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THE GENDER GAP ON THE FEDERAL BENCH

Carl Tobias*

The energy that a presidential administration devotes to appointing female federal judges is one test of its commitment to improving conditions for women in American society. President George Bush neither miserably failed nor clearly passed this test during his first half-term of service. The Bush Administration has so far named few women to the federal bench, although there was reason to hope that President Bush would place substantially more women on the federal courts than did the Reagan Administration. President Bush did promise to be the President of all the people in his Inaugural Address and pledged to eschew reliance on litmus tests as a judicial selection criteria, which the Reagan Administration had allegedly employed.

Now that the Bush Administration has reached mid-term and the 101st Congress has adjourned, the President’s record of appointing women to federal judgeships should be analyzed. Comparing President Bush’s performance with those of prior administrations reveals that he has named more than twice as many female judges during his initial two years as did President Ronald Reagan. This does not mean that President Bush’s record of placing women on the federal bench has been exemplary. Indeed, the Bush Administration

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must appoint five times the number of women in the next half-term as it did during the first if President Bush is to appoint as many female judges as President Jimmy Carter did in four years.

The Bush Administration’s record also masks certain difficulties. Even though President Bush and President Carter appointed similar numbers and percentages of women during their first half-terms, the Bush Administration had a considerably more qualified and much larger group of female lawyers from which to choose nominees. Women attorneys now command substantial respect in the American legal community and comprise more than twenty percent of practicing lawyers.

This Commentary evaluates President Bush’s lackluster record of appointing women to the federal courts. The Commentary initially examines the relevant data on female judicial appointments and assesses why the Bush Administration has placed few women on the bench. It next recommends that President Bush name substantially more women in 1991 and 1992 and explores why and how this endeavor should be instituted. The Commentary then analyzes what the Bush Administration is likely to do about the paucity of female appointees. Because it is not clear that President Bush will place very many women on the federal courts, the Commentary affords constructive suggestions for increasing the number of women the Bush Administration names to federal judgeships.

I. THE DEARTH OF WOMEN APPOINTED

A. The Data

President Bush appointed seven women out of sixty eight appointees (10.3 percent) to the federal judiciary during his opening two years in office. By comparison, President Reagan named three female federal judges out of eighty seven appointees (3.4 percent) in the initial half of his first term, and President Carter appointed six women out of sixty appointees (10 percent) to the federal bench during his beginning two years of service. President Reagan named thirty one women out of three hundred seventy two appointees (8.3 percent)
percent) to the federal courts during his eight year term, while President Carter appointed forty one women out of two hundred fifty eight appointees (15.9 percent) during his four-year tenure.

B. The Dearth

Why President Bush placed so few women on the federal bench in his initial half-term is unclear. President Bush, apparently, has substantive views on the federal judiciary, and applied judicial selection procedures that essentially replicate those of President Reagan. Boyden Gray, the White House counsel who has substantial responsibility for judicial appointments, recently observed that the Bush Administration's selection process was "structured a little differently, [than that of the Reagan Administration] but the result is very much the same, [shifting] the courts in a more conservative direction."

Other Bush Administration officials and organizations, which monitor judicial appointments and range across a broad political spectrum, agree that President Bush has continued to choose judges whom he believes will strictly construe the Constitution and statutes, support law enforcement officers, especially in contrast to those accused of crimes, and rarely recognize rights which benefit impoverished people or minorities. The Bush Administration has selected

8. See Lewis, supra note 7, at A1, col. 3. Murray Dickman, who has similar responsibility as an aide to Attorney General Richard Thornburgh, recently stated in April, 1990, that both the Reagan and Bush Administrations have sought to name judges who believe that courts are improper mechanisms for achieving social change and political reform while claiming that "we have made a dramatic difference in the courts" by making them more conservative. Weiner, supra note 7, at 1-A, col. 2. In November, 1990, Dickman acknowledged that 90 percent of President Bush's appointees were males, but stated that the Bush Administration had attempted to convince Senators, who proposed most nominees, that they suggest more women and promised that President Bush's initial group of nominees in 1991 would include substantial numbers of women. See Lewis, Senate is Quick to Approve Judgeship for Former Aide, N.Y. Times, Nov. 12, 1990, at A16, col. 1.
9. For instance, Patrick McGuigan of the Free Congress Foundation, a conservative lobbying group, believes that the Bush "Administration regards the Reagan efforts to transform the Federal judiciary as something to emulate, and that's largely what we're getting." Lewis, supra note 7, at A19, col. 1; accord Weiner, supra note 7. In contrast, Nan Aron of the Alliance for Justice, a liberal lobbying organization, states that "from the nominees we've seen
those judges primarily by emphasizing conservative ideological views, such as traditional notions of the family, which female attorneys as a group are less likely to hold. 10

President Bush's appointment process has resembled that of President Reagan's in other ways. The Bush Administration, like its predecessor, has revived the longstanding practice of "senatorial courtesy" and has stressed prior prosecutorial and judicial experience in considering nominees for district judgeships. 11 President Bush has been able to select circuit court appointees from the several hundred district court judges that the Reagan Administration named and who provide a "kind of farm system." 12 This has reduced the need to apply any litmus test for nomination because the Reagan Administration had purportedly employed such tests and made painstaking assessments of these candidates' judicial, in any event, and legal philosophies. 13

Bush Administration officials responsible for judicial selection have also followed the lead of the Reagan Administration by making no special efforts to find qualified women and name them to the federal judiciary. 14 This omission is typified by President Bush's refusal to revitalize the merit-premised selection panels that President Carter instituted, commissions described as the most effective mechanism that has been created for increasing the number of successful female candidates. 15 The failure to undertake any special efforts has

so far, Bush's campaign to reshape the courts is being pursued as relentlessly as Ronald Reagan's, albeit more quietly." Lewis, supra note 7; accord Weiner, supra note 7.

10. See Lewis, supra note 7, at A19, col. 1 (stating that President Bush "has elevated lower-court judges with an identifiable conservative bent."); Weiner, supra note 7, at 20-A, col. 1, col. 2 (reporting that a Washington Legal Foundation official observed that "the Administration looks for a judge who comes from a conservative viewpoint."); cf. Martin, supra note 7, at 141 (observing that similar emphasis was made during the Reagan Administration).

11. See Martin, supra note 7, at 138-41 (stating additionally that "[t]his emphasis tends indirectly to downgrade the ratings of many women.").

12. Lewis, supra note 7, at A19, col. 2; see also Goldman, supra note 5, at 322 (discussing Reagan's appointment of district judges).

13. Because Reagan Administration "officials gathered more extensive information about candidates and operated under a more formal structure," Bush Administration officials have little need to scrutinize Reagan appointees' ideology. Lewis, supra note 7, at A19, col. 2. A former Department of Justice official who worked in the Reagan Administration for seven years recently stated that "[u]nder Bush, the litmus tests are gone - but the same type of judges are chosen." Weiner, supra note 7, at 20-A, col. 2.


15. See Martin, supra note 7, at 141. See generally L. BERKSON, S. CARBON & A. NEFF, A STUDY OF THE U.S. CIRCUIT JUDGE NOMINATING COMMISSION (1979) (discussing the com-
particularly disadvantaged women who remain underrepresented in the pool of eligible attorneys from which judges are drawn. Moreover, many female lawyers choose career paths that are deemed less worthy by the American Bar Association (ABA) Committee on Federal Judiciary, the entity that rates presidential nominees as well qualified, qualified, or unqualified. The ABA Committee strongly influences judicial selection because the Senate Judiciary Committee accords great respect to the ABA's opinion when discharging its responsibility to review candidates. Senators are less likely to know female attorneys, who often have less political or judicial experience than their male counterparts.

The small number and percentage of women that the Bush Administration has appointed to the federal bench may mirror a phenomenon witnessed in other contexts. The naming of few women could be an important example of the "glass ceiling" that women have experienced difficulty piercing across numerous areas of the legal profession, including partnerships in large private law firms and deanships in law schools.
In fairness, President Reagan and President Carter placed in substantial numbers of women on the federal courts in their first half-terms.22 Indeed, each of these Presidents appointed fewer women during a comparable period than did President Bush, although both the Reagan and Carter Administrations eventually increased the number and percentages of women named to the federal judiciary during the remaining periods of their administrations.23

II. ADDITIONAL APPOINTMENTS

President Bush must immediately institute a concerted campaign to appoint a substantial number of highly qualified women to federal judgeships. It is certainly possible for the Bush Administration to improve on the mediocre record of the initial two years. President Bush should name at least as many women as did President Carter. This is a realistic goal given the greater number of highly qualified female attorneys practicing today.

A. Why More Women Should be Appointed

The Bush Administration should significantly increase the number of women on federal courts for many reasons. Female appointees are one important indicator of this Administration’s commitment to improving circumstances for women in the federal civil and criminal justice systems, fostering females’ progress in the legal profession, and enhancing conditions for women in this country. Moreover, women currently constitute more than one-fifth of the bar.24 The distinguished records of judicial service compiled by women, such as Justice Sandra Day O’Connor, Chief Judge Patricia McGowan


22. See supra notes 3-4 and accompanying text.

23. See supra notes 5-6 and accompanying text. The Carter Administration improved its record because President Carter orchestrated a vigorous effort to appoint female federal judges. See Goldman, Should There Be Affirmative Action For The Judiciary? 62 JUDICATURE 488 (1979) (arguing that “special efforts to find qualified women and minorities for the federal bench are not incompatible with merit selection because they insure that we choose the best judges from among all possible candidates.”); Randall, The Success of Affirmative Action in the Sixth Circuit, 62 JUDICATURE 486 (1979) (discussing the method by which the Sixth Circuit Panel of the U.S. Circuit judge nominating commission implemented President Carter’s call to place more women and minorities on the federal bench). The Reagan Administration had six additional years in which to improve its record. Moreover, it may have felt less compelled to demand prior judicial or prosecutorial experience as time passed. See Martin, supra note 7, at 139-40.

24. See supra note 1.
Wald of the United States Court of Appeals for the District of Columbia Circuit, and Senior District Judge Constance Baker Motley, also provide compelling evidence that women are outstanding federal judges.

Much evidence suggests that numerous female judges have different attitudes, experiences, points of view and approaches to judging than many male jurists and that these attributes will improve the federal judicial process. Considerable data indicate that there is widespread gender bias in the federal justice system which the service of additional women as judges will reduce. The appointment of more female judges could correspondingly help persuade fellow citizens of the neutrality of the justice system. Justice Christine Durham of the Utah Supreme Court recently observed that female judges “bring an individual and collective perspective to our work that cannot be achieved in a system which reflects the experience of only a part of the people whose lives it affects.”

The diverse views of women who sit on federal courts may also influence substantive judicial decision making. One analysis of President Carter's appointees to the circuit courts indicated that female judges were somewhat more “liberal” than males in resolving issues of gender and race discrimination, although this was not true of criminal law questions. Female judges are likely to have greater

26. See, e.g., Schafran, Gender Bias in the Courts: An Emerging Focus For Judicial Reform, 21 ARIZ. ST. L.J. 237, 238, 271-73 (1989) (discussing gender bias and proposing that its elimination in the courts must be a permanent item on the judicial reform agenda); Statement of Judith Resnik, Professor of Law, University of Southern California Law School, for the Hearings on the Federal Courts Study Committee (Jan. 29, 1990) (on file at the Hofstra Law Review) (suggesting methods of improving the federal courts by removing gender bias); see also infra notes 35-37 and accompanying text.
27. See Ness, Women on the Federal Judiciary: An Assessment of the Past Four Years (1980); Goldman, A Profile of Carter's Judicial Nominees, 62 JUDICATURE 246, 253 (1978) (stating that “[a] judiciary composed of many racial or ethnic strains as well as both sexes and major political parties-in other words a pluralistic judiciary-is more likely to win confidence of the diverse groupings in a pluralistic society.”). 28. Durham, President's Column, NATIONAL ASS'N OF WOMEN JUDGES: NEWS & ANNOUNCEMENTS, Spr./Sum. 1987, at 1, 3.
29. See 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 (1983). Professor Gottschall defined “attitudinal liberalism as a relative tendency to vote in favor of the legal claims of the criminally accused and prisoners in criminal and prisoner's rights cases, and in favor of the legal claims of women and racial minorities in sex and race discrimination cases respectively.” Id. at 168; see also Martin, supra note 25, at 208 (concluding that similar evidence from studies of state court judicial behavior is inconclusive). But cf. Walker & Bar-
appreciation of many difficulties that women face in American society, such as gender discrimination, problems involving reproductive freedom, including abortion, and conflicts between career and familial obligations. Indeed, Judge Judith S. Kaye, a member of the New York Court of Appeals, offered similar observations last April: "After a life-time of different experiences and a substantial period of survival in a male-dominated profession, women judges unquestionably have developed a heightened awareness of the problems that other women encounter in life and in law; it is not at all surprising that they remain particularly sensitive to these problems." 30

Professor Elaine Martin, in a recent article, suggested that the different viewpoints of women might afford certain additional advantages. 31 She stated that female judges' perspectives could influence the conduct of business in courtrooms, perhaps altering the sexist demeanor of some litigators. 32 Their views also might change male judges' sex-role attitudes, particularly on circuit courts that have collegial decision making. 33 Furthermore, the diverse perspectives of women may affect administrative conduct, such as law clerk employment, and foster collective activity through service on entities like gender bias task forces. 34

In April, 1990, the Federal Courts Study Committee, which Congress commissioned to review the federal judicial system and to develop constructive recommendations, addressed several important ideas treated in this section. 35 The Committee suggested that "the President and the Senate should endeavor to select the most qualified candidates for federal judicial office, irrespective of party affiliation, but with due regard for the desirability of reflecting the heterogene-


31. See Martin, supra note 25, at 208 (discussing the different perspectives women judges bring to the bench).

32. See id.

33. Id.

34. Professor Martin cautioned that none of these ideas have been seriously assessed. Id. Moreover, her earlier study found that female judges appointed by President Carter may have stronger feminist attitudes than those named by President Reagan. See Martin, supra note 7, at 141-42; cf. Schafran, supra note 26, at 272 (discussing task forces studying gender bias in the courtroom).

It observed that analyses of court systems in many states reflect the existence of "bias—particularly gender bias—in state judicial proceedings" and acknowledged that the federal courts are not completely immune from this generic societal problem, although the Committee was confident that the federal judiciary's quality and the federal law's character keep these difficulties at a minimum. The Committee suggested that the federal court system "expand efforts to educate judges and supporting personnel about the existence and dangers of social, ethnic, and gender discrimination and bias," especially by capitalizing on the knowledge of state gender bias task forces.

There is, of course, much more to federal judicial selection than merely counting numbers. Numerous observers have debated whether significant increases in the number of female lawyers or the appointment of women to the federal judiciary will substantially improve either the legal profession or the bench. Moreover, considerable evidence suggests that the women the Bush Administration has appointed possess political and philosophical views, ideas about proper judicial roles and the purposes of the federal courts, and judicial temperaments that seem similar to those of certain male jurists currently on the federal bench. These phenomena are exemplified by recent conduct attributed to Judge Edith Jones of the United States Court of Appeals for the Fifth Circuit, a Reagan Administration appointee, but a judge who could well be the Bush Administration's next nominee to the Supreme Court. Judge Jones castigated one

36. See REPORT, supra note 35, at 167.
37. See id. at 169.
38. See id. See generally Schafran, supra note 26 (discussing state gender bias task forces).
39. See, e.g., Resnik, On The Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. CAL. L. REV. 1877 (1988) (arguing that feminism can inform the structures of adjudication); Schafran, Lawyers' Lives, Client Lives: Can Women Liberate the Profession?, 34 VILL. L. REV. 1105 (1989) (discussing how women have the potential for changing the legal profession to the benefit of all lawyers and the administration of justice); Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 544 (1986) (analyzing how a feminine jurisprudence might embrace and adapt the dominant masculine and liberal response for the benefit of modern society); see also Kaye, supra note 20 (analyzing the changing status of women in the legal profession); Wald, supra note 5 (discussing the status of women in the legal profession and how appointment of women judges will counteract the latent prejudices and processes that perpetuate gender inequalities in the courts).
40. See Shenon, Conservative Says Sununu Assures Him on Souter, N.Y. Times, Aug. 24, 1990, at A10, col. 1 (quoting Sununu: "I can tell you Edith starts next time at the top of the stack.").
attorney representing a death-row inmate by equating the lawyer’s pursuit of what she thought was a frivolous eleventh-hour appeal to the alleged crime for which the inmate had been sentenced to death. Judge Jones chastised another attorney for bringing a last-minute death penalty appeal and causing her to miss her young son’s birthday party.

Although there is considerably more to appointing judges than simply calculating totals, so few women have been named that it creates cause for concern. The Bush Administration has not yet compiled a record as dismal as that of President Reagan. Nonetheless, President Bush certainly could approach this abysmal performance unless he mounts a sustained effort to increase significantly the number of female federal judges appointed in the next two years.

B. Increasing the Number of Female Judges

The Bush Administration can attain the objective of placing substantially more women on the federal bench during its second half-term in a number of ways. The Administration must institute a vigorous campaign to recruit and appoint many highly qualified female attorneys. President Bush and his staff could encourage members of the Senate to seek out and recommend more women for nomination.

The Administration also may want to consider re-establishing some form of merit-based selection panels. On those commissions, numerous individuals and organizations that had minimal or no involvement in the nomination process, worked with people and groups that had traditionally participated, namely the President, the Senate and the ABA. The panels promoted the candidacies of many fe-

41. Suro, The Judge Not Chosen is Less of an Enigma, N.Y. Times, July 29, 1990, at A18, col. 5 (stating that Judge Jones wrote “[t]he veil of civility that must protect us in society has been torn twice.”)
42. See id.
43. See Lisphutz & Huron, Achieving a More Representative Federal Judiciary, 62 JUDICATURE 483, 485 (1979) (stating that Carter aides said he worked behind scenes to convince Senators to nominate more women); cf. Lewis, supra note 8 (reporting that a Bush aide stated that the Administration had attempted to convince Senators to propose more women candidates and promised that the first group of 1991 nominees would include many women); Trigoboff, supra note 14 (stating that the Bush Administration contends that “it is committed to diversity”).
44. See supra note 15 and accompanying text.
45. See L. Berkson, S. Carbon, & A. Neff, supra note 15; Martin, supra note 7, at 140-41 (noting how these merit commissions produced so many more names of potential women candidates).
male nominees who did not possess time-honored credentials, such as political party involvement or partnership status in prestigious law firms, but who were otherwise highly qualified.  

46. See Goldman, supra note 23, at 488-89 (noting that recommending qualified women and minorities for the federal bench is compatible with merit selection goals); Randall, supra note 23, at 486-87 (discussing how the Sixth Circuit panel responded to President Carter's call for more women on the bench).

47. See supra text accompanying notes 24-30.


49. See id.

50. See supra notes 12-13 and accompanying text.
promising female nominees who, for instance, are considered to have improper views on abortion.

The Bush Administration and the Senate need not, and should not, eliminate political considerations from the appointment process. The drafters of the Constitution contemplated that politics would be an important component of checks and balances, despite the terse provision that the framers made for naming judges in the document. Ideological correctness, however, should not function as the dispositive, or even a principal, qualification for nomination and must be downplayed as a criterion for appointment.

III. A LOOK INTO THE FUTURE

The policy of federal judicial selection that the Bush Administration will pursue over the next two years is difficult to predict. Fundamental substantive or procedural changes appear unlikely, principally because the commitment to name judges who resemble Reagan Administration appointees affords President Bush an "important and politically cost-free way to please the more conservative wing of the Republican party." Indeed, Administration officials recently have evinced less interest in implementing change than in continuing to rely on past selection practices. Thus, although significant modification of the selection process seems unlikely, the number and percentage of women that Presidents Carter and Reagan appointed did increase during their third and fourth years in office, and the Bush Administration will probably follow this trend.

If President Bush fails to place substantially more women on the bench soon, Senators who favor the appointment of additional women should attempt to persuade Attorney General Thornburgh and White House Counsel Gray that more women must be named. Should the efforts prove unsuccessful, those legislators should try to bring public pressure to bear directly on the President.

They also might consider provoking debate on the question of

52. See Lewis, supra note 7, at A19, col. 1.
53. Id.; Weiner, supra note 7. But see Lisphutz & Huron, supra note 43.
54. See supra notes 5-6 and accompanying text.
55. See Trigoboff, supra note 14.
appointees' gender, just as many Senators made an issue of competence with President Reagan's 1986 choice of Daniel Manion for the Seventh Circuit. Numerous Senators challenged Manion's nomination, because his written legal work and Manion's oral testimony before the Senate Judiciary Committee showed that he did not have the requisite qualifications for appellate court service. The Senate ultimately confirmed Manion on a vote of 50 to 49 with Vice President Bush ironically casting the tie-breaking ballot. The Senate consented only after a bruising battle in which a number of Senators indicated that they would not confirm presidential nominees who lacked the necessary qualifications.

If the Bush Administration fails to make substantial progress in appointing women to the federal courts, linking gender and competence would be particularly appropriate. There is now a striking discrepancy between the substantial number of female lawyers who possess outstanding qualifications and who would be excellent jurists, and the few women on the federal bench.

Of course, those who believe that more women must be appointed will not, and should not, rely exclusively on Bush Administration officials and Senators who agree with them. Women, particularly female attorneys, can pursue numerous possibilities that range across a broad spectrum of traditional and untraditional political and non-political activities. For example, insofar as prior prosecutorial experience, state court judicial service or political party involvement are considered important to district court nomination, more women may want to participate as actively as possible in those endeavors. Those who favor naming additional women should also seek out highly qualified female lawyers and promote their judicial candidacies, for instance, by acquainting Senators with the attorney's capabilities. Moreover, proponents can question Senatorial candidates and vote for the nominees who promise to expand the number of female judges both locally and nationally.

Although the suggestions above might strike some observers as

56. See Shenon, Senate Ending Judicial Fight, Gives Manion Final Approval, N.Y. Times, July 24, 1986, at A1, col. 3 (discussing the debate in the Senate over Manion's “competence and political views.”).

57. See id. (noting that Manion had “never written a scholarly law article.”)

58. Id.

59. See id.

60. These suggestions obviously are not intended to be exhaustive. For an additional discussion, see Copelon and Kolbert, With Brennan Gone . . . Saving the Bill of Rights, Ms., Sept.-Oct. 1990, at 89.
overtly political, the Bush, Reagan and Carter Administrations may have politicized the process of federal judicial selection more than prior administrations.61 Thus, it would be unrealistic to propose solutions that are devoid of political content. However, the paramount consideration must be the glaring disparity between the multitude of very qualified female lawyers and the dearth of women on the federal courts.62

IV. CONCLUSION

During President Bush's opening half-term in office, his Administration appointed more than twice as many female judges as President Reagan and one more than President Carter. Nevertheless, the Bush Administration's record has been mixed. Numerous women have been exceptional federal judges, and the appointment of additional women will improve the federal justice system. More than twenty percent of practicing lawyers are women, many having distinguished careers in law. Thus, President Bush should expeditiously implement a concerted effort to place highly qualified female attorneys on the federal bench. If the Bush Administration follows the suggestions offered, it will easily appoint more women than did President Reagan and may even eclipse the record that President Carter compiled.

61. However, President Franklin D. Roosevelt's notorious threat to pack the Supreme Court in the 1930s was equally political. See generally supra note 51.

62. Adoption of these recommendations is even more important because President Bush will have the opportunity to name nearly 125 new judges. See Rehnquist, 1990 Year-End Report of the Federal Judiciary, Third Branch, Jan. 1991, at 1, 5. Eighty-five of these judgeships were created by Congress in the 1990 Omnibus Judgeships Act. Id.