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More Women Named Federal Judges

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MORE WOMEN NAMED FEDERAL JUDGES

*Carl Tobias**

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I. INTRODUCTION

During President Bush's third year in office, his administration has improved its record of appointing women to the federal bench. After appointing relatively few women to the federal circuit and district courts during his first two years in office, President Bush instructed administration officials responsible for judicial selection to undertake special efforts to seek out "qualified" female attorneys for appointment.¹ These officials apparently implemented President Bush's instructions, because President Bush increased the percentage of women appointed to the federal courts by fifty percent during his third year in office.²

Whether this increase in the percentage of women appointed to the federal courts represents meaningful improvement and, if so, whether the Bush Administration will maintain this momentum re-

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1. "Qualified" is a term employed considerably more often in describing female or minority judicial candidates than white males. *See, e.g.*, Letter from President George Bush to Senator Robert Dole, Senate Minority Leader (Nov. 30, 1990) [hereinafter Bush Letter] (copy on file with author). *See also infra* note 13. I find this practice objectionable. However, because those who make the nominations employ this practice, I follow it for purposes of clarity.

2. *See infra* note 8 and accompanying text.

mains unclear. For example, although the percentage of women appointed increased, the total number of judges appointed, male or female, is so small that comparatively few additional appointees could change the percentages considerably. In any event, if the Bush Administration intends to surpass the record of appointment that President Jimmy Carter compiled,³ President Bush must significantly increase the number of women whom he places in judgeships during his fourth year in office.

With an election year approaching, current polls indicate that President Bush is likely to win re-election.⁴ However, even if President Bush is defeated, Presidents Reagan and Bush will have appointed two-thirds of the sitting federal judges and will have made a significant imprint on the federal judiciary by 1993.⁵ President Bush and the administration officials principally responsible for judicial selection have candidly proclaimed that their goal is to make the federal courts more conservative.⁶ This is an objective they apparently have accomplished. These factors warrant analysis of federal judicial selection during the Bush Administration's third year in office to ascertain why President Bush has increased the percentage of women appointed and what that increase might portend.⁷ This essay undertakes that analysis.

The essay initially assesses information pertinent to President Bush's record of appointments to the federal bench during his first three years in office. The prospects for future appointment of women are explored next. Finding these prospects inconclusive, this essay suggests that President Bush continue employing the constructive measures initiated during his administration's third year to name additional women while seriously considering the possibility of instituting even more vigorous efforts to appoint women in the future. Finally, the essay examines why greater numbers of women should be placed on the federal courts and how that goal can be attained.

3. See *infra* text accompanying note 18.

4. See Dowd, *President Is Given High Marks in Poll*, N.Y. Times, Feb. 26, 1989, § 1, at 1, col. 5 (New York Times/CBS News Poll indicates that a majority of Americans approve of President Bush); but see Toner, *Casting Doubts: Economy Stinging Bush*, N.Y. Times, Nov. 26, 1991, at A1, col. 3 (New York Times/CBS News Poll indicates that only 39% of registered voters said they support President Bush).

5. See Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 306 (1991).

6. See *infra* note 15 and accompanying text.

7. These factors warrant analysis now, even though similar work was undertaken at earlier junctures of the Bush Administration. See Goldman, *supra* note 5; Tobias, *The Federal Judiciary Engendered*, 5 WIS. WOMEN'S L.J. 123 (1989); Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171 (1990) [hereinafter Tobias, *Gender Gap*].

II. INCREASED PERCENTAGES DURING THE THIRD YEAR

A. *The Data*

In his third year in office, President Bush named eleven women out of fifty-six appointees (19.6 percent) to federal judgeships.⁸ This record is considerably better than the one that the Bush Administration compiled during its first half-term. In that period, President Bush placed seven women out of sixty-eight appointees (10.3 percent) on the courts.⁹ Moreover, President Bush's 1991 record of appointments is stronger than the Reagan Administration's appointment record and compares favorably with President Carter's overall record. For example, women comprised only 8.3 percent of the lawyers whom President Reagan selected for the federal courts in his eight-year tenure, while women constituted 14.4 percent of President Carter's appointees over his four-year term.¹⁰

B. *The Increase*

Several reasons explain why President Bush named a higher percentage of women to the federal courts during his third year in the White House. Perhaps most important was the Bush Administration's efforts to search for and appoint highly qualified female attorneys to the bench. For example, in November 1990, President Bush wrote Senator Robert Dole, the Senate Minority Leader, seeking the assistance of Republican senators in finding women with the appropriate credentials.¹¹ The President also informed those administration officials responsible for recruiting judicial candidates that they should provide greater access for qualified individuals than was previously achieved with "old boy networks" and should make special efforts to seek out properly qualified female lawyers.¹²

The implementation of these instructions apparently facilitated the appointment of a higher percentage of women, but their appointment

8. Telephone interview with George Kassouf, Alliance for Justice, Washington, D.C. (Dec. 3, 1991).

9. See Tobias, *Gender Gap*, *supra* note 7, at 172 n.2.

10. See Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 322, 325 (1989) [hereinafter Goldman, *Judicial Legacy*]; see also Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335, 339, 345 (1983) [hereinafter Goldman, *Judicial Appointments*]; Wald, *Women in the Law: Despite Progress, Much Still Needs to Be Done*, 24 TRIAL 75 (Nov. 1988).

11. See Bush Letter, *supra* note 1; see also Biskupic, *Bush Boosts Bench Strength of Conservative Judges*, 49 CONG. Q. WKLY. REP. 171 (Jan. 19, 1991).

12. See Bush Letter, *supra* note 1; see also Goldman, *supra* note 5, at 297.

was not meant to compromise President Bush's political agenda. President Bush instructed administration officials that he wanted to appoint highly qualified people who were philosophically conservative and attentive to the constitutional proposition of separation of powers.¹³ The Bush Administration also eschewed the use of selection commissions which proved to be so successful in improving access during the Carter Administration.¹⁴ Moreover, there seems to have been little change in the overarching appointment philosophy that the Bush Administration pursued during its first half-term. Murray Dickman, a Justice Department official with significant responsibility for recruiting nominees, recently characterized the Bush Administration's selection process as "very consistent with the Reagan mold."¹⁵ Conservative and liberal entities that closely follow the judicial selection process concur that the Bush Administration has continued to name judges "who are committed to a narrow reading of the Constitution; are tough on crime; and view the judiciary as a vehicle for resolving discrete disputes, not an engine for social change."¹⁶ Therefore, although the percentage of women named to the federal judiciary has increased, these new judges are likely to have political philosophies similar to their male counterparts.

President Bush's efforts to increase the number of women on the federal bench and the percentage of women appointed during his third

13. See Bush Letter, *supra* note 1. President Bush explained the term "qualified candidates." By "qualified candidates," I mean not only persons who have the training, intellect, character and temperament to be excellent judges, but also persons who understand the separation of powers and the judicial role within our constitutional system and who are committed to interpreting the law and not legislating from the bench.

Id.

14. See Goldman, *supra* note 5, at 297; see also Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136 (1987) (success of President Carter's commissions). See generally L. BERKSON & S. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (1980) (study of federal judicial selection during the Carter Administration).

15. See Marcus, *Bush Quietly Fosters Conservative Trend in Courts*, Wash. Post, Feb. 18, 1991, at A4, col. 1 (quoting Murray G. Dickman, a top aide to Attorney General Dick Thornburgh); see also Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. Times, Apr. 10, 1990, at A1, col. 2 (Boyden Gray, White House Counsel, who has substantial responsibility for judicial appointments, stated that the aim is to shift the federal "courts in a more conservative direction").

16. Marcus, *supra* note 15, at A4, col. 1. Nan Aron of the liberal lobbying group Alliance for Justice stated that "Bush is quietly but as relentlessly [as President Reagan] using the courts to place those who are in sync with his ideology on civil rights and civil liberties issues." *Id.* at A4, col. 3. Clint Bolick, Director of the conservative Landmark Center for Civil Rights, stated that "there is no area in which conservatives are more happy with George Bush than in judicial nominations." *Id.* at A4, col. 2; see also Tobias, *Gender Gap*, *supra* note 7, at 173 (similar, earlier observations).

year in office represent significant improvement. Nonetheless, several qualifications are warranted. First, the total number of appointees named in 1991 has been so insubstantial that the appointment of even a relatively small number of additional judges could alter the percentages considerably.¹⁷ Moreover, every President in recent history has increased the numbers and percentages of women appointed to the federal judiciary over time, mainly at the end of his first term or during his second term, if re-elected. For instance, President Carter appointed six women out of sixty judges during his initial two years but named thirty-one women out of one hundred ninety-eight appointees in the second half of his term.¹⁸ Furthermore, the percentage of women whom President Bush named in 1991 remains smaller than the percentage of female attorneys in the United States.¹⁹

In analyzing the judicial selection process, it is important to do more than simply count the number of women placed on federal courts. Merely increasing the number of female judges may not dramatically improve the bench.²⁰ Some evidence indicates that numerous women named by President Bush have political and philosophical views, particularly of judicial functions, and judicial temperaments that differ minimally from the perspectives of their male colleagues.²¹ The Bush Administration, therefore, appears to be achieving its expressly articulated goals of simultaneously appointing more women to the federal bench while increasing the number of conservative judges. However, the life experiences that many women bring to judicial service²² may

17. See *supra* note 8 and accompanying text.

18. See Goldman, *Judicial Appointments*, *supra* note 10, at 339, 345 (federal court appointees). Even President Reagan improved on the abysmal record (three women of 87 total appointees) compiled in his first half term. He eventually named 30 women out of 368 appointees. See Goldman, *Judicial Legacy*, *supra* note 10, at 322, 325.

19. Dillon, *Madeline Kleiner and Helen Bendix*, AM. LAW., Mar. 1989, at 118 (women comprise about 20% of lawyers in the United States).

20. See generally Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988) (discussion of women and judicial election, selection, and accountability); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (discussion of "feminine jurisprudence" in the United States).

21. Judge Edith Jones of the Fifth Circuit, whom President Reagan appointed and who has frequently been mentioned as a possible Bush Administration nominee for the Supreme Court, has displayed these characteristics. See Shenon, *Conservative Says Sumunu Assures Him on Souter*, N.Y. Times, Aug. 24, 1990, at A15, col. 1 (Jones as possible nominee); Tobias, *Gender Gap*, *supra* note 7, at 179-80 (examples of characteristics). Correspondingly, some male appointees may be less ideological than the women.

22. Judge Judith S. Kaye of the New York Court of Appeals recently observed:

After a lifetime of different experiences and a substantial period of survival in a male-dominated profession, women judges unquestionably have developed a

frustrate the administration's attempt to make the federal judiciary more conservative. Notwithstanding these qualifications, the Bush Administration's effort to place women on the courts during its third year in office apparently is a positive development.

III. PROSPECTS FOR FUTURE APPOINTMENT

A. *Complications of Prognostication*

It is difficult to ascertain precisely what the increased percentage of women appointed to the bench during the Bush Administration's third year in office augurs. Several considerations complicate accurate prognostication for both 1992 and President Bush's possible second term. Nonetheless, the Bush Administration probably will pursue a policy of federal judicial selection during 1992 which is substantially similar to that followed in 1991. This means that those who screen judicial candidates for President Bush's consideration will continue the efforts instituted in 1991 to seek out and nominate highly qualified women for federal judgeships.²³ These officials also will be reluctant to nominate individuals who might jeopardize President Bush's prospects for re-election.

Judicial selection has rarely had much impact on a presidential race, but the recent controversy surrounding the confirmation of Justice Clarence Thomas may suggest otherwise for 1992. Although the Bush Administration cautiously selected Justices Souter and Thomas, the Thomas hearings focused unprecedented national attention on the judicial nomination and confirmation process. Thus, notwithstanding President Bush's cautious approach, the nomination and confirmation process itself could become an important political issue in the upcoming 1992 election.

Despite the problems of the Thomas confirmation, the administration probably will not depart from its 1991 policy of attempting to select conservative jurists, because the policy has offered President Bush an "important and politically cost-free way to please the more conservative wing of the Republican Party."²⁴ Indeed, an official of one organization that monitors court appointments recently remarked

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.

Goldberg, *Carter-Appointed Judges: Perspectives on Gender*, 26 TRIAL 108 (Apr. 1990). See also *infra* text accompanying note 33.

23. See *supra* notes 11-12 and accompanying text.

24. See Lewis, *supra* note 15, at A19, col. 1.

that "[j]udicial selection is one of the few areas where conservatives feel that [President Bush] has still been consistent from the start."²⁵

Some of these ideas may apply to President Bush's judicial selection policy, if he is re-elected. For example, the Bush Administration might persist in viewing court appointments as an easy means to satisfy the President's conservative constituency. So using judicial appointments enhances the administration's flexibility to pursue other domestic or foreign policy initiatives. In comparison, President Bush could maintain and even expand the directives implemented during his third year in office to seek out and appoint highly qualified female attorneys. Central to these two possibilities is the idea that re-election would free President Bush from certain political concerns that must be considered in setting judicial selection policy during the first term of any administration.²⁶ The policy for appointing judges may ultimately depend on what legacy the Bush Administration wishes to leave; that is, whether foreign policy will remain the administration's primary focus as it has been to date or whether the focus will shift to domestic matters, including gender fairness.

B. *Why More Women Must Be Appointed*

The importance of gender fairness is one of numerous reasons why President Bush should substantially increase the percentage and number of women named to the federal judiciary.²⁷ The appointment of female judges illustrates the Bush Administration's commitment to improving conditions for women in the United States, in the federal courts, and in the legal profession of which women now comprise greater than twenty percent.²⁸ Moreover, women, such as United States Supreme Court Justice Sandra Day O'Connor and Judge Patricia McGowan Wald of the Court of Appeals for the District of Columbia Circuit, have rendered excellent service on the federal courts that resolve the country's most complex legal issues.²⁹

25. See Marcus, *supra* note 15, at A4, col. 2 (statement of Thomas Jipping of the Free Congress Federation).

26. These restraints would be lifted in nearly all policy areas. See *supra* text accompanying notes 23-24.

27. The reasons provided below are not intended to be exhaustive. Cf. Tobias, *Gender Gap*, *supra* note 7, at 176-80 (more comprehensive discussion of the reasons why President Bush should increase the number of women on the federal bench).

28. See Dillon, *supra* note 19, at 118.

29. Many others, including Judge Amalya Kearse of the Second Circuit, Judge Cornelia Kennedy of the Sixth Circuit and Senior Judge Constance Baker Motley of the Southern District of New York, obviously have rendered distinguished service. See Tobias, *Gender Gap*, *supra* note 7, at 176-77.

Considerable evidence indicates that female judges have different backgrounds, perspectives and views of judging than many of their male colleagues and that these differences could improve the federal criminal and civil justice systems.³⁰ Some information suggests that naming more female judges would limit the significant gender bias that exists in the federal judicial system.³¹ Appointing additional women to the federal bench could help convince the American public that the system of justice is equitable and neutral by making the judiciary's composition more representative of the society.³²

The differing perspectives that many women bring to judicial service could beneficially affect certain substantive determinations. For instance, the personal experiences of many female judges enable them to comprehend more easily a number of problems confronting women in the United States today. These include gender-based discrimination and conflicts between employment and familial responsibilities.³³ Moreover, female judges' diverse viewpoints may improve the way that courtroom litigation is conducted, modify traditional perspectives on gender roles that some male judges hold, and advantageously affect certain administrative activity, such as the hiring of law clerks.³⁴

C. *How More Women Can Be Appointed*

President Bush can achieve the goal of appointing more women in many ways, some of which his administration implemented during its third year in office. For instance, officials responsible for judicial selec-

30. See generally Martin, *Men and Women on the Bench: Viva la Difference?*, 73 JUDICATURE 204 (1990) (study of male and female judges appointed by President Carter reveals how differences in women's experiences and attitudes affect judicial behavior). *But cf. supra* note 21 and accompanying text (evidence indicates numerous women named by President Bush have views that differ minimally from male colleagues).

31. 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); Statement of Judith Resnik, Professor of Law, University of Southern California Law School, for the Hearings of the Federal Courts Study Committee (Jan. 29, 1990) (on file with author). See also *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 928-40 (1990) (findings based on a study commissioned by the Florida Supreme Court of gender bias throughout the legal profession affecting professional opportunities, fee-generating opportunities, the courtroom experience, and nomination to judgeships).

32. See, e.g., Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978).

33. See *supra* note 22; see also Tobias, *Gender Gap*, *supra* note 7, at 177-78 (discussion of how differing perspectives of female judges can improve substantive decisionmaking).

34. See Martin, *supra* note 30, at 208; Torry, *At Yale Law, A Gender Gap in Who Gets Clerkships Sparks Debate*, Wash. Post, May 13, 1991, at F5, col. 1 (statistics show dramatic disparity in prospects for securing clerkships of male and female Yale law students).

tion seem to have searched more aggressively for highly qualified female lawyers who could be appointed. This was exemplified by President Bush's letter to the Republican Minority Leader seeking the assistance of Republican Senators in finding and recommending such candidates for nomination.³⁵

Although the President has commendably sought to enlarge the number of women named and to move beyond "old boy networks" while stressing that candidates have the "training, intellect, character and temperament to be excellent judges,"³⁶ he may have overemphasized ideology. The President has insisted that nominees be philosophically conservative individuals "who understand the separation of powers and the judicial role within our constitutional system and who are committed to interpreting the law and not legislating from the bench."³⁷ Although this view may be appropriate as articulated, it could in practice lead to litmus tests of ideological propriety. Overemphasis of ideological appropriateness could exclude numerous highly qualified women simply because they are considered to possess "ideologically incorrect" perspectives on abortion, affirmative action, or other issues of special importance to women.³⁸

In contrast to a nominee's ideological beliefs, the attributes that judicial selection officials should emphasize³⁹ are independence, intelligence, and industry, qualities that a number of women presently on the bench clearly possess.⁴⁰ President Bush, himself, has acknowledged and acted on the premise that nominees may embark on judicial service with different, but equally legitimate, qualifications.⁴¹ In pursuing non-traditional careers, many women will have developed valuable perspectives and qualities which deserve special consideration in measuring fitness for judicial service.

President Bush's attempt to encourage senators to forward the names of women for appointment is positive, but his effort could prove to be inadequate. A number of senators may be unresponsive to these overtures simply because they could have male candidates whom they would prefer to nominate. Senators may also be unresponsive because

35. See Bush Letter, *supra* note 1; see also *supra* note 11 and accompanying text.

36. Bush Letter, *supra* note 1.

37. *Id.*

38. See Tobias, *Gender Gap*, *supra* note 7, at 181-82.

39. See *supra* text accompanying note 36.

40. See *supra* note 29 and accompanying text.

41. See *The Candidates Respond*, 74 A.B.A. J. 52, 56-57 (Oct. 1988). The appointment of Justice Souter to the Supreme Court suggests that President Bush appreciates that appointees may have diverse, equally valid qualifications.

they have strong political ties to certain nominees or are unable to extricate themselves from certain "old boy networks."

These ideas suggest that President Bush should seriously consider re-instituting merit-based commissions for judicial selection similar to the panels employed during the Carter Administration.⁴² President Carter's judicial commissions were the most efficacious mechanism yet devised for finding and promoting highly qualified female nominees who lacked traditional credentials, such as partnership in a large law firm or active participation in party politics.⁴³

IV. CONCLUSION

The Bush Administration appointed a significant percentage of women to the federal courts during its third year in office. Although this increase constitutes an improvement, it is unclear whether President Bush will continue to place greater numbers of women on the bench in the future. Women have compiled distinguished records of achievement on the federal courts and could improve the federal judiciary and justice system in numerous ways, such as bringing different perspectives to the bench than their male colleagues. Moreover, women now comprise more than one-fifth of the bar. President Bush, therefore, should undertake a concerted effort to increase significantly the number of women placed on the federal judiciary.

42. See *supra* note 14 and accompanying text.

43. See *supra* note 14.