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CLOSING THE GENDER GAP ON THE FEDERAL COURTS

Carl Tobias*

Near the advent of the Bush Administration, I urged President George Bush to appoint substantial numbers and percentages of women to the federal bench.¹ My principal reasons for suggesting that the administration name more female judges were that additional women would improve the federal courts and that President Bush's predecessor, President Ronald Reagan, had compiled such a dismal record of appointing female lawyers to the judiciary. When the Bush Administration placed comparatively few women on the bench during its initial half-term, I criticized President Bush's mediocre record.² I was pleasantly surprised to learn that the Bush Administration ultimately appointed an unprecedented percentage of women to the federal courts; 36 of the 192 judges President Bush appointed were women (18.7%).³

Notwithstanding the Bush Administration's efforts, the percentage of female judges remains significantly lower than the representation of women in the legal profession. Moreover, President Bush left 100 open judgeships. These vacancies mean that President Bill Clinton can greatly increase the numbers and percentages of female judges and fulfill his campaign promise to make the federal courts look like America.

Now that President Bush has concluded his four-year term, the Bush Administration's record of judicial selection warrants assessment. It is also important to analyze whether President Clinton will actually appoint more women and, if so, how he best can achieve that objective. This essay undertakes that effort. The first section examines President Bush's record of choosing female judges. The second part explores how the Clinton Administration probably will treat the appointment of women and suggests how it can select substantial numbers and percentages of female federal judges.

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1. See Carl Tobias, *The Federal Judiciary Engendered*, 5 WIS. WOMEN'S L.J. 123, 126 (1990).

2. See Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 172-76 (1990).

3. See Carl Tobias, *The President and the Federal Bench*, 1992 WIS. L. REV. 1329; ALLIANCE FOR JUSTICE, *THE FEDERAL COURTS AT A CROSSROADS* 6 (1992) (copy on file with author).

I. THE BUSH ADMINISTRATION'S RECORD OF JUDICIAL APPOINTMENTS

A. *The First Half-Term*

President Bush compiled a lackluster record of naming women to the federal bench during his first two years in office. The Bush Administration chose 7 women out of 68 appointees (10.3%).⁴ Even this record clearly surpassed that of President Reagan who selected only 3 women out of 87 judges he appointed (3.4%) in the first half of his initial term, and it mirrored the record of President Jimmy Carter who named 6 female judges out of 60 appointees (10%) during his opening half-term in office.⁵ The Reagan Administration eventually placed 31 women out of 372 appointees (8.3%) on the courts during its eight-year tenure,⁶ and the Carter Administration ultimately named 41 women out of 258 appointees (15.9%) in its four years of service.⁷

There are numerous reasons why President Bush selected relatively small numbers and percentages of women during his first half-term.⁸ President Bush apparently subscribed to the same judicial selection goals, and adopted similar procedures for choosing judges, as his predecessor. Both the Bush and Reagan Administrations attempted to make the courts more conservative and appointed judges who would enable them to achieve that objective.⁹ Moreover, neither President Bush nor administration officials with significant responsibility for recruiting judges undertook any special efforts to search for, find, or promote the candidacies of, highly qualified women.¹⁰ For instance, the Bush Administration relied minimally on merit-based judicial selection commissions which contributed significantly to the Carter Administration's success in nam-

4. See Tobias, *supra* note 2, at 172.

5. See Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335, 339, 345 (1983); see also Tobias, *supra* note 2, at 172.

6. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989); Patricia M. Wald, *Women in the Law*, 24 TRIAL 75 (1988) (assessing numbers of women in legal profession).

7. See Goldman, *supra* note 6, at 322, 325.

8. In this paragraph, I rely substantially on Tobias, *supra* note 2, at 173-76.

9. See, e.g., DAVID M. O'BRIEN, JUDICIAL ROULETTE 60 (1988) (Reagan Administration); Sheldon Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 306 (1991) (Bush Administration); Goldman, *supra* note 6, at 328 (Reagan Administration); Neil Lewis, *The 1992 Campaign: Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at A13 (Bush and Reagan Administrations).

10. See, e.g., Tobias, *supra* note 2, at 174; Dan Trigoboff, *Bush Judicial Nominees Blasted*, 77 A.B.A. J., Mar. 1991, at 20.

ing large numbers and percentages of female federal judges.¹¹ All of these factors, therefore, probably led to the selection of comparatively few women.

B. *The Second Half-Term*

President Bush substantially improved his administration's record of placing women on the federal courts in his second half-term in office. Of the 56 appointees President Bush selected during his third year as Chief Executive, 11 were women (19.6%).¹² The Bush Administration correspondingly doubled the total number of female judges named in the preceding three years, appointing 18 women out of 68 judges (26.5%) in his fourth year of service.¹³

There are numerous reasons why the Bush Administration was so successful in naming significant numbers and percentages of women to the federal bench during its concluding half-term.¹⁴ Most important apparently were the efforts of the President and his advisers to seek out, and foster the candidacies of, very competent female lawyers. Typical of these endeavors was a November 1990 letter from the President to Senator Robert Dole, the Senate Minority Leader, which requested the help of Republican senators in nominating female attorneys with the requisite qualifications.¹⁵ President Bush also asked that administration officials charged with judicial selection implement special efforts to find women who possessed the appropriate credentials and to afford broader access for well-qualified female lawyers than had been provided through "old boy networks."¹⁶ These directives' implementation apparently facilitated the selection of greater numbers and percentages of women.¹⁷

11. See, e.g., Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 140-41 (1987); Tobias, *supra* note 2, at 174; see generally LARRY BERKSON & SUSAN CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980); ALAN NEFF, *THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES* (1981).

12. Telephone Interview with George Kassouf, Alliance for Justice, Washington, D.C. (Dec. 3, 1992); see also Carl Tobias, *More Women Named Federal Judges*, 43 FLA. L. REV. 477 (1991).

13. See ALLIANCE FOR JUSTICE, *supra* note 3, at 6; see also *supra* notes 3 and 12 and accompanying text for discussion of appointment of women to the bench during the Bush Administration.

14. I rely substantially here on Tobias, *supra* note 12, at 479-82.

15. Letter from President George Bush to Senator Robert Dole (Nov. 30, 1990) (copy on file with author).

16. Tobias, *supra* note 12, at 479-80; see also Goldman, *supra* note 9, at 297.

17. See Tobias, *supra* note 12, at 479-80. See also notes 12-13 and accompanying text for a discussion of the appointment of women to the bench during the Bush Administration.

Another explanation for the increase in female federal judges may be the Bush Administration's recognition that many women have secured valuable expertise pursuing less traditional legal practices and career paths, experience which affords different, equally legitimate qualifications for the bench.¹⁸ The appointment of Justice David Souter seemed to illustrate President Bush's understanding that candidates could possess diverse qualifications that are as valid as more traditional credentials, such as private practice in large law firms.

C. *Success Qualified*

The numbers and percentages of female federal judges whom the Bush Administration appointed certainly represent a substantial improvement over the record that President Reagan compiled.¹⁹ Nevertheless, numerous qualifications should be posited. The last three Chief Executives have named higher numbers and percentages of women over the course of their presidencies, particularly near the end of the initial terms and, in the case of the Reagan Administration, during its second four years. For example, even President Reagan improved on the abominable record of appointing only 3 female judges of 87 in his first half-term by eventually naming 31 women out of 372 appointees.²⁰

The percentage of women whom the Bush Administration placed on the courts was significantly lower than the percentage of women in the American legal community.²¹ It also is important to remember that President Bush had a substantially larger, and considerably more experienced, pool of female attorneys from whom to select than did the Carter Administration. Indeed, women comprised only seven percent of the lawyer population when President Carter was

18. See Tobias, *supra* note 2, at 181; Tobias, *supra* note 12, at 485. The increased numbers and percentages of female judges may also be attributable to the fact that Lee Liberman, Assistant Counsel to the President and a person who had central responsibility for judicial selection, is a woman. See Goldman, *supra* note 9, at 297; see also Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075, 1081 (1992) (discussing Lee Liberman's influence in federal judicial appointments).

19. Compare *supra* notes 3, 12-18 and accompanying text with *supra* notes 5-6 and accompanying text.

20. See *supra* notes 5-6 and accompanying text for statistics on the appointment of women to the federal bench during the Reagan Administration.

21. Women comprise approximately 23% of the lawyers in the United States. Telephone Interview with Marena McPherson, American Bar Association Commission on Women in the Profession (Dec. 2, 1992).

elected, but women constituted twenty percent of all attorneys the year Mr. Bush captured the White House.²²

Additional factors make the Bush Administration's record of selecting women less significant than it might appear at first blush. One-sixth of the female appointees actually were district judges whom President Bush elevated to the circuit courts of appeals.²³ President Reagan had initially named nearly all of these Bush Administration appointees to district court judgeships; Mr. Bush's practice contrasts markedly with that of the Carter Administration, only one of whose forty-one female appointees had ever been a federal judge.²⁴

The Bush Administration's record of judicial selection can be criticized in other ways. President Bush instituted special efforts to recruit women for the federal bench only after completing nearly half of his term.²⁵ Some observers have accused the administration of rushing to appoint women for purposes of political expediency, perhaps as a crude form of damage control. President Bush named practically one-third of the female judges whom he selected during the seven-month period after the proceedings to confirm Justice Clarence Thomas, in which Professor Anita Hill accused him of sexual harassment.²⁶ President Bush correspondingly selected fully half of all his female judicial appointees during the year in which he unsuccessfully ran for re-election.²⁷

There is considerably more to court appointments than merely counting the women named to the judiciary. Certain observers have wondered whether simply enhancing the numbers and percentages

22. *Id.* Even more troubling statistics are that 62,000 women were attorneys in 1980 when Ronald Reagan was elected and 140,000 women were lawyers in 1988. *Id.*

23. See ALLIANCE FOR JUSTICE, *supra* note 3, at 5; see also Ruth Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, WASH. POST, Feb. 18, 1991, at A4.

24. See ALLIANCE FOR JUSTICE, *supra* note 3, at 5; see also Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, April 10, 1990, at A1. For statistics on the appointment of women to the federal judiciary during the Carter Administration, see *supra* note 7 and accompanying text.

25. For a further discussion of the appointments of the Bush Administration, see *supra* notes 10-18 and accompanying text. See also Lewis, *supra* note 24; Marcus, *supra* note 23.

26. See ALLIANCE FOR JUSTICE, *supra* note 3, at 5; see also Neil A. Lewis, *Four Women Delayed in Rise to Bench*, N.Y. TIMES, July 14, 1992, at A20; see generally Symposium, *Gender, Race and the Politics of Supreme Court Appointments: The Impact of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279, 1279-1582 (1992).

27. See *supra* note 13 and accompanying text for a discussion of the number of women appointed to the federal judiciary during the Bush Administration. See also Lewis, *supra* note 9; Lewis, *supra* note 26.

of female judges will significantly improve the courts.²⁸ Evidence suggests that quite a few women whom the Bush Administration placed on the bench have political perspectives, views of judicial roles and the federal courts' purposes, and judicial temperaments that resemble those of their male counterparts.²⁹ For instance, Judge Edith Jones, whom President Reagan appointed to the Fifth Circuit but whom President Bush seriously considered naming to the Supreme Court, has been very conservative and has exhibited problematic judicial temperament.³⁰

It also seems very unlikely that Lee Liberman, who had significant responsibility for judicial recruitment in the Bush Administration, would have forwarded the name of any lawyer, regardless of gender, whom she deemed insufficiently conservative.³¹ Indeed, Circuit Judge Roger Miner recently observed that it was "well known that no federal judicial appointment [was] made without [Ms. Liberman's] imprimatur" and that she evaluated "all candidates for federal judgeships for [conservative] ideological purity."³²

D. Resolution

These qualifications leave unclear what the appointment of increased numbers and percentages of women portends for the judiciary. One significant difficulty is that most of the women whom the Bush Administration named have been on the courts for an insufficient time to permit very definitive conclusions about specific aspects of their judicial service. This problem complicates efforts to discern patterns in substantive decisionmaking, much less to analyze more abstract phenomena, such as judicial temperament or effects on gender bias in the courts. Nonetheless, it is possible to offer some observations.

28. See, e.g., Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1939 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544 (1986).

29. See, e.g., Ann Pelham, *Elusive Collegiality*, LEGAL TIMES, Nov. 6, 1989, at 7; Tobias, *supra* note 2, at 179-80; see also Lewis, *supra* note 9 (discussing views of appointees generally).

30. See, e.g., Roberto Suro, *The Judge Not Chosen Is Less of an Enigma*, N.Y. TIMES, July 29, 1990, at A18 (discussing judicial temperament of Judge Jones as possible Supreme Court nominee); Philip Shenon, *Conservative Says Sununu Assures Him on Souter*, N.Y. TIMES, Aug. 24, 1990, at A15 (discussing White House Chief of Staff John Sununu's assurances to President Bush of Judge Jones' conservatism); see also Tobias, *supra* note 12, at 481.

31. See *supra* note 18 and accompanying text for a discussion of Liberman's role in the Bush Administration.

32. See Miner, *supra* note 18, at 1081.

Certain ideas analyzed above indicate that President Bush accomplished his explicitly enunciated objectives of simultaneously naming additional female judges and making the courts more conservative. Nevertheless, a number of factors, especially the life experiences that numerous women bring to service on the federal bench, could frustrate the Bush Administration's efforts to create a more conservative judiciary.

Some evidence suggests that many women have backgrounds, attitudes, and views, particularly of judicial roles, that differ significantly from those of male judges and that this diversity of perspectives will improve the federal courts. The appointment of greater numbers and percentages of women should limit widespread gender bias in the federal criminal and civil justice systems.³³ Naming more female judges could concomitantly increase numerous citizens' confidence in the impartiality and fairness of those systems, partly because the courts' composition would more closely reflect that of society.³⁴

The different viewpoints of female judges might afford other important advantages. Most of these jurists will more readily apprehend particular problems, such as securing employment and encountering discrimination, that many American women experience.³⁵ Certain research indicates that numerous female judges could beneficially affect substantive decisionmaking, especially in areas such as discrimination.³⁶ For instance, they might be more solicitous of congressional intent to reduce discrimination expressed in civil rights statutes and could rigorously enforce the legislation. Female judges may correspondingly enhance the judiciary's appreciation of the complex public policy issues, such as affirmative action and allocation of scarce societal resources, which courts must

33. See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (Apr. 2, 1990); Lynn H. Schafran, *Gender Bias in the Courts: An Emerging Focus For Judicial Reform*, 21 ARIZ. ST. L.J. 237, 238, 271-73 (1989); see generally PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1992).

34. See, e.g., Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978); *Bush v. Clinton, The Candidates on Legal Issues*, 78 A.B.A. J., Oct. 1992, at 57; see also Tobias, *supra* note 2, at 177.

35. See, e.g., Christine Durham, *President's Column*, NATIONAL ASS'N OF WOMEN JUDGES: NEWS & ANNOUNCEMENTS, Spr./Sum. 1987, at 1, 3; Marion Z. Goldberg, *Carter-Appointed Judges: Perspectives on Gender*, 26 TRIAL 108 (1990). But cf. Anna Quindlen, *The Skirt Standard*, N.Y. TIMES, Dec. 6, 1992, at E19 (stating that successful female lawyers, such as federal judges, are less likely to experience sexual harassment).

36. See Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Court of Appeals*, 67 JUDICATURE 165, 168 (1983); see also Elaine Martin, *Men and Women on the Bench: Vive la Difference?*, 73 JUDICATURE 204, 208 (1990).

treat.³⁷ Moreover, women's diverse perspectives might improve the conduct of litigation, help to change traditional attitudes regarding gender that a number of male jurists and attorneys have, and enhance some aspects of court administration, such as personnel practices.³⁸

Additional, persuasive reasons support the appointment of even greater numbers and percentages of women to the federal bench. One is that many female judges, including Supreme Court Justice Sandra Day O'Connor, Circuit Judges Amalya Kearse and Patricia McGowan Wald, and Senior District Judge Constance Baker Motley, have compiled outstanding records of judicial service, thereby demonstrating that women are excellent judges.³⁹ Another is that the selection of more female judges can signify an administration's commitment to improving circumstances for women in this nation, in the federal criminal and civil justice systems, and in the legal profession of which women comprise nearly twenty-five percent.⁴⁰

In short, President Bush compiled a praiseworthy record of appointing female federal judges. Many of the above considerations mean that the Clinton Administration should undertake a concerted effort to name even greater numbers and percentages of women to the federal courts. The second section of this essay examines whether President Clinton is favorably disposed to this idea and affords numerous suggestions for how his administration can substantially increase the numbers and percentages of female judges.

II. THE CLINTON ADMINISTRATION

A. Predisposition

The Clinton Administration seems committed to the appointment of increased numbers and percentages of women to the federal bench. Mr. Clinton compiled an excellent record of placing women on the state courts during his lengthy tenure as Governor of Arkan-

37. See, e.g., Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 494 (1979); Elliot E. Slotnick, *Lowering the Bench or Raising It Higher? Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 272 (1983); see generally Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

38. See Martin, *supra* note 36, at 208; Tobias, *supra* note 2, at 178; Tobias, *supra* note 12, at 484.

39. Tobias, *supra* note 12, at 483. This obviously is not an exhaustive list. See Tobias, *supra* note 2, at 176-77 (discussing why more women should be appointed). Also see *infra* notes 45 and 48 and accompanying text for additional discussion of Judges Wald and Kearse, who were two of four women considered for post of Attorney General.

40. See Tobias, *supra* note 1, at 176; Tobias, *supra* note 12, at 483.

sas.⁴¹ Moreover, candidate Clinton suggested that the current “judiciary is less reflective of our diverse society than at any other time in recent memory” and thus risks losing legitimacy in the eyes of many citizens.⁴²

When seeking the Presidency, Governor Clinton pledged to name greater numbers and percentages of women to the federal bench.⁴³ The numerous women who worked in the presidential campaign, who labored in the transition, and who are filling high-level posts, such as Secretary of Health and Human Services (HHS) and Administrator of the Environmental Protection Agency (EPA) in the Clinton Administration, strongly indicate that the naming of enhanced numbers and percentages of female judges will be a significant priority of the new government.⁴⁴ Indeed, President Clinton’s choice of Janet Reno as the first woman to serve as Attorney General of the United States should ensure the appointment of many female judges, partly because candidate Clinton promised to “select an attorney general whose knowledge of lawyers around the country” would facilitate the rapid identification of potentially excellent candidates.⁴⁵

B. *Suggestions For Appointing More Women*

Recommendations for how President Clinton can name more women to the federal bench warrant comparatively brief treatment here, as numerous such suggestions have been offered elsewhere.⁴⁶ Perhaps most important, the new Chief Executive should clearly and forcefully state that the appointment of higher numbers and percentages of female judges is a significant priority of his administra-

41. See Joan Biskupic, *Court Vacancies Await New President*, WASH. POST, Nov. 6, 1992, at A1; Neil A. Lewis, *Clinton Fills Many Arkansas Judgeships With His Allies*, N.Y. TIMES, Apr. 3, 1992, at A14; Thom Weidlich, *Clinton’s Judicial Record is Generally Praised*, NAT’L L.J., July 6, 1992, at 12.

42. See William J. Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT’L L.J., Nov. 2, 1992, at 15; *Bush v. Clinton*, *supra* note 34.

43. See, e.g., Clinton, *supra* note 42; *Bush v. Clinton*, *supra* note 34.

44. See, e.g., Gwen Ifill, *Clinton Widens His Circle, Naming Four Social Activists*, N.Y. TIMES, Dec. 12, 1992, at A1 (naming Donna E. Shalala HHS Secretary and Carol M. Browner EPA Administrator); Al Kamen, *Social Policy Posts Filled by Clinton*, WASH. POST, Dec. 12, 1992, at A1.

45. See Gwen Ifill, *Reno is Confirmed in Top Justice Job*, N.Y. TIMES, Mar. 12, 1993, at A10; Neil A. Lewis, *Clinton Expected to Name Woman Attorney General*, N.Y. TIMES, Dec. 9, 1992, at A1; *Bush v. Clinton*, *supra* note 34 (promising to select Attorney General who knows many lawyers). Cf. Kamen, *supra* note 44 (stating Judge Wald decided against leaving bench to be Attorney General).

46. See, e.g., Tobias, *supra* note 2, at 181-84; Tobias, *supra* note 12, at 484-86; see generally Martin, *supra* note 11; Carl Tobias, *Rethinking Federal Judicial Selection* (1992) (unpublished manuscript on file with author).

tion. He must institute a rigorous effort to search for, find, promote the candidacies of, and appoint, many highly qualified women.

1. Goals

President Clinton should initially enunciate his goals for choosing federal judges.⁴⁷ Merit must be the polestar of judicial selection. The Clinton Administration should nominate lawyers who will be exceptional judges. The individuals chosen must be excellent attorneys with outstanding qualifications, who exhibit all of the qualities that are important to service on the federal bench. For instance, the lawyers should be extremely intelligent and highly motivated. Moreover, the attorneys must promise to exercise properly measured judicial temperament and should evince impeccable integrity and great independence.

The nominees should also have participated in very rigorous legal work; however, the challenging nature of the endeavor is more significant than its exact form. This consideration has peculiar saliency for the numerous women who have followed less traditional career tracks, but who have acquired invaluable legal experience and have developed diverse perspectives, that will make them superior judges. Illustrative are District of Columbia Circuit Court Judge Patricia McGowan Wald and New York Court of Appeals Chief Judge Judith S. Kaye, two of four women whom Clinton Administration transition officials interviewed for the position of Attorney General.⁴⁸ Judge Wald and Chief Judge Kaye interrupted very interesting, extremely demanding, and highly successful careers in law to raise their children.⁴⁹

Correspondingly, some types of lawyering in which many women have participated could better prepare them for federal judicial service than more traditional forms of legal work, such as achieving partnership in substantial law firms, which can require that attorneys be administrators.⁵⁰ These activities include pursuing landmark desegregation or environmental litigation, laboring in the offices of United States Attorneys or federal or state public defenders, or authoring rigorous scholarship on federal criminal or civil procedure.

47. Tobias, *supra* note 46, at 21-29.

48. See Lewis, *supra* note 45; see also Kamen, *supra* note 45 (noting that Judge Wald withdrew from consideration).

49. See Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 *FORDHAM L. REV.* 111, 111-13, 123-24 (1988) (referring to Judge Kaye); Lewis, *supra* note 45 (referring to Judge Wald).

50. See Tobias, *supra* note 2, at 181; Tobias, *supra* note 12, at 485; see generally Tobias, *supra* note 46, at 21, 28.

In short, President Clinton should recognize, and act on, the premise that judicial candidates may have different, but equally legitimate, qualifications. The Clinton Administration might concomitantly want to de-emphasize certain time-honored credentials, such as involvement in partisan politics and even in large firm practice. Participation in these activities may be less reliable predictors of excellent judicial performance.

The Clinton Administration should concomitantly make the enhancement of gender diversity on the federal bench an extremely important goal.⁵¹ President Clinton can at once achieve merit and name greater numbers and percentages of women, principally because those objectives are compatible. For example, the substantial, very qualified, pool of female attorneys that currently exists means that the new administration will be able to increase merit and gender diversity on the courts.⁵²

2. Procedures

The Clinton Administration can enhance merit, and increase the numbers and percentages of women, on the federal judiciary in quite a few ways. The President and those administration officials responsible for recruiting judges should expressly articulate the administration's philosophy, and process, of judicial selection. The abilities of the individuals who assist President Clinton will be as important as the procedures used. These persons must have his to-

51. The Clinton Administration should make the enhancement of racial diversity an equally, if not more, important goal. This is especially so, given the abysmal records of appointing African Americans that the Bush and Reagan Administrations compiled. See Tobias, *supra* note 46, at 15, 20, 25 (noting African Americans constituted less than two percent of Reagan appointees and five percent of Bush appointees). Cf. *supra* note 39 and accompanying text for more on Judges Kearsse and Motley, two of four judges who have compiled excellent records of judicial service, and who are African Americans. As important as increasing racial diversity is, that issue is beyond the scope of this piece. See Tobias, *supra* note 46, at 22-24 for additional discussion of the issue of racial diversity.

The Clinton Administration may also make enhanced political balance an important goal. See, e.g., Biskupic, *supra* note 41; Eva M. Rodriguez, *A True Benchmark: Federal Judiciary Will Soon Feel Clinton's Stamp*, LEGAL TIMES, Nov. 9, 1992, at 13. It could justify that approach because Presidents Bush and Reagan pursued an expressly articulated policy of making the courts more conservative in appointing two-thirds of the presently sitting bench. See *supra* notes 9-11, 28-32 and accompanying text for a discussion of the Reagan and Bush appointments. President Clinton need not overemphasize political balance. His administration can simultaneously attain merit and political balance in part because most female Clinton appointees will increase such balance. See Gottschall, *supra* note 36, at 168; Tobias, *supra* note 46, at 26-29. The issue of political balance is also beyond the scope of this piece. For additional discussion of the political balance question, see Tobias, *supra* note 46, at 22-29.

52. See Tobias, *supra* note 46, at 23, 27-29.

tal confidence, employ excellent judgment, and be conciliators who can work well with everyone involved in the process of choosing judges.

Judicial recruiters must vigorously search for, find, and champion the candidacies of, highly qualified female lawyers. The officials should solicit the help of traditional sources, such as bar associations and senators who represent those areas in which judges must be appointed. President Clinton should strongly urge senators to forward the names of very competent female attorneys.⁵³ The Chief Executive and his advisers should also seek the aid of, and work closely with, all of the female United States Senators, especially those women who were elected in 1992.⁵⁴

The persons who recruit judges must correspondingly enlist the assistance of other sources. The administration officials should confer with individuals and organizations that could recommend well-qualified female lawyers who more traditional sources may not know, because the attorneys have relatively non-traditional legal practices or are not involved in party politics.⁵⁵ Examples include people or entities, such as women's groups, that participated in the merit-based nomination commissions which so efficaciously promoted the candidacies of female judges in the Carter Administration.⁵⁶

President Clinton and his advisers, therefore, must aggressively pursue the nomination of female lawyers and move beyond "old boy networks," employing previously untapped sources and exploring novel approaches and techniques. Essential to appointing more women will be the new networks created by, and the efforts of, female attorneys who now constitute nearly one-fourth of the American bar.⁵⁷ Equally important will be the networking and other skills of

53. President Clinton should receive greater senatorial cooperation than when different political parties controlled the White House and the Senate. *Cf. supra* notes 15-17 and accompanying text (stating President Bush sought senatorial cooperation). *But cf. Rodriguez, supra* note 51, at 13 (stating Clinton Administration and senators may fight over patronage).

54. Barbara Boxer (D-Cal.), Dianne Feinstein (D-Cal.), Carol Moseley Braun (D-Ill.), and Patty Murray (D-Wash.) were recently elected; they join Nancy Landon Kassenbaum (R-Kan.) and Barbara Mikulski (D-Md.). See *Women in the Senate*, N.Y. TIMES, Nov. 4, 1992, at A1.

55. See *supra* notes 18, 48-50 and accompanying text for a discussion of some qualified candidates.

56. See *supra* note 11 and accompanying text for more discussion of the judicial nomination commissions. *Cf. Tobias, supra* note 46, at 32 n.124 (suggesting that procedures such as those recommended here provide most of commissions' benefits with fewer detriments and, therefore, President Clinton should not revitalize commissions at outset of his administration).

57. See Telephone Interview with Marena McPherson, *supra* note 21.

the first female Attorney General, the women who serve as United States Senators, and Hillary Rodham Clinton, who chaired the American Bar Association Commission on Women in the Profession and apparently helped recruit judicial nominees in Arkansas.⁵⁸

CONCLUSION

President Bush deserves commendation for appointing an unprecedented percentage of women to the federal courts. President Clinton, who will ultimately name 300 judges, has an important opportunity to increase substantially the numbers and percentages of female federal judges. If the Clinton Administration follows the above recommendations, it can name excellent judges, make the bench more representative of the profession and of society, and improve conditions for women in the United States.

58. See, e.g., Biskupic, *supra* note 41 (regarding Hillary Rodham Clinton); Lewis, *supra* note 41 (regarding Hillary Rodham Clinton); see also *supra* note 45 and accompanying text (regarding selection of female Attorney General); *supra* note 54 and accompanying text (regarding election of female senators).