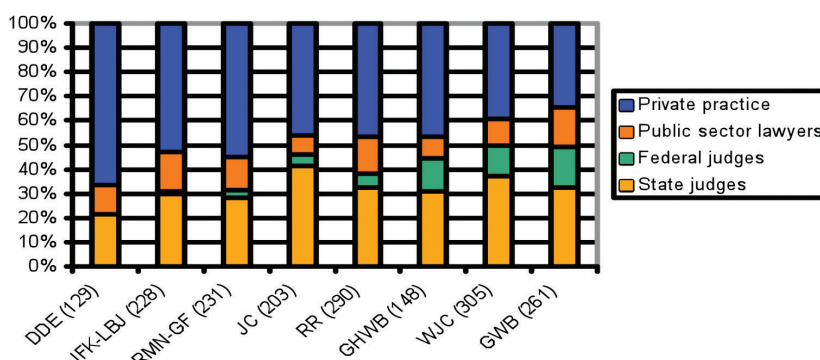
Sixty-two percent of California Central's 73 judges were appointed from sitting judges, 29 percent from private practitioners, and nine percent from public sector lawyers. By contrast, over 60 percent of New York Southern's and Texas Southern's judges were private practitioners; 30 percent of Texas Southern's appointees were judges, but only 15 percent of New York Southern's were.

If drawing district judges from the public sector, especially the bench, produces a more "professional" district court, then there is considerable variation in the professionalization of the district courts shown in the table. And if the district bench needs to be dominated by former practitioners, then some of the table's courts are quite needy. But those are big ifs. Do judges appointed from the public sector perform differently than those from private practice—differently, for example, as to decisional tendencies, reversal rates, cases pending, valid ethics complaints, and other matters? Answering that question empirically would be a major task, well beyond the scope of this article. Commentators, though, think they perform differently, as explored in the next part.

Good for the district courts?

Goldman and his colleagues describe

Figure 1. Appointments to district courts nationally, 1963-2008 (in % by administration and prior position)



the increased appointment of sitting judges and prosecutors positively, as "the continued professionalization of the federal judiciary." Because President George W. Bush's district appointees had the lowest proportion of judges with neither judicial (nor prosecutorial) experience at least since 1933, those appointees have "the strongest professional credentials"¹⁰ of the last 85 years.

Goldman and his colleagues do not explain why public sector appointees make for a more "professional" judiciary, but one can surmise (without necessarily endorsing) the arguments, especially as to judges: well-vetted sitting judges know the umpireal role and don't have to shake off the advocacy instinct. They can manage a docket and a judge's chambers and are familiar with rules of evidence and procedure. Unlike many practitioners, U.S. magistrate judges and state judges (despite federal-state jurisdictional differences) are familiar with the range of a civil and criminal docket; they have imposed sentences. Sitting judges should have a good idea of their ethical obligations and how to live with them.

Judge Richard A. Posner speculates that judges, more than practitioners, are "likely to have developed an interest in public issues" and an

appreciation and aptitude for judging, and to be willing to make financial sacrifices for a judicial career.¹¹ Finally, U.S. bankruptcy and magistrate judges and some state judges have gained their offices through "merit selection" screening processes including candidate assessment by bipartisan screening panels.¹²

Roberts and Rehnquist see the development much differently, even while acknowledging that federal judges appointed from the public sector have "served ably"¹³ and include some "very good judges."¹⁴ Nevertheless, both assert that the federal judiciary has benefited the nation because it has been populated mainly by judges appointed from among private practitioners. Roberts said federal judges "have historically been leaders of the bar before joining the bench" and that it

8. Goldman, PICKING FEDERAL JUDGES, *supra* n. 3, at 58-59, 104-05.

9. E.g., Goldman et al, *supra* n. 1 and Jennifer Segal Diascro and Rorie Spill Solberg, *George W. Bush's legacy on the federal bench: Policy in the face of diversity*, 92 JUDICATURE 289 (2009).

10. Goldman et al *supra* n. 1, at 278.

11. Richard A. Posner, *How JUDGES THINK* 168-69 (2008).

12. See, for magistrate judges, 28 U.S.C. §631(a) and for bankruptcy judges §120 of Public Law 98-353, as amended and set out as a note to 28 U.S.C.A. §152.

13. William Rehnquist, "2001 Year End Report on the Federal Judiciary," (Jan. 2002) viewed at www.uscourts.gov/ttb/jan02ttb/jan02.html.

14. Roberts, *supra* n. 2.

Table 2. Appointment patterns in the largest district court in each circuit, 1953-2008

District (total judges)	Percent district judges appointed from among:			
	Private practice	State judges	Federal judges	Public sector lawyers
California (C) Los Angeles (73)	29%	58%	4%	9%
Illinois (N) Chicago (63)	32%	40%	8%	21%
Michigan (E) (Detroit) (45)	33%	40%	4%	22%
Minnesota (18)	33%	33%	11%	22%
Massachusetts.(26)	35%	27%	8%	31%
Colorado (21)	38%	38%	14%	10%
District of Columbia (43)	47%	40%	-	14%
Florida (S) Miami (44)	50%	41%	-	9%
Virginia (E) Nor'k., Rich'd., DC subs (27)	52%	30%	11%	7%
Pennsylvania (E) Philadelphia (70)	57%	36%	-	7%
New York (S) Manhattan (93)	62%	12%	3%	23%
Texas (S) Houston (37)	65%	27%	3%	5%

“changes the nature of the federal Judiciary when judges are no longer drawn primarily from among the best lawyers in the practicing bar.”¹⁵

Neither, though, has spelled out why district courts need mostly private sector appointees, beyond Rehnquist’s warning that the growth in the proportion of district judges drawn from the public sector could make the federal judiciary “too much resemble the judiciary in civil law countries” (i.e., “professional judiciaries”). There “a law graduate may choose upon graduation to enter the judiciary, and will thereafter gradually work his way up over time. Reasonable people,” he asserted, “think that many civil law judicial systems simply do not command the respect and enjoy the independence of ours,” with its “practice of drawing on

successful members of the private bar to become judges.”¹⁶

One can surmise (without necessarily endorsing) additional arguments cautioning against a “professional judiciary.” “Professional judges” may develop a narrow and homogeneous approach to their jobs. Given judging’s isolated nature, selecting district judges from those who are already judges risks selecting individuals who are already distant from the life of the community. They are likely to have been long apart from the perceptions of clients, the dynamics that stimulate litigation, and the law’s development and interplay with social, technological, and economic trends.

These claims are somewhat of a piece with the view that the Supreme Court needs appointees other than sitting circuit judges.¹⁷ (In a February 2009 lecture, Roberts opined that the appointment of circuit judges rather than politicians has provided the Court’s jurisprudence with “a more legal perspective and less of a policy perspective.” But he also praised what he called the Court’s diversity “in terms of the [pre-court of appeals] experiences people bring,” including private practice and executive and legislative branch service, and he bemoaned the lack of trial experience among the justices, at least in February 2009¹⁸). In January 2010, Justice Antonin Scalia said appointing jus-

tices exclusively from lower courts is “leading us to the European system,” where, he asserted, “[y]our whole life you have done nothing but be a judge and you come to think the government is always right.” In “the Anglo-Saxon system” judges on “the most important courts [have] been suing the government [and] defending their clients against the government. [It’s] a different mindset.”¹⁹ (Scalia served four years, Roberts two, on the U.S. Court of Appeals for the District of Columbia Circuit before their appointments to the Supreme Court.)

Pre-appointment careers

These competing views rest in part on empirical questions about the pre-appointment careers of district judges. First, in light of Rehnquist’s warning against “drastically shrink[ing] the number of judicial nominees who have had substantial experience in private practice,”²⁰ how much private practice experience did district judges who were appointed from the judiciary have before assuming the judgeships from which they moved to the district court? Second, given the view that judicial experience produces a more professional district bench, how long had district judges served as state or term-limited federal judges before appointment as district judges? And have there been changes over time?

15. *Id.*

16. Rehnquist, *supra* n. 13.

17. E.g., Terri Peretti, *Where have all the politicians gone? Recruiting for the modern Supreme Court*, 91 JUDICATURE 112 (2007).

18. The text of his University of Arizona Rehnquist Center lecture apparently has not been published. The quotations are from Adam Liptak, *Roberts Sets Off Debate on Judicial Experience*, NY Times, February 16, 2009. A video of the lecture is available at www.rehnquistcenter.org/newsletter.cfm?page=news; the relevant comments are at about minutes 16 and 29.

19. Moore, *Scalia: Court Needs People from Varied Backgrounds*, Clarion Ledger (Miss.), Jan. 5, 2010. Available at: www.clarionledger.com/article/20100105/NEWS/1050338/Scalia-Court-needs-people-from-varied-backgrounds

20. Rehnquist, *supra* n. 13.

Table 3. District judges appointed from the judiciary with private practice-dominated pre-judge careers

	Pre-judge careers of			
	All	1-3 Years	4-9 Years	10+ Years
All years (725)	580 (80%)	7 (1%)	187 (26%)	386 (53%)
1953-76 (Eisenhower-Ford) (173)	138 (80%)	1 (1%)	18 (10%)	119 (69%)
1977-92 (Carter-Bush) (275)	182 (66%)	3 (1%)	36 (13%)	143 (52%)
1993-2008 (Clinton-Bush) (277)	260 (94%)	3 (1%)	133 (48%)	124 (44%)

Table 4. Years spent by district judges as state or term-limited federal judge

	1-3 Years	4-9 Years	10+ Years
All years (725)	63 (9%)	334 (46%)	330 (45%)
1953-76 (Eisenhower-Ford) (173)	21 (12%)	85 (49%)	67 (39%)
1977-92 (Carter-Bush) (275)	24 (9%)	136 (49%)	115 (42%)
1993-2008 (Clinton-Bush) (277)	18 (6%)	113 (41%)	148 (53%)

served as judges for four to nine, and for over 10 years. As with private-practice-dominated pre-judge service, there is a shift over time. Just as pre-judge careers decreased in length, time spent as a judge increased. In the years 1953 to 1976, 39 percent served as judges for over 10 years, a figure that rose in the Clinton-Bush years to 53 percent.

These figures will suggest to some that the district bench is growing more “professional” not only by the increased proportion of appointments of sitting judges, but also by those judges’ lengthening tenure in pre-district court judicial positions.

Tables 3 and 4 provide three time periods of relevant information:²¹

- 1953-76 (Eisenhower to Ford), when the proportion of private practitioner appointees nationally declined from 67 percent to 53 percent;
- 1977-92 (Carter to H.W. Bush), when that proportion hovered around 47 percent; and
- 1993-2008 (Clinton and W. Bush), when the proportions were under 40 percent.

Years in private practice prior to pre-district judge position. Table 3 shows the percentage of judges appointed to the district court, from a state or term-limited federal judgeship, who had spent a majority of their time in private practice prior to assuming that judgeship. Overall, 80 percent (580) of the 725 district judges appointed from the judiciary spent more than half their careers before their state or term-limited federal judgeship in private practice, and over half of them had careers of 10 years or more. These data discount the specter of a European-like civil

service judiciary.

There is, however, among these judges a trend toward shorter pre-judge careers. In the 1953 to 1976 years, 10 percent had pre-judge careers of four to nine years and 69 percent had pre-judge careers of 10 or more years. The percentage of four to nine year careers was up to 48 percent among Clinton and Bush appointees, and those with 10 years or more in private practice-dominated pre-judge careers dropped from 69 percent to 44 percent. In short, most district judges appointed from the judiciary had private practice-dominated careers before becoming judges, but the length of those careers has decreased.

Time in pre-district judge judicial position. Table 4 shows the time that district judges appointed from the ranks of sitting judges spent in their prior judicial positions. Overall, of the 725 district judges appointed from the judiciary, 63 (9 percent) served as state or term limited judges for one to three years, and 46 percent and 45 percent respectively,

21. I estimate time spent in private practice as time from law school, a clerkship, and/or active-duty, non-JAG military service, to the year the person entered his or her public sector post that started uninterrupted public sector service until the district court appointment. I counted all years as a judge or public service lawyer, even on different courts or offices, assuming those years constitute uninterrupted public sector service prior to district court appointment. A district judge who had, immediately prior to appointment, been a state trial judge for three years and an appellate judge for three years had six years of judicial service. The same calculus holds for a judge who had been a state prosecutor for three years, and then, immediately, a federal prosecutor for three years.

My estimates of time spent in private practice are drawn from my inspection of the “Professional Background” section of each judge’s Federal Judicial Center judicial biography. The Professional Background information does not use standard terms and is based on work of other researchers or forms filled out by sitting judges. I encountered a variety of problems. For example, a biography might say the judge was in “Private Practice, 1973-1988” but also say “Deputy Solicitor, Village of Pleasantville, 1980-1983.” Some local prosecution positions are part-time, so it’s plausible that she was in private practice and served Pleasantville only occasionally. But it may be that the person filling out the form was inexact. I coded the backgrounds as best I could, but these data should be taken with a grain of salt. More exhaustive research on this question would require reference to additional materials, multiple coders, and tests for inter-coder reliability.

Table 5. Non-white males (NWM) appointed as district judges

	All appointees		Public sector appointees		Judicial branch appointees	
	All judges	All NWM	All judges	All NWM	All judges	All NWM
All years	1,207	383 (32%)	699	281 (40%)	554	222 (40%)
Carter	203	65 (32%)	109	48 (44%)	95	43 (45%)
Reagan	290	44 (15%)	155	28 (18%)	114	17 (15%)
H.W. Bush	148	40 (27%)	79	25 (32%)	66	19 (29%)
Clinton	305	149 (49%)	185	109 (59%)	150	84 (56)%
W. Bush	261	85 (33%)	171	71 (42%)	129	59 (46)%

Others will worry that not only are fewer judges appointed directly from private practice, but whatever pre-judge private practice experience those public sector appointees may have had is, increasingly, temporally distant from their district court appointments.

These trends suggest that *if* the district courts benefit from most of their judges' bringing substantial pri-

trict judgeships other than the size-of-firm data reported by Goldman and his colleagues.²²

Explaining the change

Numerous factors influence whether individuals seek judgeships and the types of individuals whom judicial selectors seek.²³ The increase in public sector appointments to the federal district courts likely results from

called "bankruptcy and magistrate benches replete with individuals of great ability."²⁴

2. Gender/ethnicity/race. Presidents since Carter—and the home state legislators who have an outsized say in selecting district judges—have sought to varying degrees to include women and racial and ethnic minorities among their judicial nominees. Such nominees are likely more prevalent in the public than in the private sector (albeit less so now than in the 1970s). That may explain why district judges appointed from the public sector include a smaller proportion of white men than district judges from private practice, a fact that Goldman and his colleagues have emphasized.²⁵ Table 5 shows the proportion of all non-white male district judges and the proportions they comprise of all public sector appointees, and more specifically, of all judiciary appointees.

Overall 32 percent of all district appointees were not white men (383 of 1,207), but 40 percent of appointees from the public sector overall were not white men (281 of 699), as were appointees from the judiciary (222 of 554). For every president, greater proportions of public sector appointees were non-white males than among their appointees as a whole, although the proportions in most categories were lower for Reagan and H.W. Bush. In short, presidents and legislators appear to turn to the public sector for district nominees in part because that pool likely includes more women and racial and ethnic minorities.

3. Judicial salaries. Judicial salaries

For every president, greater proportions of public sector appointees were non-white males.

vate practice experience to their jobs, the change in vocational backgrounds is a cause for concern. Conversely, *if* pre-district judge judicial experience is a positive, things are getting better. But either conjecture depends on differences in the district court performance of the two types of judges, a difference that remains to be explored empirically. Indeed, "two types of judges" is probably an oversimplification, because we know little about variations in the types of practice from which private sector appointees come to their dis-

at least five factors, some of which are unlikely to go away any time soon.

1. Improvements in state and term-limited federal judiciaries. The increase in district court appointments from the judiciary is likely due in part to higher quality in the pools of potential judicial appointees. By almost any account, most states' courts have improved significantly, especially since the 1960s, due to such factors as judicial modernization efforts, including changes in selection methods; federal seed money for state court improvement, especially in the 1970s; and the creation of national and state judicial education agencies. And the creation of the federal magistrate judge system in 1968 and bankruptcy judge system in 1978 has created what federal courts scholar Judith Resnik has

22. Goldman et al, *supra* n. 1 and Goldman, *supra* n. 3.

23. See, for example, Margaret S. Williams, *Individual Explanations for Serving on State Courts*, 30 JUST. SYS. J. 158 (2009).

24. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV., 579, 608 (2005).

25. E.g., Goldman et al, *supra* n. 1, at 275.

are an oft-cited influence on individuals' willingness to seek judgeships.²⁶ Chief Justices Rehnquist and Roberts have stated that federal judicial salaries have increasingly discouraged private practitioners from accepting district judgeships.²⁷ Clearly, the buying power of federal judicial salaries has declined since the 1960s, as has the proportion of private practitioners appointed as federal district judges. District judge salaries do not approach salaries of most successful private practitioners but are higher than (almost all) salaries of state judges and public sector lawyers, and all federal bankruptcy and magistrate judges.

Figure 2 shows, since 1953, district judge salary buying power (in 2008 dollars²⁸) and the proportion of district judge appointees from private practice. Table 6 shows the proportion of private practitioners appointed as district judges during the eight administrations since 1953 (grouping Kennedy and Johnson, and Nixon and Ford, as single administrations).

District judge salary buying power in the Eisenhower administration went from \$120,956 to \$163,659; in the W. Bush administration it went from \$176,400 to \$169,300. Yet two thirds of Eisenhower's appointees came from private practice while one third of W. Bush's did. That suggests that salaries alone cannot explain the decline in private practitioners as district judges. How buying power declined, however, may help explain why fewer private lawyers have sought district court nominations.

Buying power rose erratically during the Kennedy-Johnson years, starting at \$162,017 and ending at \$175,430. In 1969, the first year of the Nixon administration, Congress raised salaries from \$30,000 to \$40,000, increasing buying power in 2008 dollars to \$234,663. Buying power then declined during the Nixon-Ford administrations to \$166,491. Under Kennedy-Johnson, when buying power was increasing, 54 percent of district judge appointees came from private practice. Under Nixon-Ford, when buying

Figure 2. District judge buying power and % of private practice appointees (2-year intervals)

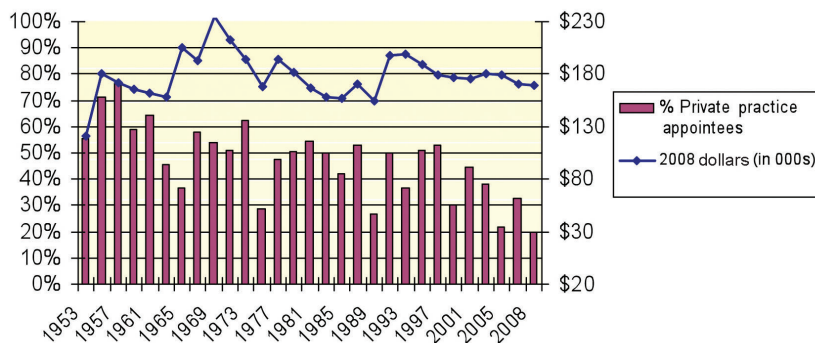


Table 6. District judge appointments from private practice, 1953-2008

DDE	JK-LJ	RN-GF	JC	RR	GB	WC	GB
1953-60	61-68	69-76	77-80	81-88	89-92	93-00	01-08
67%	54%	53%	46%	47%	47%	39%	34%

power was declining, 55 percent came from private practice.

Because the proportion of private practitioners was the same whether buying power was heading up or down, one might claim there's no relationship between judicial pay and private practitioner appointments. But such a claim may assume an unrealistically close calibration between practitioners' entering the judiciary and annual changes in judges' actual buying power. A more complex interplay is just as reasonable: the hefty salary boost in 1969 produced an (unrealized) expectation of further statutory adjustments. Would-be judges in private practice in the early to mid 1970s may have assumed a continuation of relatively high judicial salary buying power after 1969.

District judges' salaries' buying power jumped again in 1977, the first year of the Carter administration, from \$166,491 to \$193,631. Buying

power then declined throughout the Carter administration and most of the Reagan administration, to \$164,602 in 1986. The proportion of district judge appointees from private practice dropped from 55 percent in the Nixon-Ford administrations to 46 percent in the Carter administration, and stayed essentially there in the Reagan administration.

Although buying power increased in 1977, it stayed below the level Congress provided in 1969 (\$234,663 versus \$193,631). By 1977, more would-be judges in the private bar, having watched the steep drop in buying power after 1969, might have

26. See Williams, *supra* n. 23.

27. Roberts, *supra* n. 2, Rehnquist, *supra* n. 13.

28. Russell Wheeler and Michael Greve, "How to Pay the Piper: It's Time to Call Different Tunes for Congressional and Judicial Salaries," Appendix 1 (Brookings, April 2007) and Pay Table ("Judicial Salaries Since 1968") (on U.S. Courts website at <http://www.uscourts.gov/salarychart.pdf>) and Bureau of Labor Statistics Inflation Calculator, available at <http://data.bls.gov/cgi-bin/cpicalc.pl>

grown increasingly aware that Congress was not likely to maintain buying power at the 1977 level, much less that of 1969. That awareness might help explain the decline in private practitioners under Carter and Reagan compared to the Nixon-Ford years.

Variation in buying power in the Clinton and Bush administrations was less volatile, but the proportion of private practitioners in the last 16 years has decreased albeit erratically from 37 percent to 20 percent. Overall, 39 percent of Clinton's district judge appointees came directly from private practice, as did 34 percent of W. Bush's.

The decline in district judge salary buying power after 1969 may have factored into private practitioners' growing reluctance to seek nomination to the district court.

More sophisticated empirical tests are necessary to identify the exact relationships between fluctuations in district judge salary buying power and changes in recruitment patterns. One would want, among other things, to assess regional variations in judicial salary buying power from 1953 to 2008 to comparable buying power data for private practitioners, data that do not appear to exist in any readily retrievable form.

Yet, the summary statistics presented here suggest that the decline

in district judge salary buying power after 1969—and the dawning realization that Congress was unlikely to do much about it—factored into private practitioners' growing reluctance to seek nomination to the district court.

Variations in recruitment by cost-of-living areas. If buying power were the sole driver in the decline in private practitioners, however, one would not expect the regional variations in recruitment patterns seen in Table 2. Boston, San Francisco, and Los Angeles are high cost areas²⁹ and, as might be expected, their district courts have comparatively low proportions of private practitioners. But 62 percent of

said they declined to seek judicial office because they didn't want to raise money for an election campaign, and a third said they might be more likely to seek a judgeship were there a change in Texas's judicial selection method.³¹ Federal judges of course don't stand for election, but nevertheless, the changing district judge confirmation process may have affected the mix of practice backgrounds.

Greater contentiousness and the available pool of private practitioners. District nominees still get confirmed at fairly high rates (around 90 percent, versus the low 70 percent for Clinton's and Bush's circuit nominees), but the time between district court nomination and confirmation has grown. District judges waited on average about two months for confirmation in the Reagan administration but four months in the Clinton and W. Bush administrations. Confirmations occurring more than 180 days after nomination were less than five percent under Reagan but about 20 percent for Clinton and W. Bush.³²

The confirmation lag affects practitioners more than public sector nominees, even though the lag, at least in the W. Bush administration, was about the same for private practitioners and public sector nominees (143 days on average versus 136). Nevertheless, clients shy away from lawyers who are unlikely to be available for the duration of the legal problem, a likelihood that no doubt discourages some lawyers from pursuing a nomination that may sit in the Senate for four months or more, especially if some snag could doom an otherwise fairly certain confirmation, and perhaps provoke career-damaging attacks on the would-be nominees' record. Sitting judges might also get attacked during the confirmation process, but they are less affected than practitioners by confirmation delays, and they stand to gain a raise, good-behavior tenure, and generally more attractive working conditions.

Judicial experience as an indicator of confirmation success. A 2004 analysis of district and circuit nominations from 1989 to 2000 found that nominees

judges in the Southern District of New York were from private practice; that district embraces mainly Manhattan, one of the highest cost of living areas in the country. Southern New York's 62 percent is almost the same as Southern Texas's 65 percent. Houston, that district's headquarters, has a cost-of-living index at or below the national average.³⁰

These examples don't establish or disprove a link between judicial salaries and proportions of private practitioner appointees. Perhaps Southern New York has a comparatively high proportion of practitioners because its large bar includes a critical mass of lawyers who want to be district judges and are wealthy enough to take a big cut in pay. But that phenomenon, if true, is apparently not operating in the Central District of California, with Los Angeles's similarly large bar.

4. The nomination and confirmation process. About a fifth of Texas attorneys in a recently reported survey

29. No. 767 "Cost of Living Index—Selected Metropolitan Areas, First Quarter 1989," in Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, 1990 at 474, and Table 706, "Cost of Living Index—Selected Urban Areas: Annual Average 2007, in U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009 at 469-471. (These are the first and most recent years available to me.)

30. *Id.*

31. Williams, *supra* n. 23, at 166.

32. Reported in Russell Wheeler, "Prevent Federal Court Nomination Battles, De-Escalating the Conflict over the Judiciary," (revised, August 2008) at 8-9, available at http://www.brookings.edu/papers/2007/1120_judiciary_wheeler_opp08.aspx

with judicial experience and those with higher ratings from the American Bar Association's Standing Committee on the Federal Judiciary got confirmed faster than other nominees.³³ And several studies have found that the committee tends to give higher ratings to sitting judges than to non-judges who are nominated to the courts of appeals.³⁴ If that is true as well for district court nominees, sitting judges are likely to be good confirmation candidates simply by being sitting judges, and by likely having high ABA ratings.

Committees that vet potential nominees. It appears that during George W. Bush's presidency, senators in 10 states used committees to help them evaluate potential judges to recommend to the White House. State and term-limited federal judges may prefer applying for judgeships to these screening committees than applying directly to senators or their staffs, on the view that the committees, especially if they are bipartisan, are more likely to look favorably on potential nominees whose political clout has dried up during their judicial service.

Despite the American Judicature Society's vigorous efforts, information about the committees remains illusive, including the years of their existence and whether appointees were indeed committee-recommended. Nevertheless, it appears that about a quarter of Bush's 261 appointees (68) were appointed from seven states when commissions were in use.³⁵ Although 15 percent of the appointees from non-committee states were U.S. magistrates or bankruptcy judges, 21 percent of those from the seven committee states are. The gap is even wider for state judges—28 percent to 46 percent. And private practitioners (and public sector lawyers) are under-represented among committee state district judges.

The available data make it impossible to determine how much, if at all, these differences are a result of the committees or of long-standing recruitment practices in different states. Twenty-five of the 68 district judges are from California, where recruitment patterns have generally

avored sitting judges more so than nationally. These trends, though, combined with the fact that legislators in at least 11 other states announced creation of committees in 2009, might auger more nominations of sitting judges.³⁶

5. Attractiveness of district judgeships to private lawyers. A practitioner wealthy enough to adjust to a federal judicial salary, and not deterred by the confirmation process, might nevertheless see a district court appointment as less prestigious, and thus less attractive, than it may have seemed several decades ago. Courts scholar Arthur Hellman, for example, citing changing caseload, has said "it's just

And more people have the job. As long ago as 1955, Justice Felix Frankfurter warned that the "inflation of the number of the district judges," would "by its own Gresham's law," depreciate "the judicial currency and impair[] the prestige . . . of the federal courts."³⁹ To take one often-referenced measure, in 1955, the country had about half as many district judgeships—238—as seats in the House of Representatives. Today, the number of judgeships—678—is larger by half than the House membership.

On the other hand, the declining attractiveness of district judgeships may be matched by declining attrac-

A practitioner might see a district court appointment as less prestigious than it may have seemed several decades ago.

not the attractive job it was 20 or 30 years ago, especially if you've been in private practice doing business-related cases."³⁷

At the very least, as U.S. District Judge D. Brock Hornby reminds us, the district judge's job is different than it was even a generation ago. "The black-robed figure up on the bench presiding publicly over trials, and instructing juries," has morphed into "a person in business attire at an office desk surrounded by electronic assistants."³⁸

33. Thomas Stratmann and Jared Garner, *Judicial Selection: Politics, Biases, and Constituency Demands*, 118 PUB. CHOICE 251, 265 (2004).

34. James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J.L. & POL. 1 (2001); Michael J. Saks & Neil Vidmar, *A Flawed Search for Bias in the American Bar Association's Ratings of Prospective Judicial Nominees: A Critique of the Lindgren Study*, 17 J.L. & POL. 219 (2001); Richard Vining, Jr., Amy Steigerwalt, and Susan Smelcer, "Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees," Paper prepared for presentation at the Annual Meeting of the Midwest Political Science Association, April 2-5, 2009, Chicago, Illinois.

35. The seven states are California, Colorado, Florida, Georgia, Texas, Washington, and Wisconsin; there were no vacancies for the Hawaii

tiveness of law practice. Similar factors were prominent in a survey of Texas attorneys and judges as to their interest in serving on the state judiciary; for some, comparatively low judicial pay compensated for not having to chase billable hours.⁴⁰ Posner has pointed to the same trade-off.⁴¹ If law practice were more attractive, the decline in the proportion of private practice appointees might be even steeper than it has been.

commission to act on, and I did not learn until after the analysis that Pennsylvania's and Oregon's senators evidently used committees and do not know for what periods the committees operated.

36. Senators, and a few House members, who have appointed screening committees are listed at the American Judicature Society website at http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD.

37. Carol J. Williams, *Judicial Pay Disparity Drains Talent from Federal Bench*, Los Angeles Times, September 27, 2009.

38. D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 453, 462 (2007).

39. *Lumbermen's Mutual Cas. Co. v. Elbert*, 348 U.S. 48 at 59 (concurring opinion) (1955).

40. Williams, *supra* n. 23, esp. at 170.

41. Posner, *supra* n. 11, at 166.

Conclusion

This preliminary effort to assess how various factors may have influenced changes in district judges' vocational backgrounds suggests some areas for further and more exacting inquiry, starting with six factors discussed above:

Are there differences in the performance of district judges from the public and private sectors?

Does the proportion of state judges selected as federal judges vary based on reliable indicators of the quality of the various state judiciaries?

Greater proportions of district judges appointed from public sector careers are women and ethnic or racial minorities than are other district judges. Is it possible, given the sometimes small numbers, to discern regional variations from the national data, and to what degree do intervening factors account for the differences observed?

Are there relationships—both over time and across regions—between fluctuations in practitioners' incomes and the proportion of practitioners nominated for district judgeships?

Is it possible to determine differences overtime in the pool of potential district court nominees due either to aversion to the confirmation process or perceptions of the prestige of the job?

To what degree, if at all, are apparent differences in judges appointed from states where senators use screening committees compared to those from states where they don't, due to the committees as opposed to other factors?

Some other questions include:

What explains differing recruitment patterns in some districts notwithstanding changes in the White House, Senate, and salary buying power? In the Northern District of Ohio, for example, only 4 of the 35 appointees,

1953-2008, came from private practice, and in five of the eight administrations, no appointees did. In Southern New York, by contrast, private practitioners outnumbered public sector lawyers for all but one administration (President Carter appointed two practitioners and a state judge, a state prosecutor, and a law professor).

Is there an association between divided government and the vocational backgrounds of judges? In divided government, seeking candidates who are likely to be acceptable to the opposite party controlling the Senate might motivate presidents—and home state legislators of the president's party—to seek public sector candidates. I found no difference whatsoever in the proportion of former public and private sector appointees during periods of unified and divided government, but that finding was based on aggregated data and did not include a host of other variables that could be considered, such as presidential popularity and strength of party control in the Senate.

But the question on which the importance of these other questions depends is the first one posed above—whether district judges from the public sector perform differently than those from private practice. ❧

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