

DEMOCRATS NEED

TO NOMINATE

BETTER

JUDGES

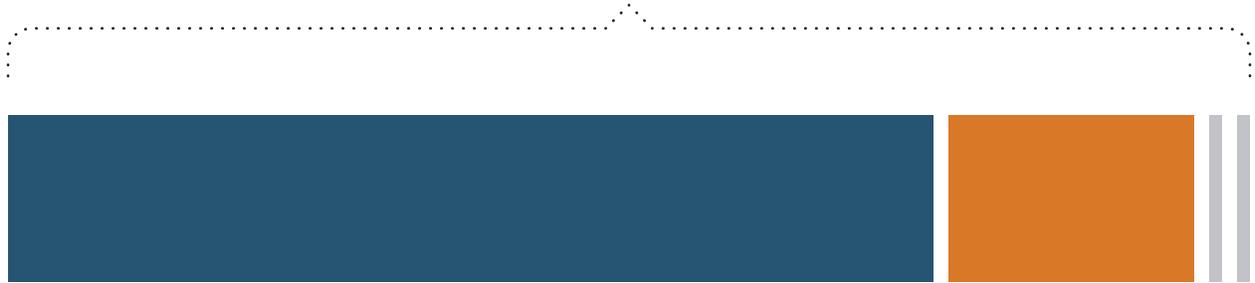
Emma Steiner
& Matt Bruenig

PEOPLE'S POLICY PROJECT

INTRODUCTION

The Democratic Party likes to position itself as a party that cares about the underdog in society. But the current processes the party uses to appoint judges do not reflect that positioning: it has been captured by insiders, the wealthy, and the privileged. This is a problem both for the optics of the party but also for the practical reality of how judicial power is used. The corporate capture of the federal judicial nomination process actively works against democratic interests and makes our society more unequal and less diverse. When Democrats position themselves as defenders of the marginalized but work in practice to further marginalize them, it erodes faith in democratic processes and causes active harm to vulnerable communities. A less fair judicial system and society are the result of these actions.

870 FEDERAL JUDGES



DISTRICT COURTS: 673 **COURTS OF APPEALS: 179** SUPREME & INTERNATIONAL TRADE COURTS: 18

There are currently 870 lifetime federal judgeships in the United States that are authorized under Article III of the United States Constitution.¹ The formal process for appointing individuals to these judgeships requires the president to nominate candidates and then requires the Senate to confirm those candidates through a majority vote.

In practice, the process for selecting judges often begins with the senators who represent the state where a district court judgeship is located. In many cases, this means that senators recommend the individuals that they would like to see appointed to the judgeships and then the

president generally nominates those individuals. For circuit court judgeships, there is traditionally less deference to home-state Senators, although presidents often receive recommendations from them.

How the president ends up with judicial nominees is thus critically important for determining the shape of the federal judiciary. Yet little is known about how senators populate their lists of suggestions.

For this paper, we reached out to every Democratic senator and requested information about the process that they use to identify the individuals that they recommend for federal judgeships. Of the



45 senators who have made judicial recommendations, 37 have created a committee of people to help them do so. Nineteen of the 37 senators with such committees have publicly available information about who sits on their committee. Our research into the backgrounds of those individuals revealed that these committees are disproportionately composed of corporate lawyers and prosecutors. The remaining 18 senators with committees operate in complete secrecy.

In section one of this paper, we outline the information that we collected

for this project. In section two, we make recommendations for how the process of judicial selection should work.

In short, we believe that the current Senate-based committee system should be abandoned entirely in favor of an executive commission composed of demographically-representative individuals who practice law on behalf of workers, consumers, criminal defendants, and other underdog groups in our society. Absent that, we also provide recommendations for improving the current committee system if it remains in place.



1

**WHERE JUDGES
COME FROM**

To determine how Democrats decide on who to recommend for judgeships, we looked at all 47 sitting Democratic senators, including Bernie Sanders and Angus King, independents who caucus with the Democrats.

These 47 senators can be broken down into four categories:

No Recommendations

These senators have not yet had an opportunity to recommend a judge.

2

Maggie Hassan
Chris Van Hollen

No Committees

These senators do not have a committee or similar formal process for making judicial recommendations.

8

Martin Heinrich
Doug Jones
Joe Manchin
Jack Reed
Jeanne Shaheen
John Tester
Tom Udall
Sheldon Whitehouse

Private Committees

These senators have a committee for making judicial recommendations but would not share information about who sits on their committee.

18

Richard Blumenthal
Cory Booker
Ben Cardin
Tom Carper
Bob Casey, Jr.
Chris Coons
Kirsten Gillibrand
Kamala Harris
Tim Kaine
Bob Menendez
Jeff Merkley
Chris Murphy
Gary Peters
Chuck Schumer
Kyrsten Sinema
Debbie Stabenow
Mark Warner
Ron Wyden²

Public Committees

These senators have a committee for making judicial recommendations and have shared information about who sits on their committee.

19

Tammy Baldwin
Michael Bennet
Sherrod Brown
Maria Cantwell
Catherine Cortez Masto
Tammy Duckworth
Dick Durbin
Dianne Feinstein
Mazie Hirono
Angus King
Amy Klobuchar
Patrick Leahy
Ed Markey
Patty Murray
Jacky Rosen
Bernie Sanders
Brian Schatz
Tina Smith
Elizabeth Warren



These committees, while different in each state and sometimes with each senator, operate under the same basic premise: as a gatekeeper for judicial nominees. They, in concert with the senators involved, solicit applications. Some committees search for prospective nominees. The prospective nominees are then interviewed and vetted, and then the recommendations are passed to the senators, who often then conduct their own interviews. This means that the committees have an extraordinary amount of power in shaping the federal judiciary: and in many cases we don't

even know whether they exist, or who is on them. The gatekeepers to the federal judiciary may operate in complete secrecy from the senators' constituents.

The 19 senators with public committees have a combined 144 members on their committees. Determining which of those members have worked as prosecutors or corporate lawyers can be difficult at times and requires certain judgment calls around the edges. Nevertheless, by our count, 71 of the 144 members of these committees have worked as a prosecutor, a corporate lawyer, or both.

| | Senators | Prosecutors | Corporate Lawyers | LAWYERS WHO HAVE BEEN BOTH Corporate Lawyers and Prosecutors | Other Members | Corporate Lawyers and Prosecutors (PCT.) |
|----|---|-------------|----------------------|--|------------------|--|
| CA | Dianne Feinstein | 3 | 4 | 7 | 7 | 66.7% |
| CO | Michael Bennet | 1 | 6 | 1 | 3 | 72.7% |
| HI | Brian Schatz & Mazie Hirono | 1 | 4 | 0 | 2 | 71.4% |
| IL | Dick Durbin & Tammy Duckworth | 1 | 3 | 0 | 6 | 40.0% |
| MA | Elizabeth Warren & Ed Markey | 3 | 2 | 1 | 8 | 42.9% |
| ME | Angus King | 2 | 2 | 0 | 8 | 33.3% |
| MN | Amy Klobuchar & Tina Smith | 1 | 1 | 1 | 5 | 37.5% |
| NV | Catherine Cortez Masto & Jacky Rosen | 3 | 3 | 1 | 3 | 70.0% |
| OH | Sherrod Brown (with Rob Portman) | 1 | 8 | 1 | 10 | 50.0% |
| VT | Patrick Leahy & Bernie Sanders | 2 | 0 | 0 | 7 | 22.2% |
| WA | Patty Murray & Maria Cantwell | 2 | 2 | 2 | 10 | 37.5% |
| WI | Tammy Baldwin | 1 | 1 | 0 | 4 | 33.3% |
| | Total | 21 | 36 | 14 | 73 | 49.3% |



The last survey of state prosecutor offices, conducted in 2007, found that there were around 34,000 lawyers working in such offices, which was equal to about 3 percent of all lawyers employed that year.³ The percentage of committee members who have worked as prosecutors is 24.3 percent. Even given that our analysis included any service as a prosecutor and not just current roles, this is an utterly unrepresentative figure compared to the legal profession as a whole. It is unclear how many lawyers are employed in federal prosecutor offices, but even if you aggressively assumed that there were as many federal prosecutors as state prosecutors, that would mean that these committees have 4 times as many prosecutors on them as they would if they reflected the overall lawyer population.

Around 13.9 percent of law graduates who secure employment do so as a corporate lawyer.⁴ Yet corporate lawyers make up around 35 percent of the members on these committees. Since we defined a corporate lawyer as making partner at a large corporate firm, the results are even less reflective of the profession

as a whole: few lawyers in the legal profession are corporate partners.

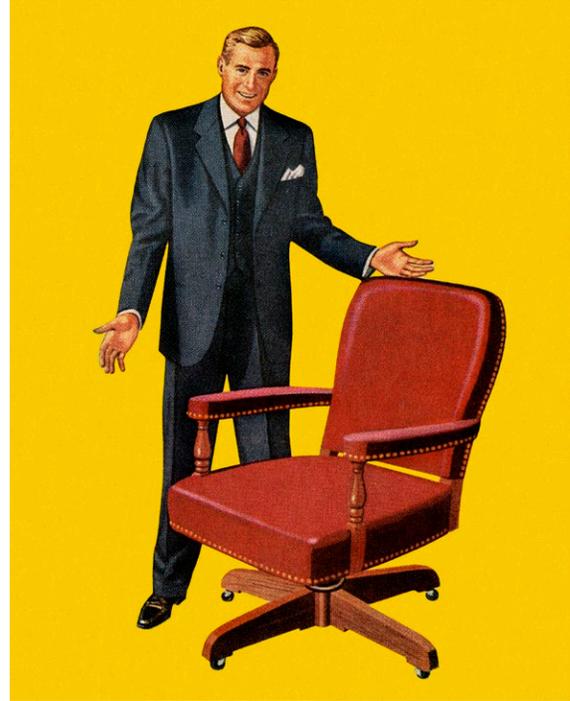
Based on these approximations, it appears that there are at least twice as many prosecutors and corporate lawyers in the committees that select Democratic judicial nominees than there are in the lawyer population more generally.

We also looked at the number of members of these judicial nomination

committees who have worked or currently work as public defenders. The number is vanishingly small—just 11 out of 144, barely a third as many public defenders as prosecutors. In many, the absence is glaring: Dianne Feinstein’s commissions in Cal-



ifornia do not have a single lawyer with experience as a public defender, nor does Angus King’s, despite his admirably low proportions of prosecutor/corporate attorneys. In fact, Feinstein’s committee has almost as many prosecutors as the total number of public defenders on all of the committees combined. Six of the 12 states with public committees had no public defenders at all. The rate of public defenders to prosecutors is completely unreflective



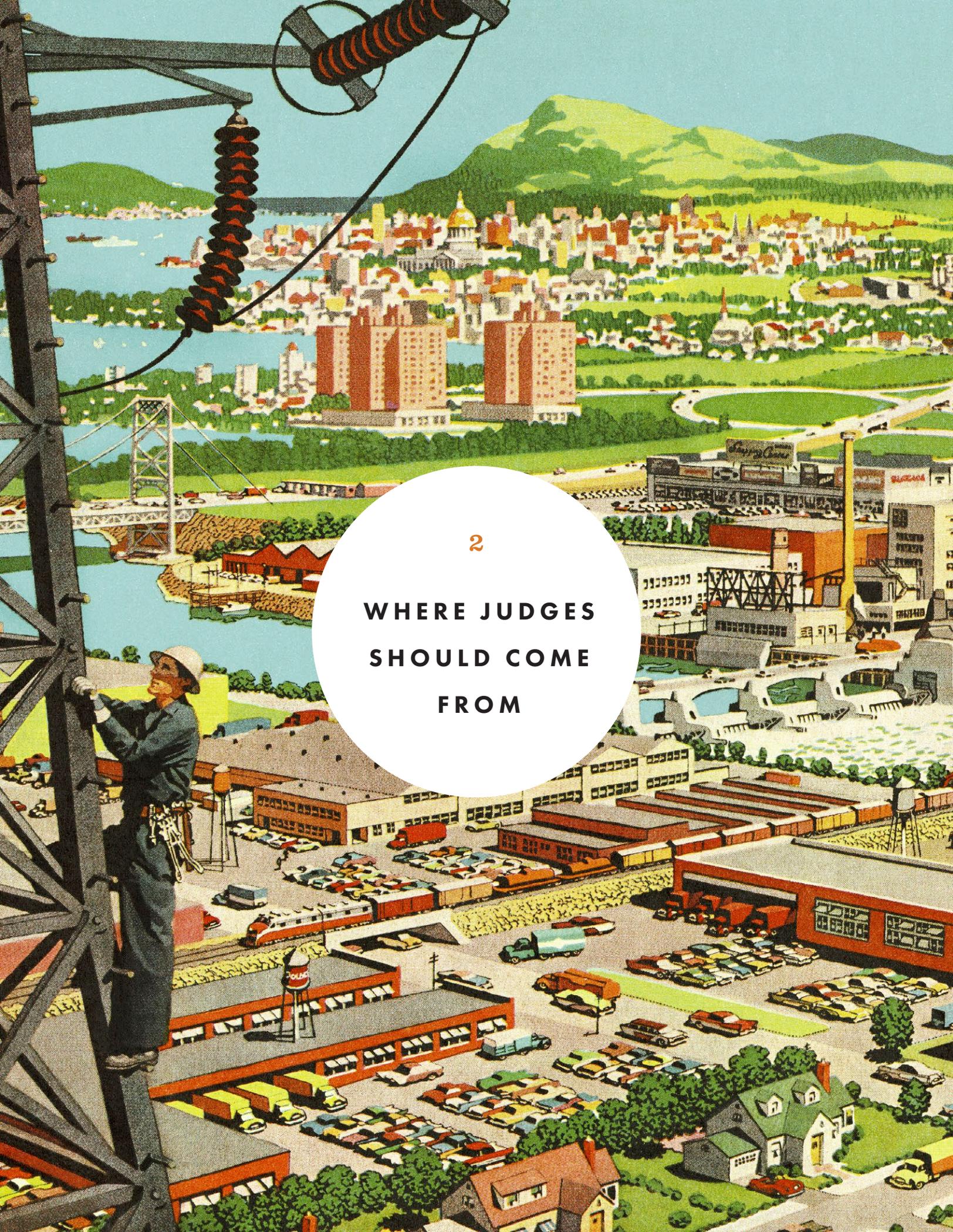
of the Democratic party's positioning on criminal justice and racial justice issues.

In addition to being disproportionately made up of prosecutors and corporate lawyers, these committees are also often composed of donors. In our research, we found that nearly half of the public committee members (67 of 144) had donated a combined \$344,358 to the senators whose committee they sit on. This raises questions about whether a seat on these committees comes with a price tag.

Notably, our analysis is of the people who make up the publicly-announced and confirmed committees. The ones that

operate privately and that senators refuse to comment on are probably worse. Right now, 18 Democratic senators have committees that operate in secret—and yet these committees have the power to recommend lifetime judicial appointments, permanently shaping our society.

It is clear from looking at the data that the process of federal judicial recommendations is broken. Instead of ensuring that competent, diverse voices make it to the bench, it is a system of rarified glad-handing and patronage, in which politicians can reward high donors and powerful attorneys by giving them a say in numerous lifetime appointments.



2

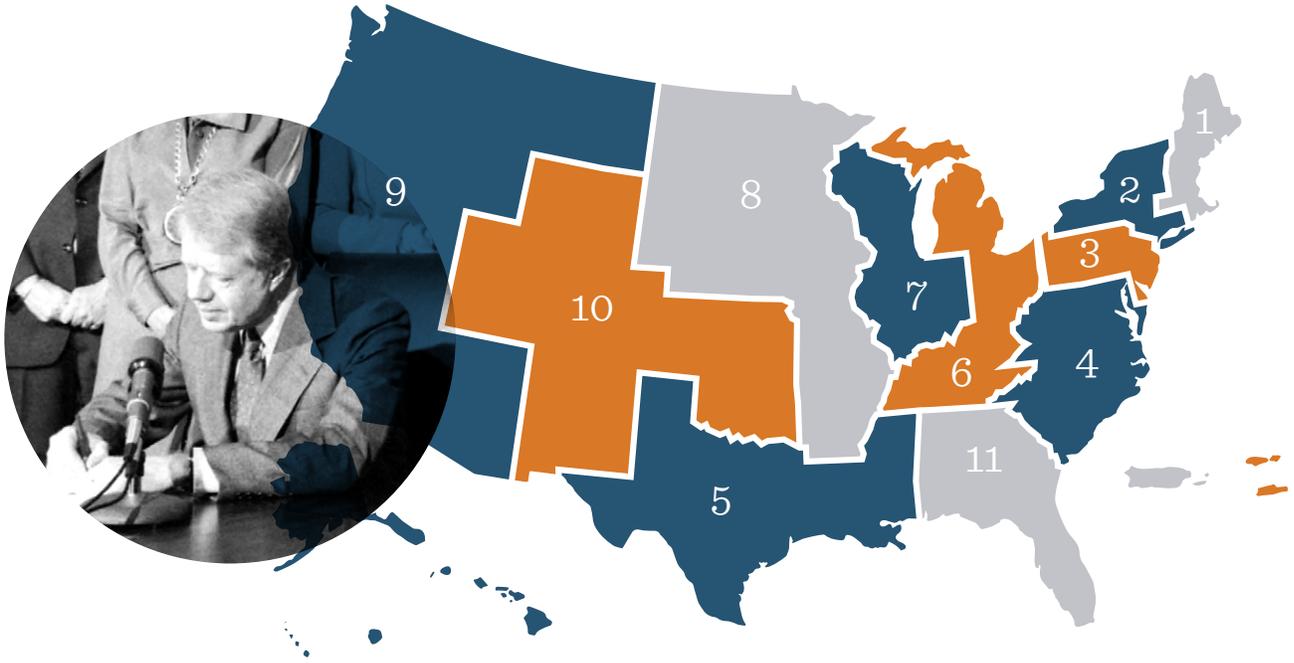
**WHERE JUDGES
SHOULD COME
FROM**

Unlike the Republicans, which have a well-oiled machine for appointing reliable right-wing judges, the Democrats rely on ad-hoc and often private advice that disproportionately comes from members of legal fields that make life so bad for so many of the underdog populations that Democrats claim to represent. The judges that result from these kinds of advisors are not likely to be as good as the judges that would result from a better-designed process that was overseen by lawyers from more progressive sections of the legal profession.

We would prefer for the candidates that are nominated for the federal judiciary to represent the diversity of the profession, which the current system of gatekeeping does not allow for. This means not only allowing for plaintiffs' attorneys, public defenders, legal aid lawyers, and civil rights attorneys to have a much

greater say in the process, but also ensuring that demographic diversity is present. The only way to diversify the perspectives on the bench is to diversify the judges sitting on the bench, and this means making sure the routes to the bench aren't full of campaign donors and corporate gatekeepers who represent only a certain circle or class.

Given these goals, we have concluded that the committee system cannot be salvaged. Along with the "blue-slip" tradition that allows home-state senators to block judicial nominees, the current committee-based selection process should be eliminated entirely. Committees are simply too unwieldy to handle the speed of vacancies, operate so as to protect senators from accountability, and in many cases are captured and compromised by corporate and carceral interests.



Instead of Senate-based committees, we think the Democrats should adopt a new model based on what Jimmy Carter did during his presidency. Through Executive Order 11972, Carter created a federal judicial commission composed of 13 panels: one for each of the circuit courts (two for the Fifth and Ninth Circuits, and one for the District of Columbia).⁵ These panels were composed of presidential appointees, with stipulations requiring gender and racial diversity as well as a balanced membership between lawyers and non-lawyers. Upon notification, they were required to send five names to the President for vacancies after a period of sixty days.

By rooting this process in the executive, Carter was able to fill vacancies transparently and efficiently, diversify the federal judiciary, and sidestep the system of political patronage that exists around judicial nominations.

We believe that the next Democratic president should copy the Carter model and also commit to only appointing lawyers to the commission that have spent the vast majority of their career advocating for underdog groups in society. That would include public defenders, union-side labor lawyers, civil rights lawyers, immigration lawyers, environmental lawyers, and other public interest legal professions. Individuals should not be appointed to the commission if they have worked for a significant period as prosecutors, corporate lawyers, union busters, or in similar areas of law.

Carter limited this process to circuit court positions only, but with a fully-staffed commission containing members from the geographic regions of the vacancy, the process could and should be extended to include district court vacancies.



If, contrary to our preference, Senator-based judicial nomination committees are retained, those Democrats who use them should universally commit to creating transparent committees with public membership lists that are composed of the kind of lawyers mentioned already above: public defenders, union-side labor lawyers, civil rights lawyers, immigration lawyers, environmental lawyers, and other similar lawyers.

We anticipate a couple of objections to these suggestions that we want to address specifically.

The first objection is that legal careers are complicated and it can sometimes be difficult to determine what exactly counts as advocating for an underdog group or not. While we agree that line-drawing is always tricky, we do not believe that this presents any particular

problems for our proposal. There are over a million lawyers in the country and it should be possible to select members who have unambiguously spent their lives on the right side of the legal profession. Edge cases should simply be avoided.

The second objection is that these strict selection criteria are unfair as there are many good, progressive lawyers who have worked in corporate law or as a prosecutor. We also agree with the basic point of this argument: there are no doubt at least a handful of far left lawyers who represent elite clients. But this is beside the point. The policy to only select members from certain sections of the legal profession is not premised on the idea that every lawyer in every other section is bad, but is instead a general rule that we believe will, as a practical matter, generate better judicial nominees.

CONCLUSION

Appointing a good judiciary is a crucial part of achieving progressive goals. This is true not just for the high-profile cases handled by the Supreme Court, but also for the much higher volume of lower-profile cases handled by federal district and circuit courts. It is in these courts where the vast majority of judicial power is exercised, including the interpretation and application of laws and regulations as well as the handling of run-of-the-mill cases.

Having judges who understand what it is like to practice law on the side of individuals and the downtrodden is thus key to creating the kind of government that we want to see. By implementing the judicial nomination process proposed above, we believe that Democrats will ensure that the federal bench is full of precisely these kinds of judges. **3P**

NOTES

- 1 United States Courts, Authorized Judgeships.
<https://www.uscourts.gov/sites/default/files/allauth.pdf>
- 2 Some of Schumer's members are listed here, though the committee is private. See: Colby Hamilton, "Capital Public Law Report: How Schumer screens for U.S. attorney; A.K.A. epidemic," Politico, March 6, 2015.
<https://www.politico.com/states/new-york/albany/story/2015/03/capital-public-law-report-how-schumer-screens-for-us-attorney-aka-epidemic-023217>
- 3 Prosecutors in State Courts, 2007 - Statistical Tables.
<https://www.bjs.gov/content/pub/pdf/psc07st.pdf>
(Adding up all the lawyers in Table 2 yields a total of 34,288). ABA National Lawyer Population Survey.
https://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2019.pdf (1,143,358 lawyers). Dividing 34,288 by 1,143,358 yields 3%.
- 4 NALP Class of 2017 National Summary Report.
https://www.nalp.org/uploads/Classof2017_NationalSummaryReport.pdf
- 5 Jimmy Carter, "Executive Order 11972."
<https://www.presidency.ucsb.edu/documents/executive-order-11972-united-states-circuit-judge-nominating-commission>

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