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The Changing Face of the Federal Judiciary

Russell Wheeler

EXECUTIVE SUMMARY

Justice Sonia Sotomayor’s appointment to the United States Supreme Court highlights attention again on the Court’s demographic makeup. She is the first Hispanic member and third woman. There have been two African-American appointees.

The rest of the federal judiciary is also changing demographically. Sotomayor has been part of three trends since the 1950s—an increase in the proportion of women and in members of racial and ethnic minorities and a decrease in the proportion of district judges appointed, as was she, from among private lawyers.

This paper lays out some basic data on these changes,* as we await the confirmation of President Obama’s initial nominees to the lower federal courts. The paper does not engage the debate—illustrated by the controversy over Sotomayor’s “wise Latina women” remark—over how much judges’ backgrounds do or should influence their decision-making. Nor does it postulate a proper proportion of various demographic groups on the federal bench. That matter is tied up with the proportion of members of those groups in the relatively small pool of lawyers whom judicial selectors consider professionally qualified for appointment to the federal bench—hardly a precise definition—and who fit within the varying political party calculi that influence federal judicial recruitment.

Changes in the Demographic Makeup of the U.S. Courts of Appeals and District Courts

Table 1 shows the aggregate numbers of judges serving in early August on the 13 court of appeals and 91 district courts in active status and in “senior” status, and the percentages of those judges who are white, African-American and Hispanic men and women. (Judges become eligible for senior status when they are at least 65 years of age and have a specified number of years in office. Most senior judges do some judicial work, but not many carry a full calendar.)

Table 1 - Composition of the Federal Judiciary, as of August 11, 2009 (in %)

COURT OF APPEALS	White		African American		Hispanic	
	Men	Women	Men	Women	Men	Women
Active (161)	61%	24%	6%	3%	6%	1%
Senior (108)	85%	8%	3%	1%	2%	0%
All (269)	71%	17%	4%	2%	4%	1%
DISTRICT COURTS						
Active (607)	59%	20%	9%	3%	5%	3%
Senior (392)	86%	6%	4%	1%	3%	0%
All (999)	69%	15%	7%	2%	4%	2%
ALL JUDGES						
Active (768)	59%	21%	8%	3%	5%	2%
Senior (500)	86%	7%	3%	1%	2%	0%
All (1,268)	70%	15%	6%	2%	4%	1%

The table shows, for example, that in early August 2009, of the 161 active judges on the courts of appeals, 61 percent were white men (versus 66 percent of the Supreme Court) and one percent were Hispanic women (two judges, with Sotomayor’s elevation). Appendix table 1 shows the number of judges as well as the percentages (and reports the small numbers of Asian-Americans and Native Americans).

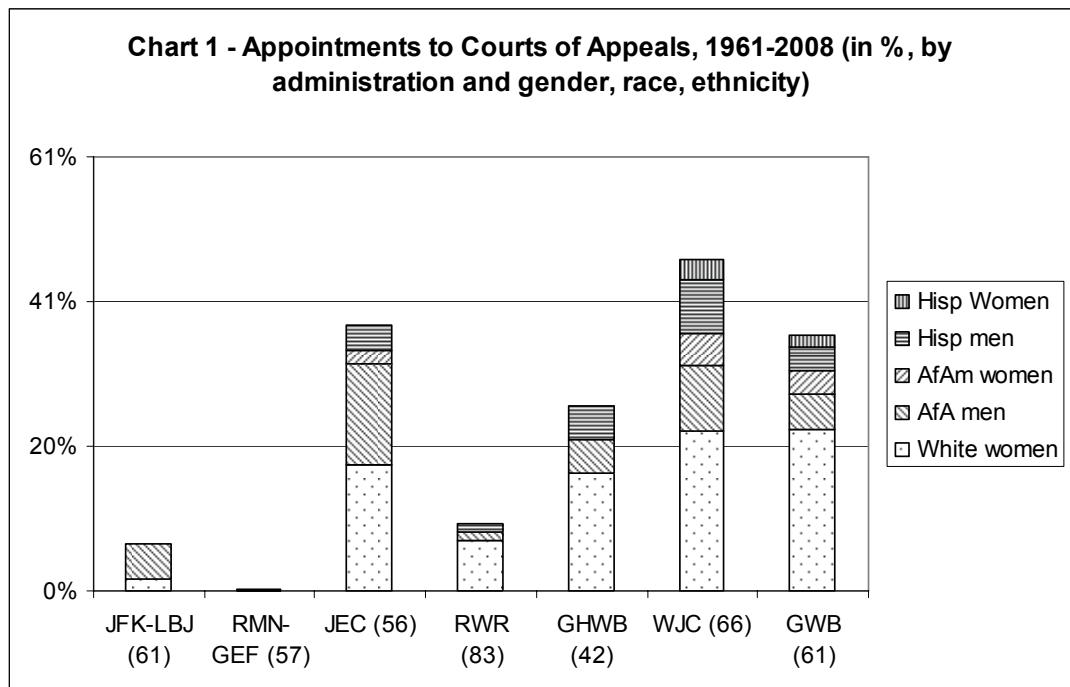
Differences Over Time: Appointments Since 1953

In each category in Table 1, the proportion of active women and minority judges is higher than among senior judges because recent appointees have included proportionately fewer white males. President Roosevelt appointed a woman to the courts of appeal, and President Truman appointed an African-American appellate judge and a female district judge. Slightly more non-white males appeared in the Kennedy-Johnson and Nixon-Ford administrations, as shown on the charts 1 and 2 and appendix tables 2 and 3.

Under President Carter, though, the demographic mix changed noticeably. He appointed the highest proportion of judges who are not white men of any president except President Clinton. Fourteen percent of President Carter’s appellate appointees were African-American males, which remains the largest proportion for any president, and he appointed the first two Hispanic court of appeals judges.

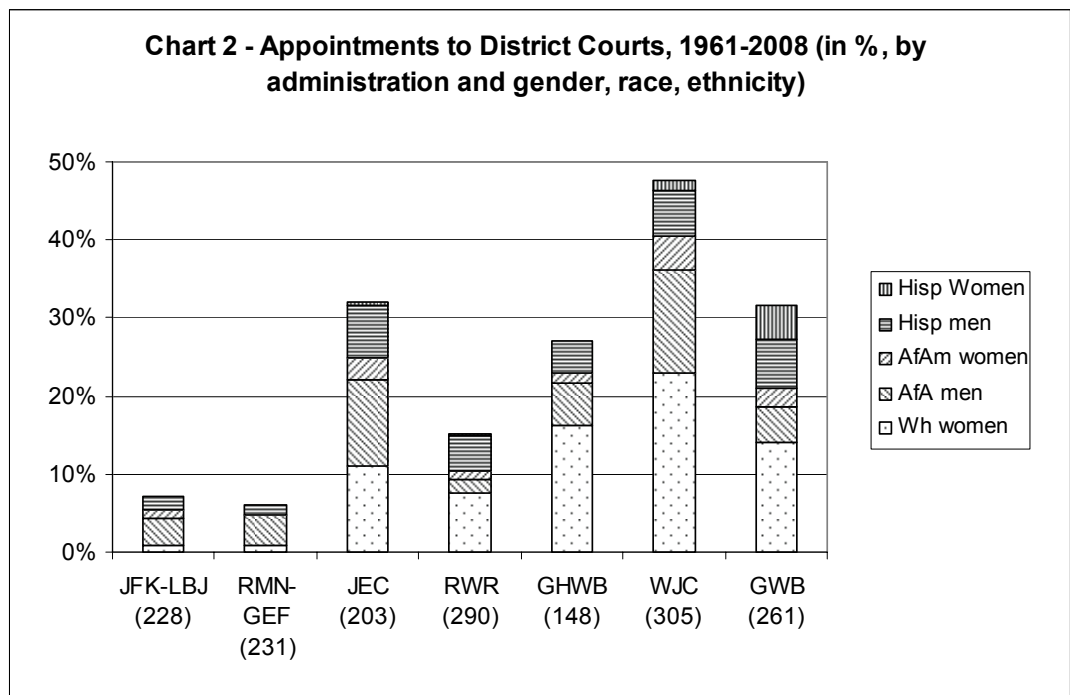


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Eighteen percent of President Carter’s appellate appointees were white women, versus 23 percent of Presidents Clinton’s and W. Bush’s.

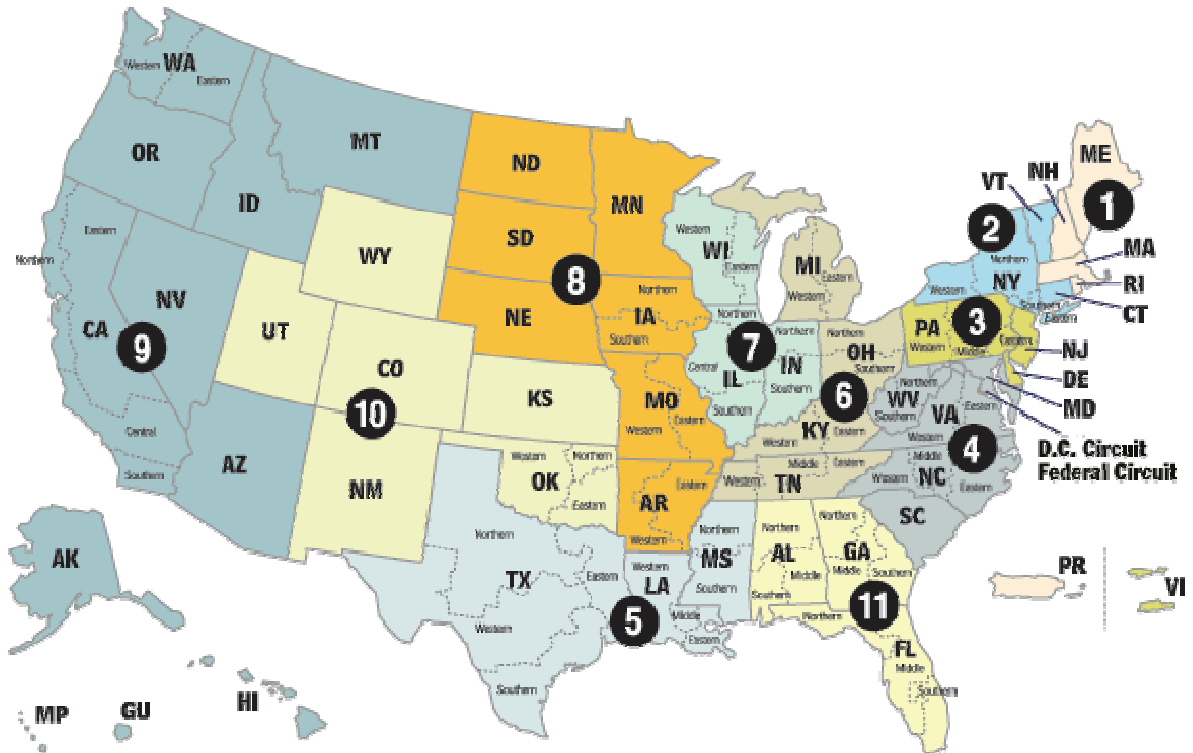
Appointments of women and racial and ethnic minorities to the district courts since 1961 roughly mirror those to the courts of appeals. Seven percent of President Carter’s district judge appointees were Hispanic, a figure topped only by President George W. Bush. (President Kennedy had appointed one Hispanic district judge, and President Johnson appointed three, including, as with President Nixon, two to the reconstituted U.S. district court in Puerto Rico.) Under Presidents Clinton and Bush, the proportion of African-American and Hispanic women also became noticeable. (Some of the actual numbers, shown in the Appendix tables, are small and thus the percentages need to be read with caution.)



Since 1961, the proportion of appointees to the Supreme Court, courts of appeals, and district courts do not vary greatly as to women (16 percent, 15 percent, 13 percent) and African Americans (11 percent, 7 percent, 8 percent), but those figures mask the shrinking proportions of white males appointed to the lower courts more recently, especially under Presidents Carter, Clinton, and W. Bush.

Regional Differences Since 1977

Figure 1 – Geographic Boundaries of U.S. Courts of Appeals and U.S. District Courts



© United StatesCourts, retrieved August 14, 2009 from <http://www.uscourts.gov/images/CircuitMap.pdf>.

Just as different presidential administrations have produced different mixes of judges, recruitment for individual courts has produced different mixes, as shown in charts 3 and 4 (and Appendix tables 4 and 5), which display appointments since 1977, the first year of the Carter administration.

Chart 3 shows that women have constituted about 25 percent of appointees to the courts of appeals in the Sixth, Eleventh, and Federal circuits, but only five percent and nine percent (one judge each) on the First and Eighth circuits' courts of appeals.

Chart 3 - Appointments to Courts of Appeals, 1977-2008 (in %, by circuit and gender, race, ethnicity)

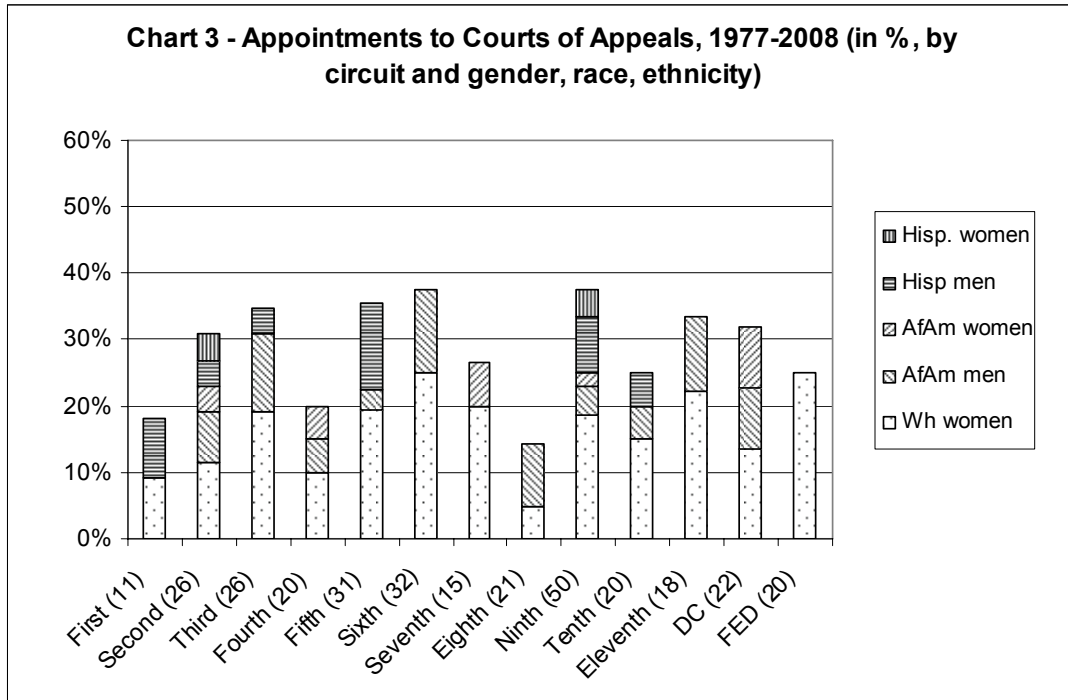
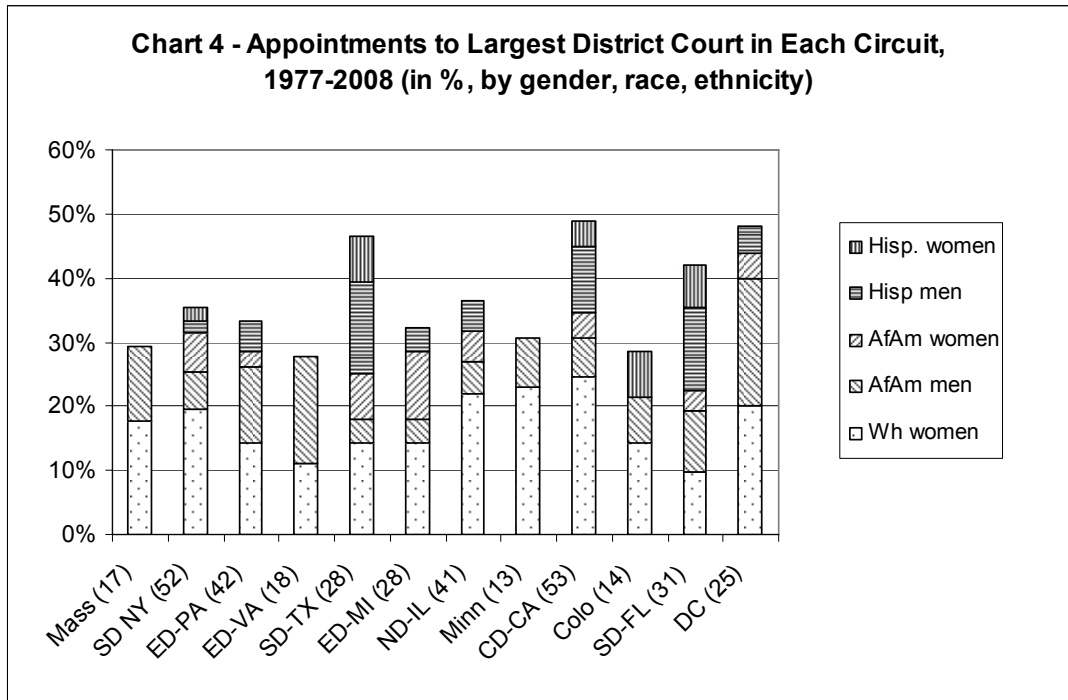


Chart 4 shows appointees since 1969 to the largest district court, currently, in each of the regional circuits. These courts' 362 appointees since 1977 constitute 30 percent of all 1,207 district appointees since 1977. District court variations in chart 4 are similar to those in the courts of appeals. White women are roughly a quarter of the appointees to the districts of Northern Illinois (viz., Chicago), Minnesota, Central California (viz., Los Angeles), and the District of Columbia, but only 11 percent (two of 18) of those in Eastern Virginia (viz., D.C. suburbs, Norfolk, and Richmond). To keep the charts manageable, they do not represent the small number of Asian-American appointees. Showing them, however, would show the four post-1977 Asian-American appointees to the Central District of California, pushing that court's percentage of women and racial and ethnic minority judges over the 50 percent mark.

Chart 4 - Appointments to Largest District Court in Each Circuit, 1977-2008 (in %, by gender, race, ethnicity)



The data in both charts are suggestive, but hardly dispositive. It is not surprising, for example, that the Fifth and Ninth circuits' courts of appeals, and the Southern Texas, Central California, and Southern Florida districts have greater percentages of Hispanic judges than the Eighth Circuit's Court of Appeals and the Minnesota District Court. Reasons for the variations in women appointees to both the appeals and district courts are less apparent.

Changes in the Prior Vocations of District Judges

Just as Justice Sotomayor's gender and Puerto Rican background attracted comment during the confirmation process, so did her judicial experience. Supporters cited her six years as a federal district judge and eleven as court of appeals judge as significant qualifications. That emphasis on prior judicial experience muted for the moment restlessness among some court watchers over the last several administrations' practice of making the federal courts of appeals the near-exclusive recruitment pool for the Supreme Court.

That tendency to recruit justices almost exclusively from the courts of appeals tracks a similar, and growing, tendency over the last 50 years to appoint proportionately fewer district court judges from the private bar (as was Sotomayor) and more from the public sector. Chief Justice John Roberts, while noting that such judges serve ably, has nevertheless warned that the trend will not maintain "the sort of Judiciary on which we have historically depended to protect

the rule of law in this country.”¹

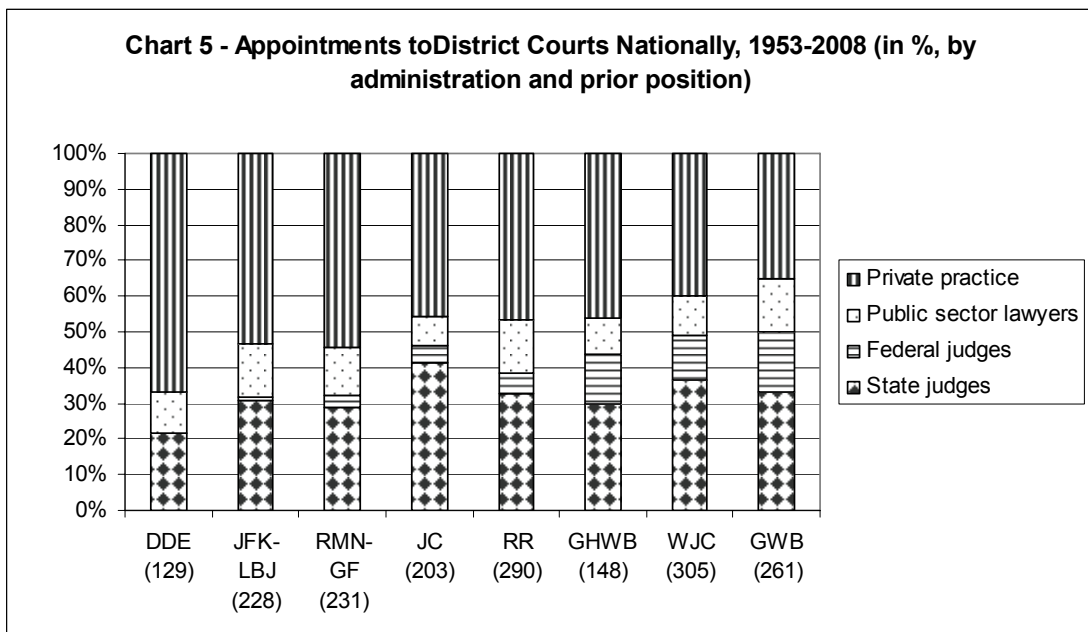
In fact, his predecessor, William Rehnquist, worried that the trend could make the federal judiciary:

“..too much resemble the judiciary in civil law countries, where a law graduate may choose upon graduation to enter the judiciary, and will thereafter work his way up over time...Reasonable people 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.”²

Others, Judge Richard A. Posner, for example, have suggested that judges appointed from the public service may be more committed to public service and may serve more ably than practitioners.³

Whatever the merits of the competing arguments, the trend away from private practitioners is unmistakable. Chart 5 (and Appendix table 6) show the increase in district judges appointed from sitting judges – first state judges and, starting gradually with President Reagan, also of U.S. magistrate judges and bankruptcy judges, both of whom serve for terms after appointment by the district courts and courts of appeals respectively. Congress created the magistrate judge system to assist U.S. district judges in 1968 and the modern bankruptcy courts in 1978.

Chart 5 shows that over 60 percent of President Eisenhower’s district appointees were private practitioners, compared to 36 percent of President W. Bush’s appointees. Another third of President W. Bush’s appointees were state judges, 16% were term-limited federal judges (mainly magistrate judges), and 13% were public sector lawyers (mainly prosecutors, other government lawyers, public defenders, legal aid lawyers).



(This change in vocational backgrounds has not been matched on the courts of appeals, where the proportion of sitting judge appointees has stayed around the 50 percent mark since 1953 – over 60 percent for President H.W. Bush and over 50 percent for every other administration except President Carter (46 percent) and President W. Bush (47 percent). Law professors, except for the 14 percent and 13 percent among Presidents Carter and Reagan appellate appointees, have never been more than a handful.)

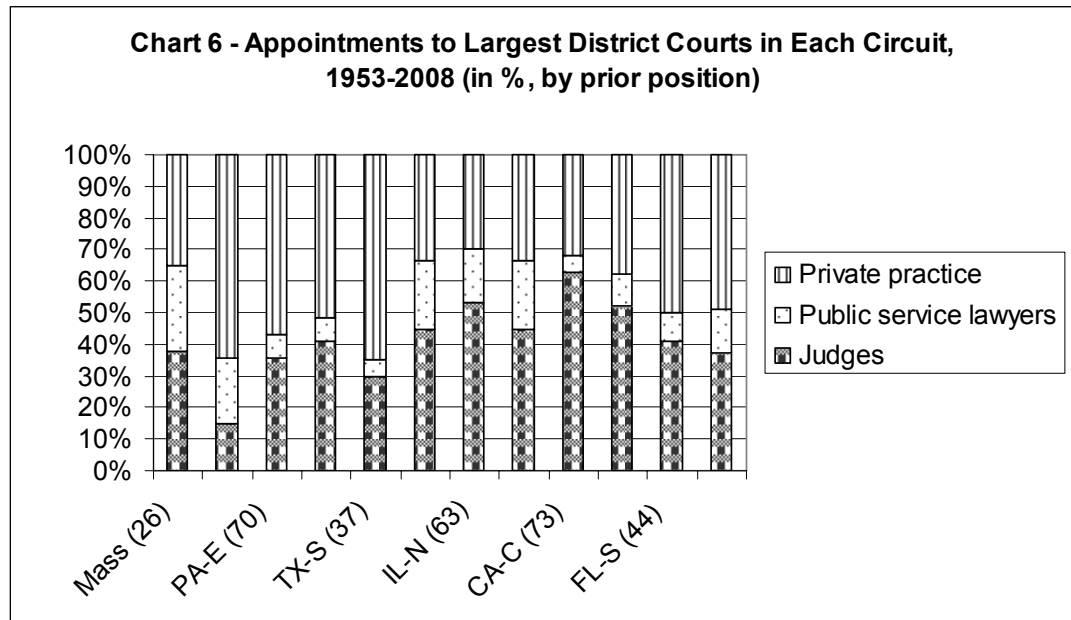


Chart 6 and appendix table 7 show variations in the vocational backgrounds of appointees to the same 12 district courts depicted in Chart 4. For example, about 15 percent of the judges in the New York Southern district were sitting judges when appointed; that percentage exceeds 50 percent in the Northern Illinois and Colorado districts and 60 percent the Central California district.

Nationally, the changes in vocational background are most likely due to a combination of factors, including:

- the improved quality of the state judiciaries and the creation of the U.S. magistrate judge system and U.S. bankruptcy courts;
- the desire of presidents (and the senators whose district nominee recommendations are often dispositive) to appoint more women and minorities, who at least until recently, were more likely to be found in the public service than in private law firms;
- the increased time from district judge nomination to confirmation, which may discourage private lawyers from considering judgeships because clients walk

away from lawyers once they know those lawyers may not be available for the duration of the legal problem;

- possibly the declining prestige of a district court appointment; and
- the gradual, if erratic, decline in the buying power of federal judges' salaries, which are lower than what private practitioners earn but inevitably a step up for state and term-limited federal judges.

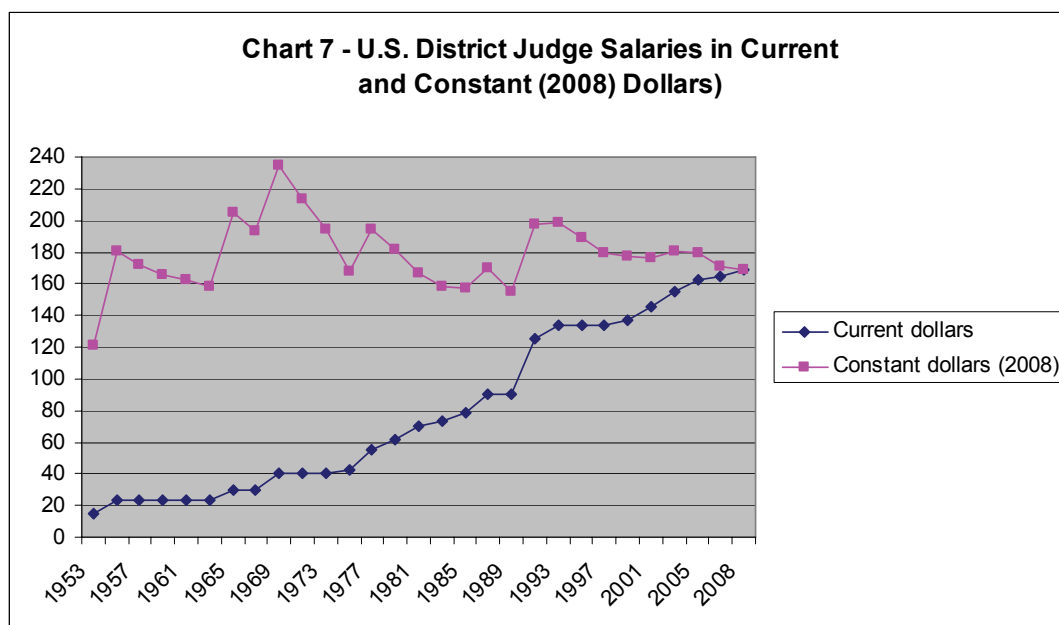



Chart 7 shows district judge salaries since 1953 in current dollars (lower line) and constant 2008 dollars (upper line); Appendix table 8 gives precise dollar amounts. Practitioners, for example, who saw district judge salary buying power rise to almost \$240,000 (in 2008 dollars) in the late 1960s, might have assumed that Congress would at least adjust salaries to maintain that level of buying power. As they saw the decline, albeit episodic, since then, what may have seemed as a safe financial move might gradually have seemed more risky. However, the large proportion of practitioners to accept district judgeships in Southern New York, with its high cost of living, suggests that more than salary is operating on shifting vocational patterns.

Conclusion

Most would agree with the modest proposition that, all things being equal, the federal judiciary should look more or less like the population it serves as to gender, race, and ethnicity – or at least look more or less like the realistic pool of potential judges. Over the last thirty years, the face of the judiciary has changed, although it



hardly mirrors the general population and probably not the applicant pool. And it shows different faces in different parts of the country. In any event, there's little reason to doubt the changes will continue, regardless of the party in the White House.

Whether the change in district judges' vocational background will or should continue is a more difficult question. For one thing, as an empirical matter, there is scant evidence on whether or not they judge differently.

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Notes

* I developed race and gender data after expressions of interest at a January 2009 meeting of the Justice at Stake Campaign, and vocational background data for a paper at the May 2009 conference sponsored by the Aspen Institute and Sandra Day O'Connor project at Georgetown Law Center. Data here come principally from the Federal Judicial Center's Federal Judicial Biographical Database (www.fjc.gov, last viewed August 11, 2009) and are not surprising to federal court watchers familiar with Professor Sheldon Goldman's and his colleagues' periodic reports on federal judicial appointments, most recently in "W. Bush's Judicial Legacy: Mission Accomplished" in the May-June 2009 issue of the journal *Judicature*, which includes other related articles.

¹ Roberts, "2006 Year End Report on the Federal Judiciary," (Jan. 2007) viewed at www.uscourts.gov/ttb/2007-01/2006/index.html

² Rehnquist, "2001 Year End Report on the Federal Judiciary," (Jan. 2002) viewed at <http://www.uscourts.gov/ttb/jan02ttb/jan02.html>

³ Posner, HOW JUDGES THINK 169 (2008)

Appendix

Table 1 – Composition of Current Federal Judiciary as of August 11, 2009
(amplifies Text Table 1)

	White		Afr. American		Hispanic	
	Men	Women	Men	Women	Men	Women
CT of APPEALS						
Active CA (161)	98 (61%)	38 (24%)	9 (6%)	5 (3%)	9 (6%)	2 (1%)
Senior CA (108)	92 (85%)	9 (8%)	3 (3%)	1 (1%)	2 (2%)	0
All CA (269)	190 (71%)	47 (17%)	12 (4%)	6 (2%)	11 (4%)	2 (1%)
DISTRICT						
Active DC (607)	356 (59%)	122 (20%)	53 (9%)	20 (3%)	32 (5%)	16 (3%)
Senior DC (392)	338 (86%)	24 (6%)	14 (4%)	3 (1%)	10 (3%)	0
All DC (999)	694 (69%)	146 (15%)	67 (7%)	23 (2%)	42 (4%)	16 (2%)
ALL JUDGES						
Active (768)	454 (59%)	160 (21%)	62 (8%)	25 (3%)	41 (5%)	18 (2%)
Senior (500)	430 (86%)	33 (7%)	17 (3%)	4 (1%)	12 (2%)	0
All (1,268)	884 (70%)	193 (15%)	79 (6%)	29 (2%)	53 (4%)	18 (1%)

**Asian-Americans make up less than one percent of senior appellate judges (1), of senior district judges (2) and of active district judges (6 males, two women). One senior district judge is Native American.*

Table 2 – Appointments to Courts of Appeals, 1961-2008, by administration and gender, race, ethnicity (amplifies Text Chart 1)

Admin.	White		Afr. American		Hispanic	
	Men	Women	Men	Women	Men	Women
JFK-LBJ (61)	57 (93%)	1 (2%)	3 (5%)	0	0	0
RMN-GEF (57)	56 (98%)	0	0	0	0	0
JEC (56)	34 (61%)	10 (18%)	8 (14%)	1 (2%)	2 (4%)	0
RWR (83)	75 (90%)	6 (7%)	1 (1%)	0	1 (1%)	0
GHWB (42)	31 (74%)	7 (17%)	2 (5%)	0	2 (5%)	0
WJC (66)	34 (52%)	15 (23%)	6 (9%)	3 (5%)	5 (8%)	2 (3%)
GWB (61)	39 (64%)	14 (23%)	3 (5%)	2 (3%)	2 (3%)	1 (2%)
TOTAL (426)	326 (77%)	53 (12%)	23 (5%)	6 (1%)	12 (3%)	3 (1%)

**Rows that do not add to the total appointments are due to the small number of Asian-American appointees (e.g., two by Richard Nixon).*

Table 3 – Appointments to District Courts, 1961-2008, by administration and gender, race, ethnicity (amplifies Text Chart 2)

Admin.	White		Afr. American		Hispanic	
	Men	Women	Men	Women	Men	Women
JFK-LBJ (228)	213 (93%)	2 (1%)	8 (4%)	1 (<1%)	4 (2%)	0
RMN-GEF (231)	215 (97%)	2 (1%)	9 (4%)	0	3 (1%)	0
JEC (203)	136 (67%)	22 (11%)	22 (11%)	6 (3%)	13 (7%)	1 (<1%)
RWR (290)	247 (85%)	22 (8%)	5 (2%)	1 (<1%)	13 (4%)	1 (<1%)
GHWB (148)	108 (73%)	24 (16%)	8 (5%)	2 (1%)	6 (4%)	0
WJC (305)	159 (52%)	70 (23%)	40 (13%)	13 (4%)	18 (6%)	4 (1%)
GWB (261)	176 (67%)	36 (14%)	12 (5%)	6 (2%)	16 (6%)	11 (4%)
TOTAL (1666)	1254 (75%)	178 (11%)	104 (6%)	29 (2%)	73 (4%)	17 (1%)

*Rows that do not add to the total appointments are due to the small number of Asian-American appointees (e.g., four President W. Bush appointees) and Carter's appointment of two Asian-Americans and one Native American.

Table 4 – Appointments to Courts of Appeals, 1977-2008, by circuit and gender, race, ethnicity (amplifies Text Chart 3)

	White		Afr. American		Hispanic	
	Men	Women	Men	Women	Men	Women
First (11)	9 (82%)	1 (9%)	0		1 (9%)	0
Second (26)	18 (69%)	3 (12%)	2 (8%)	1 (4%)	1 (4%)	1 (4%)
Third (26)	17 (65%)	3 (12%)	3 (12%)	0	1 (4%)	0
Fourth (20)	16 (80%)	2 (10%)	1 (5%)	1 (5%)	0	0
Fifth (31)	20 (65%)	6 (19%)	1 (3%)	0	4 (13%)	0
Sixth (32)	20 (63%)	8 (25%)	4 (13%)	0	0	0
Seventh (15)	11 (73%)	3 (20%)	0	1 (7%)	0	0
Eighth (21)	18 (86%)	1 (5%)	2 (10%)	0	0	0
Ninth (50)	30 (60%)	9 (18%)	2 (4%)	1 (2%)	4 (8%)	2 (4%)
Tenth (20)	15 (75%)	3 (15%)	1 (5%)	0	1 (5%)	0
Eleventh (18)	12 (67%)	4 (24%)	2 (12%)	0	0	0
DC (22)	15 (68%)	3 (14%)	2 (9%)	2 (9%)	0	0
FED (20)	15 (75%)	5 (25%)	0	0	0	0
TOTAL(311)	216 (70%)	53 (17%)	20 (7%)	20 (7%)	12 (4%)	3 (1%)

*Rows that do not add to the total appointments are due to the small number of Asian-American appointees (e.g., two to the Ninth Circuit's Court of Appeals).

**Seven judges appointed to the Fifth Circuit's Court of Appeals after 1977, who were reassigned to the Eleventh Circuit's Court of Appeals when created in 1981, are shown as Eleventh Circuit appointees. Four judges who were appointed to the Court of Claims or the Court of Customs and Patent Appeals after 1977, who were reassigned to the Federal Circuit Court of Appeals when created in 1982, are shown as Federal Circuit appointees.

Table 5 – Appointments to Largest District Court in each Circuit, 1977-2008, by gender, race, ethnicity (amplifies Text Chart 4)

	White		Afr. American		Hispanic	
	Men	Women	Men	Women	Men	Women
Mass (17) (Boston)	12 (71%)	3 (18%)	2 (12%)	0	0	0
SD NY (52) (Manhattan)	33 (63%)	10 (19%)	3 (6%)	3 (6%)	1 (2%)	1 (2%)
ED-PA (42) (Philadel.)	28 (67%)	6 (14%)	5 (12%)	1 (2%)	2 (5%)	0
ED-VA (18) (Rich., DC subs)	13 (72%)	2 (11%)	3 (17%)	0	0	0
SD-TX (28) (Hous.-McA'n)	15 (54%)	4 (14%)	1 (4%)	2 (7%)	4 (14%)	2 (7%)
ED-MI (28) (Detroit)	19 (68%)	4 (14%)	1 (4%)	3 (7%)	1 (4%)	0
ND-IL (41) (Chicago)	26 (63%)	9 (22%)	2 (5%)	2 (5%)	2 (5%)	0
Minn (13)	9 (69%)	3 (23%)	1 (8%)	0	0	0
CD-CA (53) (Los Ang.)	25 (47%)	12 (23%)	3 (6%)	2 (4%)	5 (9%)	2 (4%)
Colo (14) (Colorado)	10 (71%)	2 (14%)	1 (7%)	0	0	1 (7%)
SD-FL (31) (Miami)	18 (58%)	6 (19%)	3 (10%)	1 (3%)	4 (13%)	2 (6%)
DC (25)	13 (52%)	7 (28%)	5 (20%)	1 (4%)	1 (4%)	0
TOTAL (362)	221 (62%)	68 (19%)	30 (8%)	15 (4%)	20 (6%)	8 (2%)

*Rows that do not add to the total appointments are due to the small number of Asian-American appointees (e.g., one to the Southern District of New York, four to the Central District of California).

Table 6 – Appointments to District Courts, Nationally, 1953-2008, by administration and prior position (amplifies Text Chart 5)

	State judges	Fed jud.	All judges	Pub. sec. lawyers	All pub. sec	Priv. prac.
DDE (129)	28 (22%)	0 (0%)	28 (22%)	15 (12%)	43 (33%)	86 (67%)
JFK-LBJ (228)	71 (31%)	2 (1%)	73 (32%)	34 (15%)	107 (47%)	121 (53%)
RMN-GF (231)	68 (29%)	7 (3%)	75 (32%)	33 (14%)	108 (47%)	123 (53%)
JC (203)	84 (41%)	10 (5%)	94 (46%)	17 (8%)	111 (55%)	92 (45%)
RR (290)	95 (33%)	17 (6%)	112 (39%)	43 (15%)	155 (53%)	135 (47%)
GHWB (148)	44 (30%)	21 (14%)	65 (44%)	15 (10%)	80 (54%)	68 (46%)
WJC (305)	111 (36%)	38 (12%)	149 (49%)	35 (11%)	184 (60%)	121 (40%)
GWB (261)	86 (33%)	43 (16%)	129 (49%)	39 (15%)	168 (64%)	93 (36%)
TOTAL (1795)	587 (33%)	139 (8%)	725 (40%)	231 (13%)	956 (53%)	839 (47%)

Table 7 – Appointments to Largest District Court in Each Circuit, 1953-2008, by prior position (amplifies Text Chart 6)

District (& total judges)	Percent district judges appointed from		
	Private practice	Judges	Public sector lawyers
California (C) Los Angeles (73)	29%	62%	9%
Illinois (N) Chicago (63)	30%	53%	17%
Michigan (E) (Detroit) (45)	33%	44%	22%
Minnesota (18)	33%	44%	22%
Massachusetts(26)	35%	38%	27%
Colorado (21)	38%	52%	10%
District of Columbia (43)	49%	37%	14%
Florida (S) Miami (44)	50%	41%	9%
Virginia (E) Nor'k., Rich'd., DC subs (27)	52%	41%	7%
Pennsylvania (E) Philadelphia (70)	57%	36%	7%
Texas (S) Houston (37)	65%	30%	5%
New York (S) Manhattan (93)	65%	15%	20%

Table 8 – U.S. District Judge Salary in Current and Constant (2008) Dollars
(amplifies Text Chart 7)

	Current dollars	2008 dollars
1953	\$15,000	\$120,957
1955	22,500	180,758
1957	22,500	172,396
1959	22,500	166,471
1961	22,500	162,017
1963	22,500	158,311
1965	30,000	205,050
1967	30,000	193,386
1969	40,000	234,663
1971	40,000	212,645
1973	40,000	193,967
1975	42,000	168,080
1977	54,500	193,631
1979	61,500	182,385
1981	70,300	166,510
1983	73,100	158,019
1985	78,700	157,475
1987	89,500	169,627
1989	89,500	155,400
1991	125,100	197,756
1993	133,600	199,062
1995	133,600	188,743
1997	133,600	179,218
1999	136,700	176,662
2001	145,100	176,400
2003	154,700	181,018
2005	162,100	178,701
2007	165,200	171,543
2008	169,300	169,300

Source: R. Wheeler and M. 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>>