

BLACK ROBES, WHITE JUDGES: THE LACK OF DIVERSITY ON THE MAGISTRATE JUDGE BENCH

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I

INTRODUCTION

The federal judicial system is made up of two types of judges: those created by Article III of the United States Constitution¹ and those created through the power of Congress under Article I.² The demographic makeup of these bodies is curious. For decades—indeed, for nearly the first 200 years of its existence—the federal bench was made up of white³ men. During this same time, efforts by women and those of diverse racial backgrounds to enter the judiciary and the legal profession were largely thwarted.

In an early effort in 1872, the United States Supreme Court⁴ refused to overturn a decision of a lower court that found women could not be admitted to the Bar.⁵ The concurring opinion noted, “The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.”⁶ Nevertheless, seventy-five years later in 1949, President Harry S. Truman

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1. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

2. Congress was granted the power “[t]o constitute Tribunals inferior to the supreme Court.” U.S. CONST. art. I, § 8, cl. 9.

3. I use the term “white” to refer to those who are non-Hispanic Caucasians and “non-white” to refer to everyone else. I use these words not because I believe they are properly descriptive but merely to match the phraseology used in the published data. I mean no offense when using these archaic descriptors.

4. *Bradwell v. Illinois*, 83 U.S. 130 (1873).

5. *Id.* at 139.

6. *Id.* at 141.

appointed Burnita Shelton Matthews to a federal judgeship, making her the first female district judge in history.⁷

People of color faced similar difficulties. Macon Bolling Allen is credited with being the first African American to receive his license to practice law in 1844.⁸ Unable to secure enough clients—most whites would not hire him—he supplemented his income by obtaining a position as a Justice of the Peace. This made him the first African American judge despite that the United States Constitution at that time did not consider him to be a citizen of this country. It was not for another 100 years that, finally, in 1937, the first African American District Judge, William Henry Hastie⁹, was appointed to the bench. It was not until 1966 that the first African American woman, Constance Baker Motley, was appointed to the federal district court.¹⁰

Over the years, women and people of color have made inroads into the federal judiciary, but until Jimmy Carter took office only eight women had ever been appointed to Article III judgeships and only six served at that time.¹¹ By the end of the Carter Administration, forty women served. Carter's approach was goal-oriented and effective.¹² He modified the selection process away from a system of political patronage and toward one focused on the quality of the candidate.¹³ He made diversity a goal and developed citizen nominating commissions that actively recruited and encouraged women and people of color to apply for judgeships.¹⁴

Though still appointing mostly white males, President Clinton was the first to appoint fewer than 60% white males during his time in office and the first to appoint more than 20% female judges.¹⁵ George W. Bush brought more Latinas to the bench than all of the administrations before him combined, appointing twelve females of Latin American descent.¹⁶

7. *Women's History Month*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/annual-observances/womens-history-month> [https://perma.cc/N7LC-G9S9] (last visited Jan. 18, 2019). By this time, women had been appointed to other judicial positions, including as a Magistrate in the U.S. Customs Court, and in the Sixth Circuit Court of Appeals.

8. *Macon Bolling Allen Biography*, BIOGRAPHY.COM (Apr. 2, 2014) <http://www.biography.com/people/macon-bolling-allen-21342461> [https://perma.cc/2M43-77AE].

9. Interview by Jerry N. Hess with Judge William H. Hastie, Third Circuit Court of Appeals in Philadelphia, Pa. (Jan. 5, 1972), <https://www.trumanlibrary.org/orallhist/hastie.htm> [https://perma.cc/98SG-AYRJ]. President Truman previously appointed him to the position of the Governor of the Virgin Islands.

10. *Motley, Constance Baker*, <https://www.fjc.gov/history/judges/motley-constance-baker> [https://perma.cc/3RUL-MXC8] (last visited Feb. 8, 2019).

11. Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131, 1132–33 (2002).

12. *Id.*

13. *Id.*

14. *Id.*

15. Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L.J. 92, 107–08 (2016).

16. *Id.* at 108.

The Obama administration made strides toward improving the diversity of the federal bench. President Obama appointed the first Haitian American, the first Native American female and the first Afro-Caribbean district judges.¹⁷ He was the first to focus on the LGBT community when seeking out judicial candidates and appointed the first openly gay Circuit Court judge.¹⁸ Nineteen percent of Obama's overall appointments were African Americans; he appointed more African American females than any other president in history. He appointed more Asian American women than all the Presidents before him combined.¹⁹

President Obama's tactic was a modified version of Carter's initiatives. Though still relying upon senators to identify judicial hopefuls, he sought the assistance of female and minority members of Congress.²⁰ He encouraged minority and women's groups to propose judicial candidates.²¹ He promoted candidates who had the support of both major political parties and was successful in appointing most of those he nominated.²² He did this without sacrificing quality.²³

17. Jennifer Bendery, *Senate Confirms First-Ever Native American Woman as a Federal Judge*, HUFFINGTON POST (May 15, 2014, 10:07 AM), https://www.huffingtonpost.com/2014/05/15/native-american-judge_n_5330273.html?ec_carp=4279952720454742018 [https://perma.cc/2YPF-QQD8]; Donna Owens, *Obama's Legacy on Judicial Appointments, by the Numbers*, NBC NEWS (Jan. 19, 2017, 9:21 PM), <https://www.nbcnews.com/storyline/president-obama-the-legacy/obama-s-legacy-judicial-appointments-numbers-n709306> [https://perma.cc/P5FU-GW6S].

18. Diane Bartz, *U.S. Senate Confirms First Openly Gay Federal Appeals Court Judge*, REUTERS (Sept. 24, 2013), <https://www.reuters.com/article/us-usa-judge-gay/u-s-senate-confirms-first-openly-gay-federal-appeals-court-judge-idUSBRE98N16D20130924?feedType=RSS&feedName=domesticNews> [https://perma.cc/CFG9-VZH5]. Judge Todd M. Hughes is a 1992 graduate of Duke Law School.

19. Stubbs, *supra* note 15, at 108–09.

20. Carl Tobias, *Justifying Diversity in the Federal Judiciary*, 106 NW. L. REV. COLLOQUY 283, 287–88 (2012).

21. *Id.*

22. *Id.*

23. *Id.* In contrast, as of November 30, 2017, however, President Trump nominated only one African American, three Asian-American, and one biracial candidate of the 60 he has nominated. Joan Biskupic, Aaron Kessler & Ryan Struyk, *Trump judicial picks lack decades-long diversity drive*, CNN POLITICS, <https://www.cnn.com/2017/11/30/politics/trump-judges-courts-race/index.html> [https://perma.cc/2A8P-UVRE] (last updated Nov. 30, 2017). Of these 60 candidates, less than 19% were women, down from nearly 42% nominated by President Obama. *Id.* Most of those nominated by the President have been white men. *Id.* Though more than 80% of the candidates nominated by President Trump have received “Well-qualified” ratings by the American Bar Association, 8% have been rated “Not qualified.” *Id.*

Exactly how the ABA determines a candidate is “qualified,” is unclear. For example, the Senate Judiciary Committee conducted a hearing on December 13, 2017 to consider several judicial candidates. *Nominations: Hearing Before the S. Comm. On the Judiciary*, 115th Cong. (2017), <https://www.judiciary.senate.gov/meetings/12/13/2017/nominations> [https://perma.cc/D724-DSQZ] (video beginning at 1:50:57 on recording) (last visited Jan. 18, 2019). A portion of the hearing focused on a white, male candidate being questioned about his experience by Senator John Kennedy (R) of Louisiana (a former constitutional law professor at Louisiana State University). The candidate admitted to having never tried a bench or jury trial, never having taken a deposition on his own though he attended less than five as a newly minted law firm associate, never having argued a motion in court, not knowing what a motion in limine was, not having made a “comprehensive” review of the Federal Rules of Evidence or the Federal Rules of Civil Procedure since law school and not knowing what the *Daubert* standard was. Despite this, the ABA gave this candidate a “qualified” rating. Standing Comm. on the

It has been through the will of presidential administrations that women and people of color have been added to the district judge bench. Still, this change has failed to achieve a judiciary whose demographic makeup roughly approximates that of the country's population, and the diversification of the district judge bench has not been duplicated on the magistrate judge bench.

From 2009 to 2016, females on the district court bench increased 13.2%, from 19.4% to 32.6%, and non-white district judges increased 10.6%, from 16.4% to 27.0%.²⁴ During this same period, the number of female magistrate judges increased only by 7.2% and non-whites increased by a paltry 1.2%.²⁵ “Pipeline issues” may account for some part of the problem when seeking to diversify the magistrate judge bench, but, given the success of recent Presidential Administrations in diversifying the district judge bench, it cannot account for all of it.

Some of the problem stems from the selection process for magistrate judges. Applicants tend to be self-selected. Facing an all-white bench is likely to be discouraging to prospective non-white hopefuls. Likewise, unlike the political selection process for district judges, magistrate judge candidates engage in a multi-step merit selection process that winnows applicants down to a handful from which the successful candidate emerges. Differing instructions to the selection panels, differing priorities, and differing judicial philosophies all work against the selection of diverse candidates for the magistrate judge bench.

Part II of this paper will discuss the methodology employed and the relative strengths and weaknesses of the data examined. Part III examines whether it matters to the quality of justice dispensed if the magistrate judge bench is not made up of judicial officers of diverse demographics. Part IV examines the available data to reveal the relative diversity of the district court bench when compared to the magistrate judge bench. Part V discusses the differing selection processes for district and magistrate judges as a possible source for the differences in the diversity of these benches. Finally, Part VI will analyze the impediments to achieving the goal of diversity of this bench and suggest solutions.

II

STUDY METHODOLOGY

The data for this paper was gathered from many sources. The federal Administrative Office of the United States Courts provided data detailing the demographic makeup of the district courts. The Federal Judicial Center provided information as to the demographic makeup of the district judges for each judicial

Fed. Judiciary, *Ratings of Article II and Article IV Judicial Nominees: 115th Congress*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Web%20rating%20Chart%20Trump%20115.authcheckdam.pdf> [https://perma.cc/ZLT5-VG9T] (last updated Dec. 13, 2018).

24. See *infra* Figs. 1, 2.

25. See *infra* Figs. 4, 5.

district.²⁶ The American Bar Association, the U.S. Census Bureau, and mandatory bar associations throughout the country provided the demographics of bar membership in each state. Also, the author surveyed the chief judges from ninety-one of the federal judicial districts²⁷ and conducted interviews of many of these judges to understand their views about judicial diversity. The author also surveyed the entire body of active federal magistrate judges to gather their demographic data and to inquire about their court's efforts to diversify the bench. Finally, the author searched out members of recent merit selection panels across the country and surveyed them about their experiences selecting new magistrate judges.

The data is flawed in many respects. First, the Administrative Office changed the way it reported the data over time. In some years, the reports combine full-time and part-time magistrate judges and state their demographics collectively. In some years the senior district judges were included in the numbers for active district judges, rather than as a separate category. Moreover, the AO reports only broad categories of races/ethnicities without regard for those who identify with more than one race. Consequently, to harmonize the data, the author included an "other" category to account for those who describe themselves differently than these categories or who identify with more than one race.²⁸

Second, the data from the FJC did not easily compare to the data provided by the AO. For example, four districts, the Eastern and Western Districts of Oklahoma and the Eastern and Western Districts of Missouri, "share" judges. Thus, the three who sit in the districts in Missouri and the one who sits on both districts in Oklahoma are reported on the statistics of both courts. In addition, the FJC data does not distinguish between active and senior district judges. Thus, the author took these disparities into account.

On the other hand, the U.S. Census Bureau data is current to the year 2010 and is not complete. For example, there are many government lawyers practicing in the federal system who may not be members of the "mandatory" bar associations in the state in which they practice. This flaw exists in the ABA and other bar association data also. Demographic data from state bar associations, when it exists, relies on surveys with voluntary responses. Thus, the author applied the data to the total membership, despite the fact that the responses may not be representative. Finally, data reported by mandatory bar associations often differed from the data reported to and by the ABA.

Nevertheless, by using the available data, a fair picture developed as to the demographic breakdown of lawyers practicing in each state. Even still, though many states have only one federal judicial district, many states have more than

26. The FJC does not maintain historical or current demographic data on magistrate judges.

27. Because of the lack of comparative data for the districts in the Virgin Islands, the Northern Mariana Islands, Puerto Rico, and Guam, the survey did not take these courts into consideration.

28. To best capture the efforts of courts to diversify the bench, when characterizing a person as white or non-white, the author considered anyone of mixed race to be non-white.

one. Thus, the statewide data does not provide a specific picture of the demographics of each judicial district.

Also of concern, the chief judges interviewed were self-selected and some openly admitted to volunteering for interviews to address their own specific agendas—for example, to explain why more diversity could not be achieved or why diversity has been achieved easily. There was a consistent report on many topics so the information gleaned is important and informs many of the conclusions offered in this study.

Also, Magistrate Judges responded inconsistently about the total number of active, female, and non-white magistrate judges on their courts. To resolve these disputes, the author studied the websites from these districts and, for the most part, verified the correct numbers.

Finally, gathering a representative set of data from members of the merit selection panels was difficult. Many courts do not publish the names of their panelists and, when they do, they usually do not publish contact information. The author scoured the Internet to find press releases, general orders, and attorney websites that identified members of the panels and contact information. The data gathered reflects responses from eighty-five former members of panels representing thirty-seven districts across the federal system.

III

DOES IT MATTER IF THE MAGISTRATE JUDGE BENCH IS NOT DIVERSE?

When the office was created by Congress, magistrate judges were intended to serve an “integral and important role in the federal judicial system.”²⁹ Burgeoning caseloads in an era of few new judgeships placed an extraordinary and impossible burden on district judges. “Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today’s federal judicial system is nothing less than indispensable.”³⁰ Writing about the roles of Article I judges, Justice Sotomayor said famously, “It is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.”³¹

Indeed, since 1990, the number of magistrate judges has increased by more than sixty percent.³² Since 1999, about forty new magistrate judge positions were added compared to half this number for district judge positions.³³ In 2015, there were 551 full-time magistrate judges compared to 625 district judges.³⁴

29. *Peretz v. United States*, 501 U.S. 923, 928 (1991).

30. *Id.* (quoting *Government of the Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)).

31. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938–39 (2015).

32. *See infra* Figs. 4, 5.

33. *See infra* Figs. 1–4.

34. *See infra* Figs. 1–4.

In 2016, magistrate judges handled 1,087,249 matters made up of felony preliminary proceedings,³⁵ criminal matters,³⁶ Class A misdemeanors and other petty offenses, civil matters³⁷ (which included more than 16,000 matters handled on consent), prisoner cases,³⁸ miscellaneous matters, and 566,336 “additional duties.”³⁹ The increasing number of dispositive orders magistrate judges issue translates to an increased importance of this bench to litigants and leads to the conclusion that diversity must be considered for this bench just as it is for district judges.

With regularity, legal commentators publish articles setting forth the importance of judicial diversity and the reasons proffered don’t vary much. Many believe diversity promotes confidence in the judiciary.⁴⁰ They argue a judiciary made up of people of all skin colors, genders, and backgrounds instills the belief that the legal system is not just for those traditionally in power. In 2011, White House Counsel Kathryn Ruemmler explained that “[t]he president wants the federal courts to look like America . . . He wants people who are coming to court to feel like it’s their court as well.”⁴¹

Unlike courts of appeal with their three-judge panels, as trial judges magistrate judges sit alone. When in trial, they typically lack the luxury of consulting colleagues about the intricacies of the legal issues brought before them. They may receive legal argument from counsel, but like any other trial judge, to be efficient, they must rule then and there. Moreover, whether the judge’s demographics match those of the litigants before the court⁴² is a matter of chance.⁴³ This begs the question whether a diverse trial bench makes a difference to the outcome of any case. A simplistic view is that when the judge “matches”

35. “Felony preliminary proceedings” includes search and arrest warrants, initial appearances and arraignments, bail review hearings, preliminary examinations, attorney appointments, detention hearings and the like.

36. “Criminal” matters included motions, pretrial conferences, evidentiary hearings, guilty pleas, probation revocation proceedings, reentry/drug court proceedings, etc.

37. This included social security appeals, settlement conferences, pretrial conferences, motions, evidentiary hearings, etc.

38. This includes habeas corpus petitions, civil rights litigation and evidentiary hearings.

39. FED. JUDICIARY, TABLE S-17—MATTERS DISPOSED OF BY U.S. MAGISTRATE JUDGES DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2007 THROUGH 2016 (Sept. 30, 2016), https://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2016.pdf [<https://perma.cc/7N4Q-EMNQ>].

40. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1429 (2008).

41. John Schwartz, *For Obama, a Record on Diversity but Delays on Judicial Confirmations*, N.Y. TIMES, August 6, 2011, <https://www.nytimes.com/2011/08/07/us/politics/07courts.html> [<https://perma.cc/7HPX-UKXU>].

42. African Americans are incarcerated in this country at more than five times the rate of Caucasian Americans. In 2014, 2.3 million of the 6.8 million inmates in the United States were African Americans. *Criminal Justice Fact Sheet*, NAACP, www.naacp.org/criminal-justice-fact-sheet [<https://perma.cc/KF3X-4DJG>] (last visited Jan. 18, 2019). Given these figures, it is hard to know whether courts should “look like” the litigants or “look like America.”

43. Most courts assign cases to their judges randomly. Generally, at the outset of a case, the court has no information about the race or gender of the litigants.

the litigant, the judge is better able to empathize with the factual situation at issue.⁴⁴ What, then, is the result for the “non-matching” litigant?

Even if the bench reflects perfectly the demographics of the community in which the magistrate judge sits, in truth, diversity does not assure fairness any more than a lack of diversity assures unfairness. The color of the judge’s skin, whether the judge grew up in poverty, sleeps with a person of the same gender, has a strong political identity, or regularly attends church, does not ensure the judge will rule in favor of a litigant who has a similar background. To suggest otherwise sorely ignores judges’ commitment to the dictates of the law.

Though it is unlikely diversity is the “silver bullet” for justice, to suggest that it has no bearing on the quality of decision making is equally unlikely. For example, one study found that though female judges often attended lesser quality law schools and undergraduate schools, had less experience after law school, had less judicial experience, and were often younger than their male colleagues, when appointed to their state’s highest courts, they performed as well as men.⁴⁵ Though they published less frequently, when they did publish, the opinions of these female judges were cited as frequently as those authored by men.⁴⁶ Female judges tend to be more independent in their decision making and despite the assumption they perform better in certain areas, such as family law; in fact, they perform as well as men in all practice areas.⁴⁷ This suggests that although female judicial applicants may not present as well on paper, their skills may be equal to or superior to the male applicant who has an exemplary record.

The results of studies inquiring whether a judge’s gender or race impacts cases are mixed.⁴⁸ One study determined that female judges tended to regard sex discrimination claims more favorably than male judges.⁴⁹ This same study concluded that gender does not matter when female judges decide cases involving “women’s issues,” such as sexual harassment affirmative action or abortion litigation.⁵⁰ Though female judges are more likely to rule in favor of the plaintiff in some types of cases,⁵¹ they do not decide race discrimination cases differently

44. Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 134 (1997).

45. Stephen J. Choi, Mitu Gulati, Mirya Holman & Eric A. Posner, *Judging Women*, 8 J. EMPIRICAL LEGAL STUD., 504, 526 (2011).

46. *Id.* at 515–16.

47. *Id.* at 526.

48. Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges’ Sex and Race*, 69 POL. RES. Q. 788, 789–91 (2016). Professor Boyd provides an excellent analysis of the confusion related to whether the gender and race of judges matters to judging.

49. Choi, Gulati, Holman & Posner *supra* note 45, at 505 (citing Jennifer L. Peresie, *Female Judges Matter Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005)).

50. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

51. Peresie, *supra* note 49, at 1761 (An empirical analysis of 556 federal appellate cases decided in 1999, 2000, and 2001 reveals that judges’ gender mattered to case outcomes. Though plaintiffs lost in the vast majority of cases, they were significantly more likely to prevail when a female judge was on the bench.). This study concluded that in federal court, though a female plaintiff is most likely to fail in her sexual discrimination case, when the matter is assigned to a female judge, her chance of success doubles.

than their male counterparts. Though most personal injury and civil rights cases settle in federal court, when these cases are assigned to a female settlement judge, they are even more likely to settle and to settle earlier.⁵²

When a federal appellate panel considering a sexual harassment case includes at least one female, her male colleagues on the panel are twice as likely to find for the plaintiff than if the panel was made up of only men.⁵³ In sexual discrimination appeals the presence of the female panelist nearly triples the likelihood the plaintiff will prevail.⁵⁴ Black judges are much more likely than white judges to decide in favor of the plaintiff in gender discrimination cases.⁵⁵ Other studies reveal that outcomes in cases of race discrimination, voting rights, school desegregation, and affirmative action, do not vary significantly when decided by non-white judges rather than white judges.⁵⁶ In a similar study, the author determined that plaintiffs in race-based harassment cases were 3.3 times more likely to prevail when their case was decided by a black judge than a white judge, according to logistic regression analysis.⁵⁷

A different study concluded black appellate judges rule in favor of the party raising race-based affirmative action programs in about 90% of cases, and white judges who sit with a black colleague vote in favor of such parties in 80% of the cases.⁵⁸ When a black Democrat judge sits on a panel with a two non-black Republican judges, a non-black Republican judge will vote in favor of a liberal outcome 86% of the time.⁵⁹

Though these studies do not demonstrate that diversity matters when considering fairness, the impact of diversity on outcomes emphasizes the need to consider it when populating the magistrate judge bench. Even when a magistrate judge's demographics are different from the litigants', just like a district judge, when deciding areas of novel or complicated legal issues, a magistrate judge is likely to be influenced by orders issued by others on the district's bench.⁶⁰ Thus, orders from a judge of a diverse background may impact outcomes of cases with which the judge has no direct contact.

52. Christina L. Boyd, *She'll Settle It*, 1 J. L. & CTS. 193, 211 (2013).

53. Peresie, *supra* note 49, at 1778. In a similar study, different researchers came to a similar conclusion. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

54. *Id.*

55. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1133–34 (2009) (citing Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996* (June 1999) (unpublished PhD. dissertation, University of Chicago) (on file with authors)).

56. Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 144 (2000).

57. Chew & Kelley, *supra* note 55, at 1156. *See also* Boyd, *supra* note 48.

58. Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179 (2012).

59. *Id.*

60. *See id.* (discussing district court judges).

In areas where discretion is vested in the trial judge, it is more likely the judge will rule according to a sense of what is right.⁶¹ Because these cases are much less likely to be reversed on appeal, this is a key opportunity for diversity to impact the development of the law.

Even if diversity plays no role in case outcomes, chief judges interviewed for this study almost uniformly stated diversity on the magistrate judge bench lends credibility to the court. Regarding the importance of diverse judicial benches, one chief judge commented, “Justice lives as much on perception as on reality.” Another Chief Judge remarked criminal defendants “should see a bench that reflects their community” and “diversity is a message that all races and ethnicities are important.” Another Chief Judge valued colleagues with differing viewpoints, “More viewpoints support a better long-term view” for the court and improves court governance. One Chief Judge stated that a diverse bench communicates to the public, “This is *our* court; it is a court of the community.” Another remarked, “A diverse bench provides a different perspective and supports a public perception of fairness.”

Seemingly, at least in the opinion of these chief judges, a bench that ignores this reality risks legitimacy in the eyes of those it serves. Several Chief Judges explained that if a criminal defendant enters the courthouse and sees a bench made up of those who do not look like him or her, this adds to the suspicion that fairness will not be forthcoming. One Chief Judge noted a Magistrate Judge is usually the first judge a criminal defendant will see and having a diverse bench lets the defendant know it won’t be “just white men passing judgment” on them.

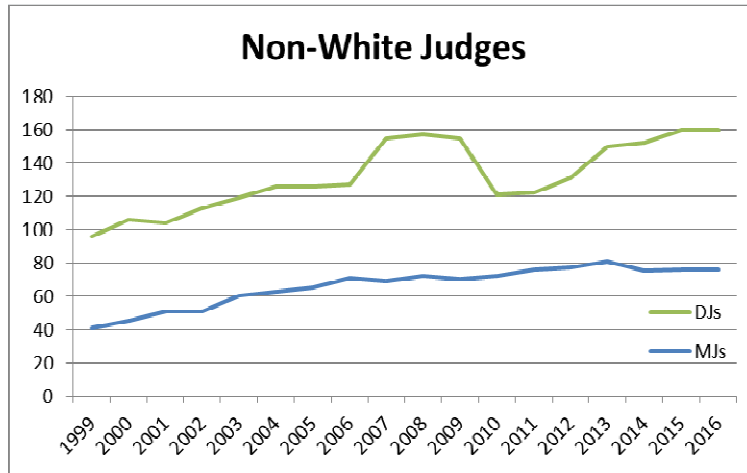
IV

THE DIVERSITY OF THE FEDERAL TRIAL COURT BENCH

A. The District Judge Bench

Of the 601 district judges in 1999, 483 were male and 118 were female. All but ninety-six judges identified themselves as white. By 2016, of the 625 district judges in the bench, 421 were male and 204 were female, and 160 were non-white. Fourteen courts had at least one-third of their positions filled by non-white judges, and sixty-one courts had at least one district judge who was non-white. This represents a 10% gain in the total number who were non-white. By 2016, females on the bench increased from little more than 20% to more than 32%. Only eight courts did not have at least one female district judge and twenty-four courts were made up of at least 30% female district judges.

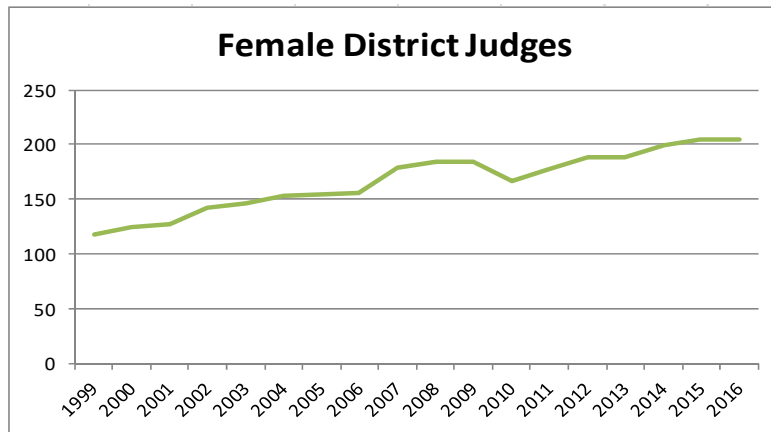
61. Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 264 (1995).

Figure 1: Non-White District Judges in the Federal System by Year

The growth in the numbers of females on the bench since 2010 is not attributable to any one district—indeed many districts did not improve at all and some decreased in the numbers of those of diverse demographics—but overall, there was a steady increase of non-white and female judges. Though some districts (Alabama Middle, Alabama Southern, Delaware, Georgia Northern, Georgia Southern, Kansas, Louisiana Western, Michigan Western, Mississippi Southern, Nebraska, Ohio Southern, Puerto Rico, Texas Eastern, and Wyoming) had increases in diversity, the statistics changed only because the number of district judges changed.

Other courts (Illinois Central, Iowa Northern, Tennessee Eastern, and Tennessee Western) became less diverse. This decrease was caused not by a loss of judges but by an increase in the number of white, male district judges. According to the available data for these states, there were not sufficient numbers of lawyers with diverse backgrounds practicing within the states to allow for the appointment of diverse judges except in Tennessee where there were sufficient numbers of female.⁶² Arkansas Eastern, California Northern, California Southern, Florida Middle, Florida Southern, Missouri Eastern, and Tennessee Middle court had changes in the ratio of females or non-whites due to the decrease in the number of total district judges in that court.

62. See *infra* Fig 6.

Figure 2: Female District Judges in the Federal System by Year

According to the Bar membership data, pipeline problems did not prevent diversification for some courts though vacant positions were not filled by non-white and/or female candidates. Arkansas Western, California Eastern, Florida Northern, Maine, Maryland, Montana, Nebraska, New York Southern, New York Western, Oregon, and Washington Eastern had sufficient numbers of female bar members to add to the bench, and North Carolina Western should have been able to do better in adding non-white and female judges.⁶³ Connecticut, New York Eastern, Pennsylvania Eastern, Tennessee Middle, Tennessee Western, Texas Western, and Virginia Eastern all added non-white judges rather than adding females despite the fact that this caused the non-whites to be overrepresented and females remained underrepresented,⁶⁴ at least according to the published statistics of bar membership in these states.

Of the courts that demonstrated improvement in their diversity not caused by a change in the number of judges, most failed to have a representative number of women.⁶⁵ Other courts became more diverse and, in doing so, appointed diverse judges despite that the percentage of female and non-white lawyers in the state was lower than the percentage achieved by the court.⁶⁶

63. This presupposes that all of the members of the Bar are qualified for the position and eligible for appointment and this is, of course, unlikely to be the case.

64. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 457 (2002).

65. These courts include Alaska, Arkansas Western, California Northern, California Southern, Florida Middle, Florida Southern, Georgia Middle, Hawaii, Illinois Northern, Illinois Southern, Iowa Southern, Indiana Northern, Kentucky Eastern, Kentucky Western, Maine, Maryland, Massachusetts, Michigan Eastern, Montana, Nevada, New Hampshire, New York Northern, New York Western, North Carolina Middle, Pennsylvania Eastern, Tennessee Eastern, Washington Eastern, and Wisconsin Eastern. The diversity numbers for Michigan Eastern, and New Mexico were more difficult to interpret because, the statistics for female lawyers in the state varied and these districts compared favorably to some but not others.

66. These courts included Alabama Northern, Arizona, Florida Southern, Illinois Southern, Louisiana Eastern, Louisiana Middle, Maryland, Massachusetts, Michigan Eastern, Minnesota, Mississippi Northern, Missouri Western, Nevada, Oregon, Pennsylvania Eastern, Puerto Rico, South Carolina, Tennessee Middle, Utah, and Virginia Eastern. Some of these courts improved in only one

Figure 3: Relative Change in Diversity of the District Judge Benches by District, 2010-2017

2010 to 2017	Change Non white	Change Female		Change Non white	Change Female		Change Non white	Change Female
Alabama Middle	3%	0%	Kentucky Eastern	4%	-5%	Oklahoma Eastern	0%	0%
Alabama Northern	0%	5%	Kentucky Western	0%	3%	Oklahoma Northern	0%	0%
Alabama Southern	0%	17%	Louisiana Eastern	7%	21%	Oklahoma Western	0%	0%
Alaska	0%	17%	Louisiana Middle	-15%	25%	Oregon	8%	-10%
Arizona	7%	-2%	Louisiana Western	0%	3%	Pennsylvania Eastern	6%	1%
Arkansas Eastern	-1%	11%	Maine	0%	17%	Pennsylvania Middle	0%	0%
Arkansas Western	0%	33%	Maryland	6%	6%	Pennsylvania Western	-5%	11%
California Central	2%	-18%	Massachusetts	4%	-1%	Puerto Rico	0%	4%
California Eastern	-5%	1%	Michigan Eastern	5%	9%	Rhode Island	0%	0%
California Northern	12%	-8%	Michigan Western	0%	6%	South Carolina	-7%	13%
California Southern	-2%	4%	Minnesota	9%	8%	South Dakota	0%	0%
Colorado	9%	-9%	Mississippi Northern	2%	23%	Tennessee Eastern	-1%	14%
Connecticut	8%	0%	Mississippi Southern	3%	0%	Tennessee Middle	11%	-1%
Delaware	3%	3%	Missouri Eastern	8%	-9%	Tennessee Western	-3%	-3%
District of Columbia	4%	2%	Missouri Western	5%	13%	Texas Eastern	0%	3%
Florida Middle	5%	-3%	Montana	0%	14%	Texas Northern	6%	2%
Florida Northern	0%	0%	Nebraska	0%	3%	Texas Southern	15%	4%
Florida Southern	-3%	9%	Nevada	15%	15%	Texas Western	-4%	1%
Georgia Middle	6%	17%	New Hampshire	0%	25%	Utah	0%	7%
Georgia Northern	2%	3%	New Jersey	7%	8%	Vermont	0%	0%
Georgia Southern	0%	5%	New Mexico	10%	0%	Virginia Eastern	5%	10%
Hawaii	0%	12%	New York Eastern	8%	-8%	Virginia Western	0%	0%
Idaho	0%	0%	New York Northern	0%	22%	Washington Eastern	10%	-4%
Illinois Central	2%	-8%	New York Southern	7%	-10%	Washington Western	-6%	2%
Illinois Northern	6%	4%	New York Western	0%	11%	West Virginia Northern	0%	25%
Illinois Southern	20%	40%	North Carolina Eastern	0%	0%	West Virginia Southern	0%	0%
Indiana Northern	0%	0%	North Carolina Middle	13%	13%	Wisconsin Eastern	3%	20%
Southern Indiana	0%	0%	Western North Carolina	0%	0%	Western Wisconsin	0%	0%
Iowa Northern	0%	-5%	North Dakota	0%	0%	Wyoming	0%	8%
Iowa Southern	0%	25%	Ohio Northern	-1%	-1%			
Kansas	2%	2%	Ohio Southern	1%	4%			

B. The Magistrate Judge Bench

1. Legal Scholarship

Despite recognition by scholars and others of the importance of Magistrate Judges to the federal judicial system, Magistrate Judges are rarely studied. Of the few papers devoted to studying this bench, most consider the source of the authority of these judges,⁶⁷ the iterations of the present-day Magistrate Judge

area, but in the category in which they showed improvement, they achieved a higher percentage of either non-white or female judges that the published data suggests they could.

67. E.g., David A. Bell, *The Power to Award Sanctions: Does It Belong in the Hands of Magistrate Judges?*, 61 ALB. L. REV. 433 (1998) (arguing that the Federal Magistrate Act and Rule 72 of the Federal Rules of Civil Procedure support the proposal that magistrate judges have jurisdiction to enter sanction orders); Ira P. Robbins, *Magistrate Judges, Article III, and the Power to Preside Over Federal Prisoner Section 2255 Proceedings*, 2002 FED. CTS. L. REV. 2 (2002) (arguing against referral of motions filed under 28 U.S.C. § 2255 to magistrate judges for final disposition); Christopher E. Smith, *From U.S.*

system,⁶⁸ and the roles these judges play in the increasingly overworked district judge bench.⁶⁹ Only a couple consider decision-making by these judges and it remains unclear whether the data support that magistrate judges exercise their own, independent judgment or they “look over their shoulders” and decide based upon how they think the district judge would want the issue decided.⁷⁰ Few consider who these judges are and the impact of their backgrounds on their decision-making.⁷¹

A recent study notes the relative lack of diversity of the Article I benches.⁷² The author asserts that the federal benches should reflect the country’s population, which is more than 50% female and about 40% people of color. However, the paper fails to account for the variations of these populations across states and districts.⁷³

Magistrates to U.S. Magistrate Judges: Developments Affecting the Federal District Courts’ Lower Tier of Judicial Officers, 75 JUDICATURE 210 (1992) (examining the history and authority of magistrate judges).

68. E.g., Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, (2005) (contemplating the expansion of the role of the magistrate judge); Ruth Dapper, *A Judge by Any Other Name: Mistitling of the United States Magistrate Judge*, 9 FED. CTS. L. REV. 1 (2015) (examining the prevalence of titling error in legal writing as it relates to magistrate judges); Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge System*, 1 FED. CTS. L. REV. 607 (2006) (reviewing the origins of the present magistrate system); Douglas A. Lee & Thomas E. Davis, “Nothing Less Than Indispensable”: *The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 NEV. L.J. 845 (2016) (examining the expansion of magistrate authority); Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503 (1995) (discussing the evolution and administration of the magistrate system); Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L. REV. 163 (1992) (examining interactions between magistrate judges and the legislature).

69. E.g., Bloom & Hershkoff, *supra* note 64 (examining the relationship between pro se litigants and magistrate judges).

70. E.g., Christina L. Boyd & Jacqueline M. Sievert, *Unaccountable Justice? The Decision Making of Magistrate Judges in the Federal District Courts*, 34 JUST. SYS. J. 249 (2013) (evaluating the magistrate’s decision making and its constraints); Christina L. Boyd, *The Comparative Outputs of Magistrate Judges*, 16 NEV. L.J. 949 (2016) (examining judicial decisions by magistrate judges); Jack Knight, Mitu Gulati & David Levi, *How Bayesian Are Judges?*, 16 NEV. L.J. 1061 (2016) (analyzing the presumption that judges constantly update their thinking with new information).

71. Tracey E. George & Albert H. Yoon, *Article I Judges in an Article III World; The Career Path of Magistrate Judges*, 16 NEV. L.J. 823 (2016) (examining the career path of magistrate judges); Marian Payson, *Diversity in the Magistrate Judge System*, FED. LAWYER, May–June 2014, at 55, 56 (analyzing diversity in the magistrate system).

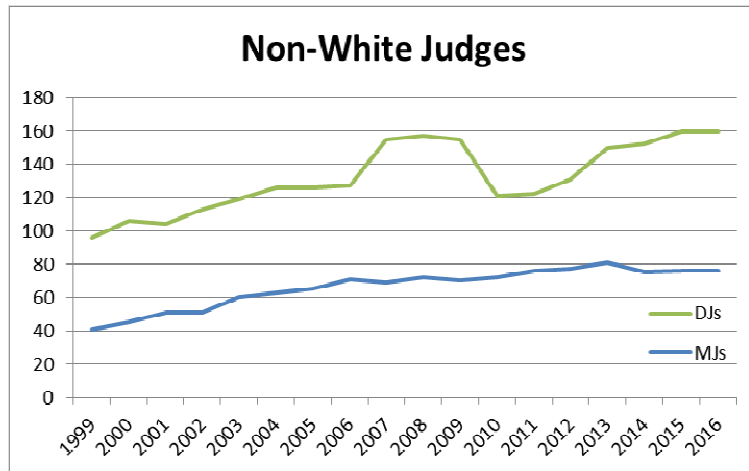
72. KATE BERRY, BUILDING A DIVERSE BENCH: SELECTING FEDERAL MAGISTRATE AND BANKRUPTCY JUDGES, (Brennan Ctr. for Justice at N.Y.U. Sch. of Law & Am. Bar Ass’n Judicial Div., 2017), https://www.brennancenter.org/sites/default/files/publications/Building_A_Diverse_Bench_0726.pdf [<https://perma.cc/K834-PS6L>] (last visited Jan. 18, 2019).

73. *Id.* at 7. The suggestion that the pipeline should be expanded with women and people of color, though facially attractive, ignores the shrinking job market for new lawyers in many populous areas and that a student entering law school today would not be prepared to ascend to the bench for upwards of 20 years. Focusing on those who have already met the prerequisites would yield earlier dividends.

2. Diversity on the Bench

In 1999, there were 450 full-time magistrate judges.⁷⁴ Of these, 348 were men, 102 were women and 41 were non-white. By 2016, there were 519 magistrate judges; 324 were men, 195 were women, and 76 were people of color. This represents only about a 5.5% increase in non-white judges.

Figure 4: Non-White Magistrate Judges in the Federal System by Year

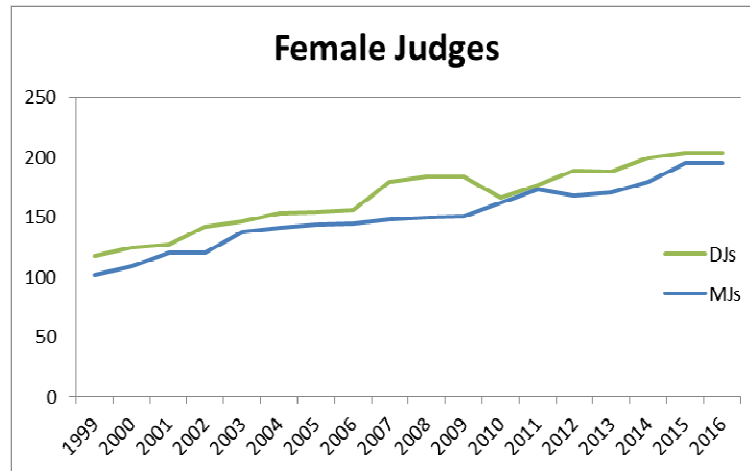


Women fared better in joining the magistrate judge ranks and by 2015 made up 37.6% of the bench. Nearly 80% of these female magistrate judges were white.

Of the ninety-one districts studied, by 2016, thirteen courts had at least one-third of their bench made up of non-white judges, and fifty-one courts had only white magistrate judges. Of these latter courts, six had at least one-quarter of their district judge benches filled by non-white judges and another five had at least 20% non-white district judges.

Thirty-one courts had at least half of their bench made up of women, and another fifty-nine had at least 30% women. Of the ninety-one courts studied, seventy-nine had at least one female magistrate judge. Of the twelve courts that had no female magistrate judges, only three had no female district judges.

⁷⁴ The report issued in September 2017, which should have detailed the 2015-2016 fiscal year data, provides the identical data as in the September 2016 report (which described the demographic data as of September 2015). The data for the years 2007 through 2009 appears to have included senior district judges, though these judges were not included in the data for the other years.

Figure 5: Female Magistrate Judges in the Federal System by Year

C. By the Numbers

Authors frequently criticize leaders for maintaining non-diverse judicial benches. Invariably, they compare the benches to the state population and find the benches lacking. A large reason for this comparison is the sparse demographic data for the mandatory bar associations. Though nearly every state bar association commits itself to diversity in the profession, most do a poor job in tracking the demographics of its members.

The membership in the various mandatory bars, at least as much as can be seen from the available data, presents obstacles for those attempting to select diverse judges. For example, California is a hugely diverse state with a non-white population of 62%.⁷⁵ However, in 2017 the California Bar Association⁷⁶ determined that only 11% of its membership is non-white. Further complicating the process is that the state is made up of fifty-eight counties and four federal judicial districts. Due to a lack of county- and district-specific demographic data for lawyers, and given that it is unlikely that the state bar membership is uniformly diverse, the available data do not necessarily explain the extent to which a diverse judiciary can be selected.

75. TRACEY E. GEORGE & ALBERT H. YOON, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?* (Am. Constitutional Soc'y, George, Tracey E., Yoon, Albert H., 2016), <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf> [https://perma.cc/7VV5-PKJY] (last visited Jan. 18, 2019).

76. These results were gratefully obtained through the courtesy of the California State Bar (on file with author).

Figure 6: Numbers of Lawyers with Diverse Backgrounds by District

	Most Recent							Most Recent							Most Recent							
	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	ABA	State Pop	Delta DJ 2010-17	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	ABA	State Pop	Delta DJ 2010-17	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	ABA	State Pop	Delta DJ 2010-17	
	Alabama Middle							Alabama Northern							Alabama Southern							
	2016 (Act.)							2016 (Act.)							2016 (Act.)							
Total	5	4	18,112	9,116	14,717			13	5	18,112	9,116	14,717			4	3	18,112	9,116	14,717			
Total Non-White	1	2	1,512	582	1,163			1	2	1,512	582	1,163			0	1	1,512	582	1,163			
% Non White	20%	50%	8%	6%	8%	34%	3%	8%	40%	8%	6%	8%	34%	0%	0%	33%	8%	6%	8%	34%	0%	
Total Female	0	1	5,844	278				5	1	5,844	278				2	2	5,844	278				
% Female	0%	25%	32%	35%		52%	0%			32%	35%		52%	5%	50%	67%	32%	35%		52%	17%	
	Alaska							Arizona							Arkansas Eastern							
	2017 (Est.)							2017 (Est.)							2017							
Total	6	4	4,326	1,838	2,402			22	14	18,486	11,542	14,960			8	5	***	4,219	6,851			
Total Non-White	0	0	215	48	72			6	2		563	3,155			1	1	***	194				
% Non White	0%	0%	5%	3%	3%	38%	0%	27%	14%		5%	21%	44%	7%	13%	20%	***	5%	27%		-1%	
Total Female	1	2	1,108	512				4	7	6,655	2,964				2	2	***	1,009				
% Female	17%	50%	27%	28%		47%	17%	18%	50%	36%	26%		50%	12%	25%	40%	***	24%			51%	11%
	Arkansas Western							California Central							California Eastern							
	2017							2017							2017							
Total	6	3	***	4,219	6,851			33	25	105,335	112,338	168,746			11	12	105,335	112,338	168,746			
Total Non-White	0	0	***	194				14	6	22,241	12,622				6	0	22,241	12,622				
% Non White	0%	0%	***	5%		27%	0%	42%	24%	21%	11%		62%	4%	55%	0%	21%	11%		62%	22%	
Total Female	1	1	***	1,009				6	12	36,807	35,100				1	7	36,807	35,100				
% Female	17%	33%	***	24%		51%	33%	18%	48%	41%	31%		50%	-7%	9%	58%	41%	31%		50%	2%	
	California Northern							California Southern							Colorado							
	2017							2017							2017							
Total	24	12	105,335	112,338	168,746			18	11	105,335	112,338	168,746			11	9	26,300	14,390	22,164			
Total Non-White	9	4	22,241	12,622				4	0	22,241	12,622				4	2	***	523				
% Non White	38%	33%	21%	11%		62%	12%	22%	0%	21%	11%		62%	-2%	36%	22%	***	4%		31%	9%	
Total Female	7	8	36,807	35,100				4	4	36,807	35,100				2	3	9,793	4,078				
% Female	29%	67%	41%	31%		50%	-4%	22%	36%	41%	31%		50%	4%	18%	33%	37%	28%		50%	-9%	
	Connecticut							Delaware							District of Columbia							
	2017							2016 (Est.)							2017 (Act.)							
Total	13	5	***	14,435	21,341			5	3	***	2,099	2,978			25	3		11,872	54,692			
Total Non-White	3	0	***	758				1	0	***	83	655			9	1	10,938	1,902	2,461			
% Non White	23%	0%	***	5%		31%	8%	20%	0%	***	4%	13%	64%	3%	36%	33%	20%	16%	5%	64%	10%	
Total Female	4	3	***	3,864				1	2	***	665				10	2		4,708				
% Female	31%	60%	***	27%		51%	0%	20%	67%	***	32%		53%	3%	40%	67%		40%		53%	6%	
	Florida Middle							Florida Northern							Florida Southern							
	2016 (Est.)							2016 (Est.)							2016 (Est.)							
Total	27	17	86,977	45,482	77,008			8	4	86,977	45,482	77,008			27	16	86,977	45,482	77,008			
Total Non-White	7	2	92,196	1,975	9,241			1	0	92,196	1,975	9,241			7	4	92,196	1,975	9,241			
% Non White	26%	12%	16%	4%	12%	44%	4%	13%	0%	16%	4%	12%	44%	-2%	26%	25%	16%	4%	12%	44%	-3%	
Total Female	8	5	33,051	12,442				1	1	33,051	12,442				8	5	33,051	12,442				
% Female	30%	29%	38%	27%		51%	-1%	13%	25%	38%	27%		51%	-2%	30%	31%	38%	27%		51%	9%	
	Georgia Middle							Georgia Northern							Georgia Southern							
	2016							2016							2016							
Total	6	3	20,593	***	31,672			16	9	***	20,593	31,672			4	3	***	20,593	31,672			
Total Non-White	2	0	2,179	***				2	2	***	2,179				0	0	***	2,179				
% Non White	33%	0%	11%	***		46%	6%	13%	22%	***	11%		46%	11%	0%	0%	***	11%		46%	0%	
Total Female	1	0	5,540	***				3	3	***	5,540				1	0	***	5,540				
% Female	17%	0%	27%	***		51%	17%	19%	33%	***	27%		51%	6%	25%	0%	***	27%		51%	0%	
	Hawaii							Idaho							Illinois Central							
	2016 (Est.)							2013							2016							
Total	7	3	3,259	3,159	4,236			3	2	***	2,538	3,836			8	3	94,610	47,424	62,782			
Total Non-White	3	0	1,101	1,548	1,144			0	0	***	64				1	1		4,263				
% Non White	43%	0%	34%	49%	27%	77%	0%	0%	0%	***	3%		17%	0%	13%	33%		9%		38%	-4%	
Total Female	3	0	827	906				0	1	***	645				2	1	58,658	12,669				
% Female	43%	0%	75%	29%		49%	14%	0%	50%	***	25%		50%	0%	25%	33%	62%	27%		51%	8%	
	Illinois Northern							Illinois Southern							Indiana Northern							
	2016							2016							2017 (Est.)							
Total	40	12	94,610	47,424	62,782			5	3	94,610	47,424	62,782			8	4	***	11,532	15,826			
Total Non-White	10	2		4,263				1	1		4,263				1	0	***	548	617			
% Non White	25%	17%		9%		38%	5%	20%	33%		9%		38%	17%	13%	0%	***	5%	4%	20%	0%	
Total Female	11	4	58,658	12,669				2	1	58,658	12,669				1	1	***	3,045				
% Female	28%	33%	62%	27%		51%	2%	40%	33%	62%	27%		51%	33%	13%	25%	***	26%		51%	0%	
	Indiana Southern							Iowa Northern							Iowa Southern							
	2017 (Est.)							2016							2016							
Total	6	7	***	11,532	15,826			5	2	7,528	5,576	7,523			8	3	7,528	5,576	7,523			
Total Non-White	1	0	***	548	617			0	0		168				0	0	198	168				
% Non White	17%	0%	***	5%	4%	20%	0%	0%	0%		3%		13%	0%	0%	0%	3%	3%		13%	0%	
Total Female	3	2	***	3,045				1	0		1235				2	2	2183	1235				
% Female	50%	29%	***	26%		51%	14%	20%	0%		22%		50%	0%	14%	67%	29%	22%		50%	14%	

	Most Recent				Delta DJ 2010-17				Most Recent				Delta DJ 2010-17						
	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	2016 ABA	2017 Pop	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	2016 ABA	2017 Pop	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	2016 ABA	2017 Pop	2017 DJ
	Kansas				Kentucky Eastern				Kentucky Western				2017						
Total	9	5	***	7,260	8,218		8	4	17,262	8,257	13,509		5	4	17,262	8,257	13,509		
Total Non-White	2	1	***	289			1	0	690	186			0	0	690	186			
% Non White	22%	20%	***	4%	23%	0%	13%	0%	4%	2%	15%	4%	0%	0%	4%	2%	15%	0%	
Total Female	2	2	***	1,593			1	1	7,164	2,021			0	0	7,163.7	2,021			
% Female	22%	40%	***	22%	50%	0%	13%	25%	42%	24%	51%	-5%	0%	0%	42%	24%	51%	-17%	
	Louisiana Eastern				Louisiana Middle				Louisiana Western				2017						
Total	15	5	***	13,798	19,307		4	2	***	13,798	19,307		10	6	***	13,798	19,307		
Total Non-White	2	1	***	1,184			1	0	***	1,184			0	0	***	1,184			
% Non White	13%	20%	***	9%	41%	7%	25%	0%	***	9%	41%	-15%	0%	0%	***	9%	41%	0%	
Total Female	6	2	***	3,095			1	1	***	3,095			3	3	***	3,095			
% Female	40%	40%	***	22%	51%	21%	25%	50%	***	22%	51%	25%	30%	50%	***	22%	51%	0%	
	Maine				Maryland				Massachusetts				2017						
Total	6	2	***	2,886	3,940		17	9	***	28,869	38,800		18	7	***	29,470	43,442		
Total Non-White	0	0	***	47			3	1	***	4,010			2	0	***	1,373			
% Non White	0%	0%	***	2%	6%	0%	18%	11%	***	14%	47%	10%	11%	0%	***	5%	26%	4%	
Total Female	1	0	***	755			4	2	***	9,601			5	5	***	9,418			
% Female	17%	0%	***	26%	51%	17%	24%	22%	***	33%	52%	-1%	28%	71%	***	32%	52%	-1%	
	Michigan Eastern				Michigan Western				Minnesota				2017						
Total	31	7	34,637	22,915	35,236		5	4	34,637	22,915	35,236		12	8	25,229	14,510	25,483		
Total Non-White	6	2	4,121	1,840	2,784		0	0	4,121	1,840	2,784		2	2	1,658	544			
% Non White	19%	29%	12%	8%	8%	24%	0%	0%	12%	8%	8%	24%	0%	17%	25%	7%	4%	19%	1%
Total Female	8	4	11,495	5,926			1	2	11,495	5,926			4	3	9,312	4,065			
% Female	26%	57%	33%	26%	51%	8%	20%	50%	33%	26%	51%	3%	33%	38%	37%	28%	50%	2%	
	Mississippi Northern				Mississippi Southern				Missouri Eastern				2017 (Est.)						
Total	5	3	9,115	5,373	7,067		10	5	9,115	5,373	7,067		15	7	***	13,466	24,787		
Total Non-White	1	0	1,748	458	1,067		3	1	1,748	458	1,067		5	3	***	782	2,528		
% Non White	20%	0%	19%	9%	15%	43%	30%	20%	19%	9%	15%	43%	3%	33%	43%	6%	10%	20%	8%
Total Female	2	1	2,697	1,278			0	1	2,697	1,278			5	5	***	3,424			
% Female	40%	33%	30%	24%	51%	23%	0%	20%	30%	24%	51%	0%	33%	71%	***	25%	51%	-9%	
	Missouri Western				Montana				Nebraska				2017						
Total	13	5	***	13,466	24,787		7	3	3,458	2,274	3,159		7	3	643	3,818	5,545		
Total Non-White	2	1	***	782	2,528		0	0	104	67			0	0	38	78			
% Non White	15%	20%	***	6%	10%	20%	0%	0%	3%	3%	13%	0%	0%	0%	6%	2%	20%	0%	
Total Female	3	1	***	3,424			1	0	1,556	574			1	2	229	872			
% Female	23%	20%	***	25%	51%	5%	14%	0%	45%	25%	50%	14%	14%	67%	36%	23%	50%	0%	
	Nevada				New Hampshire				New Jersey				2016						
Total	12	7	8,916	4,717	7,281		4	2			3,507		24	13	***	37,110	41,168		
Total Non-White	3	0		304			0	0		98			8	2	***	3,294			
% Non White	25%	0%		6%	49%	13%	0%	0%		3%	9%	0%	33%	15%	***	9%	43%	3%	
Total Female	3	3	2,942	1,178			1	1	1,877	879			9	6	***	10,181			
% Female	23%	43%	33%	25%	50%	13%	25%	50%	34%	29%	51%	20%	38%	46%	***	27%	51%	12%	
	New Mexico				New York Eastern				New York Northern				2016						
Total	10	10	7,203	5,207	5,524		30	15	71,000	92,921	177,035		9	6	71,000	92,921	177,035		
Total Non-White	4	1		1,157	1,547		8	2	8,073	10,666			0	0	8,073	10,666			
% Non White	40%	10%		22%	28%	61%	27%	13%	11%	11%	43%	6%	0%	0%	11%	11%	43%	0%	
Total Female	3	4	2,213	1,617			8	7	26,270	31,230			2	1	26,270	31,230			
% Female	30%	40%	31%	31%	50%	0%	27%	47%	37%	34%	51%	8%	22%	17%	37%	34%	51%	22%	
	New York Southern				New York Western				North Carolina Eastern				2017 (Act.)						
Total	45	14	71,000	92,921	177,035		9	7	71,000	92,921	177,035		6	4	11,675	14,585	23,694		
Total Non-White	11	2	8,073	10,666			0	0	8,073	10,666			0	0	1,583	1,168	8,473		
% Non White	24%	14%	11%	11%	43%	5%	0%	0%	11%	11%	43%	0%	0%	0%	14%	8%	36%	36%	0%
Total Female	7	6	26,270	31,230			1	1	26,270	31,230			1	1	5,067	4,051			
% Female	16%	43%	37%	34%	51%	7%	11%	14%	37%	34%	51%	13%	17%	25%	43%	28%	51%	0%	
	North Carolina Middle				Western North Carolina				North Dakota				2016						
Total	6	3	11,675	14,585	23,694		6	3	11,675	14,585	23,694		3	2	***	1,495	1,698		
Total Non-White	2	0	1,583	1,168	8,473		0	0	1,583	1,168	8,473		0	0	***	394			
% Non White	33%	0%	14%	8%	36%	36%	0%	0%	14%	8%	36%	36%	0%	0%	***	18%		13%	0%
Total Female	2	1	5,067	4,051			0	0	5,067	4,051			0	1	***	270			
% Female	33%	33%	43%	28%	51%	13%	0%	0%	43%	28%	51%	0%	0%	50%	***	26%	49%	0%	

	Most Recent				Delta DJ				Most Recent				Delta DJ											
	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	State ABA	State Pop	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	State ABA	State Pop	2017 DJ	2017 MJ	2017 Bar Data	2010 Census	State ABA	State Pop						
	Ohio Northern				2017 (Est.)				Ohio Southern				2017 (Est.)				Oklahoma Eastern				2016			
Total	14	7	***	28,813	38,623		12	7	***	28,813	38,623		3	2	17,822	8,688	13,470							
Total Non-White	2	1	***	1,432	3,090		1	0	***	1,432	3,090		1	0		643								
% Non White	14%	14%	***	5%	8%	-2%	8%	0%	***	5%	8%	20%	33%	0%		7%					33%	0%		
Total Female	4	1	***	6,934			2	6	***	6,934			0	1	5,866	2,171								
% Female	29%	14%	***	24%		51%	-5%	17%	86%	***	24%		0%	50%	33%	25%				50%	0%			
	Oklahoma Northern				2016				Oklahoma Western				2016				Oregon				2017 (Est.)			
Total	5	2	17,822	8,688	13,470		10	5	17,822	8,688	13,470		12	10	15,011	8,142	12,227							
Total Non-White	0	0		643			1	1		643			2	2	9,837	297	1,162							
% Non White	0%	0%		7%		33%	0%	10%	20%		7%		17%	20%	7%	4%	10%	23%	8%					
Total Female	1	0	5,866	2,171			2	1	5,866	2,171			2	4	3,656	2,059								
% Female	20%	0%	33%	25%		50%	0%	20%	20%	33%	25%		17%	40%	24%	25%				51%	-10%			
	Pennsylvania Eastern				2016				Pennsylvania Middle				2016				Pennsylvania Western				2016			
Total	39	10	***	36,516	49,406		13	5	***	36,516	49,406		12	5	***	36,516	49,406							
Total Non-White	9	1	***	2,360			0	0	***	2,360			1	0	***	2,360								
% Non White	23%	10%	***	6%		22%	4%	0%	0%	***	6%	22%	0%	8%	0%	***	6%		22%	-5%				
Total Female	7	5	***	9,924			2	2	***	9,924			4	4	***	9,924								
% Female	18%	50%	***	27%		51%	2%	15%	40%	***	27%		0%	33%	80%	***	27%				51%	11%		
	Puerto Rico				2016				Rhode Island				2017				South Carolina				2016 (Act.)			
Total	9	4	***	14,183	14,293		4	2	***	3,387	4,167		15	8		6,655	10,316							
Total Non-White	9	3	***	7,681			0	0	***	69			2	3		511	609							
% Non White	100%	75%	***	54%		***	0%	0%	0%	***	2%	25%	0%	13%	38%	8%	6%	36%	-7%					
Total Female	2	2	***	4,563			1	1	***	784			5	5		1,616								
% Female	22%	50%	***	32%		***	2%	25%	50%	***	23%	52%	0%	33%	63%	32%	24%			51%	11%			
	South Dakota				2017 (Act.)				Tennessee Eastern				2017 (Act.)				Tennessee Middle				2017 (Act.)			
Total	7	4	***	1,302	1,933		7	5	***	11,779	18,461		8	3		11,779	18,461							
Total Non-White	0	0	***	39			1	0	***	703	923		2	0		703	923							
% Non White	0%	0%	***	3%		17%	0%	14%	0%	***	6%	5%	25%	-1%	25%	0%	6%	5%	25%	0%				
Total Female	1	2	***	273			1	1	***	3,228			1	2		3,228								
% Female	14%	50%	***	21%		50%	0%	14%	20%	***	27%		13%	67%		27%				51%	0%			
	Tennessee Western				2017 (Act.)				Texas Eastern				2017 (Est.)				Texas Northern				2017 (Est.)			
Total	7	4	***	11,779	18,461		7	8	100,294	57,891	89,361		13	9	100,294	57,891	89,361							
Total Non-White	1	2	***	703	923		0	0	18,924	8,266	16,889		1	2	18,924	8,266	16,889							
% Non White	14%	50%	***	6%	5%	25%	-3%	0%	0%	19%	14%	19%	56%	0%	8%	22%	19%	14%	19%	56%	0%			
Total Female	1	2	***	3,228			1	4	35,037	15,686			3	2	35,037	15,686								
% Female	14%	50%	***	27%		51%	-3%	14%	50%	35%	27%		23%	22%	35%	27%				50%	0%			
	Texas Southern				2017 (Est.)				Texas Western				2017 (Est.)				Utah				2017			
Total	27	15	100,294	57,891	89,361		14	13	100,294	57,891	89,361		10	5	4,084	4,854	8,204							
Total Non-White	12	4	18,924	8,266	16,889		6	4	18,924	8,266	16,889		0	0	245	242								
% Non White	44%	27%	19%	14%	19%	56%	13%	43%	31%	19%	14%	19%	56%	3%	0%	6%	5%			21%	0%			
Total Female	10	7	35,037	15,686			2	2	35,037	15,686			2	2	245	902								
% Female	37%	47%	35%	27%		50%	5%	14%	15%	35%	27%		20%	40%	24%	19%				50%	-2%			
	Vermont				2015				Virginia Eastern				2017				Virginia Western				2017			
Total	4	1	***	1,863	2,326		19	9	24,249	32,679	23,249		5	3	24,249	32,679	23,249							
Total Non-White	0	0	***	28			4	2	2,182	3,897			0	0	2,182	3,897								
% Non White	0%	0%	***	2%		6%	0%	21%	22%	9%	12%		0%	0%	9%	12%				29%	0%			
Total Female	1	0	***	592			4	1	8,730	10,012			0	1	8,730	10,012								
% Female	25%	0%	***	32%		51%	0%	21%	11%	36%	31%		0%	33%	36%	31%				51%	17%			
	Washington Eastern				2016 (Est.)				Washington Western				2016 (Est.)				West Virginia Northern				2016 (Est.)			
Total	10	2	25,708	16,591	25,786		13	6	25,708	16,591	25,786		4	3	***	3,951	4,862							
Total Non-White	1	0	3,143	1,304	2,475		2	0	3,143	1,304	2,475		0	0	***	92	875							
% Non White	10%	0%	12%	8%	10%	30%	10%	15%	0%	12%	8%	10%	30%	-6%	0%	0%	***	2%	18%	8%	0%			
Total Female	1	1	11,959	4,766			3	2	11,959	4,766			2	0	***	1,092								
% Female	10%	50%	47%	29%		50%	-4%	23%	33%	47%	29%		50%	2%	50%	0%	***	28%		51%	25%			

	West Virginia Southern					Wisconsin Eastern					Western Wisconsin				
	2017 DJ	2017 MJ	Recent Bar Data	2010 Census	2016 (Est.)	2017 DJ	2017 MJ	Recent Bar Data	2010 Census	2016 (Est.)	2017 DJ	2017 MJ	Recent Bar Data	2010 Census	2016 (Est.)
Total	6	3	3,951	***	4,862	5	3	15,625	10,474	15,549	3	1	15,625	10,474	15,549
Total Non-White	1	2	92	***	875	1	1	1,042	371	1,617	0	0	1,042	371	1,617
% Non White	17%	67%	2%	***	18%	20%	33%	7%	4%	10%	0%	0%	7%	4%	10%
Total Female	1	0	1,092	***		1	1	6,096	2,672		1	0	6,096	2,672	
% Female	17%	0%	28%	***	51%	20%	33%	39%	26%	50%	17%	33%	0%	39%	26%
Wyoming															
Total	3	4	2,935	390	1,776										
Total Non-White	0	0		41											
% Non White	0%	0%		3%	16%	0%									
Total Female	1	1	982	349											
% Female	33%	25%	33%	29%	49%	8%									

Criticism that the magistrate judge bench remains racially homogeneous despite opportunities to diversity is valid. For example, despite the low bar membership for non-whites in California, three of the federal districts have district judge benches are made up of one-third or more non-white judges. The fourth federal district has nearly one-quarter of its district judge bench made up of non-white judges. Similarly, though Colorado's bar population is made up of about 96% white lawyers, the district judge bench is made up of 36% non-white judges. This phenomenon of equaling or exceeding bar demographics occurred in sixty-two⁷⁷ of the ninety⁷⁸ districts studied.

Though it may be surmised that courts with a racially diverse district judge bench would have a racially diverse magistrate judge bench, this is not the case. By strictly looking at the percentage of non-white district judges, the top fifteen most racially diverse courts are: Puerto Rico (100%), California Eastern (60%), Texas Western (50%), Texas Southern (44%), Hawaii (43%), California Central (40%), New Mexico (40%), California Northern (38%), Colorado (36%), District of Columbia (36%), Georgia Middle (33%), Missouri Eastern (33%), North Carolina Middle (33%), Oklahoma Eastern (33%), and New Jersey (33%).

Of the top fifteen most racially diverse district judge benches, six⁷⁹ have only white magistrate judges, and four⁸⁰ have at least one-third of their magistrate judge benches occupied by people of color. Seven of the fifteen most racially

77. Three districts exceeded or equaled the bar demographic numbers depending upon the statistic considered; oddly, in these districts, the number reported to the ABA as to non-white membership differed from that publicly reported.

78. Those districts that had fewer non-white district judges than the Bar statistics indicated included Alaska, Arkansas Western, Florida Northern, Georgia Southern, Idaho, Iowa Southern, Iowa Northern, Kentucky Western, Louisiana Western, Maine, Michigan Western, Montana, Nebraska, New Hampshire, New York Western, North Dakota, Oklahoma Northern, Pennsylvania Middle, Rhode Island, South Dakota, Texas Eastern, Utah, Vermont, Virginia Western, West Virginia Northern, Wisconsin Western, and Wyoming.

79. California Eastern, Georgia Middle, Hawaii, North Carolina Middle, and Oklahoma Eastern

80. California Northern, District of Columbia, Missouri Eastern, and Puerto Rico

diverse district judge benches have at least half of their magistrate judge bench populated by women.

Of the top gender diverse district judge benches, six⁸¹ are also at the top of the list for the most gender diverse magistrate judge benches. Thirty-one of the ninety-one courts studied have 50% or more female magistrate judges. Oddly, of the courts that have no district judges of color,⁸² the corresponding magistrate judge benches⁸³ are made up of 50% or more females.

Of the nineteen district judge benches where women occupy at least one-third of the positions⁸⁴, ten of the corresponding magistrate judge benches have at least 33% of their positions occupied by people of color.

D. Conclusion

District judge benches that are made up of a higher percentage of people of color or women do not ensure that the corresponding magistrate judge bench will have a higher percentage of judges that are non-white or female. However, courts that have a district judge bench that is well-populated by women and/or non-white judges, have at least one female magistrate even when the bench is primarily non-diverse. Courts with a racially diverse district judge bench do not uniformly have a racially diverse magistrate judge bench. In the fifteen courts in which the district judge bench has at least one-third non-white judges, five have no people of color on their corresponding magistrate judge bench. Thus, it is not the color of the skin or the gender of the district judges that drives diversity; it is the collective will of the individual courts to prioritize diversity.

IV

SELECTION OF FEDERAL TRIAL JUDGES

A. Selection of District Judges

The selection of a district judge is a political process. The senator for the district where the opening lies is generally entitled to select a candidate to present for the President's approval and, if appropriate, nomination. Before the senator

81. Pennsylvania Western (80%), Missouri Eastern (71%), Alabama Southern (67%), California Northern (67%), District of Columbia (67%), and South Carolina (63%)

82. Alabama Southern, Alaska, Arkansas Western, Georgia Southern, Idaho, Iowa Northern, Iowa Southern, Kentucky Western, Louisiana Western, Maine, Michigan Western, Montana, Nebraska, New Hampshire, New York Northern, New York Western, North Carolina Eastern, North Carolina Western, North Dakota, Oklahoma Northern, Pennsylvania Middle, Rhode Island, South Dakota, Texas Eastern, Utah, Vermont, Virginia Western, West Virginia Northern, Wisconsin Western, and Wyoming

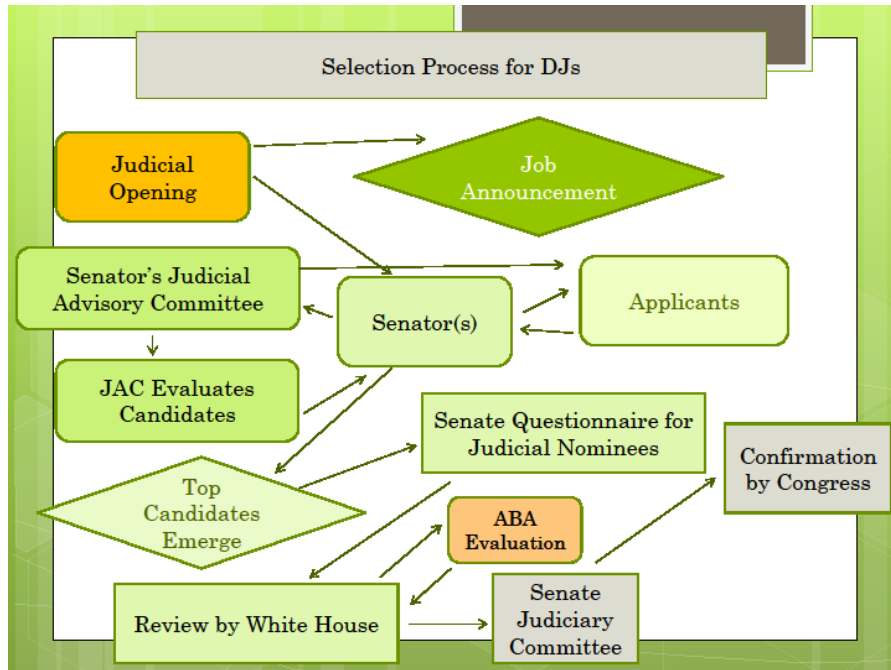
83. Alabama Southern (67%), Iowa Southern (67%), Nebraska (67%), Alaska (50%), Idaho (50%), Louisiana Western (50%), Michigan Western (50%), New Hampshire (50%), North Dakota (50%), Rhode Island (50%), South Dakota (50%), and Texas Eastern (50%)

84. Alabama Southern (50%), Indiana Southern (50%), West Virginia Northern (50%), Hawaii (43%), District of Columbia (40%), Illinois Southern (40%), Louisiana Eastern (40%), Mississippi Northern (38%), Alabama Northern (38%), New Jersey (38%), Texas Southern (37%), California Northern (33%), Minnesota (33%), Missouri Eastern (33%), North Carolina Middle (33%), Pennsylvania Western (33%), South Carolina (33%), Wisconsin Western (33%), and Wyoming (33%).

begins the selection process, the President makes his wishes known about the type of person he would like to nominate.⁸⁵ This can include information about judicial philosophy, demographic characteristics, and political party. It is uncommon for a senator to nominate a person of a political party that is contrary to that of the President's, even when the President's political party is different from the senator's. Frequently, the senator's staff members contact potential candidates with the right mix of experience, demographics, and political savvy, to encourage application.

Most senators maintain a Judicial Advisory Committee made up of lawyers, laypersons of political heft, law professors, and others with an interest in the judiciary. This committee, made up of up to ten or more members, culls through the applicants' materials and proposes the top candidates for the senator's consideration. The exact process varies from senator to senator and is generally a well-kept secret. Unless you have been through it or know someone who has, exactly what happens and how it happens is a mystery.

85. In 2008, the *Los Angeles Times* published a story detailing the agreement between the California senators and the Bush Administration, in which Senators Feinstein and Boxer agreed to recommend no candidates from the extreme right or left. Rather, candidates would fall "between the 45 yard lines," meaning they would have relatively centrist views. Henry Weinstein, *Process of Judge Selection Set Up*, L.A. TIMES, May 30, 2001, <http://articles.latimes.com/2001/may/30/local/me-4193> [<https://perma.cc/4AP3-T5S7>]. Likewise, in 2013, President Obama made clear his desire to appoint "firsts." Philip Rucker, *Obama pushing to diversify federal judiciary amid GOP delays*, WASH. POST, Mar. 3, 2014, https://www.washingtonpost.com/politics/obama-pushing-to-diversify-federal-judiciary-amid-gop-delays/2013/03/03/16f7d2067aab11e29a75dab0201670da_story.html?noredirect=on&utm_term=.9a6f388b7cca [<https://perma.cc/NH47-U9B5>]. At that time, President Obama had nominated the first openly gay black man to the district court. *Id.* Before that, he had nominated the first lesbian Asian American candidate for a district judge position. *Id.* In addition, he proposed the first South Asian to the D.C. Circuit. *Id.* Thus, it was apparent that he favored candidates from underrepresented groups. The Post author quoted White House Counsel, Kathryn Ruemmler when she said, "Diversity in and of itself is a thing that is strengthening the judicial system. It enhances the bench and the performance of the bench and the quality of the discussion." *Id.*

Figure 7: The Selection Process for District Judge

The selection process includes reference checking and other investigation by the Committee. It is common for one or more members of the Committee to contact judicial officers of the district to ferret out opinions about the candidates. A candidate who is not well-liked by the judicial officers is unlikely to do well in the process. However, this process does not promote cronyism because feelings of the court notwithstanding, the senator is obligated to propose a candidate the President will endorse. A candidate with political influence, regardless of whether he is known to or liked by the court, may succeed.

The Committee must craft its investigation toward selecting candidates who meet the senator's and President's preferred qualities. It has broad authority to identify the top candidates with these qualities and, though legal skill is a key factor, the most brilliant legal mind may not always succeed. Often the Committee selects three top candidates and ranks them. Regardless of the ranking, the senator selects the preferred candidate. It is common for candidates to benefit from political pressure being brought to bear and it can make the difference as to the one appointed ultimately.

Once the senator makes the selection, the candidate is forwarded to White House Counsel. A member of the Department of Justice is assigned, in part to assist and in part to vet, the candidate. A portion of this process includes completing the "United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees." This requires the candidate to submit a huge volume of detailed information related to legal experience, finances,

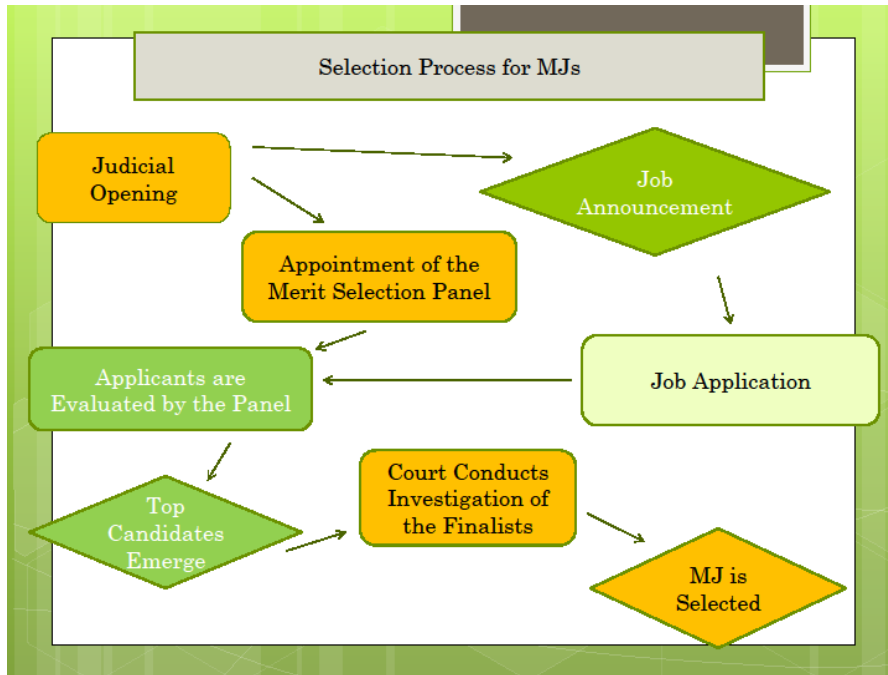
sources of conflicts, legal writings and public speeches. The candidate must provide all writings issued for years before the selection and must submit to a medical examination.

Assuming the responses to the questionnaire do not raise too many concerns, the candidate is referred to the ABA for further vetting. The ABA seeks surveys members about the candidate. Simultaneously, the FBI conducts an exhaustive background check. Also, the candidate submits to an interview with White House Counsel who, in general, wields the authority of the President to refuse to advance the candidate further.

Assuming the candidate receives a passing recommendation from the ABA and there are no skeletons uncovered by the FBI, the President makes the nomination. After this, the Senate Judiciary Committee may schedule the candidate for a hearing or may require additional information. Eventually, however, the candidate will receive a hearing, and if favorable an “up or down” vote by the Senate. If the candidate receives a majority vote, the President formally appoints the person to the judgeship.

B. Selection of Magistrate Judges

The process of selecting magistrate judges differs dramatically. Rather than requiring an act of Congress, district judges are charged with the obligation to select their court’s magistrate judges. The process is intended to be merit-based with little leeway for political maneuvering; in practice, however, often the in-group remains in, and the out-group remains out. Though permitting sufficient flexibility for courts to select a magistrate judge who can fill the district’s needs, the process for selecting magistrate judges can cause significant variability in the effectiveness of the tools designed to ensure equal access to these positions regardless of the applicant’s demographic backgrounds.

Figure 8: The Selection Process for Magistrate Judges

The process of obtaining approval to fill a magistrate judge position can be challenging depending upon the caseload statistics of the district. Once the district is given this authority, it is obligated to publicize it widely.⁸⁶ How to meet this public notice requirement is largely left to the district, which can choose to rely on electronic notice via their web page or other, more traditional methods.⁸⁷

The Administrative Office urges districts to consider avenues that will attract the greatest number of qualified applicants without regard for their gender, race, color, age (over forty), disability, religion, or national origin.⁸⁸ The AO also encourages the district to consider notice to minority bar associations and other underrepresented community groups that are likely to have members who are qualified for the position.⁸⁹ The AO invites courts to actively encourage applicants from underrepresented groups.⁹⁰

86. THE SELECTION, APPOINTMENT AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES 13 (Judicial Services Office Administrative Office of the United States Courts, Oct. 2016) [hereinafter MAGISTRATE JUDGE SELECTION REPORT], http://www.ksd.uscourts.gov/wp-content/uploads/2018/08/Selection_and_Appointment_of_Magistrate_Judges_Oct-2016.pdf [<https://perma.cc/TKS3-PQCC>].

87. *Id.*

88. *Id.*

89. *Id.* at 14.

90. *Id.*

More than half of the responding chief judges reported that they comply with this guidance and provide the job posting to minority and specialty bar groups, and also made direct contact with women and minorities to encourage them to apply. One-third of the responding chief judges reported they target women and minorities when they advertise the position. About one-fourth spoke to minority and female lawyer groups about judicial openings, but nearly one fourth were unaware of any efforts to inform candidates of diverse backgrounds about the opening.

About 57% of the current magistrate judges learned of the opening before they applied through word-of-mouth. Twenty-six percent learned of the opening through direct contact by a court member. Of these, 70% were white and about half were men. Another 25% learned of the opening through the court's website, and only 8% learned of the opening through a specialty bar association publication.

Part of the official job posting provides information about how to apply and includes a job application or a requirement that the applicant submit a curriculum vitae or both.⁹¹ Notably, the "sample" application form offered by the AO does not have space for the applicant to note demographic information, except obliquely when asking whether the applicant has become naturalized.⁹²

1. The Merit Selection Panel

The first substantive step toward culling the applicant pool is performed by a merit selection panel. This panel has enormous power to determine which applicants to reject, which to interview and, ultimately, which candidates can be considered by the judges of the district. The report the panel submits to the district includes its reasons for advancing the final five, but no explanation as to why the panel did not advance the other applicants. Consequently, the implicit and explicit biases of the panel members can play a determinative role in whether a candidate advances in the process. Despite this, panel members receive inconsistent instruction and training for completing their work.

The chief district judge must appoint a merit selection panel, headed by a chairperson, to reduce the candidate pool to the five most qualified.⁹³ The panel members must reside in or have significant ties to the district.⁹⁴ Courts are directed to appoint a demographically diverse panel.⁹⁵

Only one panelist surveyed recalled serving on a panel that did not include a woman, while 56% recalled serving on a panel that had between one and five

91. *Id.*

92. *Id.* at 63.

93. *Id.* at 18, 23–24, 28–31. However, the court may choose to use the same merit selection panel to evaluate candidates for more than one position or the court may maintain a standing panel.

94. *Id.* at 17.

95. *Id.* at 18. Notably, in January 2018, Senators Kamala Harris (CA) and Cory Booker (NJ), both Democrats, were appointed to the Senate Judiciary Committee. They represent only the second and third African American ever to serve on this committee. The first was Senator Carol Moseley Braun (IL)—also a Democrat—who served on the Committee in the 1990s.

female members. About 44% had between three and five female members. About 10% of the panelists recalled serving on a panel with no non-whites. In contrast, about 22% recalled one non-white member, about 15% recalled two non-white members, and about 16% recalled there were four non-white members on the panel. The panel must include at least seven members made up of at least five lawyers and at least two non-lawyers.⁹⁶ The greatest percentage, nearly 40%, served on a panel that included eleven or more members.

Though most of the panelists had served only on one panel, more than 27% had served on three or more panels. About 10% served on ten or more selection panels. More than 40% served within the prior twenty-one months, though 50% served between one and three years prior. About 81% had not served as a chairperson of a panel.

The first meeting of the panel is informational.⁹⁷ Because districts use magistrate judges in different ways, a judge is permitted to attend to provide insight into the unique court requirements of the job⁹⁸ and the screening criteria.⁹⁹ However, the exact process varies from district-to-district. About half of the chief judges indicated they provided written materials and oral guidance only to the chairperson of the panel. The rest provided guidance to the entire panel and provided oral instruction and written materials. For one-quarter of the panels, the initial meeting lasted more than an hour, but most of these meetings, if they occurred at all, were less than one hour. For about twenty percent of the panelists, the oral component of the training was a mere direction to read the written materials.

If the court anticipates that the position will focus on a particular area of law, the chief judge emphasizes this so it can be a significant concern for the panelists when selecting the finalists. Panelists recalled the great bulk of the training focused on the basic information about the job and the desired qualifications the successful candidate would possess.

Though nearly 97% of the chief judges agreed it was important to select diverse members of the merit selection panel, about 84% reported they did not provide training to the panel to understand the implications of implicit bias. Nearly 68% did not provide instruction on the importance of diversity on the bench though about 78% *did* provided training on how to value diversity when evaluating applicants.

Past merit selection panelists confirmed this. Less than 20% reported receiving any information about implicit bias, but nearly 80% recalled receiving some guidance about how to consider diversity when evaluating the candidates.

96. *Id.* at 17. For the appointment of a part-time magistrate judge, the panel must include at least three members and may include senior, active or retired district judges, active, recalled or retired magistrate judges, bankruptcy judges or court staff. The panel must include two members from outside the court.

97. *Id.* at 23.

98. *Id.*

99. *Id.*

Most panelists recalled that the focus of the initial meeting was on the expected qualifications of the successful candidate, basic information about the position, interview techniques for meeting with the applicants, and the criteria to apply when selecting the finalists.

At the first meeting, the panel discusses and determines the procedures it will use for the selection process, for example, whether it will use secret balloting, whether there will be an attendance requirement, whether voting may occur in absentia, the rules to establish a quorum, and whether each panel member will have a role in the initial screening of the applicants.¹⁰⁰ The panel must also establish a methodology for evaluating qualitative characteristics.¹⁰¹ The panel may conduct further investigation into the qualifications of the applicant.¹⁰² Though panel is not obligated to interview the candidates, if it chooses to do so, it must establish in advance the questions to be asked to ensure a uniform process.¹⁰³

The panel's objective is to select the top five individuals it determines are best suited to the needs of the job.¹⁰⁴ Given the increasing regularity with which district judges are selected from the magistrate judge bench, the panel is charged with examining the applicant's qualities as if it were selecting a district court judge.¹⁰⁵ The panel is required to evaluate the applicant's experience, including the areas of practice, past scholarship, professional competence, the ability to address complex legal issues, writing skill, reputation, and community involvement, including pro bono and public service work.¹⁰⁶ The panel may consider the applicant's familiarity with the district and its systems as well as its rules.¹⁰⁷ The panel must select those of high moral integrity, steady temperament, and a demonstrated commitment to the goal of justice.¹⁰⁸ Though there is no requirement to favor minority applicants, the panel is obligated "to give due consideration to all qualified applicants for a magistrate judge position, particularly those from underrepresented groups."¹⁰⁹

The merit selection panel process is strictly confidential.¹¹⁰ The panel may reveal only that information necessary to fully report to the court and the panel's deliberations may not be revealed.¹¹¹ Much like a jury deliberation, the panel

100. *Id.* at 23–24.

101. *Id.* at 29.

102. *Id.* at 26. Except where the application contains information gaps that impact the panel's decision making, the panel is not obligated to conduct more than a cursory investigation because the selected candidate will undergo a full and extensive FBI and IRS background check.

103. *Id.* at 24.

104. *Id.* at 33.

105. *Id.* at 28.

106. *Id.*

107. *Id.* at 29.

108. *Id.*

109. *Id.* at 31.

110. *Id.* at 25. However, the names of the entire pool of applicants may be revealed to the judges of the court.

111. *Id.*

discusses the candidates and members can each provide analysis.¹¹² The panel's discussion is to be robust and to fully consider the qualities of each applicant.¹¹³ The panel must identify the top five candidates unless the quality of the applicant pool is such that this cannot occur.¹¹⁴ Rather than voting on a pool of top candidates, the panel is obligated to vote on each candidate individually. To make it to the "final five,"¹¹⁵ the applicant must receive a positive vote from a majority of the panel.¹¹⁶

One Chief Judge ruminated that "horse trading" likely occurs during this process. "If you vote for my candidate, I'll vote for yours." Exactly how and whether this impacts the selection of diverse candidates is hard to know, but as the data reveals, the court and some of the panelists generally have experience with the candidates who move forward in the process. Notably, about 24% of the current sitting magistrate judges worked for the United States Attorney's Office before receiving the appointment to the bench, and about 4% worked for the United States Federal Defender's office. About 43% worked in a federal clerkship position in the past.¹¹⁷

Most magistrate judges worked in private practice or in a government office that required practice in federal court. Only ten out of the 307 magistrate judges had not practiced in federal court, and one had insignificant experience. Of this group, five were women and six were men. One of the men is African American. The remaining 297 magistrate judges had substantial federal court experience.

Within ninety days of appointment, the panel must report its five selections.¹¹⁸ Seventy-eight percent reported they believed the members followed the guidance given by the court. In the last ten years, one-third of the courts received a group of finalists that included a woman more than five times; one-third received a group of finalists that included a woman twice. Four courts had this happen four times, one court had this happen three times, and four courts had this happen only once.¹¹⁹

112. *Id.* at 33.

113. *Id.*

114. *Id.* at 34. If the applicant pool is insufficient, the court may make efforts toward further recruitment. If this occurs, the panel report is still due within 90 days from their appointment.

115. If the panel is filling two positions, it must identify at least six candidates (so that five candidates remain once the first position is filled) or the panel may be directed to determine the top ten candidates; five for each position. *Id.*

116. *Id.*

117. Law clerks could prove to be a significant source for identifying future magistrate judge candidates. Sixty-nine percent of magistrate judges agreed that their courts encouraged them to hire law clerks that are diverse in terms of race and gender but only 29% did this explicitly. The chief judges agreed with this for the most part. About 53% of the chief judges reported that their courts encouraged hiring law clerks of diverse backgrounds though only 13% stated that this came in the form of explicit encouragement.

118. MAGISTRATE JUDGE SELECTION REPORT, *supra* note 86, at 19.

119. Thus, most of the merit selection panels working from 2007 through 2017, found there was at least one woman and at least one person of color whose qualifications placed them in the top five of those considered for the judicial position. On a micro level, the degree to which significance can attach to this data, however, depends on the number of times each of these courts filled a position during this period,

Over the same period, 20% did not receive a group of finalists that included a non-white applicant; 30% received a group of finalists that included a non-white candidate one time. Seventeen percent of the courts received finalists with a non-white candidate twice, and one court had this happen three times. Ten percent of the courts received a list of finalists with a non-white candidate four times, and 14% received such a list five or more times.¹²⁰

The panel's report must provide any additional information the process has elicited that was not contained in the written materials provided by the applicants.¹²¹ The panel may choose to report on the qualities it determined to be most important, but it is not obligated to do so.¹²² The panel may choose to rank the finalists.¹²³

2. Court Selection

Once the court receives the panel's report, it may make the selection based only on the information received from the panel and the applicants, or it may conduct a supplemental investigation.¹²⁴ The court can, and usually does, conduct interviews of the finalists.¹²⁵ If the court determines the five top candidates are not acceptable, the court may request the panel provide five additional names.¹²⁶ In this event, the court must select the successful candidate from one of the two lists provided by the panel.¹²⁷

The active district judges and the senior district judges who carry at least a fifty percent caseload are entitled to vote on the final selection.¹²⁸ The selected candidate must receive a majority vote of those entitled to vote.¹²⁹ If no candidate wins a majority vote, the chief district judge must make the selection.¹³⁰

Chief district judges play a key role in selecting magistrate judges for their districts. They select, appoint, and direct the members of the merit selection panel—which would seem to provide them significant control over whether the process yields selection of diverse candidates. However, the chief judges discount this control and believe part of the reason the bench cannot be diversified is the lack of buy-in from the other district judges. On scale of one to 100, on average,

but this data was not collected. Notably, in the 10 years preceding this research, of those Magistrate Judges responding to the survey, 198 had been appointed within the last ten years; half were women and half were men. Of the women appointed during this interval, 16 were non-white. Of the 99 males appointed, 18 were non-white.

120. *See id.*

121. *Id.* at 33.

122. *Id.* at 34.

123. *Id.*

124. *Id.* at 37.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* Some courts include the magistrate judges in the selection process, though they are not always allowed to vote.

129. *Id.*

130. *Id.*

the chief judges rated the importance of having a diverse magistrate judge bench as seventy-nine. However, they felt that their court valued diversity of the magistrate judge bench only as a sixty-seven. One Chief Judge said, “You can talk about gender, you can talk about race, but the judges say they need to select the best candidate for the job and let the chips fall where they may.” In only one instance did a chief judge indicate the court valued diversity on the magistrate judge bench much more highly than the chief did.¹³¹

Current magistrate judges had a slightly different take. Like the chief judges, on average, magistrate judges rated their own courts as a sixty-five on a scale of one to 100 when considering how highly it valued diversity of the magistrate judge bench. About one-fifth of magistrate judges graded their own court as a forty-nine or below. Another one-fifth rated their courts at ninety or above. Of the 163 magistrate judges describing their own courts as valuing diversity more than the average score of sixty-five, one-third were white men.

The chief district judges felt achieving diversity of the subordinate bench was due, in no small part, to market forces. Seventy-five percent cited the lack of qualified, diverse candidates as the primary impediment to diversifying the bench. Fifty percent believed the need to hire the best-qualified candidate was a secondary impediment to achieving diversity, and one-third cited the failure of the merit selection panel to provide diverse candidates as a tertiary obstacle. The nature of the job itself was cited by several chief judges as explanation why there was not a more diverse candidate pool. One reported that despite the substantive work done by magistrate judges, some lawyers still believed the position was nothing more “than a glorified law clerk.” Others cited the loss of pay an experienced private practitioner would suffer if appointed to the position as explanation for the relatively shallow pool of applicants. This explains, one Chief Judge reported, why courts receive so many applications from government agencies; the salary of a magistrate judge is higher than that which government lawyers generally receive. However, because district judges are paid only 8% more than magistrate judges, this does not fully explain why people of diverse backgrounds will leave private practice for appointment to the district judge bench but won’t do so for appointment to the magistrate judge bench.

One judge opined women are more interested in the magistrate judge bench because, due to family demands, they have not been on the partnership path for a sufficiently long time to have earned a top salary. Another thought women do well in the magistrate judge selection process because men—who still tend to be the greatest demographic on the district judge bench—are comfortable having

131. Only considered here are those courts where the chief judge’s personal rating differed from the rating the chief gave the court by 20 points or more. As to several courts, where data was provided by both the chief judge and the members of the corresponding magistrate judge bench, the magistrate judges on average felt that the court as a whole valued diversity much less—meaning they rated the value the court placed on diversity 20 points or lower—than the chief judge. In a few instances, they felt the court valued diversity of their bench much higher than the chief judge. For the most part, there were insignificant differences between the value assessed by the chief and the average figures provided by the magistrate judges.

women as their subordinates but not as comfortable with people of color in this role.

Notably, 30% of the responding chief judges reported their courts maintained demographic data on every applicant for magistrate judge positions and 10% maintained it as to the five finalists. One-third of the courts kept no data, and nearly 27% were uncertain whether the court kept the data.

V

METHODS FOR CHANGE

Most of the chief judges interviewed expressed a commitment to diversity though few knew how to achieve it. A few were interested in diversity but balked at the idea of any “affirmative action” approach. A few advocated for a system of color-blindness in which the best candidate was selected regardless of that person’s race, religion, ethnicity, or gender. However, after studying the data and talking with the chief judges, areas for improvement became clear.

The AO should maintain magistrate judge’s demographics on a district-by-district basis rather than holding it in the aggregate. Districts should be encouraged to develop a culture of diversity that includes the entire court family, including the clerk’s office, the probation and pretrial services offices and in law clerk hiring in addition to the judges. Recruitment efforts should be standardized and targeted to ensure the wide distribution of information about open judicial positions. The prestige and pay for magistrate judges should be increased to attract candidates. Courts should gather and track demographic data on the judicial applicants to help to determine why more diverse applicants are not selected. The merit selection panels should be made up of people of diverse backgrounds and they should receive standardized training on key selection issues. Finally, courts should be held accountable for their efforts toward achieving diversity.

A. Gather and Maintain Court-by-Court Data

Despite consistent devotion of resources to the goal of diversity, the scope of the problem is hard to understand due to the lack of data. Though each district is required to report annually about the demographic makeup of their court and the AO reports these findings, data regarding magistrate judges is available only in the aggregate. This composite data provides no sure method of knowing which courts are doing well and which courts are struggling to achieve diversity on the subordinate bench. The reason for this opacity is not known, but, at least in some instances, it frustrates change.

Some courts have dismal numbers in terms of diversity despite what appears to be a hearty pipeline of diverse bar members. It is likely these courts have no idea as to their relative lack of diversity. Making court-by-court data available, peer pressure may encourage strengthened efforts toward achieving diversity. This is particularly important for data related to magistrate judges because, unlike district judges—whose demographics are readily available from the FJC—

no entity tracks demographic data on magistrate judges except the AO, and as noted above, reports the information only in the aggregate.

No entity in the federal or state systems seeks to determine the causes of the lack of diversity. Rather, it appears that courts rely nearly exclusively on anecdotal evidence to evaluate whether efforts should be expended on achieving diversity goals and they tend to explain the failure to achieve parity with the district judge bench by citing pipeline issues. However, review of the data indicates that the pipeline explains the problem in only limited circumstances.

B. Encourage Diversity Throughout the Entire Court Family

The most diverse courts have focused not only on the diversity of the benches but have determined that diversity must occur throughout, including in the clerk's office, in the probation office, in law clerks, and among support staff. A chief judge from one of these courts reported that the concept of diversity is so ingrained that instead of taking note when they have a diverse gathering, it is remarkable to them only when they don't. Courts that have developed a culture of diversity invariably have a more diverse magistrate bench.

A chief judge from a district with a culture of diversity reported that the court celebrates diversity by supporting minority bar associations—through the entire bench actively attending events hosted by these groups—and in this way, communicates a message that everyone is welcome in their court. By actively engaging with the minority and female bars, the judges meet future candidates for upcoming judicial vacancies and vice versa.

The idea of knowing candidates is a common theme in the hiring process for magistrate judges. Most chief judges interviewed reported that though there is not a formal policy of selecting those they know, this is a common practice. Of the magistrate judges responding to the survey, nearly half clerked at some point before their appointment to the bench. Despite this, most courts did not explicitly encourage the selection of diverse law clerks. Though 53% of the chief district judges reported their courts encouraged judges to hire non-white and female law clerks, 40% indicated this encouragement was implicit only.

Nearly 30% of Magistrate Judges worked previously as an Assistant United States Attorney or as an Assistant Deputy Federal Defender, but only 8% of AUSAs are African American, only 5% are Latino and only 38% are female.¹³² Thus, part of the diversity problem is that the U.S. Attorneys' offices consistently

132. Debbie Mukamal & David Alan Sklansky, Op-Ed, *A study of California prosecutors finds a lack of diversity*, L.A. TIMES, Jul. 29, 2015, <https://www.latimes.com/opinion/op-ed/la-oe-0729-sklanskymukamal-diversity-prosecutors-california-20150729-story.html> [<https://perma.cc/7RPS-DDYF>]. As of January 2018, President Trump had nominated new U.S. Attorneys for 58 vacancies in the federal districts. Of these, most were white men, three were women, and few were people of color. Jody Godoy, *Ex-US Attorneys Say Justice Best Served by Diverse Group*, LAW360 (Jan. 12, 2018, 6:12 PM), <https://www.law360.com/articles/1001193/ex-us-attys-say-justice-best-served-by-diverse-group> [<https://perma.cc/S9KS-4REL>].

lack diversity and improving the diversity of these source offices can only improve diversity of this bench in the long term.¹³³

The idea of requiring courts to select a specified number of female or non-white judges in the manner of a quota system has been questioned for decades.¹³⁴ Several chief judges mentioned the peril of creating “the black seat” or the “woman seat,” when filling the benches because, once filled, there is the belief there is no need to consider another female or non-white for a new opening. This type of tokenism was a topic of a 2016 podcast, “The Lady Vanishes,” produced by Revisionist History.¹³⁵ The podcast discusses the tragedy of “moral licensing” in the context of gender bias. It suggested that breaking gender and racial barriers does not necessarily pave the way for other women or people of color, but to the contrary, provides moral justification to exclude others of these demographics. The author posits, “You open the door to one outsider, and that gives you permission to close the door to others.”

Recognizing a similar problem, famous Pittsburgh Steelers owner and one-time chair of the NFL’s diversity committee, Dan Rooney, revolutionized how coaches are hired. To address the disconnect between the relatively large number of black players but only few black coaches, Rooney developed a requirement that one person of color must be interviewed for every open coaching position.¹³⁶ Other sports organizations and companies like Xerox and Facebook, have adopted the “Rooney Rule” in the hiring processes.

None of the chief judges interviewed who hired diverse magistrate judges, or who wanted to do so, felt that quality needed to be compromised. If quality and demographically diverse district judges can be selected, seemingly, there is no need to compromise the quality of magistrate judges selected to achieve diversity.

133. Widespread change is a long way off. Recently, *The National Law Journal* reported that most of the Justices of the United States Supreme Court make little effort to hire a diverse staff of law clerks. Tony Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, NAT’L L. J. (Dec. 11, 2017), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/12/11/shut-out-scotus-law-clerks-still-mostly-white-and-male/?slreturn=20190018214329> [https://perma.cc/97F5-J436]. During the Roberts’ Court, 85% of law clerks have been white. Only 20 of the 487 clerks were African American and only nine were Latino. *Id.* The Justices hired male law clerks twice as often as female law clerks despite that “more than half of all law students are female.” *Id.* *The National Law Journal* reported that in 1998, “fewer than 1.8% of the clerks hired by the then-members of the court were African-American (now it is 4%) and 1 percent were Hispanic (now the figure hovers at roughly 1.5%). The percentage of clerks who are of Asian descent has doubled from 4.5% then to nearly 9% since 2005. Then, women comprised one-fourth of the clerks; now they make up roughly a third.” *Id.* Justice Thomas placed the blame on the “feeder judges” who recommended white, male law clerks most often. *Id.* Justice Thomas said, “I don’t think it’s up to us to change other federal judges’ hiring practices” . . . “The reality is that Hispanic and blacks do not show up in any great numbers.” *Id.* Contrary to this assertion, 30% of Justice Sotomayor’s law clerks have been non-white and of the seven law clerks hired by Justice Gorsuch, three are non-white. *Id.*

134. Elliot E. Slotnick, *Gender, Affirmative Action, and Recruitment to the Federal Bench*, 14 GOLDEN GATE U. L. REV. 519, 526 (1984).

135. *The Lady Vanishes*, REVISIONIST HISTORY (2016) (accessed via internet browser).

136. Tom Pelissero, *Rooney Rule leaves a legacy and impact far beyond NFL*, USA TODAY, Apr. 14, 2017; Leigh Steinberg, *Rooney Rule for NFL Minority Coaches Needs Tuning*, FORBES, Jan. 19, 2017.

C. Standardize and Require Targeted Recruitment Efforts

Old boy networks exclude those who are “out” and consider only those who are “in.” When these networks are relied upon as a primary method for recruiting judicial candidates, this results in a disproportionately low turnout of women and minority applicants because they are, in general, “out.” Though it is laudable for court members to encourage specific candidates to apply for open magistrate judge positions, unless this is done with an awareness of the goals of diversity it risks that the candidate pool will be increased with people of the same race, and, to a lesser extent, the same gender as the judge doing the encouraging.¹³⁷ An all or nearly all white bench may be self-perpetuating regardless of the prospective pipeline because it communicates a message that those of diverse backgrounds need not apply. As astronaut Sally Ride said, “You can’t be what you can’t see.”¹³⁸

Consequently, targeted recruitment efforts must focus on quality candidates who also represent a significant demographic in the community. Outreach efforts need not focus only on candidates of a different race, ethnicity, and gender but should consider also the diversity of viewpoints which may be obtained by adding those of a different sexual orientation, geographical location, socio-economic class, or physical ability, for example. Though establishing a bench that reflects the community may be the goal, this should not mean search and recruitment efforts are restricted to the confines of the district. Especially in those districts where bar membership is unable to support a more diverse bench, courts should expand their recruitment efforts to the region, and as needed, to the entire nation. To do this, courts should contact specialty and minority bar groups,¹³⁹ but they should also actively seek out specific bar members who represent a historically ignored group. The power behind a judge offering encouragement to a prospective candidate cannot be ignored.

D. Improve the Salaries and Prestige of the Role of Magistrate Judges

Several chief judges in districts with small populations of diverse candidates believed the relatively low judicial salary for federal judges was a significant factor that thwarted efforts toward diversity. In several districts where there is a small population of lawyers of color but a large population of people of color,

137. Brian W. Collins, Note, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 912 (2007) (“However, acknowledging that a problem exists is merely symptom recognition; it does not guarantee a solution. Because unconscious bias is unintentional and not easily recognizable, it will not disappear unless specifically addressed. Exhortation, education, and protest all modify our conscious beliefs while leaving the unconscious foundation largely untouched.”).

138. Alison Beard, *Sally Ride*, HARV. BUS. REV., Sept. 2012, <https://hbr.org/2012/09/sally-ride?referral=00134> [<https://perma.cc/2L9B-9K2Q>] (last visited Jan. 18, 2019).

139. The effectiveness of communication with specialty and non-specialty bar associations needs further study. Only about seventeen percent of responding magistrate judges indicated that they learned of the vacant judicial position through this method. This may be because those selected are not members of local bar associations for reasons including that they do not have the demographics served by the association or because those who learned of the position through this method were not selected for the position.

most of these lawyers were successful in finding well-paying jobs out of the area. Several chief judges lamented their inability to lure these diverse candidates into applying for the position due to the substantial pay cut these lawyers would have to take and the lower prestige this judicial office carries. Though the duty of public service carried weight when deciding to apply for a magistrate judge position, the chief judges believed it was not sufficient to overcome salary concerns.¹⁴⁰

Courts have no control over the salary paid to magistrate judges; this is the job of Congress. Courts *do* have control over the prestige of the office. Many districts limit the responsibility of their magistrate judges to routine, largely non-substantive work, and place them in an onerous supervisor-subordinate relationship. It is not surprising then that there is a view in these districts that the magistrate judge is “not a real judge.” Even in courts where magistrate judges have great responsibility and are trusted and valued members of the judicial team, practitioners still may have a faulty perception of the position. Expecting a candidate to leave a high-paying, respected position for one where the judge is treated like a research attorney is folly. Thus, hiring quality magistrate judges and treating them with respect would likely go far in attracting quality diverse candidates.

E. Track the Demographics of the Applicants

The model application form for magistrate judge openings fails to ask questions about the applicant’s gender, ethnic and racial background, and sexual orientation. The form should be modified to request this information even if it permits the ability to “decline to state.”

One third of the chief judges reported their courts have modified the application already. This enables them to track whether the judicial opening is being communicated to diverse populations and to track the success of diverse applicants through the selection process. As it stands, districts do not know whether there are insufficient diverse candidates applying for the position or whether these candidates are culled out by the merit selection panel. Nevertheless, none of the chief judges interviewed knew whether this tracking occurred and none expressed a belief that doing so could be helpful. Requiring this type of tracking by the courts or the AO at least would provide a better understanding of the scope of the problem.

Failing to track this information is a disadvantage for many reasons. First, there may be an implicit or explicit bias at play. Even with hard data, trends are difficult to spot and more so when the only information available is anecdotal.

140. Magistrate and Bankruptcy Judges are paid 92% of the salary of District Judges. *Judicial Salaries: U.S. Magistrate Judges*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/judicial-salaries-u.s.-magistrate-judges> [<https://perma.cc/SE8M-HYZ4>] (last visited Jan. 18, 2019). The 2017 annual salary for Magistrate Judges was \$188,692. Other job perks could be emphasized during the recruitment period such as the opportunities for travel and training and the favorable retirement scheme. These “value-added” perks should be detailed in job announcements.

For example, most of the chief judges reported pipeline issues cause the inability of courts to diversify the magistrate judge bench. However, 49 districts have more non-white and/or female district judges than their corresponding magistrate judge bench, leading to the conclusion that diversity is possible.

Second, if a quality diverse candidate is not selected, maintaining this person's data would permit the court to make direct contact to encourage re-application when there is another opening. This type of contact would help to spread the word that the court really does consider and value non-white and non-male candidates.

Third, failing to take note of the demographics of the applicant pool and employing a true colorblind system of selection ignores the historical lack of relative opportunities for women and people of color. No person of any race, ethnicity, or gender is entitled to a federal judgeship. Likewise, no one should be excluded from a federal judgeship due to any immutable characteristic.

F. Diversify Merit Selection Panels

Courts are instructed that “[t]o further efforts to achieve diversity in all aspects of the magistrate judge selection process, courts are strongly encouraged to appoint a diverse merit selection panel.”¹⁴¹ Further instruction could be helpful explaining why this is important and describing ways to help the court identify and select diverse panel.

Courts should be encouraged to consult specialty, minority, and voluntary bar associations to identify prospective panelists and should account for efforts in developing a diverse panel. These panelists would likely have contacts within their own legal communities and may be better positioned to seek out potential diverse applicants. Consequently, panelists should be given the opportunity to encourage additional applications¹⁴² for the vacant position.

G. Standardize the Training of Merit Selection Panels

In general, we no longer live in a time or place where open bigotry is tolerated. In the place of open bigots are those who maintain justifications for acting in a manner that is discriminatory while maintaining a self-perception of fairness.¹⁴³ These people act in a discriminatory manner if social norms permit.¹⁴⁴ Addressing these and the implicit biases held by the well-intentioned members of hiring panels who denounce racism and sexism, is crucial.¹⁴⁵

141. MAGISTRATE JUDGE SELECTION REPORT, *supra* note 86, at 18.

142. This seems to pose no greater risk of conflict than when judges encourage specific lawyers to apply despite that ultimately, the judges select the new magistrate judges. If the senator's committee can do this when recruiting district judge applicants, it seems to make sense to allow panelists to do this too.

143. Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 554 (2005).

144. *Id.*

145. *Id.* at 554–55.

Courts can take steps to counter “hidden” explicit bias and implicit bias. One important step is to standardize the training given to merit selection panelists and to others involved in the selection process. Most of the panelists surveyed received written instruction about their roles. Many courts provide panelists the pamphlet issued by the Administrative Office of the Courts, “The Selection, Appointment and Reappointment of United States Magistrate Judges.” Though this document is comprehensive, it provides little guidance about selecting a diverse bench and no information about how to do it. It states a broad and worthy goal:

The essential function of courts is to dispense justice. An important component of this function is the creation and maintenance of diversity in the court system. A community’s belief that a court dispenses justice is heightened when the court reflects the community’s racial, ethnic, and gender diversity.

Following this goal, the pamphlet instructs, “The merit selection panel is obligated, under the Judicial Conference’s selection and appointment regulations, to give due consideration to all qualified applicants for a magistrate judge position, particularly those from underrepresented groups.” This guidance fails to advise the group how to achieve this goal.

The pamphlet should be modified to explain to a greater degree why a diverse bench is necessary and the importance of achieving this goal. It should explain that diversity reinforces the court’s legitimacy in the community and provides other benefits, including providing a broader perspective held by the bench, which increases the likelihood that justice is meted out.

The pamphlet should provide actual training on the important topics that impede the selection of a diverse bench, including detailed information about implicit and explicit bias, why it exists, and specific, concrete steps to counteract their effects. Courts should be provided materials, including videos, to be used when presenting live training to the panel. Topics should include those discussed in the pamphlet but should supplement that document. Providing these materials would tend to increase the likelihood that courts would offer live training.

When discussing implicit bias, the materials could include standardized interview questions to be posed to the candidates, to reduce the possibility of bias seeping in. At a minimum, it should remind the panelists that questions should be considered carefully to ensure the information sought is helpful to a fair and impartial selection of the top candidates and that they don’t penalize any applicant.

Not only would standardized training materials ease the way for the court, but it would also provide a roadmap identifying the topics on which the panelists should be most aware. “We all should know that diversity makes for a rich tapestry, and we must understand that all the threads of the tapestry are equal in value, no matter what their color.”¹⁴⁶

146. Attributed to Maya Angelou. *Maya Angelou’s Words that Spoke to All Our Lives*, THE ROOT, <https://www.theroot.com/maya-angelou-s-words-that-spoke-to-all-our-lives-1790875890> [<https://perma.cc/KAJ9-VNFD>] (last visited Jan. 18, 2019).

H. Make Courts Account for Diversity Goals

Leading by example, the AO and individual courts must not only “talk the talk,” but they must “walk the walk.” They cannot merely give the idea of diversity lip service; they must showcase this commitment by taking the steps they can to improve diversity wherever they can. Improving the hiring practices in the AO’s office, the Clerk’s Office, Probation, and Pretrial Services of individual districts, and establishing greater participation in the court’s committees by women and people of color, are important steps to take. As the old cliché reminds, actions really do speak louder than words. Anything short of a demonstrated commitment, and the message will not be accepted by the selectors and may be viewed as an invitation to thwart efforts toward diversity by keeping out those who are not “suited” for the job.¹⁴⁷

Unless courts are required to account for their efforts made toward diversity, those courts that are mired in the status quo will have little impetus to change. Currently, the goal of diversity is aspirational only though it appears diversity can be achieved where it is fervently desired. Because necessity is the mother of invention, holding courts accountable for documenting their efforts toward a diverse magistrate judge bench would improve the likelihood of achieving such a bench. Courts could be required, rather than just encouraged, to take particular steps, for example, advertising in specialty and minority bar journals, making presentations to lawyer groups whose membership advances diversity, accounting for the number of diverse applicants, and documenting the results of these applications, including why they were not selected if they were not. This type of reporting would provide courts a reason to become creative in their approach.

Almost uniformly, chief judges believe diversity provides legitimacy for the judiciary locally and nationally. Because the very integrity of our system is at issue, we must actively seek out this legitimacy or risk communities turning against it.

VI

CONCLUSION

The lack of diversity of the magistrate judge bench stems not from a lack of enthusiasm for the goal but from a lack of a consistent will to achieve it. Failing to take time to understand where the problem lies and then failing to develop a comprehensive approach to address the problem are the biggest impediments to diversity. Despite the consistent view of the chief judges that the very legitimacy and ongoing utility of the judiciary depends upon the perception of fairness that can only be achieved by encouraging the belief that the courts belong to the

147. See Ziegert & Hanges, *supra* note 143, at 554 (“[O]rganizational climate is a function of what is rewarded, supported, and expected in the organization and sends strong signals to employees and others about what behavior is socially acceptable.”) (citing Benjamin Schneider *Organizational Climate: Individual Preferences and Organizational Realities*, 56 J. APPLIED PSYCHOL. 211 (1972)).

people they serve, too many courts accept, rather than challenge, the idea that diversity cannot be achieved.

Conversely, many courts are so adept at advancing the cause of diversity they no longer even think about it. These courts should be a model for the rest. Individual districts should not be permitted to refuse these proven methods because every court belongs not to the judges who work there, but to us all.