JOBS, JUDGES, AND JUSTICE

The Relationship between Professional Diversity and Judicial Decisions.

By: Joanna Shepherd

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DEMAND JUSTICE

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I. Introduction

Recently, interest has grown in the lack of professional diversity in the federal judiciary. A 2019 study revealed that 60 percent of sitting judges on the U.S. Circuit Courts had a corporate law background.[2] A 2020 study reported that people spending the majority of their career in private practice or as federal prosecutors comprise over 70 percent of the active federal appellate bench.[3] Recent articles in The Atlantic[4] and Slate[5] have argued that the next Democratic President, Joe Biden, should dramatically reform the way judges are selected to expand the professional backgrounds that are represented among the federal judiciary.

In this report, we explore the professional diversity of the federal judiciary using a new dataset of nominees to the U.S. District Courts and U.S. Circuit Courts under Presidents Obama and Trump. We compile comprehensive data on the nominees' professional backgrounds to include more than just the one job held immediately prior to their appointment to the federal bench or the one job that comprised the majority of their career. Our data shows that two types of professional backgrounds—a corporate background and prosecutorial background—are disproportionately represented among both Presidents' judicial nominees.

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The lack of diversity has potential implications both for the institutional legitimacy of the courts and for actual case outcomes. The public is more prone to trust a judiciary comprised of people representing a broad range of viewpoints rather than one or two dominant perspectives. And like all people, judges are the product of their backgrounds and experiences. Over the course of their careers, lawyers learn the laws, regulations, precedents, and legal philosophy relevant to their area of practice, along with more intangible lessons about litigants, legal arguments, and the perspectives of the clients for which they advocate. If selected for the bench, the different perspectives and expertise gained in their legal work up to that point will inevitably exert some influence on a judge's determination of which legal claims are plausible, which legal arguments are convincing, which witnesses are credible, and which behavior is reasonable.

To test the relationship between a judge's professional background and their judicial decisions, we use data on employment cases decided by summary judgment, judgment on the pleadings, or judgment as a matter of law in the U.S. District Courts from 2015-2019. As claimants in these trial-level employment cases are typically individual employees or representatives of employees bringing claims against employers, these analyses show whether certain types of career experiences are associated with judges favoring individuals over corporations, or vice versa. Our analyses, including regression results, reveal that judges that worked as state or federal prosecutors and judges with corporate backgrounds are less likely to decide employment cases in favor of claimants. The results are statistically significant, even after controlling for a variety of other influences on

judges' decisions. Moreover, the results hold when analyzing only judges appointed by President Obama, meaning that, regardless of political ideology, corporate and prosecutorial background are related to decisions in favor of employers over employees.

Our results suggest that expanding the professional diversity of the federal judiciary will do more than just create a judiciary that is more representative of the legal profession. It can affect actual case outcomes and, as a result, the development of legal precedent. Moreover, given the disproportionate representation of certain demographic groups in different areas of the legal profession, expanding professional diversity should result in more demographic diversity as well.

> **Our analyses, including regression results, reveal that judges that worked as state or federal prosecutors and judges with corporate backgrounds are less likely to decide employment cases in favor of claimants.**

II. Corporate lawyers and prosecutors are overrepresented among federal judicial nominees

Several recent studies have noted the lack of professional diversity in the federal judiciary. For example, a 2017 Congressional Research Service report studying the job that active federal judges held immediately before taking the bench found that, among active circuit court judges, 46 percent were either in private practice or state or local judgeships when they were appointed, 7.5 percent were working as law professors, 3.7 percent were working for state or local government, and fewer than 1 percent were serving as a public defender.[6] Among the active district court judges they studied, an overwhelming 66 percent were in private practice or state or local judgeships, compared to 3 percent working for state or local government, 1.4 percent serving as public defenders, and 0.5 percent working as law professors.

Other studies have looked beyond the job that immediately preceded a judge's appointment to the federal bench to, instead, analyze how judges spent the majority of their careers. These studies report that people spending the majority of their career in private practice or as federal prosecutors comprise over 70 percent of the active federal appellate bench.[7] In contrast, only one percent of federal appellate judges spent the majority of their careers as public defenders or legal aid attorneys. Moreover, not one active federal appellate judge has spent the majority of their career at a nonprofit civil rights organization, in a labor union, or in an organization advocating for women's rights, child welfare, immigration rights, or disability rights. A separate 2019 study revealed that 60 percent of sitting judges on the U.S. Circuit Courts had a corporate law background, defined as making partner at a Big Law firm or serving as in-house counsel at a large corporation.[8]

While there are likely multiple reasons why former private practice attorneys and prosecutors hold a disproportionate share of seats on the federal bench, one significant reason is the way in which these judges are chosen. The process for selecting district court judges generally begins with the home-state Senators—Senators from the state in which the judge will have his or her home—recommending a list of potential candidates. The President not only seeks these recommendations, but generally accedes to the Senators' wishes, especially Senators of the same party. Moreover, longstanding Senate practice empowers a home-state Senator to withhold a "blue slip," and thus impede, or even preclude, a nomination vote on a nominee of which they disapprove. Although in the case of circuit court judicial nominees, Presidents have tended to assert more authority in the nomination process, input from home-state Senators is still influential.[9]

The majority of Senators have committees to help them make these judicial recommendations. A recent analysis of these committees revealed that the committee membership is disproportionately composed of corporate layers and prosecutors.[10] Of the committees for which they could obtain membership data, 24.3 percent of the members were prosecutors and 35 percent of the members were corporate lawyers. This lack of diversity among the judicial nominating commissions is likely an important reason why the judicial nominees also lack professional diversity. The prosecutors and corporate lawyers on the committees are more likely to know, appreciate, and even, perhaps, feel obligated to people in their same line of work. As a result, judicial nominations reflect the lack of professional diversity among the nominators.

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A. Diversity among Obama and Trump Federal Judicial Nominees

Our analysis digs deeper into the professional background of federal judicial nominees nominated to the district and circuit courts under President Obama and President Trump.[11] Instead of looking only at the one job held immediately before their appointment to the federal bench or the one job that comprised the majority of their career, we compiled data on all previous jobs that judicial nominees had held in which they were either promoted to a certain level (such as partner in a firm) or worked for a certain amount of time (such as three years). Obviously there will be significant overlap between our measures of professional background and previous studies' measures, but compiling data on all important jobs held by a judicial nominee will, for some judges, provide a more comprehensive view of their career experience.

> **... we compiled data on all previous jobs that judicial nominees had held in which they were either promoted to a certain level (such as partner in a firm) or worked for a certain amount of time (such as three years).**

1. Demographic and Educational Diversity

We collected data on all judicial nominees for a U.S. District Court or a U.S. Circuit Court during either the Obama or the Trump administration. From the Federal Judicial Center, we collected information on each nominee's gender, race, age, and JD-granting law school. Table 1 shows a significant difference in the demographic diversity among federal judges nominated during the Trump administration compared to the Obama administration. In fact, President Trump nominated no Black judges to the circuit courts during our sample period.

Table 1: Demographic and Educational Diversity among Federal Judicial Nominees

	Obama nominees for U.S. District Courts	Obama nominees for U.S. Circuit Courts	Trump nominees for U.S. District Courts	Trump nominees for U.S. Circuit Courts
Gender				
% Female	42.0%	44.9%	26.9%	18.5%
% Male	58.0%	55.1%	73.1%	81.5%
Race				
% Asian	5.4%	8.7%	5.7%	11.1%
% Black	20.7%	18.8%	6.7%	0.0%
% Latino/a	10.5%	7.3%	3.6%	1.9%
% White	62.1%	65.2%	83.4%	87.0%
% Other	1.3%	0.0%	0.5%	0.0%
Age				
Average age at nomination	51.4	52.5	50.5	47.7
Law School				
% attending T-14 law schools	37.3%	52.2%	25.9%	70.4%

2. *Professional Diversity*

We also collected data on the career histories from the Senate Judiciary Committee's Questionnaires for Judicial Nominees.[12] We coded for whether each nominee had previously served as a federal or state judge, for how long, and for which court. We also collected information on whether the nominee had made partner in an Am Law 100 firm, Am Law 200 firm, or in one of the largest firms in the state. In addition, we coded for whether the nominee had worked for at least 3 years as an attorney for a Fortune 500 company, as an attorney for any company or association working in the largest industry in the state, as a prosecutor, as a public defender, as a legal aid lawyer, or as a government lawyer.[13] Finally, we read each nominee's description of the general character of their legal practice and clients and coded for whether the nominee had significant experience representing companies in corporate, commercial, or business matters.

Table 2 reports the professional background of Obama and Trump nominees to the district and circuit courts. Note these categories are not mutually exclusive; a nominee could have worked for three years as a federal prosecutor, then become a partner in an Am Law 100 firm, and then served as a federal magistrate or district court judge. Many career paths are common among both Obama and Trump appointees. Regardless of appointing President or level of court, at least one-third of the nominees had served as federal prosecutors for at least three years. Previous service in the federal judiciary, previous service as a state judge, and previous work as a government lawyer for at least three years are also common jobs among the nominees. However, other types of professional experience differ among the Obama and Trump nominees. Obama was more likely to nominate both federal and state public defenders and legal aid lawyers.

In contrast, no Trump nominees for the circuit courts had held one of these positions. Instead, Trump was more likely to nominate former partners in Am Law 100 firms and people indicating they had significant experience representing corporate clients.

"

Regardless of appointing President or level of court, at least one-third of the nominees had served as federal prosecutors for at least three years.

Table 2: Professional Diversity among Federal Judicial Nominees

	Obama nominees for U.S. District Courts	Obama nominees for U.S. Circuit Courts	Trump nominees for U.S. District Courts	Trump nominees for U.S. Circuit Courts
Previous Federal judicial service	18.5%	34.8%	16.6%	24.1%
Previous State judge	31.8%	24.6%	24.9%	22.2%
Partner in Am Law 100 firm	10.8%	11.6%	18.7%	22.2%
Partner in Am Law 101-200 firm	4.1%	11.6%	8.3%	7.4%
Partner in largest state firms	5.1%	7.2%	5.7%	7.4%
At least 3 years as: Federal Prosecutor	35.4%	36.2%	36.3%	33.3%
At least 3 years as: State Prosecutor	15.9%	10.1%	17.1%	1.9%
At least 3 years as: Federal Public Defender	7.0%	2.9%	2.1%	0.0%
At least 3 years as: State Public Defender	5.4%	2.9%	2.1%	0.0%
At least 3 years as: Legal Aid Lawyer	1.0%	2.9%	0.0%	0.0%
At least 3 years as: Government Lawyer	18.2%	33.3%	16.6%	42.6%
Attorney for Fortune 500 company	1.0%	1.4%	3.6%	0.0%
Attorney for Largest State Industries	1.6%	1.4%	4.1%	5.6%
Significant experience representing corporations	39.2%	46.4%	55.4%	55.4%

When compared to the overall legal profession, which represents the pool of potential nominees, certain types of professional experience are disproportionately represented among both Presidents' judicial nominees. For example, current data shows that 4.2 percent of current practicing lawyers in the United States are partners at Am Law 200 firms (the 200 largest firms in America).[14] In contrast, former partners in Am Law 200 firms made up 15 percent of Obama's district court nominees and over 22 percent of his nominees to the circuit courts. This means that Obama's judicial nominees were comprised of between 3.6 - 5.2 times more Am Law 200 partners than if they reflected the overall lawyer population. Among Trump's judicial nominees, Am Law 200 partners made up almost 25 percent of those nominated to the district courts and almost 30 percent of those nominated to circuit courts. This means that Trump nominated Am Law 200 partners between 6 - 7 times more than if they were proportionately represented.

Similarly, roughly three percent of current practicing lawyers are serving as federal or state prosecutors.[15] In contrast, about 45 percent of Obama's nominees to the district courts and 38 percent of his nominees to the circuit courts had served as state or federal prosecutors for at least three years. Among Trump's nominees, 49 percent of district court nominees and 33 percent of circuit court nominees had served as state or federal prosecutors. Although the data on the number of current prosecutors doesn't include people who were prosecutors in the past for at least three years, it nevertheless shows that the nomination of prosecutors to the federal judiciary is very disproportionate relative to their prevalence in the legal profession as a whole.

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3.   *Race and Gender Breakdown among Different Professional Backgrounds*

There is a significant relationship between professional diversity and demographic diversity. Across the legal profession, certain demographic groups are disproportionately represented in different practice settings. For example, according to data from the American Bar Foundation, over 50 percent of White lawyers work in private practice, but only 35 percent of Black lawyers work in this setting.[16] In contrast, whereas less than 27 percent of White lawyers work in government and public service legal jobs, approximately 42 percent of Black lawyers work in these areas. Gender representation also varies by practice setting. While 52 of men work in private practice, only 45 percent of women do. In contrast, 33 percent of women work in government and public service settings, but less than 24 percent of men hold these jobs.

Unsurprisingly, similar patterns emerge in the federal judiciary. For example, approximately 70 percent of male judges in federal appellate courts were from private practice, whereas less than half of the women of color in the courts were from private practice.[17] In our analysis of the federal judicial nominees of Presidents Obama and Trump, we note that certain professional backgrounds tend to be strongly correlated with different degrees of racial diversity. As Figure 1 and Appendix Tables 1 and 2 report, among President Obama's judicial nominees, there tend to be more people of color among nominees that had served as state court judges or as state or federal public defenders; 48 percent of prior state court judges are non-white and 67 percent of prior public defenders are non-white. In contrast, only 41 percent of former state or federal prosecutors are non-white and 33 percent of nominees with a corporate background are non-white.[18] As Figure 2 and Appendix Tables 3 and 4 report, President Trump's judicial nominees are significantly less racially diverse than President Obama's. However, there are more people of color among President Trump's nominees that had served as state court judges compared to his nominees who had corporate backgrounds.

> **... whereas less than 27 percent of White lawyers work in government and public service legal jobs, approximately 42 percent of Black lawyers work in these areas.**

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Figure 1: Racial Diversity and Professional Background: Obama Appointees

White   Latino/a   Black   Asian   Other

State or Federal Prosecutor
1% 8%
23%
9%
59%

Corporate Background
0.6% 7.4%
18.2%
7.4%
66.5%

State Court Judge
0.9% 3.4%
29.1%
14.5%
52.1%

State or Federal Public Defender
2.5% 2.5%
37.5%
25.0%
32.5%
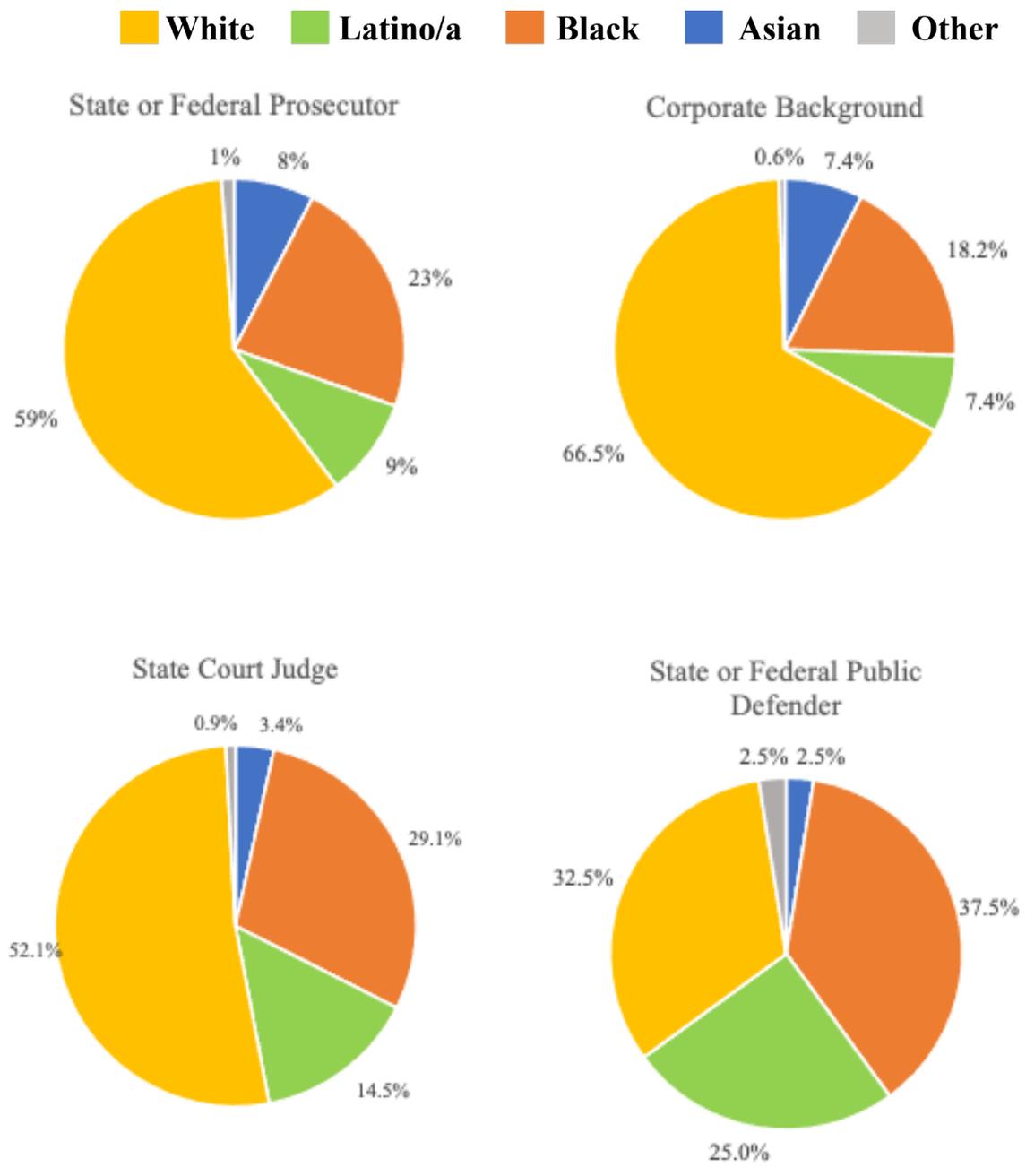
Figure 2: Racial Diversity and Professional Background: Trump Appointees

🟨 **White** 🟩 **Latino/a** 🟧 **Black** 🟦 **Asian** ⬜ **Other**

State or Federal Prosecutor

0.9% 8.9%
7.1%
5.4%
77.7%

Corporate Background

5.9% 2.0%
4.6%
87.5%

State Court Judge

5.0%
11.7%
5.0%
78.3%

State or Federal Public Defenders
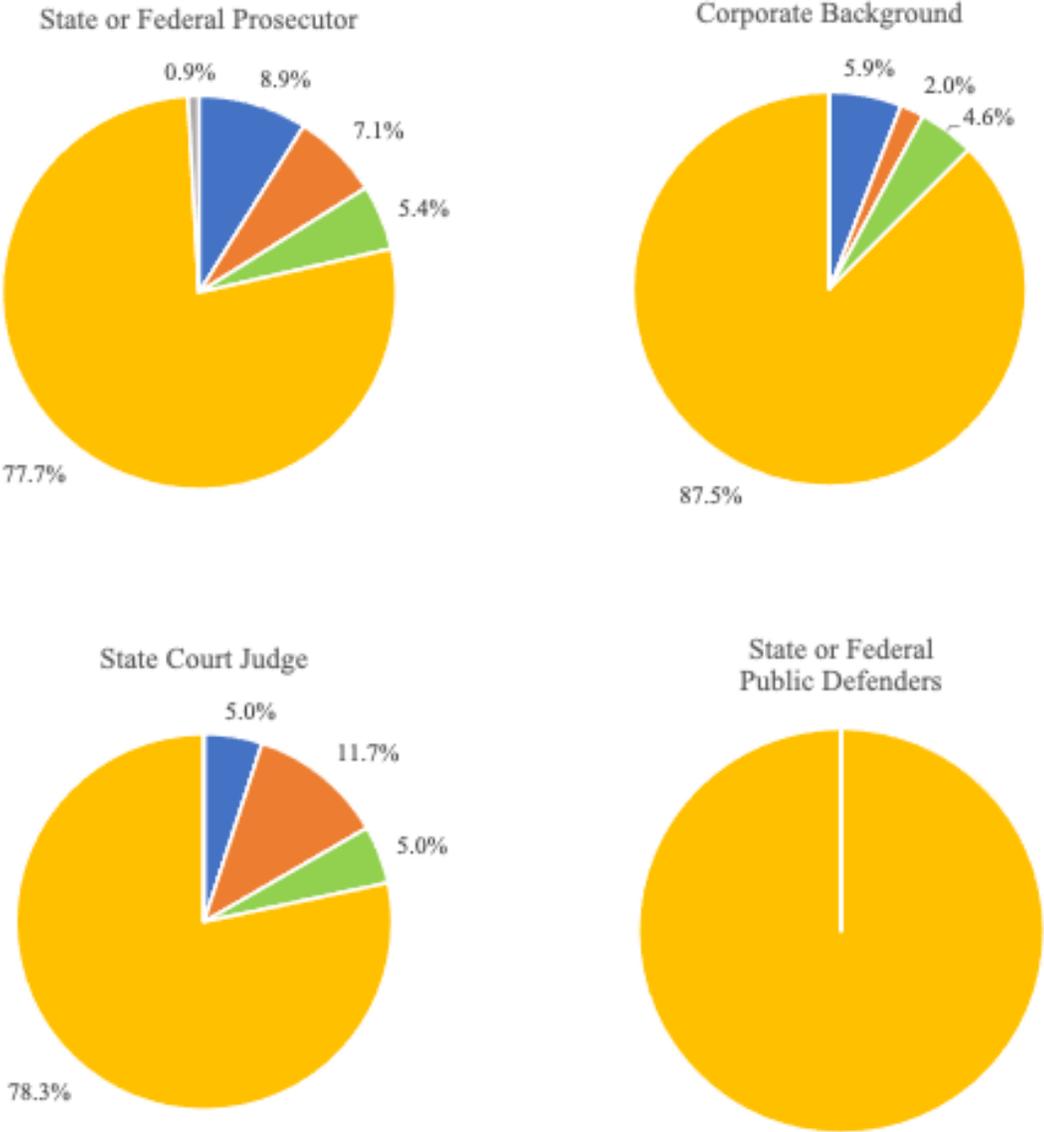
III. Consequences of a Lack of Professional Diversity Among Federal Judicial Nominees

The lack of professional diversity among federal judges is more than just an interesting observation. It has real consequences for both the public's trust in the judiciary and for actual case outcomes.

A. Impact on public trust in the judiciary

The public generally perceives the courts and their decisions as more legitimate when judges share characteristics with the broader U.S. population.[19] A judiciary that looks like the broader populace is assumed to possess the diversity of experiences, values, and viewpoints necessary to ensure that judicial decisions reflect a broad range of perspectives.[20]

As Supreme Court Justice Elena Kagan explained, "People look at an institution and they see people who are like them, who share their experiences, who they imagine share their set of values, and that's a sort of natural thing and they feel more comfortable if that occurs."[21]

Just as diversity among judges' demographic characteristics can affect the institutional legitimacy of the courts, so too can diversity among judges' professional backgrounds. Judges from different areas of legal practice have different experiences, expertise, and skills that are perceived to impact the perspectives they bring to the bench. A judge's professional backgrounds affects the way he or she considers the interests and perspectives of different litigants and legal issues. Thus, a federal judiciary that reflects the diversity of the legal profession will improve the public's belief that the judges and their decisions represent a broad set of viewpoints rather than one or two dominant perspectives.

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Moreover, the professional diversity of the judiciary is linked to its demographic diversity. Studies show that there is a strong correlation between race, gender, and professional experience. For example, our analysis of Obama and Trump judicial nominees shows that there tends to be more racial diversity among prior state court judges and public defenders than among prior prosecutors and lawyers with a corporate background. Thus, expanding the professional diversity of the bench could directly and indirectly increase the courts' legitimacy both by broadening the range of judges' professional backgrounds and by creating a judiciary that looks more like the public it serves.

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B. Impact on judicial decisions

Professional diversity not only affects the public's perception of the courts, it also impacts actual judicial decisions and case outcomes. It isn't surprising that judges' perspectives would be significantly shaped by their professional experiences. Over the course of their careers, lawyers learn the laws, regulations, precedents, and legal philosophy relevant to their area of practice. They also come to understand more intangible lessons about litigants, legal arguments, and the perspectives of the clients for which they advocate. Thus, lawyers from different areas of practice will inevitably have different perspectives that represent their experience and expertise. If selected for the bench, the different perspectives and expertise gained in their legal work up to that point will inevitably exert some influence on a judge's determination of which legal claims are plausible, which legal arguments are convincing, which witnesses are credible, and which behavior is reasonable. As Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia Circuit explained, it is "inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them." [22]

> **"[It is] inevitable that judges' different professional and life experiences have some bearing on how they confront various problems that come before them."**
>
> *- Judge Harry Edwards, U.S. Court of Appeals for the District of Columbia*

Empirical studies confirm that professional background can impact judicial decisions and case outcomes. For example, studies have shown that judges who have worked as former prosecutors are more likely to vote against defendants,[23] more likely to side with plaintiffs and find intent in racial equal protection claims,[24] and more likely to favor the U.S. Sentencing Guidelines established in 1988.[25] Unfortunately, most of the focus on the impact of professional background has been limited to prosecutorial experience, so there is a dearth of empirical evidence showing that other career experiences also influence judicial decisions.

Yet, intuition suggests that experience in non-prosecutorial positions also affects how judges view the facts and interpret and apply the law. For example, judges who spent much of their legal career advancing business interests may be more likely to continue to favor, whether consciously or subconsciously, the interests of businesses once they are on the bench. Similarly, judges that spent their legal careers representing disadvantaged

groups or aggrieved individuals, whether as a legal aid lawyer, public defender, or in some other capacity, might carry the experience and insights they gained to the bench. As Supreme Court Justice Sandra Day O'Connor explained about Justice Thurgood Marshall[26] :

> *Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection.*

Moreover, the demographic makeup of certain professions could also contribute to the relationship between professional background and judicial decisions. As previously discussed, career experience among federal judges is highly correlated with judges' gender and race. And a much larger body of empirical literature has found a significant relationship between judges' gender and race and their decisions in certain types of cases. For example, empirical studies have found that female judges are more likely to support plaintiffs in sex

discrimination cases,[27] sexual harassment cases,[28] and employment discrimination cases, and more likely to rule that laws or acts violate the constitutional rights of people identifying as LGBTQ.[30] Similarly, Black judges are more likely to support plaintiffs in racial harassment cases,[31] support criminal defendants alleging violations of their Fourth Amendment rights,[32] and rule in favor of affirmative action cases.[33] Because there are fewer people of color among judges with corporate backgrounds or who had previously served as prosecutors, we would expect to see different voting patterns from these judges across a wide range of cases.

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C.   Empirical analysis

To further investigate the impact of professional background on judicial decisions, we collected data on the decisions of U.S. District Court judges appointed by President Obama and President Trump in employment litigation over the five-year period from January 1, 2015 – December 21, 2019.[34] We examine judicial decisions in district court cases rather than circuit court cases because an individual judge's decision in district court is not influenced by a trial court record or by the action of a multimember appellate panel. We restricted our search to cases that were resolved through summary judgment (SJ), judgments on the pleadings (JOP), or judgments as a matter of law (JMOL) to focus on cases resolved through the judges' discretionary judgment without input from a jury. Thus, we eliminated cases resolved through settlement, for procedural reasons, or through trial, the majority of which are jury trials. We also restricted our data to U.S. District Court judges who decided at least three employment cases.

The claimants in our sample of employment cases are overwhelming individuals pursing claims against an employer. Beyond individual claimants, there are also a handful of cases brought by the Equal Employment Opportunity Commission (EEOC) or the Secretary of the Department of Labor on behalf of claimants. Several different legal claims are at issue in the employment cases we investigated. Although the majority of cases involve contractual claims or wrongful termination, other cases involved discrimination claims under Title VII on the basis of race, religion, national origin, and sex/gender, age discrimination claims under the ADEA, or disability discrimination claims under the ADA. Appendix Table 5 details the prevalence of these discrimination-related claims among the cases.

> **The claimants in our sample of employment cases are overwhelming individuals pursing claims against an employer.**

We explore the relationship between judicial decisions in these employment cases and different types of professional backgrounds. We identify a judge as having a "Corporate Background" if he/she made partner in an Am Law 100 or Am Law 200 firm, made partner in one of the largest firms in the state, worked as an attorney for a Fortune 500 company for at least 3 years, worked as an attorney for any company or association working in the largest industry in the state for at least 3 years, or otherwise indicated that representing corporations was a significant part of his/her practice. As shown in Table 3, the distribution of judges with this background varies significantly between the judges appointed by President Obama and the judges appointed by President Trump.

Table 3: Percentage of District Court Judicial Nominees with Corporate Background

	% of Obama District Court Nominees	% of Trump District Court Nominees
Partner Am Law 100	10.8%	18.7%
Partner Am Law 101-200	4.1%	8.3%
Partner in largest state firms	5.1%	5.7%
Attorney for 3 or more years in Fortune 500 company	1.0%	3.6%
Attorney for 3 or more years in largest state industry	1.6%	4.1%
Significant experience representing corporations	39.2%	55.4%
Any indicator of Corporate Background	44.3%	58.5%

Because of the heightened legal standard, judges only rarely grant motions for summary judgment, judgment on the pleadings, or judgment as a matter of law. Even more rarely do judges decide for claimants when granting these motions. In fact, in our sample of employment cases, judges grant just under three percent of summary judgment motions, motions for judgment on the pleadings, or motions for judgment as a matter of law in favor of the claimants. Nevertheless, as shown in Figures 3 and 4, we find that the judges without corporate or prosecutorial backgrounds grant slightly more of these motions in favor of the claimant than do judges with corporate or prosecutorial backgrounds. In addition, when we limit the cases to only those cases decided by judges appointed by President Obama, we find the same pattern. Thus, regardless of political ideology as reflected by the appointing president, former prosecutors and lawyers with a corporate background are less likely to rule in favor of claimants—individual employees or the EEOC or Department of Labor on behalf of employees—than are judges without these backgrounds.

> **Thus, regardless of political ideology as reflected by the appointing president, former prosecutors and lawyers with a corporate background are less likely to rule in favor of claimants—individual employees or the EEOC or Department of Labor on behalf of employees—than are judges without these backgrounds.**

**Figure 3: Decisions in Favor of Claimants, by Corporate Background**
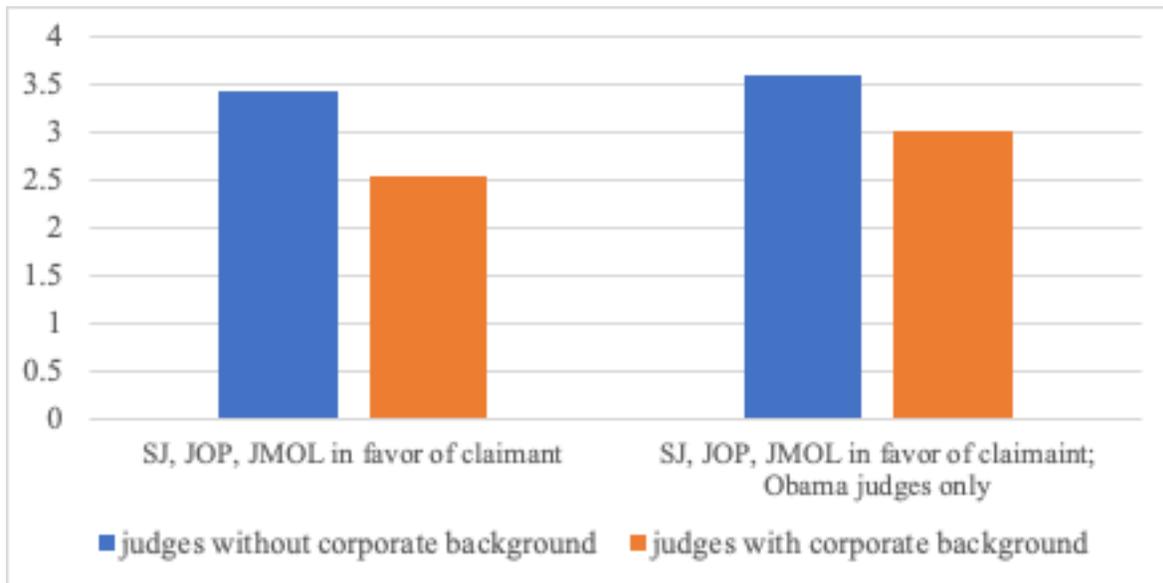
Figure 4: Decisions in Favor of Claimants, by Prosecutorial Background
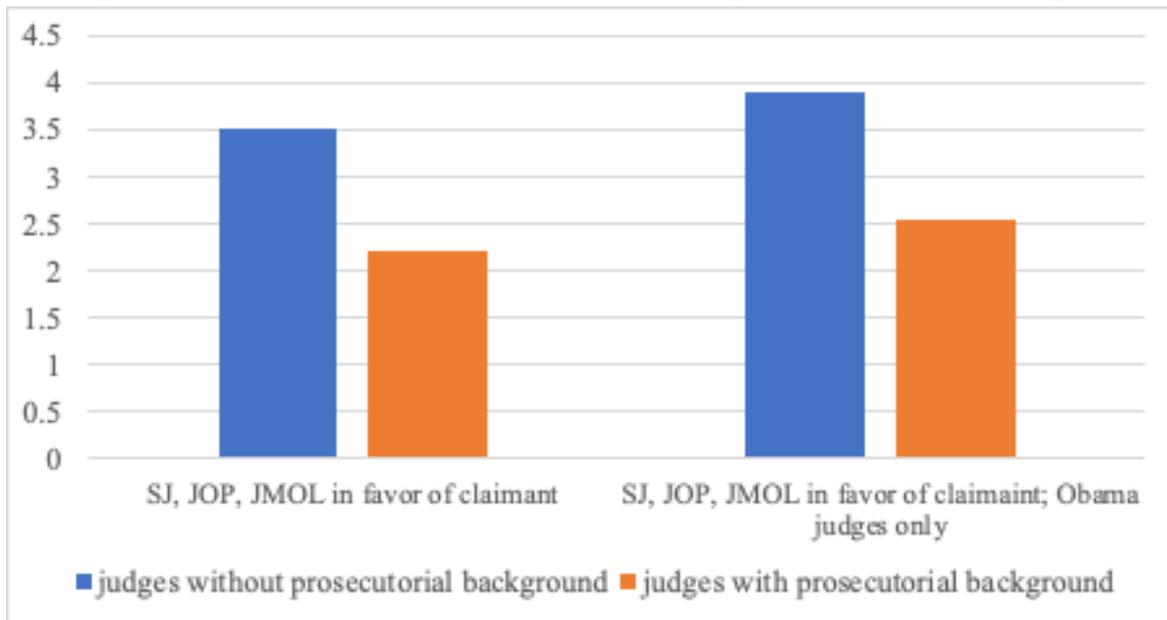
However, differences in pro-claimant decisions could be explained by a variety of factors. Thus, we perform a series of regression analyses to isolate the influence of prosecutorial and corporate background from other variables that may influence how judges decide employment cases. To control for other influences in our regression analyses, we include as control variables various demographic measures (gender, race, and age indicators), information on the judges' law school and careers (whether they attended a top-14 law school and had worked as a public defender, prior judge, legal aid lawyer, or government lawyer), and the number of employment cases they heard during our sample period. The regression also includes state-specific indicator variables to control for state-specific factors such as the general political environment in a state or the underlying state law concerning contractual and labor issues.

Table 4 reports the regression results.[35] We present both the coefficient and the z-value associated with each coefficient. For simplicity we include a "*" to indicate statistical significance at the .05 level and a "+" to indicate statistical significance at the .10 level.[36]

The regression results show that, even when controlling for a variety of influences on judicial decision-making, there is a statistically significant relationship between a judge's corporate background or prosecutorial experience and whether he/she votes in favor of the claimant in employment cases. Transforming the coefficients on corporate and prosecutorial background to odds ratios reveals the magnitude of the relationship between these professional backgrounds and judges' pro-claimant decisions.

The results show that a judge with a corporate background is 43 percent less likely to decide in favor of the claimant in employment cases than is a judge with no corporate background. A judge with a prosecutorial background is 56 percent less likely to decide in favor of the claimant in employment cases than non-prosecutors.

Moreover, when we restrict the sample to judges appointed by President Obama, the results continue to hold. Transforming the coefficients to odds ratios reveals that Obama judges with corporate backgrounds are 36 percent less likely to decide in favor of the claimant in employment cases than are Obama judges with no corporate background. Similarly, former prosecutors appointed by Obama are 50 percent less likely to decide in favor of claimants in employment cases than are non-prosecutors. These results show that, even when controlling for political ideology as proxied by the appointing president, prosecutorial and corporate backgrounds have a statistically significant relationship with judicial decisions in employment cases.

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Table 4: Regression results

Variable	SJ, JOP, JMOL in favor of claimant	SJ, JOP, JMOL in favor of claimaint; Obama judges
Corporate Background	-0.57* (2.19)	-0.45+ (1.81)
Former Prosecutor	-0.82* (3.69)	-0.68* (3.11)
Male	0.14 (0.54)	-0.02 (0.10)
White	0.27 (1.16)	0.20 (0.87)
Age of Judge	0.001 (0.04)	0.005 (0.23)
Judge attended top-14 law school	0.35 (1.37)	0.28 (1.05)
Former Public Defender	-0.10 (0.23)	-0.14 (0.30)
Previous Judge	0.31 (1.09)	0.14 (0.54)
Previous Legal Aid Lawyer	-0.31 (0.31)	-0.19 (0.18)
Previous Government Lawyer	-0.20 (0.55)	-0.15 (0.47)
Number of Cases Judge Heard during period	0.02+ (1.65)	-0.002 (0.16)
Number of judges analyzed	292	242
Number of employment cases analyzed	3,934	3,632

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IV.   IMPLICATIONS

While significant attention has been paid to the racial and gender diversity of the federal bench, the professional diversity of federal court judges has generally garnered less attention. However, professional diversity is important both to maintaining the institutional legitimacy of the courts and to ensuring that judicial decisions do not disproportionately reflect a single, dominant perspective.

Over the course of their careers, lawyers learn the laws, regulations, precedents, and legal philosophy relevant to their area of practice, along with more intangible lessons about litigants, legal arguments, and the perspectives of the clients for which they advocate. If selected for the bench, the different perspectives and expertise gained in their legal work up to that point will influence how judges interpret and apply the law.

Moreover, the different demographic makeup of different professions can also contribute to the relationship between professional background and judicial decisions. For example, there tends to be more racial diversity among federal judges that were prior state court judges or public defenders than among prior prosecutors or lawyers with a corporate background. As several empirical studies have found a significant relationship between judges' gender and race and their decisions in certain types of cases, the different demographic makeup of judges with different professional backgrounds may also result in distinctive voting patterns.

In this study, we explore the professional diversity of nominees to the U.S. District Courts and U.S. Circuit Courts under Presidents Obama and Trump. Two types of professional backgrounds—a corporate background and prosecutorial background—are disproportionately represented among both Presidents' judicial nominees. We investigate the consequences of this disproportionate representation by performing a series of analyses to test the relationship between the judges' professional backgrounds and their likelihood of deciding in favor of claimants in employment cases. As claimants in trial-level employment cases are typically individual employees or representatives of employees bringing claims against employers, these analyses show whether certain types of career experiences are associated with judges favoring individuals over corporations, or vice versa.

Our analyses, including regression results, reveal that judges that worked as state or federal prosecutor and judges with corporate backgrounds are less likely to decide employment cases in favor of claimants. The results are statistically significant, even after controlling for a variety of other influences on judges' decisions. Moreover, the results hold when analyzing only judges appointed by President Obama, meaning that, regardless of political ideology, corporate and prosecutorial background are related to decisions in favor of employers over employees.

It is impossible to know what the "right" outcome is in these cases, so we don't conclude that prior prosecutors or judges with corporate backgrounds came to the "wrong" decision. Nevertheless, these judges are more likely to decide motions for summary judgment, motions for judgment on the pleadings, and motions for judgment as a matter of law in favor of employers over individual employees. The results for judges with a corporate background are not surprising; judges who spent much of their legal career advancing business interests may be more likely to continue to favor, whether consciously or subconsciously, the interests of businesses once they reach the bench. The results for judges that had served as state or federal prosecutors suggest that prosecutors practice in an area of law that tends to be pro-institution (i.e. pro-state) and this pro-institutional perspective continues to be reflected in their judicial decisions as pro-employer decisions.

> **Our analyses, including regression results, reveal that judges that worked as state or federal prosecutor and judges with corporate backgrounds are less likely to decide employment cases in favor of claimants.**

Although we only analyze the decisions of U.S. District Court judges to isolate the relationship between professional background and an individual judge's decisions, professional background likely has a similar impact on the decisions of U.S. Circuit Court judges and even U.S. Supreme Court judges. In fact, even though appellate decisions are made by a panel of judges instead of an individual judge, research shows that the predispositions of one judge on a multi-member panel can influence the viewpoints of the other judges and, ultimately, impact case outcomes. For example, studies of the federal Circuit Courts show that a single panelist of a different gender,[37] race,[38] or political ideology[39] can affect the viewpoints of the other judges on the panel and lead to different panel decisions. Similarly, we expect that an individual judge's professional background can influence the perspectives of other judges on the panel, ultimately leading to different appellate decisions.

Our results suggest that expanding the professional diversity of the federal judiciary will do more than just create a judiciary that is more representative of the legal profession. It can affect actual case outcomes and, as a result, the development of legal precedent. Moreover, because certain demographic groups are disproportionately represented in different areas of the legal profession, expanding professional diversity should result in more demographic diversity as well.

> **Our results suggest that expanding the professional diversity of the federal judiciary will do more than just create a judiciary that is more representative of the legal profession. It can affect actual case outcomes and, as a result, the development of legal precedent.**

Appendix

Table 1. Obama Nominees to the U.S. District Courts

	Total number of nominees with career experience	Percentage of Nominees that are:						
		Female	Male	Asian	Black	Latino/a	White	Other
Previous Federal judicial service	58	46.6%	53.4%	3.4%	13.8%	12.1%	70.7%	0.0%
Previous State judge	100	41.0%	59.0%	2.0%	28.0%	16.0%	53.0%	1.0%
Partner Am Law 100	34	35.3%	64.7%	5.9%	26.5%	8.8%	58.8%	0.0%
Partner Am Law 200	13	38.5%	61.5%	0.0%	23.1%	7.7%	69.2%	0.0%
Partner in largest state firms	16	50.0%	50.0%	12.5%	31.3%	0.0%	56.3%	0.0%
Federal Prosecutor	111	47.7%	52.3%	8.1%	21.6%	9.0%	59.5%	1.8%
State Prosecutor	50	38.0%	62.0%	2.0%	34.0%	8.0%	56.0%	0.0%
Federal Public Defender	22	45.5%	54.5%	0.0%	40.9%	22.7%	36.4%	0.0%
State Public Defender	17	23.5%	76.5%	5.9%	35.3%	29.4%	23.5%	5.9%
Legal Aid Lawyer	3	0.0%	100.0%	0.0%	33.3%	33.3%	33.3%	0.0%
Government Lawyer	57	40.4%	59.6%	7.0%	26.3%	10.5%	52.6%	3.5%
Attorney for 3 or more years in Fortune 500 company	3	66.7%	33.3%	0.0%	33.3%	0.0%	66.7%	0.0%
Attorney for 3 or more years in largest state industry	5	40.0%	60.0%	0.0%	20.0%	0.0%	60.0%	20.0%
Significant experience representing corporations	123	44.7%	55.3%	7.3%	19.5%	8.9%	64.2%	0.0%

Table 1. Obama Nominees to the U.S. District Courts

	Total number of nominees with career experience	Percentage of Nominees that are:						
		Female	Male	Asian	Black	Latino/a	White	Other
Previous Federal judicial service	24	37.5%	62.5%	12.5%	20.8%	12.5%	54.2%	0.0%
Previous State judge	17	58.8%	41.2%	11.8%	35.3%	5.9%	47.1%	0.0%
Partner Am Law 100	8	37.5%	62.5%	12.5%	12.5%	0.0%	75.0%	0.0%
Partner Am Law 200	8	37.5%	62.5%	0.0%	37.5%	12.5%	50.0%	0.0%
Partner in largest state firms	5	60.0%	40.0%	20.0%	20.0%	0.0%	60.0%	0.0%
Federal Prosecutor	25	48.0%	52.0%	12.0%	20.0%	8.0%	60.0%	0.0%
State Prosecutor	7	57.1%	42.9%	0.0%	14.3%	14.3%	71.4%	0.0%
Federal Public Defender	2	50.0%	50.0%	0.0%	0.0%	50.0%	50.0%	0.0%
State Public Defender	2	0.0%	100.0%	0.0%	50.0%	50.0%	0.0%	0.0%
Legal Aid Lawyer	2	0.0%	100.0%	0.0%	100.0%	0.0%	0.0%	0.0%
Government Lawyer	23	39.1%	60.9%	13.0%	17.4%	8.7%	60.9%	0.0%
Attorney for 3 or more years in Fortune 500 company	1	0.0%	100.0%	0.0%	100.0%	0.0%	0.0%	0.0%
Attorney for 3 or more years in largest state industry	1	100.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%
Significant experience representing corporations	32	46.9%	53.1%	9.4%	6.3%	6.3%	78.1%	0.0%

Table 3. Trump Nominees to U.S. District Courts

	Total number of nominees with career experience	Percentage of Nominees that are:						
		Female	Male	Asian	Black	Latino/a	White	Other
Previous Federal judicial service	58	46.6%	53.4%	3.4%	13.8%	12.1%	70.7%	0.0%
Previous State judge	100	41.0%	59.0%	2.0%	28.0%	16.0%	53.0%	1.0%
Partner Am Law 100	34	35.3%	64.7%	5.9%	26.5%	8.8%	58.8%	0.0%
Partner Am Law 200	13	38.5%	61.5%	0.0%	23.1%	7.7%	69.2%	0.0%
Partner in largest state firms	16	50.0%	50.0%	12.5%	31.3%	0.0%	56.3%	0.0%
Federal Prosecutor	111	47.7%	52.3%	8.1%	21.6%	9.0%	59.5%	1.8%
State Prosecutor	50	38.0%	62.0%	2.0%	34.0%	8.0%	56.0%	0.0%
Federal Public Defender	22	45.5%	54.5%	0.0%	40.9%	22.7%	36.4%	0.0%
State Public Defender	17	23.5%	76.5%	5.9%	35.3%	29.4%	23.5%	5.9%
Legal Aid Lawyer	3	0.0%	100.0%	0.0%	33.3%	33.3%	33.3%	0.0%
Government Lawyer	57	40.4%	59.6%	7.0%	26.3%	10.5%	52.6%	3.5%
Attorney for 3 or more years in Fortune 500 company	3	66.7%	33.3%	0.0%	33.3%	0.0%	66.7%	0.0%
Attorney for 3 or more years in largest state industry	5	40.0%	60.0%	0.0%	20.0%	0.0%	60.0%	20.0%
Significant experience representing corporations	123	44.7%	55.3%	7.3%	19.5%	8.9%	64.2%	0.0%

Table 4. Trump Nominees to U.S. Circuit Courts

🟨 **White**   🟩 **Latino/a**   🟧 **Black**   🟦 **Asian**   ⬜ **Other**

	Total number of nominees with career experience	Percentage of Nominees that are:						
		Female	Male	Asian	Black	Latino/a	White	Other
Previous Federal judicial service	13	15.4%	84.6%	7.7%	0.0%	0.0%	92.3%	0.0%
Previous State judge	12	50.0%	50.8%	0.0%	0.0%	8.3%	91.7%	0.0%
Partner Am Law 100	12	0.0%	100.0%	25.0%	0.0%	0.0%	75.0%	0.0%
Partner Am Law 200	4	25.0%	75.0%	0.0%	0.0%	0.0%	100.0%	0.0%
Partner in largest state firms	4	25.0%	75.0%	25.0%	0.0%	0.0%	75.0%	0.0%
Federal Prosecutor	18	16.7%	83.3%	11.1%	0.0%	5.6%	83.3%	0.0%
State Prosecutor	1	0.0%	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%
Federal Public Defender	0	-	-	-	-	-	-	-
State Public Defender	0	-	-	-	-	-	-	-
Legal Aid Lawyer	0	-	-	-	-	-	-	-
Government Lawyer	23	13.0%	87.0%	17.4%	0.0%	0.0%	82.6%	0.0%
Attorney for 3 or more years in Fortune 500 company	0	-	-	-	-	-	-	-
Attorney for 3 or more years in largest state industry	3	0.0%	100.0%	0.0%	0.0%	0.0%	100.0%	0.0%
Significant experience representing corporations	35	22.9%	77.1%	5.7%	0.0%	2.9%	91.4%	0.0%

Table 5. Discrimination-Related Claims in Employment Cases Studied

Legal Claim in Case	% of Cases with Claim
Title VII Discrimination Race/Color	12.66%
Title VII Discrimination Religion	1.50%
Title VII Discrimination National Origin	3.08%
Title VII Discrimination Sex/Gender	7.49%
ADEA Discrimination Age	7.46%
ADA Discrimination Disability	9.35%
PDA Discrimination Pregnancy	0.49%
1981/1983 Discrimination	5.48%
Equal Pay Act Discrimination	0.94%
Rehabilitation Act Discrimination	1.68%
USERRA Discrimination	0.20%
Hostile Work Environment / Harassment	10.84%
Retaliation	25.20%
Discrimination: Other Federal Statute	0.35%
Failure to Accommodate	5.84%
FMLA Violation	3.63%
Willfulness	0.45%
FLSA Violation	3.35%

Notes:

Institutional affiliation provided for identification purposes only

[1] Thomas Simmons Professor of Law; Emory University School of Law. This work was supported by Demand Justice.

[2] Demand Justice, *No More Corporate Lawyers* (2019), *available at*: https://demandjustice.org/no-more-corporate-judges/.

[3] Maggie Jo Buchanan, Center for American Progress, *The Startling Lack of Professional Diversity Among Federal Judges* (June 17, 2020), *available at*: https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/ ; Maggie Jo Buchanan, Center for American Progress, *Pipelines to Power: Encouraging Professional Diversity on the Federal Appellate Bench* (August 13, 2020), *available at*: https://www.americanprogress.org/issues/courts/reports/2020/08/13/489312/pipelines-power-encouraging-professional-diversity-federal-appellate-bench/

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[9] Nancy Scherer, *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process* 18-19, 79 (2005).

[10] Emma Steiner and Matt Bruenig, People's Policy Project, *Democrats Need to Nominate Better Judges* (July 23, 2020), *available at*: https://www.peoplespolicyproject.org/projects/nominate-better-judges/

[11] We included judges nominated from January 2009 - June 2020.

[12] Committee on the Judiciary, *Judicial nominations* (January 2009 – June 2020), *available at:* https://www.judiciary.senate.gov/nominations/judicial. Note, in situations in which a nominee was nominated more than once for the same office by the same President, the nominee is only counted once in our data.

[13] We identified a government lawyer as any lawyer for an agency or branch of a state or local government.

[14] There are approximately 1.3 million practicing lawyers in the U.S. American Bar Association, *ABA Profile of the Legal Profession 2020*, 2 (2020), *available at:* https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf. Yet there are 53,983 partners at Am Law 200 firms. ALM Intelligence, *The Am Law 200 Data* (2020), *available at*: https://www.alm.com/intelligence/?s=am+law+200.

[15] Data on the number of state and federal prosecutors is not collected regularly. The most recent survey of state prosecutors reports that there were about 34,000 state prosecutors in 2007. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 – Statistical Tables,* NCJ 234211 Table 2 (2011), *available at:* https://www.bjs.gov/content/pub/pdf/psc07st.pdf. The most recent report on federal prosecutors reports that there were roughly 5,800 prosecutors in the 93 U.S. Attorneys' Offices in 2008. Office of the Inspector General, U.S. Department of Justice, *Audit Report 09-03, Resource Management of the United States Attorneys' Offices* 1 (2008), *available at:* http://www.usdoj.gov/oig/reports/EOUSA/a0903/final.pdf. Roughly 40,000 prosecutors represents just over three percent of the 1.3 million practicing attorneys in the U.S.

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[17] Maggie Jo Buchanan, Center for American Progress, *The Startling Lack of Professional Diversity Among Federal Judges* (June 17, 2020), *available at*: https://www.americanprogress.org/issues/courts/news/2020/06/17/486366/startling-lack-professional-diversity-among-federal-judges/

[18] As explained in more detail later, we define a judge as having a "Corporate Background" if he/she made partner in an Am Law 100 or Am Law101-200 firm, made partner in one of the largest firms in the state, worked as an attorney for a Fortune 500 company for at least 3 years, worked as an attorney for any company or association working in the largest industry in the state for at least 3 years, or otherwise indicated that representing corporations was a significant part of his/her practice.

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[28] Sean Farhang and Gregory Wawro, *Indirect Influences of Gender on the U.S. Courts of Appeals: Evidence from Sexual Harassment Law* (U.C. Berkeley working paper 2010), *available at*: http://www.columbia.edu/~gjw10/FarhangWawroIndirectEffectsMay2010.pdf.

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[32] Nancy Scherer, *Diversifying the federal bench: Is universal legitimacy for the U.S. justice system possible?,* 105 NORTHWESTERN UNIVERSITY LAW REVIEW 587 (2011).

[33] Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AMERICAN JOURNAL OF POLITICAL SCIENCE 167 (2013).

[34] The data was compiled from LexMachina, which collects, cleans, codes, and tags all federal cases appearing in PACER (https://lexmachina.com/how-it-works/).

[35] For the regression model, we use a generalized linear model to allow for the binomial distribution of the proportion of claimant wins.

[36] The z-value for each variable indicates whether there is sufficient evidence in the data to conclude that the variable has a relationship with judges' decisions. A statistically significant coefficient indicates that there is strong evidence that the variable has a relationship, whereas a statistically insignificant coefficient indicates that the evidence is not strong enough to conclude that there is a meaningful relationship between the variable and judges' decisions.

[37] Christina L. Boyd, Lee Epstein, and Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AMERICAN JOURNAL OF POLITICAL SCIENCE 389 (2010).

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