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A Demographic Snapshot of America's Federal Judiciary: A Prima Facie Case for Change

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Nearly a decade ago, then judge Sonia Sotomayer gave a speech at the UC Berkeley Law School and asked a simple question: “what it all will mean to have more women and people of color on the bench?”¹ This article places Justice Sotomayer’s perceptive question in historical context by providing a demographic profile of the gender and race of federal judges confirmed to the bench from September 24, 1789 through January 13, 2011.² The paper focuses principally upon federal courts of general jurisdiction, specifically, the Supreme Court, the various Courts of Appeal and the federal district courts. After presenting historical data, the article summarizes some reasons why the Executive Branch and the Senate should conscientiously cooperate to create a more diverse federal judiciary.

On September 24, 1789, Congress passed the Judiciary Act of 1789.³ On the same day, President George Washington nominated five white males to the federal bench, thereby establishing what became a race and gender template for members of the federal judiciary.⁴ The

¹ Sonia Sotomayer, A Latina Judge’s Voice, 13 Berk. La Raza L.J. 87, 90 (2002).

² Scholars have focused on various aspects of the federal judicial selection process including evaluation of how race and gender have influenced judicial nominations and confirmations. Cf. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997) (a comprehensive, thorough, well written analysis of the complex context in which federal judges especially, in the lower courts, were selected between 1933 and 1989); Russell Wheeler, *The Changing Face of the Federal Judiciary*, Brookings Institution (August 2009) available at http://www.brookings.edu/papers/2009/08_federal_judiciary_wheeler.aspx (outlining demographic changes in judicial appointments from the Eisenhower presidency through that of George W. Bush and including data regarding judges’ gender, race and ethnicity as well as professional background) (last visited July 22, 2010); Carl Tobias, *Diversity and the Federal Bench*, 87 Wash. L. Rev. 1, 4-12 (2010)(carefully describing and evaluating the judicial selection process of the Obama administration as well as the Senate’s response). For an interesting empirical analysis of the possible impact of the intersection of race and gender on judicial decision making at the federal appellate level in criminal cases see Todd Collins and Laura Moyer, *Gender, Race and Intersectionality on the Federal Appellate Bench*, 61 Pol. Res. Q. 219 (June 2008).

³ Judiciary Act of 1789, ch. 20, 1 Stat. 73

⁴ Data derived from Federal Judicial Center, <http://www.fjc.gov/history/judges.html> (hereafter “Federal Judicial Center”). On Federal Judicial Center homepage click “Federal Judicial History,” then click “Judges of the United States Courts,” afterwards click “select research categories”, next select “Nominating President” and then select “George Washington”) (last visited, January 14, 2010).

next thirty presidents who succeeded Washington made the same race and gender selections: specifically, 891 white male judges.⁵

President Franklin Delano Roosevelt departed (slightly) from the exclusionary model of judicial appointments followed by his predecessors. After Roosevelt had appointed—and the Senate had confirmed—twelve white males to the bench,⁶ President Roosevelt nominated Florence Ellinwood Allen to serve as a judge on the Sixth Circuit. The Senate confirmed Allen on March 15, 1934.⁷ Judge Allen was the first woman to have lifetime tenure on a federal court of general jurisdiction (President Coolidge had appointed Genevieve Rose Cline to a lifetime position on the U.S. Customs Court which was a specialty court with very limited jurisdiction).⁸

After Roosevelt appointed Judge Allen, the next forty two years (1934-1976) witnessed one thousand and fifty seven federal judicial appointments (1057). Only eight (8) of the judges were women.⁹

While breaching the barrier of gender, Roosevelt did little to challenge racial segregation in the federal judiciary. He appointed William H. Hastie (an African American who had graduated from Harvard Law School as a member of the Law Review) to a non-lifetime judgeship with very limited jurisdiction in the U.S. Virgin Islands.¹⁰ The appointment was important as a symbol of progress, though practically it had little impact on the federal judiciary.¹¹

On October 21, 1949, President Harry Truman gave Hastie a recess appointment as a judge on the United States Court of Appeals for the Third Circuit. Hastie was the first person of color appointed to a lifetime position on a federal court of general jurisdiction.¹² After extensive debate,¹³ the Senate confirmed Hastie's appointment. Prior to Hastie's appointment, Truman had appointed Irvin Mollison to the United States Court of Customs in New York which had very restricted jurisdiction but being a lifetime appointment, was more than a symbolic act.¹⁴

Dwight Eisenhower also appointed one African American, Scovel Richardson, to the U.S. Customs Court.¹⁵ In addition, on October 13, 1960, Eisenhower gave Cyrus Niles Tavares

⁵ Data compiled from Federal Judicial Center, *supra* note 4. See also, Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Gender and Race: 1789-2010* (January 14, 2011 (unpublished manuscript on file with author).

⁶ Federal Judicial Center, *supra* note 4.

⁷ Florence Ellinwood Allen – Biography <http://www.fjc.gov/servlet/nGetInfo?jid=28>

⁸ Goldman, *supra* note 2, at 51, n. q.

⁹ See, Federal Judicial Center, *supra* note 4; Stubbs, *supra* note 4.

¹⁰ Goldman, *supra* note 2 at 55.

¹¹ GILBERT WARE, *GRACE UNDER PRESSURE*, 85-86 (1984). See also, Goldman, *supra* note 2, at 55, and at 98, n.,v.

¹² Ware, *supra* note 11 at 85-86. Franklin Roosevelt had earlier appointed Hastie and William E. Moore to the federal district court for the Virgin Islands, which had very limited jurisdiction and non lifetime tenure (a ten year term). See Goldman, *supra* note 2 at 98, n., v.

¹³ Ware, *supra* note 11 at 233-41; see also, Federal Judicial Center.

¹⁴ Goldman, *supra* note 2, at 98, n., v. See also the biographical profile of Judge Mollison at <http://www.jtbf.org/index.php?src=directory&view=biographies&srctype=detail&refno=188> (last visited July 23, 2010).*Id.*

¹⁵ Goldman, *supra* note 2, at 144.

a recess appointment to the federal trial court in Hawaii.¹⁶ According to Professor Goldman's painstaking research, Judge Tavares was the first Asian American male to serve as a judge of a federal court of general jurisdiction.¹⁷ President Kennedy resubmitted Judge Tavares' nomination, and the Senate confirmed him on September 21, 1961.

Furthermore, President Kennedy nominated the first Latino, Reynaldo Guerra Garza to the bench. The Senate confirmed him on April 13, 1961.¹⁸ Kennedy was also the first president to appoint more than one African American judge: he appointed three.¹⁹ In addition, he appointed one woman.²⁰ On January 26, 1966, President Johnson widened the door of opportunity by nominating the first woman of color, Constance Baker Motley to the federal bench. The Senate confirmed her on August 30, 1966.²¹

Under the administrations of Richard Nixon and Gerald Ford only two of the two hundred and eighty-five judges confirmed to the bench were females.²² No women of color were confirmed. During Gerald Ford's administration, for the first time, white males comprised less than ninety percent of an American president's federal judges.

Jimmy Carter's administration had a number of firsts:

- less than 90 percent of President Carter's confirmed federal judges were white
- just over twenty percent of Carter's judges were people of color²³
- the number of women of color on the federal bench increased from one to nine including Almaya L. Kears, the first woman of color to hold a federal appellate judgeship²⁴
- On June 26, 1980, Carmen Consuelo Cerezo²⁵ became the first Latina confirmed to serve on the federal bench
- On October 31, 1979, Frank Howell Seay²⁶ was confirmed as the first Native American to serve on the federal bench²⁷

¹⁶ <http://www.fjc.gov/servlet/nGetInfo?jid=2343&cid=999&ctype=na&instate=na> (last visited, January 21, 2011).

¹⁷ Goldman, *supra* note 2 at 196.

¹⁸ See, LOUISE ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996), and see, <http://www.fjc.gov/servlet/nGetInfo?jid=827&cid=999&ctype=na&instate=na> (Federal Judicial Center last visited Jan. 14, 2011).

¹⁹ See, Federal Judicial Center. (Thurgood Marshall, Wade Hampton McCree, Jr., and James Benton Parsons).

²⁰ See, Sarah Tilghman Hughes – Biography, <http://www.fjc.gov/servlet/nGetInfo?jid=1116> (last visited Jan. 13, 2011).

²¹ See, Federal Judicial Center, [Motley, Constance Baker](#) (last visited Jan. 14, 2011). See also, CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY 214 (1998).

²² Cornelia Groefsema Kennedy and Mary Anne Richey. See, Federal Judicial Center, *supra* note 4.

²³ See, Federal Judicial Center.

²⁴ Almaya Lyle Kears – Biography, <http://www.fjc.gov/servlet/nGetInfo?jid=1236&cid=999&ctype=na&instate=na> (last visited Jan.14, 2011).

²⁵ Carmen Consuelo Cerezo – Biography, <http://www.fjc.gov/servlet/nGetInfo?jid=408> (last visited Jan. 14, 2011).

Of Ronald Reagan's 358 confirmed judges, 308 were white males (86%) and twenty seven white females (7.5%). Reagan nominated Sandra Day O'Connor to be the first woman to serve on the Supreme Court, and on September 22, 1981, Justice O'Connor received her commission.²⁸ Like all of his predecessors, Reagan did not appoint any Asian American women or Native American women to the bench.²⁹

Ninety percent of President George H.W. Bush's (188) confirmed appointments to the federal bench, were white persons. Bush's appointment of three Latinas was the largest number of such appointments until that time.³⁰

The majority of President William J. Clinton's judicial appointees were white males (194 of 372 appointments or 52%).³¹ Clinton had a number of firsts, too, for an American president:

- white males constituted less than 60 percent of Clinton's confirmed judgeships
- Clinton's female judicial appointees exceeded 20 percent³²
- On June 23, 1997 Susan Oki Mollway became the first Asian American female to serve on the federal bench.³³

Eighty two percent of President George W. Bush's appointees were white persons (265 out of 322), and nearly 10 percent were Latino/Latina (18 Latinos and 12 Latinas). Approximately 22 percent of Bush's appointees were women. Bush appointed more Latinas to the bench than all of his predecessors combined. A recent analysis of President George W. Bush's appointees shows that nearly two thirds of them are millionaires.³⁴

As of January 12, 2011, President Barack Obama has appointed, and the Senate confirmed, 62 persons to the federal bench. Eighteen are white males, seventeen are white females, eight are African American males, eight are African American females, four are Asian American females, three are Latinas, and two are Asian males.³⁵ Thus far, Obama has appointed thirty two women and thirty men.³⁶ In addition, both of his Supreme Court appointees were women. Obama is establishing a pattern of more demographically diverse appointments than any of his predecessors.³⁷ However, no President, during the two hundred and twenty one year

²⁶ Frank Howell Seay – Biography, <http://www.fjc.gov/servlet/nGetInfo?jid=2137> (last visited Jan. 14, 2011).

²⁷ *Id.*

²⁸ Sandra Day O'Connor – Biography, <http://www.fjc.gov/servlet/nGetInfo?jid=1796&cid=999&ctype=na&instate=na> (last visited Jan. 14, 2011)

²⁹ See, Federal Judicial Center, *supra* note 4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* Twenty eight percent of Clinton's judges were women.

³³ Susan Oki Mollway – Biography, <http://www.fjc.gov/servlet/nGetInfo?jid=2784> (last visited Jan. 14, 2011).

³⁴ Sheldon Goldman, Elliott Slotnick, Gerard Grysk, Gary Zuk and Sara Schiavoni, *W. Bush Remaking The Judiciary: Like Father, Like Son*, 86 *Judicature* (May-June 2003).

³⁵ Federal Judicial Center, *supra* note 4; see also, Tobias, *supra* note 2; Stubbs, *supra* note 4.

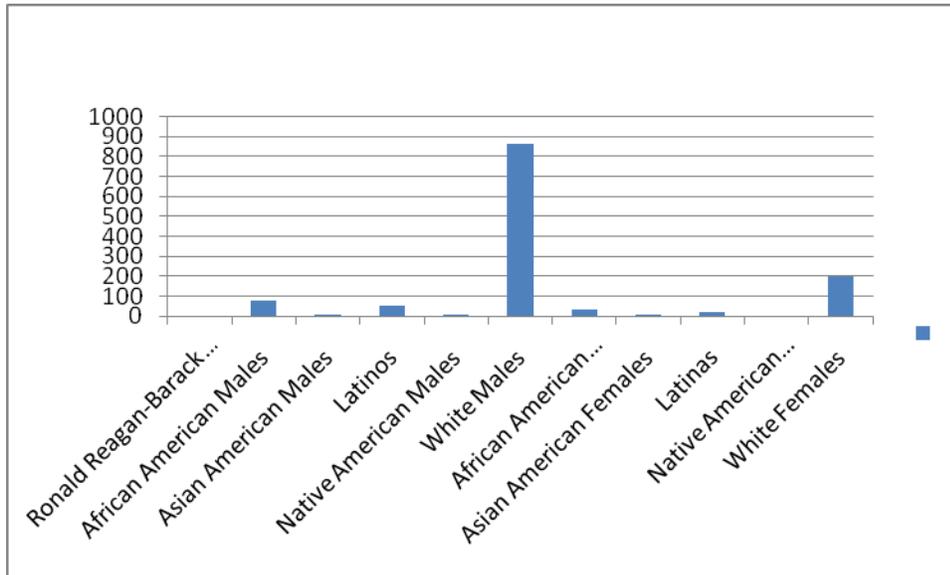
³⁶ See Federal Judicial Center, *supra* note 4.

³⁷ For an excellent analysis of President Obama's efforts to diversify the federal judiciary see Tobias, *Diversity and the Federal Bench*, *supra* note 2; and , Carl Tobias, *Appointing Asian*

history of America’s federal judiciary, has appointed a Native American woman to the federal judiciary.³⁸

II

A demographic profile of the federal judiciary for the past thirty years (Ronald Reagan-Barack Obama) is presented below:



Ronald Reagan-Barack Obama: 1296 judicial appointments (872 white males, 84 African American males, 56 Latinos, 11 Asian American males, 1 Native American male, 34 African American females, 24 Latinas, 6 Asian American females, 208 white females. Native American females continue to be excluded from federal judicial service)³⁹

According to recent United States Bureau of Census data, a demographic snapshot of America’s general population is as follows:⁴⁰

America's population estimate: July 1, 2009

African American Males 17,966,746

American Judges in the Obama Administration (2010) (unpublished manuscript, on file with author).

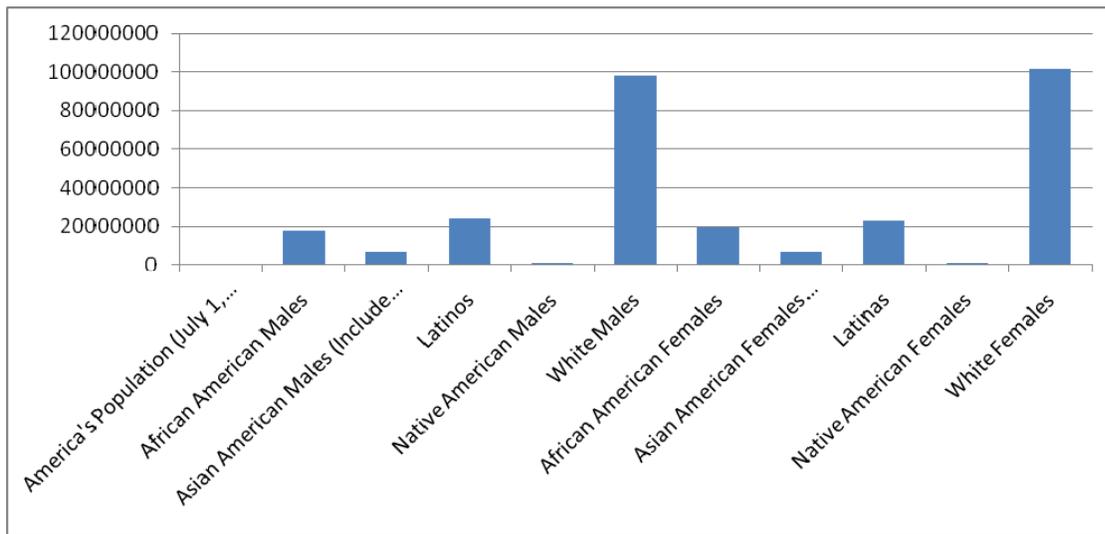
³⁸ Federal Judicial Center, *supra* note 4.

³⁹ Table based upon data derived from Federal Judicial Center <http://www.fjc.gov/history/home.nsf> ((on Federal Judicial Center homepage click link for “Federal Judicial History,” then click “Judges of the United States Courts,” afterwards click “select research categories”, next select “Nominating President”, select “Race or Ethnicity” and select “Gender”. Then select each of the presidents from Ronald Reagan through Barack Obama (last visited Jan. 13, 2011).

⁴⁰ Table 3: Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000-July 1, 2009, U.S. Bureau of Census (Released June 2010), available at <http://www.census.gov/popest/national/asrh/NC-EST2009-srh.html> (last visited January 13, 2011).

Asian American Males (Include Hawaiian & Pacific Islanders)	6,830,583
Latinos	25,056,919
Native American Males	1,164,575
White Males	98,180,733
African American Females	19,714,798
Asian American Females (Include Hawaiian & Pacific Islanders)	7,304,010
Latinas	23,362,405
Native American Females	1,196,232
White Females	101,670,5077

(A graphic representation of America’s population by gender and race follows.)

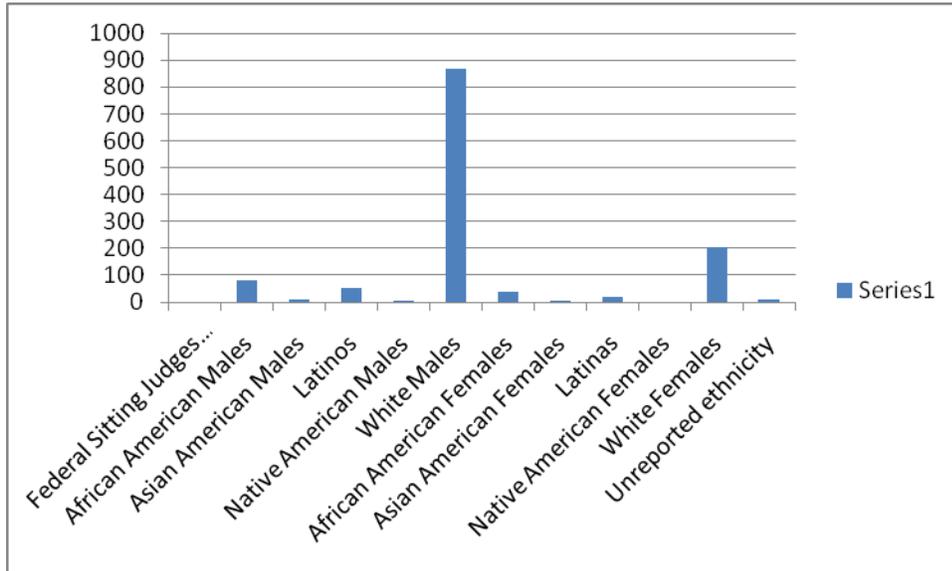


A graphic portrayal of America’s federal sitting judges by gender and race (January 13, 2011)⁴¹:

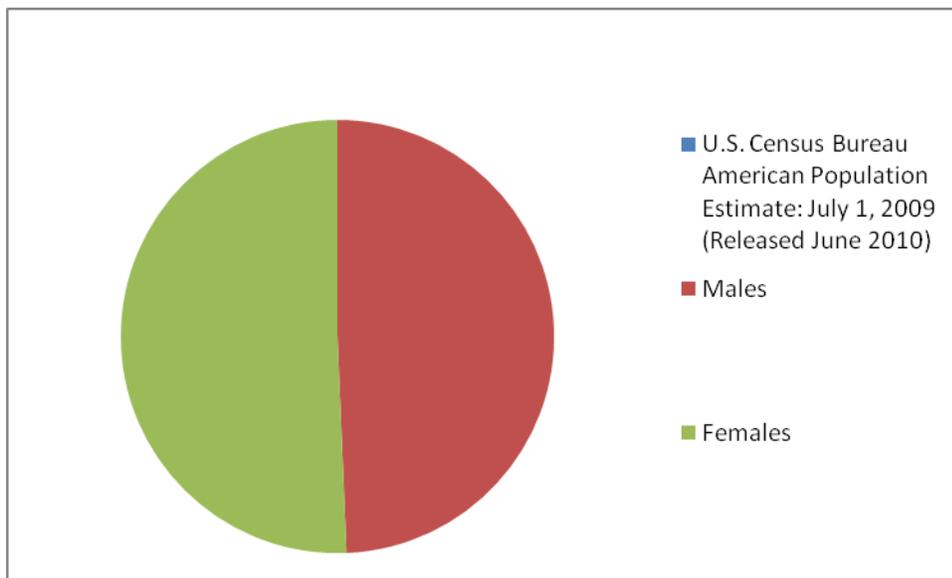
Federal sitting judges: January 11, 2011	
African American Males	82
Asian American Males	9
Latinos	54
Native American Males	1
White Males	869
African American Females	37
Asian American Females	6
Latinas	20
Native American Females	0
White Females	206
Unreported Ethnicity	9

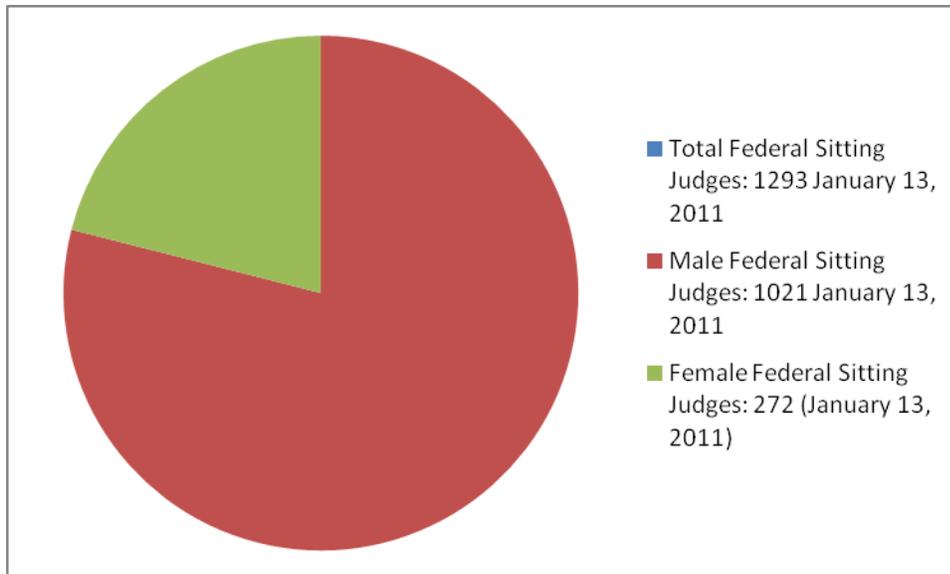
⁴¹ Federal Judicial Center, *supra* note 4.

Total number of judicial appointments 1293



A comparison of America's population by gender versus its federal judicial composition by gender reveals:





Observations:

For 145 years after the creation of the federal judiciary (1789-1934) women were excluded from lifetime appointments to courts of general jurisdiction. For 160 years following the establishment of the federal judiciary (1789-1949), people of color were barred from such service. For more than 170 years after the founding of the judiciary (1789-1961), Latinos and Asian Americans were turned aside. For over 175 years after the federal judiciary was created (1789-1966), women of color were effectively banned from service. For over 190 years (1789-1980) Latinas and Native Americans were left out. For more than 200 years after the inception of the federal judiciary (1789-1997) Asian American women were excluded from service. Native American females have never been allowed to serve on the bench. Over half of Americans are women (51%) while presently 80 percent of judges are males. Seventeen percent (17%) of Americans are women of color (about one in six) yet only five percent (5%) of federal judges (one of twenty) are women of color.

From its inception, the American federal judiciary has been (and still is) dominated by a demographic minority group: males. During the first 145 years of the American federal judiciary, a subdivision of the male minority group, white males, held every federal judgeship from the district courts to the Supreme Court. Today, white males comprise one third of the general population of the United States. In the federal judiciary, white males constitute at least two thirds of federal sitting judges at every level including the Supreme Court, United States Circuit Courts of Appeals, and the United States District Courts.

The disproportionate share of judgeships held by white males for over two hundred and twenty years has resulted in the underrepresentation on the federal bench of most other groups within the general American population from 1789 until now.

Recommendations:

The general public and policy makers in the federal government should acknowledge the overrepresentation of males on the federal bench. Special attention should be given to addressing the striking overrepresentation of one demographic subcategory in the male minority (namely white males). Equally careful attention should be given to the egregious underrepresentation of women of color on the federal bench.

Finally, we must ask what are the long-term costs to American society and the prospects of a representative American democracy where overwhelmingly the socioeconomic and political leadership class is drawn principally from one gender, race and socioeconomic status minority group? Stated differently, what kind of America will exist at mid-twenty first century if American leaders continue to overwhelmingly look like the Framers of the late 1700s?

SJI Assists Oregon Court of Appeals in Reexamining Judicial Workload

The Oregon Court of Appeals recently completed a workload assessment with support from the State Justice Institute (SJI), with technical assistance provided by the National Center for State Courts (NCSC). The workload assessment was required to assist the Court with achieving operational efficiencies in response to increasing caseloads, additional demands on staff and judicial resources, and budget constraints.

To guide the process of developing workload assessment tools and interpretation of the results, an advisory committee composed of Court of Appeals judges and staff was created. NCSC consultants employed a five phase process to: define the work of judges and staff; conduct a self-report time study on work activities; evaluate reported times against court activities; review findings in relationship to desired improvements and established benchmarks; and develop a workload assessment model based on input from the advisory committee and the workload data.

Results of the assessment supported the conclusions from an earlier internal review that the Court of Appeals is chronically underfunded, despite greater need for more resources as measured

through caseloads and filings. The assessment further acknowledged that more judgeships are required, since the number of judges has remained the same since 1977 – while other justice system partners have expanded staffing and administration between 1977 and 2004. The assessment also noted the importance of continuing a strong track record of technological advancements and reviewing commitments to new initiatives, including enactment of an appellate reference judge, two-judge appellate panels, statutory amendments, and expanded use of the voluntary certification of Court of Appeals cases for the Supreme Court.

The Court of Appeals will continue to review the workload model, and communicate the needs of the judiciary to the Oregon Legislature as they enter the FY 2012 budget cycle. The final workload assessment report from this SJI-funded grant, and more information about Oregon Court of Appeals, is available on their website, <http://courts.oregon.gov/COA/Reports.page>.

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