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The President and the Federal Bench

To the editors:

One critical responsibility that the Constitution assigns the President of the United States is the appointment of federal judges. The President nominates and, with the advice and consent of the Senate, appoints these life-tenured officials who must resolve disputes that involve citizens' fundamental freedoms, implicating their persons and their property. Recent indications that the Democratic majority on the Senate Judiciary Committee will confirm few additional nominees before the November presidential election make it possible to analyze the record of President George Bush in appointing Article III judges.

During the Bush Administration's four-year term of office, it has named 182 federal judges. Of these, 18.7% (34 out of 182) have been women, and 5.5% (10 out of 182) have been African-Americans. This record is substantially better than that of President Reagan in whose administration George Bush served as Vice-President. Women constituted only 8.3% (30 out of 368) and African-Americans were a mere 1.9% (7 out of 368) of the attorneys whom President Reagan placed on the courts during his two terms. President Bush's record also compares favorably with the record that President Jimmy Carter compiled. Women comprised 15.5% (40 out of 258) and African-Americans were 14.3% (37 out of 258) of the lawyers whom the Carter Administration appointed in its four-year tenure.

President Bush's success in naming a high percentage of women represents some improvement. Nevertheless, certain qualifications are warranted. Most Presidents in recent history have increased both the numbers and percentages of women and African-Americans appointed over time, especially at the conclusion of their initial terms or during their second four years in office. For example, the Carter Administration named six women out of sixty appointees in its first half-term; however, President Carter placed thirty-one women out of 198 attorneys on the bench during his last two years. Even the Reagan Administration improved on the dismal record of its initial half-term in which the President named three women of eighty-seven judges. The Reagan Administration went on to appoint thirty women out of 368 judges. Moreover, the percentage of women whom the Bush Administration placed on the courts was somewhat smaller than the percentage of female lawyers (approximately twenty-two percent) in the nation. President Bush also had a substantially larger, and much more experienced, pool of
women from whom to select that did President Carter, because the significant influx of women into American law schools only commenced in the mid-1970s.

It is important to remember as well that there is more to judicial selection than merely counting the percentages of women and African-Americans appointed. Simply increasing the number of minorities on the bench may not greatly enhance the quality of judicial decisionmaking, as some observers believe Clarence Thomas’s elevation to the Supreme Court illustrates. Considerable evidence suggests that numerous women and African-Americans whom the Bush Administration has appointed have philosophical and political perspectives and judicial temperaments that resemble those of their colleagues.

Officials in the Bush Administration with substantial responsibility for judicial selection, such as White House Counsel Boyden Gray, have expressly stated that the President is attempting to shift the courts in a more conservative direction. Indeed, during the summer of 1992, President Bush proclaimed that one of the major achievements of his administration had been the appointment of conservative federal judges. The President, therefore, may be accomplishing his explicitly enunciated goals for expanding the number of women and African Americans on the federal courts while making the Judiciary more conservative.

The Bush Administration’s pronouncements may be overstatements in several respects, however. The life experiences which a number of women and African-Americans bring to the bench could well frustrate President Bush’s efforts to create more conservative federal courts. Furthermore, numerous judges whom he has placed on the bench appear to be considerably less ideological than many Reagan Administration appointees.

In sum, President Bush has named much higher percentages of women and considerably higher percentages of African-Americans than did President Reagan and has approached the record the President Carter compiled. The Bush Administration has also appointed judges who generally remain conservative but are less ideological than those whom President Reagan placed on the courts. When voters cast their ballots for President in November, they should keep in mind the role that presidential administrations play in federal judicial selection.

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