ALLIANCE FOR JUSTICE

BROADENING THE BENCH:
Professional Diversity and Judicial Nominations

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A report by
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About Alliance for Justice

Alliance for Justice is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. It is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

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I. Introduction: Professional Diversity and the Federal Judiciary

In changing its rules last November, the Senate ushered in a new era of opportunity for judicial nominations. Now that only a simple majority is required to break filibusters on district and circuit court nominations, the time is ripe to fill a growing a number of judicial vacancies with judges who are not only exceptionally well-qualified, but who also reflect the full diversity of the legal profession.

A truly diverse judiciary is one that not only reflects the gender, ethnic, sexual orientation, and racial diversity of the nation, but is also comprised of judges who have been advocates for clients across the socio-economic spectrum, seeking justice on behalf of everyday Americans. As this report details, the federal judiciary is currently lacking in judges with experience (a) working for public interest organizations; (b) as public defenders or indigent criminal defense attorneys; and (c) representing individual clients—like employees or consumers or personal injury plaintiffs—in private practice.

Now it's time to broaden the bench. Without the threat of a filibuster, and with more than 50 judicial vacancies currently waiting for a nominee, we have an extraordinary opportunity to increase experiential diversity on the federal courts. Importantly, the responsibility for this change extends beyond the President and the Senate, and lies with all those interested in the health of our justice system. To increase the professional diversity of our courts, Alliance for Justice calls upon:

- Lawyers with public interest backgrounds to seek out and apply for federal judgeships;
- Advocacy groups, lawyers, and others who work on judicial nominations to actively recruit judicial candidates with public interest and civil rights backgrounds;
- State judicial selection commissions and Senators to encourage lawyers with professionally diverse backgrounds to apply for judicial vacancies, and, in recommending nominees, to consider whether a candidate's experience would add needed professional diversity to the judiciary;
- President Obama to make professional diversity a priority, and to work with home-state Senators to ensure that professional diversity improves across the entire federal judiciary.

With the door now open for a more inclusive approach to nominations, this report is intended to spark an urgent national conversation about the value and necessity of broadening the bench.

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Before he became the first African American Supreme Court Justice, Thurgood Marshall had a groundbreaking legal career—one spent fighting for civil rights, racial equality, and fairness in the criminal justice system. When he retired from the Court, his colleagues reflected on his remarkable experience as an advocate at the height of the civil rights movement, and how his unique perspective influenced the Justices' deliberations. According to Justice Byron White,

> *Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. . . . He characteristically would tell us*

> *things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.*[1]

Similarly, Justice Sandra Day O'Connor explained that:

> *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. . . . At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences . . . .* [2]

Each recognized that Justice Marshall brought valuable diversity to the Supreme Court not just because of his race or his personal life experiences, but specifically because of his unique *professional* experience as a practicing lawyer. The insights he acquired in the course of representing the poorest, least powerful, and most marginalized members of society were often essential to the other Justices' ability to understand all angles of the cases before them.

More broadly, these observations speak to the importance of professional diversity among all our federal judges. First, increasing professional diversity enhances judicial decicionmaking. Like all human beings, judges are the product of their background and experiences, including their professional lives before taking the bench. When a judge decides whether a claim is "plausible,"[3] or whether a witness is "credible," or whether police officers, when they stopped and searched a pedestrian, acted "reasonably,"[4] her determination is necessarily influenced by the nature of her work as a lawyer up to that point. Thus, when judges come from all corners of the legal profession—and particularly when they've worked in the public interest, representing those whose voices are otherwise rarely heard—they are equipped to understand the views of each litigant before them, and to render more informed, thorough decisions.

Professional diversity is also essential to maintain the public trust in our justice system. When individuals suffer injustice—when pay is less because of gender, or a manufacturing plant contaminates an entire town's drinking water, or police systematically stop and frisk racial minorities—they turn to the federal courts to protect their rights. And when they walk through the courthouse doors, they need to feel like they'll get a fair shake—that their arguments will be seriously considered and understood, and their claims resolved without bias or favor. But if the judiciary is devoid of judges with prior experience representing civil rights plaintiffs or otherwise

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[1] Byron White, *A Tribute to Thurgood Marshall*, 44 STAN. L. REV. 1215, 1215-16 (1992).
[2] Sandra Day O'Connor, *A Tribute to Thurgood Marshall*, 44 STAN. L. REV. 1215, 1217 (1992).
[3] *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that civil complaints must set forth a "plausible" claim to relief to survive a motion to dismiss, and recognizing that, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense").
[4] *See Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("the ultimate touchstone of the Fourth Amendment is 'reasonableness'").

advocating for the public interest, it will appear as though the deck is stacked in advance, and public confidence in the courts—the belief that all litigants truly can have their day in court—will erode.[5]

Of course, broadening the bench to include judges with diverse professional backgrounds must begin with judicial nominations. Before Senate Democrats changed the filibuster rule, the rampant obstruction of judicial nominees narrowed the field of potential candidates who could reasonably expect to be confirmed, and disfavored lawyers with public interest backgrounds. The result is that, of President Obama's judicial nominees:

- Only 10—fewer than four percent—have worked as lawyers at public interest organizations;
- Only 10 have significant experience representing workers in labor and employment disputes;
- Prosecutors outnumber public defenders (state or federal) by more than three to one;
- Only four out of 56 circuit nominees have worked as a public defender (state or federal), compared to 21 who have worked as prosecutors;
- Approximately 85% have been either corporate attorneys or prosecutors (and in some cases both).

This consequence of increasingly hostile confirmation proceedings was recently noted by Supreme Court Justice Ruth Bader Ginsburg, whose own background adds to the professional diversity of the Supreme Court. Before taking the bench, Justice Ginsburg was a tenured law professor and fought for gender equality as director of the Women's Rights Project at the American Civil Liberties Union. At the ACLU, she argued six gender equality cases before the Supreme Court, winning five. On the Court, Justice Ginsburg's professional experience as an advocate for equal rights is reflected in several landmark decisions. For example, Justice Ginsburg wrote the majority opinion in *United States v. Virginia*,[6] which opened the doors of the Virginia Military Institute to female students. She also dissented in *Ledbetter v. Goodyear Tire & Rubber Co.*,[7] which rejected a Title VII claim of gender pay inequity because the plaintiff, Lilly Ledbetter, brought her claim too late. Justice Ginsburg chastised the Court for being out of "tune with the realities of the workplace," and asked Congress to clarify the statute so that future victims of workplace gender discrimination would have a reasonable opportunity to seek justice. In response, Congress passed the Lilly Ledbetter Fair Pay Act of 2009, the first bill signed into law by President Obama. As with Justice Marshall, Justice Ginsburg's experience as a public interest advocate has proved invaluable to the work of the Supreme Court. But in 2011 she told a group of law students that, "[t]oday, my ACLU connection would probably disqualify me."[8]

Now that an obstructionist minority cannot use the filibuster to so easily derail judicial nominees in the Senate, all those interested in nominations should be more focused on filling judicial vacancies with nominees who—like Justices Marshall and Ginsburg—have professional experience using the law to seek justice for those most in need.

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[5] *See* Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 48-49 (2009) (arguing that diversity is important both to ensure the "public's confidence in the judiciary," and because it "enriches judicial decisionmaking"), *available at* http://www.greenbag.org/v13n1/v13n1_ifill.pdf.

[6] 518 U.S. 515 (1996).

[7] 550 U.S. 618 (2007).

[8] Jamie Stengle, *Ruth Bader Ginsburg Speaks at SMU*, Deseret News (Aug. 29, 2011), *available at* http://www.deseretnews.com/article/700174796/Ruth-Bader-Ginsburg-speaks-at-SMU.html.

So far in 2014, the outlook on nominations is bright. With his first judicial nominations of the year, President Obama has already taken a positive step toward increasing professional diversity. On January 16, the President nominated four lawyers to fill district court vacancies in Illinois, Washington, Missouri, and Nevada. All four have professional backgrounds that are currently underrepresented among federal judges: two have substantial plaintiff-side trial experience, one is a former public defender, and one is a state court judge who was previously a solo practitioner focused on criminal defense.[9] With just under two years left in President Obama's Administration, there will be ample opportunity to turn these promising nominations into the norm, rather than the exception.

II. Current Statistics: Professional Diversity and President Obama's Judicial Nominees

This section sets forth comprehensive professional diversity statistics for President Obama's judicial nominations, divided into five parts: (A) civil public interest and public service advocacy; (B) criminal law; (C) private practice; (D) state and federal judges; and (E) overall professional diversity statistics.

In preparing this report, Alliance for Justice exhaustively compiled the professional backgrounds of each of President Obama's Article III nominees, including those who were blocked by Republican filibusters, threats of filibuster, or withholding of home-state senators' support post-nomination.[10] While other studies have focused on a nominee's employment immediately prior to nomination, AFJ has counted the entire professional history of each nominee. Therefore, a nominee may be counted several times: as a corporate and non-corporate lawyer, as a public defender and as a prosecutor, as a government lawyer and as a corporate lawyer, and so on. This methodology gives the fullest, most accurate portrait of the professional experience each nominee brings to the federal judiciary.

A. Civil Public Interest and Public Service Advocacy

Lawyers with experience as public interest attorneys, public servants, and educators bring valuable perspectives to the bench.

Only eight of President Obama's district court nominees have worked at public interest organizations, and of those, five worked at organizations that were primarily international in focus. Two district court nominees—Ed Chen with the American Civil Liberties Union (ACLU) and Fernando Olguin with the Mexican American Legal Defense and Education Fund (MALDEF)—have worked at civil rights organizations that litigate to protect the constitutional and legal rights of clients. Two circuit court nominees have been public interest attorneys, one of whom is Cornelia "Nina" Pillard, confirmed in December 2013 to the U.S. Court of Appeals for the D.C. Circuit.

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[9] *See* White House Press Release, *President Obama Nominates Four to Serve on the United States District Courts* (Jan. 16, 2014), *available at* http://www.whitehouse.gov/the-press-office/2014/01/16/president-obama-nominates-four-serve-united-states-district-courts.

[10] The professional history used in this report is taken from Senate Judiciary Committee questionnaires, *available at* http://www.judiciary.senate.gov/nominations/judicial.cfm. The data compiled includes those judges whose questionnaires were posted as of January 20, 2014, for a total of 281 nominees. Additionally, while work done *pro bono* may be instructive and commendable, our report does not consider *pro bono* work done in the course of employment in its analysis, unless a nominee was employed specifically as a volunteer attorney.

Additionally, relatively few legal academics or full professors (excluding adjuncts) have been nominated to district or circuit courts. More of President Obama's nominees have had experience as non-criminal state and federal government attorneys.

In sum, President Obama has nominated:

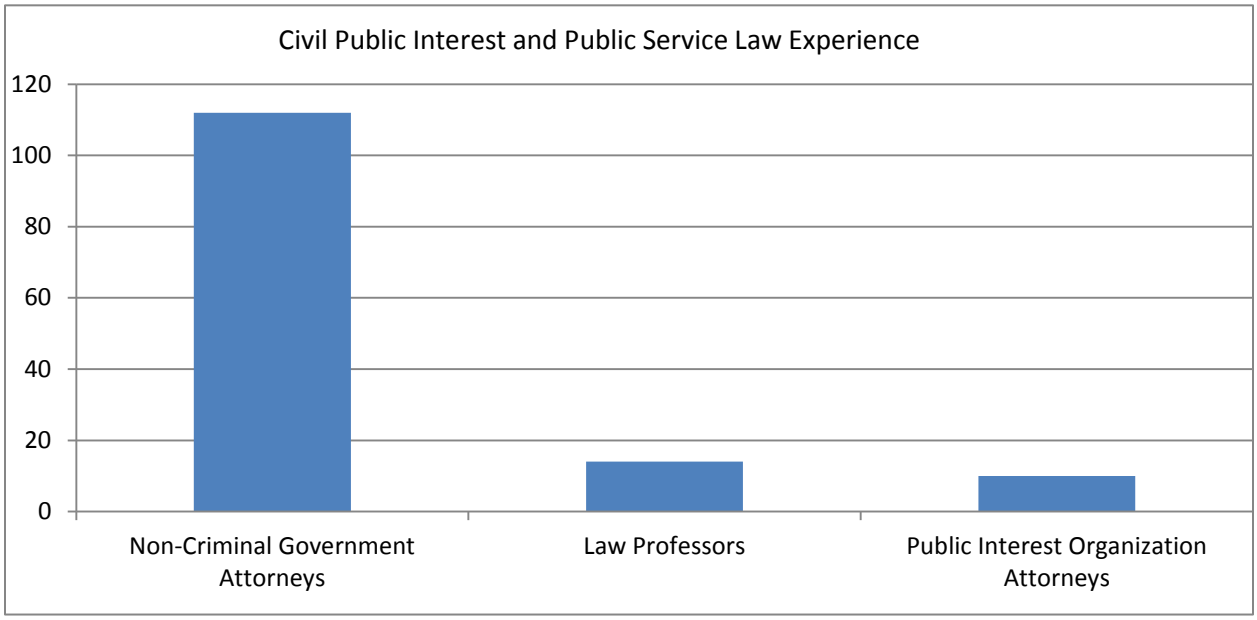
- 8 (3.5%) district court and 2 (3.6%) circuit court judges who have worked for public interest organizations, for an overall total of 3.6% of all nominees.
- 85 (38%) district court and 27 (48%) circuit court judges who have served as civil government attorneys, for an overall total of 40% of all nominees.
- 5 (2.2%) district court and 9 (16%) circuit court judges who have been law professors, for an overall total of 5% of all nominees.

Spotlight on Diversity

Cornelia "Nina" Pillard
D.C. Circuit Court of Appeals

Nina Pillard's career exemplifies a long record as a public interest and public service attorney. After a one-year fellowship with the American Civil Liberties Union, she joined the NAACP Legal Defense and Education Fund, representing victims of discrimination and other civil rights abuses. Since 1994, Pillard has been a professor at Georgetown University Law Center, an Assistant to the Solicitor General, and Deputy Assistant Attorney General in the Office of Legal Counsel.

The American Bar Association rated Pillard unanimously well qualified—its highest possible rating.



B. Criminal Law

Of President Obama's nominees who have practiced criminal law, far more have been prosecutors than criminal defense attorneys, including private lawyers and public defenders. Ninety-seven district court nominees have served as federal or state prosecutors, while 73 have been private criminal defense attorneys (including white collar, indigent, and mixed-income clients) or public defenders. Furthermore, prosecutors outnumber public defenders by a margin of more than 2-to-1 among district court nominees, and more than 5-to-1 among circuit court nominees.

Spotlight on Diversity

Judge L. Felipe "Phil" Restrepo

Eastern District of Pennsylvania

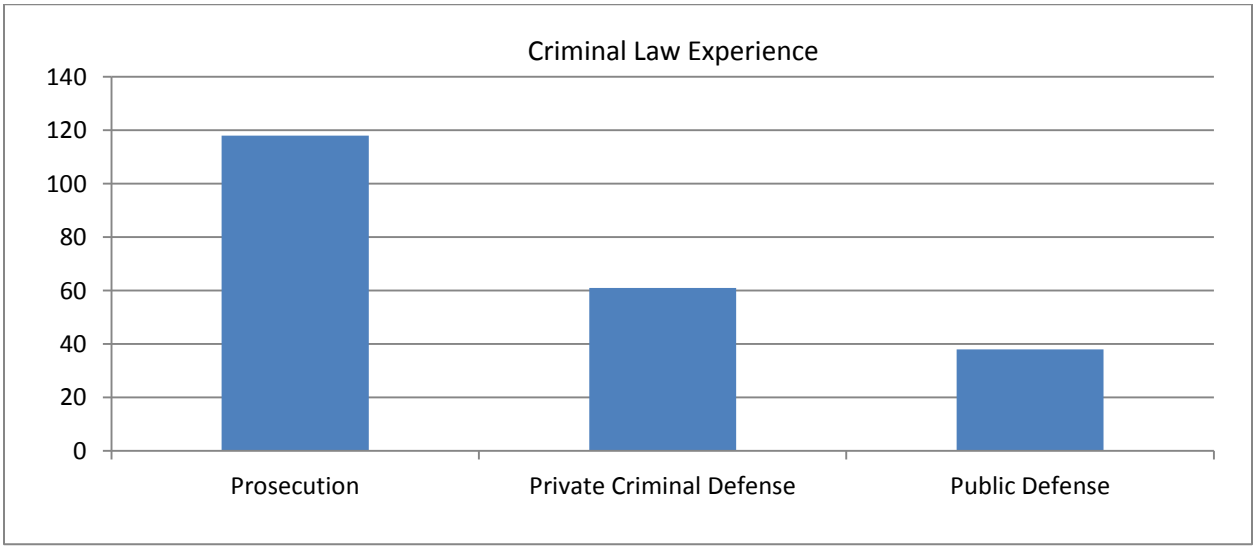
Phil Restrepo's legal career before joining the federal bench as a magistrate judge focused on representing indigent clients, first as a Philadelphia public defender, then as a Federal Defender, and finally as a private litigator.

Judge Restrepo's commitment to indigent criminal defense continued when he entered private practice, and expanded to include plaintiff civil rights litigation on behalf of indigent Philadelphians who were victims of police and government misconduct.

Private practice attorneys also include attorneys who specialize in or practice criminal defense, with clients ranging from indigent individuals to white collar defendants. President Obama has nominated judges like L. Felipe Restrepo and Rosemary Marquez—both public defenders before entering private practice as civil rights and criminal defense lawyers—who have a long record of advocating for indigent clients in public and private practice.

Among President Obama's judicial nominees:

- 97 out of 225 district court nominees (43%) have been state or federal prosecutors. Thirty-four out of 225 (15%) have been state or federal public defenders, while 51 out of 225 (23%) have been private criminal defense attorneys.
- 21 of 56 circuit court nominees (38%) have been prosecutors. Ten of 56 (18%) have been private criminal defense attorneys, and 4 of 56 (7%) have been public defenders. Only one nominee, Jane Kelly, has been a federal defender.



C. Private Practice

"Private practice" is a broad category that includes different types of law and clientele. In compiling this data, AFJ separated private practice litigators into those attorneys who have had primarily corporate client practices and those who have had either mixed client practices or primarily non-corporate clients. A nominee may be counted in each category, if the practice changed over his or her career.

Spotlight on Diversity

Judge John "Jack" McConnell

District of Rhode Island

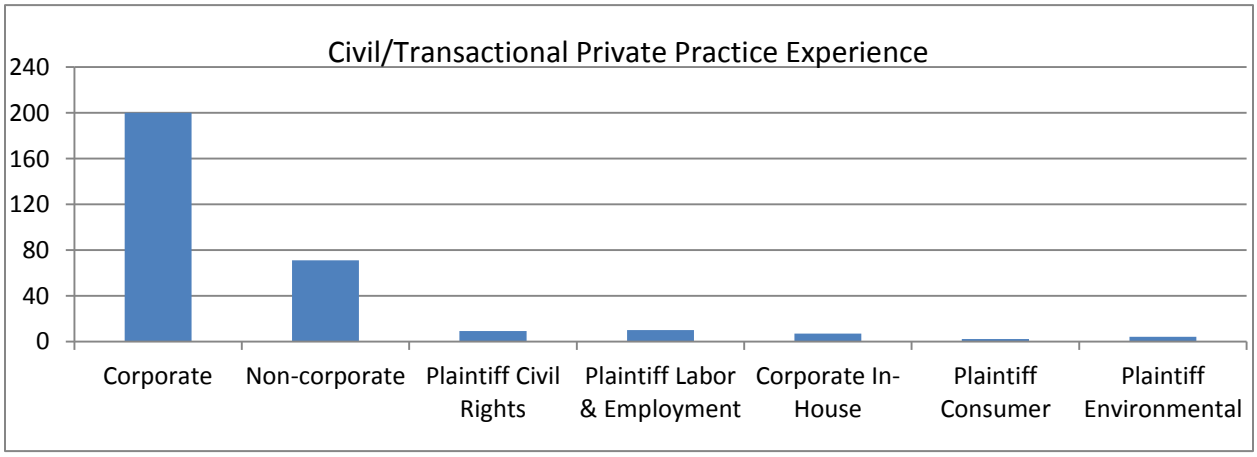
Following a judicial clerkship, Jack McConnell spent his entire legal career as an advocate for victims of corporate malfeasance. He practiced consumer protection and environmental law, heading the Environmental Practice of Motley Rice LLC and leading historic litigation against the tobacco industry. McConnell drafted and helped negotiate a $264 billion settlement that covered 46 states and ushered in altered marketing practices, funding for victims of tobacco-related diseases, and reimbursed state governments for health expenses of tobacco victims.

McConnell's Senate confirmation vote was a watershed: 11 Republicans joined with Democrats in breaking a Chamber of Commerce-backed filibuster, reaffirming the standard that district court nominees with support from both home-state senators are entitled to a yes-or-no vote on the Senate floor.

There are several notable private practice statistics:

- 71% of President Obama's district court nominees have practiced with primarily corporate or business clients, while 28% have practiced with either primarily non-corporate clients, or a mix of corporate and non-corporate clients.
- 73% of President Obama's circuit court nominees have practiced with primarily corporate or business clients, while 16% have practiced on behalf of non-corporate or a mix of clients.
- Overall, this imbalance between corporate and non-corporate lawyers is 71% versus 25%, in favor of corporate attorneys.
- Of all 281 circuit and district court nominees included in this report, 10 have significant experience or specialization representing workers in labor and employment disputes. Four have experience representing environmental plaintiffs, while 26 have practiced in plaintiff tort or personal injury litigation.

In the chart below, plaintiff categories are a subset of non-corporate private practice, while in-house corporate attorneys are a subset of corporate attorneys—all are included in the overall numbers for the respective larger categories, but are also shown separately to give a more detailed view of nominees' backgrounds.



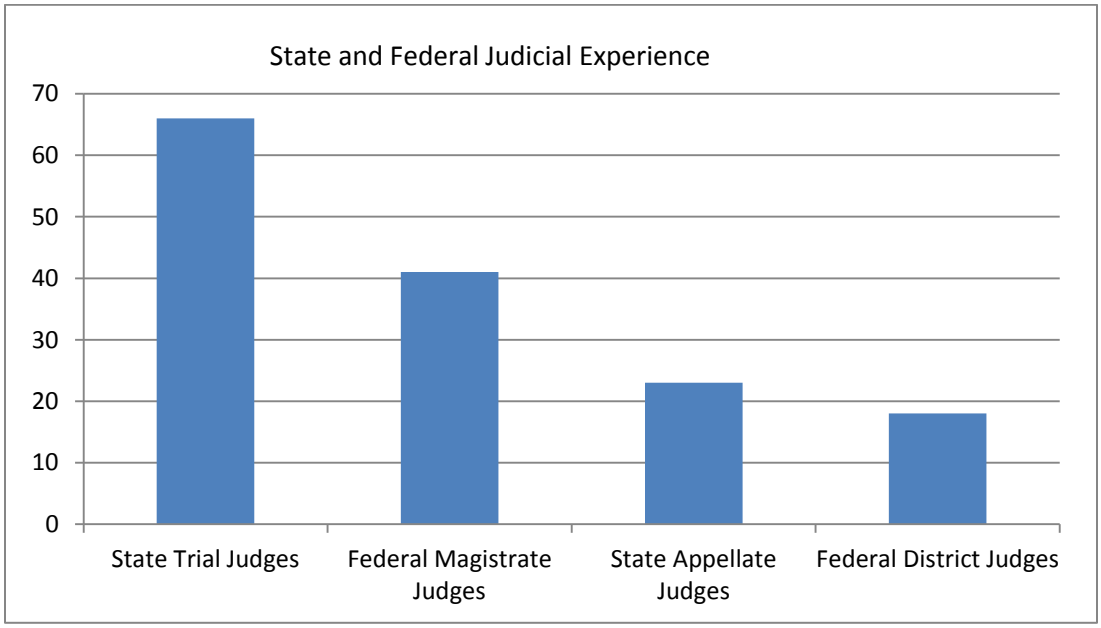
D. State and Federal Judges

State and federal judiciaries have been a major source of President Obama's judicial nominees. These candidates have come from state trial and appellate benches, as well as federal magistrate and district court judgeships. While less numerous than corporate attorneys, the number of President Obama's nominees with judicial experience prior to nomination is slightly higher than those who have been criminal prosecutors, which makes state and federal judges the second most prevalent professional background of President Obama's nominations.

Of President Obama's judicial nominations:

- 38 (17%) district court and 3 (5.4%) circuit court nominees have been federal magistrate judges prior to nomination, for a total of 14.6% of all nominees.
- 66 (29.3%) district court and 9 (16%) circuit court nominees have been state trial judges prior to nomination, for a total of 26.7% all nominees.
- 16 (7.1%) district court and 7 (12.5%) circuit court nominees have been state appellate judges prior to nomination, for a total of 8.2% all nominees.
- 18 (32.1%) circuit court nominees were federal district court judges prior to elevation to a federal appellate court.

Overall, approximately 47% of President Obama's district court nominees and 52% of circuit court nominees have been state or federal judges prior to nomination.



E. Overall Professional Diversity Statistics