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HOW THE CONTENTIOUS NATURE OF FEDERAL JUDICIAL APPOINTMENTS AFFECTS “DIVERSITY” ON THE BENCH

Theresa M. Beiner *

I. INTRODUCTION

The focus of this Symposium has been on the contentious nature of the federal judicial appointments process and ways that this problem might be solved. My concern is with one aspect of this contentiousness: the difficulties of appointing a diverse bench. In this context, I mean diversity on many levels, including race, gender, socioeconomic status, as well as other background factors such as career track and—I dare to say it—judicial ideology, which I will more fully explain below.

I would like to start with an anecdote from an episode of the television show *The West Wing*. In an episode that aired last spring, the Bartlet Administration faced a vacancy on the Supreme Court of the United States, and thus had to determine the best way to replace one of the Court’s most conservative Associate Justices, who unexpectedly passed away.¹ Glenn Close portrayed federal appellate judge Evelyn Baker Lang, a potential nominee for this seat on the Supreme Court. The only problem with her candidacy was that she was too ideologically to the left. She had overturned a parental abortion consent law and was thought to be judicially “active.” Instead, the Administration was leaning toward moderate appellate judge E. Bradford Shelton, played

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1. *West Wing: The Supremes* (NBC television broadcast, Mar. 24, 2004). Episode summary available at http://www.nbc.com/The_West_Wing/episode_guide/109.html (last visited Jan. 19, 2005).

well by Robert Picado, a judge who did not position himself on any issue and characterized his approach to decision-making as an allegiance to the eccentricity of the particular case. He was a classic centrist.

Josh Lyman, one of President Bartlet's aides, favored Judge Lang's appointment and devised a plan to appoint her as Chief Justice in exchange for a nominee for Associate Justice sanctioned by conservative Republicans. The Republicans chose appellate judge Christopher Mulriti, played by actor William Fichtner, whose views the Bartlet Administration characterized as including the refusal to recognize the right to privacy and the separation of church and state. Thus, his positions were thought so conservative that members of the Bartlet Administration considered him an untenable nominee. Sounds like a familiar stalemate, does it not?

On television, unlike in Washington, D.C., this story has a happy ending. The pivotal moment came when members of President Bartlet's staff watched while these two potential nominees sparred over Commerce Clause interpretation, specifically *United States v. Lopez*.² It was a great television moment—two apparently agile legal minds discussing constitutional interpretation. The end result, in the land of fiction, was that both judges were appointed because President Bartlet and his aides became convinced that differences of opinion among members of the Supreme Court were more important than trying to please everyone with a milquetoast appointee.

In real life, it may be possible to appoint conservative judges such as Judge Mulriti (although perhaps not to the Supreme Court), but I do not think it is currently possible to appoint a Judge Lang, the judge portrayed by Glenn Close, even with a Democratic president in office. Nor do I see the President and the Senate trying to reach the type of compromise (you get one appointment; we get one appointment) that was reached between the Bartlet Administration and conservative Republican members of the Senate. And, I think that this is cause for concern.

With this backdrop in mind, I'd like to address three things in this Article. First, I will address some of the hurdles nontraditional judges face during the confirmation process and how that

2. 514 U.S. 549 (1995).

might affect judicial appointments in the future. Second, I will discuss studies by political scientists that explore the effects of diversity on case outcomes in the federal courts. Finally, I will look at recent appointees of both President Bill Clinton and President George W. Bush and suggest that there is more to diversity than simply race and gender. Our bench is becoming homogeneous in other ways that we should not ignore and might well be cause for concern.

II. HURDLES THAT NONTRADITIONAL JUDGES FACE IN THE APPOINTMENTS PROCESS

There are some who place the beginning of the recent politicization of the judicial appointments process in the Carter Administration.³ President Carter specifically sought to appoint qualified women and minority group members as well as those who “[p]ossess[ed] and ha[d] demonstrated a commitment to equal justice under the law.”⁴ At the beginning of the Carter Administration, woefully few women and members of minority groups had served on the federal bench.⁵ The appointment of these so-called “nontraditional judges” by the Carter Administration was, in and of itself, controversial.⁶ So it should come as no great surprise that President Clinton, who appointed record numbers of women and minority group members,⁷ would have a tough time seeing his nontraditional appointees through to confirmation.⁸ Nontradi-

3. See Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13, 14 (2002). See generally Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Federal Court Nominees*, 117 POL. SCI. Q. 259, 261–62 (2002) (describing changes President Carter made to the appointment process in an effort to remove patronage from the process and instead select judges based on merit as well as to diversify the bench).

4. Slotnick, *supra* note 3, at 15.

5. *Id.* (“When Jimmy Carter took office, six women had been appointed to lifetime federal judgeships in our nation’s history—Carter appointed 40 in four years. Similarly, while 33 ethnic minorities—blacks, Hispanics, and Asians—had been appointed prior to the Carter administration in the nation’s history, 55 were seated during Jimmy Carter’s four-year tenure.”).

6. See *id.*

7. See Rorie L. Spill & Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 JUDICATURE 256, 258, 261 (2001) (noting that President Clinton appointed 108 women, 61 African-Americans, 25 Latinos, 5 Asian-Americans, and 1 Native American to the federal bench).

8. See generally Roger E. Hartley, *Senate Delay of Minority Judicial Nominees: A Look at Race, Gender, and Experience*, 84 JUDICATURE 191, 193–96 (2001) (explaining the

tional judges can face hurdles in the appointments process that their white male counterparts do not.⁹ An examination of what happened in judicial selection during the Clinton Administration provides insight into the difficulties faced by both the nominee and any president who is bold enough to nominate a nontraditional judge to the federal bench.

President Clinton appointed record numbers of nontraditional judges,¹⁰ but these judges did not have an easy time during the appointments process. The Clinton Administration's nontraditional appointments to the district courts took on average six weeks longer to go from nomination to a hearing than did white male appointees.¹¹ The time period from nomination to confirmation was on average forty-six days longer than for white male appointees.¹² For the courts of appeals, it was even longer. It took nearly two months longer from nomination to hearing for nontraditional appointees as opposed to their white male counterparts and 146 days longer (about five months) from nomination to confirmation.¹³ This does not even encompass some of President Clinton's highly qualified nominees who never made it to a vote. For example, Elena Kagan did not receive a hearing before the Re-

lengthened confirmation time for President Clinton's nontraditional appointees).

9. See *id.* at 196 (noting that there is "strong statistical evidence" that racial minorities and women were confirmed more slowly during the period of 1969 to 1998). But see Wendy L. Martinek et al., *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998*, 64 J. POL. 337, 355 (2002) (finding in nominations from 1977 to 1998 that race and gender had "no effect on confirmation duration except in the case of minority nominations to the district courts," which were estimated to take ten days longer).

10. Spill & Bratton, *supra* note 7, at 258, 261.

11. Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 234 (2001).

12. *Id.*

13. *Id.* at 235. Much of this delay appears to have been caused by the 106th Congress. In an article examining confirmations from 1969 to 1998, Roger Hartley found that Clinton's female nominees, during divided government, were confirmed in an average of twenty-six days longer than males. See Hartley, *supra* note 8, at 195. However, he did find that Clinton's white nominees confirmed up to the time of his study were actually delayed on average five days longer than African-American nominees. See *id.* at 194. Latino and Asian-American nominees, however, averaged forty-three and 111 days longer, respectively, than white appointees. See *id.* Another factor that may have affected the difference in Hartley's and Goldman's results is that Hartley eliminated major recesses from his count. See *id.* It is unclear whether Goldman considered recesses in arriving at his figures. Hartley's study also appears to concern the time period from when a nomination is presented to the Senate and when that nominee is confirmed—not delays before the Senate Judiciary Committee. *Id.* at 192.

publican-controlled Senate Judiciary Committee.¹⁴ Yet, she was subsequently found sufficiently qualified to be the dean of Harvard Law School.¹⁵

Interestingly, the differences in length of time to confirmation between men and women begins during the George H.W. Bush Administration when there was divided government.¹⁶ During those years, women nominees were confirmed more slowly by the Democratic-majority Senate than male nominees—seventy-six days versus fifty-nine days.¹⁷ Thus, creating delays for female appointees does not seem limited to Republican-majority Senates with a Democratic president in office. Indeed, both Republicans and Democrats appear to engage in extended scrutiny of female appointees.

There are those who would argue that the delay for President Clinton's nontraditional judicial nominees was a result of their particularly left-leaning views.¹⁸ Because most of President Clinton's nominees faced confirmation during divided government, one might not expect the Republican-majority Senate to be in lock-step with a Democratic president when it came to judicial appointments.¹⁹ These nontraditional appointees, in theory, were more likely to hold views with which Republican senators disagreed.²⁰ Hence, the longer appointment process was necessary to fully vet these appointees so that senators would know their views before being called to vote on them.²¹ This seems an unlikely explanation, given the judicial records thus far of President Clinton's appointees.²²

14. David G. Savage, *Approval of 168 Bush Judges A Record*, SEATTLE TIMES, Nov. 6, 2003, at A6.

15. *Id.*

16. Hartley, *supra* note 8, at 194.

17. *Id.*

18. See Goldman et al., *supra* note 11, at 236–37; see also Edith H. Jones, *Observations on the Status and Impact of the Judicial Confirmation Process*, 39 U. RICH. L. REV. 833, 840 (2005) (discussing President Clinton's "progressive" jurists).

19. See Goldman et al., *supra* note 11, at 236.

20. See *id.* at 238.

21. See *id.*

22. See, e.g., Robert A. Carp et al., *President Clinton's District Judges: "Extreme Liberals" or Just Plain Moderates?*, 84 JUDICATURE 282, 286, 287 tbl.4 (2001) (showing that President Clinton's nontraditional appointees may not be any more liberal than his more traditional appointees).

Preliminary studies on judicial opinion patterns of President Clinton's nontraditional appointees show that they are no more liberal than their white male counterparts.²³ As one political scientist observed based on a study of search and seizure decisions by President Clinton's courts of appeals appointees, "Clinton's judicial appointments to the courts of appeals look more like [George H.W.] Bush's appointees than like Carter's appointees, and they clearly are not the 'judicial activists' that Republican leaders claim."²⁴ Overall, President Clinton appointees' voting records appear rather moderate at this point.²⁵ As political scientist Elliot Slotnick has observed:

The Clinton experience . . . presents us with a bit of an ironic twist. . . . [S]everal articles in the symposium issue of *Judicature* on judicial selection in the Clinton years (March–April 2001) clearly documented that the president's nominees were all too often treated as if they were ideological zealots, while their behavior on the bench has demonstrated that they were quite moderate, actually the most conservative appointees of any Democratic president sitting on the bench today.²⁶

Political scientist Sheldon Goldman likewise notes, "President Clinton shied away from those perceived by Republicans to be liberal activists."²⁷ Members of the Judiciary Committee and Republican members of the Senate appeared to be engaging in assumptions and stereotypes about these judicial nominees based on race and gender.²⁸ Unfortunately for these nominees, they were forced to go through a more extended process in order to be considered for the same position as white males.

23. See *id.* (revealing that in civil rights and liberties cases as well as labor and economic regulation cases, President Clinton's traditional appointees were actually more liberal than his nontraditional appointees); see also Susan B. Haire et al., *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274, 299 (2001) (characterizing President Clinton's appointees as moderates when compared to judges appointed by other Democratic and Republican presidents); Nancy Scherer, *Are Clinton's Judges "Old" Democrats or "New" Democrats*, 84 JUDICATURE 150, 154 (2000) (explaining that President Clinton's courts of appeals appointees are not more liberal than President George H.W. Bush's appointees in search and seizure cases); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 147–48 (2000) (recognizing President Clinton's nominees as noncontroversial and politically moderate).

24. Scherer, *supra* note 23, at 154.

25. See Haire et al., *supra* note 23, at 278–79; Carp et al., *supra* note 22, at 288.

26. Slotnick, *supra* note 3, at 16.

27. Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 899 (2005).

28. See Goldman et al., *supra* note 11, at 238.

One is also left wondering what affect the lengthened process and apparent continued scrutiny even after a judge is appointed might have on nontraditional appointees. Will they be more conservative in their decision-making because they fear charges of bias? At the appellate level, will they feel constrained in presenting their panel colleagues with their differing perspectives? Is this why President Clinton's nontraditional appointees tend to vote less liberally in certain cases than their white male counterparts? Do the studies that show no difference in voting patterns between male and female judges suggest that female judges try to "fit in?"

As for what this says about judicial selection of nontraditional federal judges, presidents—especially Democratic presidents faced with Republican majorities in the Senate—are going to be reluctant to nominate such judges because of the increased time for confirmation. Indeed, this increased time might well make it impossible in some cases for the sitting president to see that nomination through by the end of his or her term in office.²⁹ A likely response by Democratic presidents (particularly Democratic presidents) may well be to appoint more conservative women and members of minority groups with more traditional career tracks in order to avoid some of these problems in the appointments process. Indeed, there is some evidence that President Clinton did just that.³⁰ This will likely lessen the potential for diversity to have an impact on the judicial system.

III. DOES DIVERSITY MAKE A DIFFERENCE?

Much of the argument for a more diverse bench assumes that diversity will make a difference. What sort of difference will judges of diverse backgrounds make? Political scientists have identified two theories on the effects of diversity among political actors. The first, known as "symbolic representation," posits that diversity provides certain groups with the opportunity to have access to positions of influence so that all members of society will believe in the fairness of the system.³¹ In the context of the judici-

29. See Lisa Holmes & Elisha Savchak, *Judicial Appointment Politics in the 107th Congress*, 86 JUDICATURE 232, 233 (2003).

30. See Carp et al., *supra* note 22, at 286–87; Segal, *supra* note 23, at 147–48.

31. See Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal*

ary, the theory goes that a diverse bench is necessary for the court system to have legitimacy, in essence to mirror the population of those who will be coming before the courts.³² Another reason for diversification of the political branches is a functional or substantive representation justification.³³ This justification suggests that members of under-represented groups will advocate the interests of the group to which they belong once elected or appointed to office.³⁴ In the context of the judiciary, this would mean that judges with differing backgrounds will bring differing perspectives to the bench that could lead, potentially, to differing results, or at least the advocating of different results, in lawsuits.³⁵

However, another line of political theory suggests that it is the political ideology of the judge that makes a difference in decision-making. Called the "attitudinal model," this approach "posits that the explanatory power of background characteristics derives from their contribution to the formation of political attitudes and values, the most proximate influences on judicial decision making."³⁶ Political scientists have long focused on the political affiliation of the judge or his or her appointing president in an effort to predict whether a judge will vote more conservatively or liberally in federal cases.³⁷ Thus, if a judge is a Republican or Democrat, or appointed by a Republican or Democratic president, his or her voting patterns will tend to be either more conservative or more liberal.³⁸ In terms of studying whether this attitudinal model ac-

Bench: Policy and Process Ramifications, 47 J. POL. 596, 597 (1985).

32. R. William Ide III, *Eradicating Bias in the Justice System*, A.B.A. J., Mar. 1994, at 8; Tony Mauro, *Wider Courtroom Diversity Urged*, USA TODAY, Feb. 25, 1999, at 3A. See generally Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628, 628 (1999) (describing four different contexts in which a diverse bench is needed).

33. See Walker & Barrow, *supra* note 31, at 597.

34. See *id.*

35. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 412-13 (2000); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 896-97 (1995).

36. Segal, *supra* note 23, at 140 (citing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 86 (1992)).

37. See *id.*; Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 240 (1999); see also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) (discussing the attitudinal model in greater detail).

38. See Pinello, *supra* note 37, at 240. A meta-analysis of eighty-four studies of voting record and political affiliation demonstrated a correlation between political party and voting habits of judges. *Id.* at 222-24.

tually holds up in real cases, political scientists have studied outcomes at the Supreme Court, federal courts of appeals, and federal district court levels.³⁹

Studies of voting records of nontraditional judges reveal mixed results for the representational model when it comes to the voting records of women and members of minority groups.⁴⁰ Indeed, studies of voting patterns of federal judges based on gender or race of the judge do not reveal much of a gender or race effect,⁴¹ and some studies revealed a gender effect in the opposite direction—with, for example, men voting more liberally than women judges.⁴² Some studies, however, do suggest that women and members of minority groups will vote differently than their white male counterparts in particular types of cases.⁴³ The area I would like to focus on today is one that is particularly important to those of us who must work for a living—employment discrimination law.⁴⁴

Political science professor Donald Songer and his colleagues studied federal courts of appeals decisions published in the *Federal Reporter* between 1981 and 1990 in three case areas—search

39. See *id.* at 225–29 tbl.1 (listing studies included in the meta-analysis).

40. See, e.g., Walker & Barrow, *supra* note 31.

41. See, e.g., Sue Davis, *President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals*, 14 AM. POL. Q. 328, 330–31 (1986) (finding little difference in the voting patterns of male and female federal courts of appeals judges); John Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 172 (1983) (finding differences between President Carter's black and white appointees in decisions affecting criminal defendants and prisoners' rights cases, but not in race or sex discrimination cases); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1451–58 (1998) (finding differences based on race, but not based on gender); Walker & Barrow, *supra* note 31, at 604–08 (finding no statistically significant differences based on race between President Carter's white and African-American district court appointees). But see Susan Welch et al., *Do Black Judges Make A Difference?*, 32 AM. J. POL. SCI. 126, 129, 134–35 (1988) (revealing differences in sentencing between black and white trial judges in a large northeastern community).

42. See, e.g., Walker & Barrow, *supra* note 31, at 604–05 (finding women federal district court judges appointed by President Carter less liberal than their male counterparts on personal liberties and minority policy issues).

43. Donald R. Songer et al., *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, 56 J. POL. 425, 436 (1994).

44. For studies of decision-making in employment discrimination cases, see *id.* at 434–37; Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981–1996* (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

and seizure, obscenity, and employment discrimination.⁴⁵ While there were no gender effects found in the search and seizure or obscenity cases,⁴⁶ “the coefficient for gender [was] positive, robust, and statistically significant” for employment discrimination cases.⁴⁷ They also computed an estimated probability of a liberal vote from a male judge or female judge.⁴⁸ Setting the other independent variables at their means resulted in a probability that a male judge would cast a liberal vote (i.e., for the plaintiff) 38% of the time, whereas a female judge would do so 75% of the time.⁴⁹ As they concluded, “the impact of gender appears to be quite substantial.”⁵⁰

A recent study by political scientist Nancy Crowe likewise supports this. Crowe studied decisions in sex and race discrimination cases in the federal courts of appeals from 1981 to 1996.⁵¹ Her study focused on nonconsensual cases, for example those cases in which the panel (or the court sitting en banc) did not agree on the outcome of the case.⁵² In other words, there was at least one dissenter, leaving out the entire body of cases in which the courts reached a unanimous decision. Her findings were startling with respect to the effects of race, gender, and political party (as well as the combination of these factors) on voting in these cases. She found that Democratic white female judges and Democratic African-American male judges were most likely to cast a vote for a sex discrimination plaintiff; they did so 90% and 93% of the time, respectively.⁵³ Their white male counterparts voted for sex discrimination plaintiffs 76% of the time.⁵⁴ The statistics on Republican-appointed judges is likewise telling. White male Republican-appointed judges voted for sex discrimination plaintiffs least of

45. See Songer et al., *supra* note 43, at 429.

46. See *id.* at 432–33. Instead, other variables were related to outcomes in these cases. In obscenity cases, presidential appointment, region of the country, type of litigants, and various case facts were important. *Id.* at 433 tbl.1. In search and seizure cases, existence of a warrant finding of probable cause, or a finding by a trial court that one of the expectations to the warrant requirement were present correlated with outcomes. *Id.* at 434 tbl.2.

47. *Id.* at 434.

48. *Id.* at 434–35.

49. *Id.* at 435.

50. *Id.*

51. Crowe, *supra* note 44, at 45.

52. *Id.* at 56.

53. *Id.* at 83 fig.3.1

54. *Id.*

all—only 28% of the time.⁵⁵ Their white female and African-American male counterparts voted for sex discrimination plaintiffs 53% and 61% of the time, respectively.⁵⁶

In race discrimination cases, African-American male judges appointed by both Republican and Democratic presidents were more likely to vote for a race discrimination plaintiff than their white male and female counterparts. Republican-appointed African-American male judges voted for race discrimination plaintiffs 60% of the time, and Democrat-appointed African-American male judges voted for race discrimination plaintiffs 85% of the time.⁵⁷ The difference between Democratic-appointed white male and white female judges was not statistically significant: males voted for the plaintiff 49% of the time, whereas females voted for the plaintiff 51% of the time.⁵⁸ Similarly, the difference between Republican-appointed white male and white female judges was not statistically significant; white males voted for the plaintiff 20% of the time, whereas white females voted for the plaintiff 21% of the time.⁵⁹ Crowe's findings support the effect of race, gender, and political affiliation in sex discrimination cases, but do not support differences based on gender in the context of race discrimination cases at the court of appeals level. Instead, race and political affiliation correlate with differences in voting in race discrimination cases.⁶⁰

Political scientist Jennifer Segal conducted a study attempting to chart differences in voting behavior by President Clinton's traditional and nontraditional district court appointees.⁶¹ Pairing up judges appointed during President Clinton's first term, she found no differences in voting behavior between President Clinton's African-American judges and white judges in a variety of case types, including cases that should be of interest to African-American judges, such as race discrimination, voting rights, school desegregation, and affirmative action.⁶² Indeed, "the only

55. *Id.*

56. *Id.*

57. *Id.* at 114 fig.4.1.

58. *Id.*

59. *Id.*

60. *See id.*

61. *See Segal, supra* note 23.

62. *Id.* at 144. *But see* Jennifer A. Segal, *The Decision Making of Clinton's Nontraditional Judicial Appointees*, 80 JUDICATURE 279, 279 (1997) (providing an earlier study of

statistically significant race difference [was found in] personal liberties claims, for which black judges have less support than their white colleagues."⁶³ Instead, she found that "most rulings made by both white and black judges were against the black position, the criminal defendant, the personal liberty claim and the other minority claims in these cases, and were in support of the federal government's regulation of the economy."⁶⁴

The results based on gender paint a slightly different picture. Segal found a gender difference in women's cases (gender discrimination, sexual harassment, abortion rights, and related issues), but it was not women who were more supportive of these claims, but instead the men who were more supportive of women's issues cases.⁶⁵ Women are more supportive of claims involving issues of concern to African-Americans as well as personal liberties claims.⁶⁶ In other cases, any differences based on gender did not reach statistical significance. Like the data based on race, this data "demonstrates clearly that Clinton's judges, regardless of gender, have ruled consistently against the out-group positions in each of these sets of sensitive and controversial issues."⁶⁷ Thus, simply appointing a woman judge or an African-American judge may not provide the sort of diversity that necessarily leads to differences in outcomes.

IV. PRESIDENT GEORGE W. BUSH AND THE APPOINTMENT OF DIVERSE JUDGES

President George W. Bush was the beneficiary of nearly 100 vacancies left by former President Clinton when President Bush took office in 2001.⁶⁸ While President Clinton had a difficult time appointing judges to both the district courts and courts of ap-

President Clinton's appointees showing that both black and female judges were more supportive of blacks' claims and black judges were more supportive of women's claims than white male appointees).

63. Segal, *supra* note 23, at 144. A personal liberty claim involves rights protected under the Bill of Rights. *See id.* at 143.

64. *Id.* at 144.

65. *See id.* at 144, 146 tbl.3.

66. *Id.* at 145. These two findings were statistically significant with probabilities of .10 or less. *Id.* at 146 tbl.3; *see also* Walker & Barrow, *supra* note 31, at 604 (discussing statistical significance).

67. Segal, *supra* note 23, at 145.

68. Holmes & Savchak, *supra* note 29, at 233.

peals, in spite of filibusters that created difficulties for some appellate court nominees, President Bush has had an easier time with district court appointees.⁶⁹ As of November 2003, President Bush had seen 168 of his judicial appointees confirmed.⁷⁰ In 2003 alone, President Bush saw sixty-eight of his nominees confirmed.⁷¹ This is more than President Reagan saw confirmed in his first term in office and a better record than President Clinton in seven out of the eight years he spent in the White House.⁷² Still, there was some delay for President Bush's nominees, although Democratic senators have held up mostly courts of appeals appointees.⁷³

President Bush has been more successful appointing district court judges than President Clinton.⁷⁴ As political scientist Sheldon Goldman has pointed out, while Democrats might have begun the tactics of obstruction and delay in the judicial appointments process, "Republicans escalated obstruction and delay so that it reached all-time records for the district and appeals courts including the then unprecedented index of 0.7931 for appeals court nominees in the 106th Congress."⁷⁵ Of course, the Democrats had their turn using such tactics in considering court of appeals ap-

69. *Id.* at 239 ("A large majority of [President Bush's] nominations to the district court were eventually confirmed, while many circuit court nominations garnered a good deal of opposition from liberal interest groups and Senate Democrats.").

70. *Savage, supra* note 14, at A6.

71. *See id.*

72. *Id.*

73. *See id.*

74. *See* Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 253 tbl.1 (2003). During the 105th Congress (1997–1998) and 106th Congress (1999–2000), the last of the Clinton Administration, district court nominees took 164.7 days and 103.9 days, respectively from nomination to hearing. *Id.* It took 38.3 days and 25.6 days, respectively, for these nominees to go from nomination to confirmation. *Id.* at 255 tbl.3. By contrast, the 107th Congress (2001–2002), the first of the Bush Administration, took on average 96.3 days from receipt of nomination to hearing. *Id.* at 253 tbl.1. It took these nominees 24.8 days from the day the nomination was reported to confirmation. *Id.* at 255 tbl.3. While 84.7% of President Bush's district court nominees during the 107th Congress were confirmed, only 68.7% of President Clinton's appointees during the 106th Congress were confirmed. *Id.* at 253 tbl.1. However, court of appeals appointees for both President Clinton and President Bush had equally long waits during years of divided government from nomination to hearing. *Id.* at 254 tbl.2. President Bush's courts of appeals nominees fared better than President Clinton's nominees in the time from nomination being reported to confirmation. In the 106th Congress, it took President Clinton's appointees an average of 68.5 days, whereas during the 107th Congress, it took President Bush's appointees an average of 26.4 days. *Id.* at 256 tbl.4.

75. Goldman, *supra* note 27, at 896.

pointees during the 107th Congress, during which President George W. Bush faced a divided government for much of the Congress.⁷⁶

The index of obstruction and delay ("Index") developed by Goldman reveals that the 105th and 106th Congresses (during the final years of the Clinton Administration) were the most obstructionist of district court appointees than any other Congress from the 95th Congress (1977–1978) onward.⁷⁷ The Index shows that President Bush's district court nominees had a relatively easy time: the Index was only 0.2432 for the 107th Congress (President George W. Bush), whereas it was 0.5000 and 0.4722 for the 105th and 106th Congresses (President Clinton), respectively.⁷⁸

So what do we know about President George W. Bush's appointees? How diverse are they? My co-panelist, Sheldon Goldman, with his colleagues, have done a useful assessment of the first two years of judicial appointments in the Bush Administration.⁷⁹ The group President Bush has appointed has been very diverse, especially at the district court level, although not as diverse as President Clinton's appointees.⁸⁰ In his first two years in office, President Bush appointed six African-Americans (7.2% of appointees), six Hispanics (7.2% of appointees), and seventeen women (20.5% of nominees) to the district court bench.⁸¹ In his first two years in office, President Bush appointed three women and three African-Americans to the courts of appeals.⁸² All in all,

76. See, Goldman, *supra* note 74, at 252. The index of obstruction and delay for the courts of appeals during the 107th Congress was 0.8387. *Id.* at 257 tbl.6.

77. See *id.* at 257 tbl.5. Professor Goldman developed the index of obstruction and delay. According to Professor Goldman,

The Index . . . is determined by the number of nominees who remained unconfirmed at the end of the Congress added to the number for whom the confirmation process took in excess of 180 days, which is then divided by the total number of nominees for that Congress. The Index is calculated to four places to the right of the decimal point and this ranges from 0.0000, which indicates an absence of obstruction and delay, to 1.0000, which indicates the maximum level.

Id. at 255–56.

78. *Id.* at 257 tbl.5.

79. Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282 (2003).

80. *Id.* at 294 tbl.1, 295.

81. *Id.* at 304 tbl.2.

82. *Id.* at 306 tbl.1.

34% of his appointees in his first two years in office have been nontraditional judges.⁸³ Yet, in many ways, these nontraditional appointees mirror their traditional colleagues in ways that are significant.

V. OTHER ASPECTS OF DIVERSITY

While President Bush and President Clinton appointed a group of diverse judges to the bench, there is more to diversity than simply race and gender. These appointees are similar to traditional appointees in other ways that, perhaps, do not make them as diverse as might be expected. In an article on President Bush's appointees, Goldman gives a capsule sketch of some of these appointees.⁸⁴ What struck me about them was the number who were ex-prosecutors. Of the twenty-four biographical sketches provided in the article, twelve were ex-prosecutors or ex-assistant United States attorneys.⁸⁵ Indeed, 53.8% of the nontraditional district court Bush appointees during the years studied came with prosecutorial experience.⁸⁶ Furthermore, 61.5% of them came with judicial experience.⁸⁷ In addition, they are similar to his traditional appointees in that they are relatively wealthy. Over 50% of President Bush's nontraditional appointees during this period each had a net worth of over \$1 million.⁸⁸ Only one of them had a net worth of less than \$200,000.⁸⁹

At the appellate level, 83.3% of President Bush's nontraditional appointees came from the judiciary and all of them had been judges at some point.⁹⁰ While fewer came with prosecutorial experience, all had either judicial or prosecutorial experience.⁹¹ However, a significant number of President Bush's traditional (white male) appointees—40% of them—came with neither judicial nor prosecutorial experience.⁹² Once again, they were

83. *Id.* at 294 tbl.1.

84. *Id.* at 286–91.

85. *Id.*

86. *Id.* at 303 tbl.1.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 306 tbl.3.

91. *Id.*

92. *Id.*

wealthy. Fifty percent of President Bush's nontraditional appointees were worth more than \$1 million (three judges); one-third were worth between \$500,000 and \$999,999 (two judges); and one of them was worth under \$200,000.⁹³ Most federal judges are wealthy people. One can reasonably question whether many of these judges could understand the day-to-day life of an employment discrimination plaintiff, for example, who works at Wendy's.⁹⁴

Interestingly, President Clinton's appointees are not all that different. For example, 64% of President Clinton's nontraditional appointees to the federal district courts during his last two years in office had judicial experience compared with only 46.9% of his traditional appointees.⁹⁵ In addition, 52% of them were ex-prosecutors, whereas only 40.6% of his traditional appointees were ex-prosecutors.⁹⁶ The similar career tracks might account for the little difference in voting records between President Clinton's traditional and nontraditional appointees.⁹⁷

While one can understand the desire to appoint people with judicial experience, the prevalence of ex-prosecutors is interesting and does not necessarily follow from the federal courts' caseload. Although federal courts spend more time on criminal cases than they have in the past, the majority of case filings are civil.⁹⁸ Thus, it makes sense to have judges who are familiar with both civil and criminal cases sitting as federal judges. If former prosecutors are useful as judges because more criminal cases are going to trial, why not also tap former public defenders who likewise have

93. *Id.*

94. *See, e.g.,* Morgon v. Valenti Mid-Atlantic Mgmt., No. 01-134, 2001 U.S. Dist. LEXIS 22420, at *9-10 (E.D. Pa. Dec. 14, 2001) (granting summary judgment for an employer in a racial harassment case involving an employee at a Wendy's restaurant).

95. *See* Goldman et al., *supra* note 11, at 243 tbl.2.

96. *Id.*

97. *See infra* text accompanying note 108.

98. *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS. AM. ACAD. POL. & SOC. SCI. 39, 45 (1996) (noting an increase of 70% in criminal case filings from 1980 to 1992). Beale notes, however, that these levels are not unprecedented. The federal courts' "criminal caseload has fluctuated widely since 1960, and the number of federal criminal prosecutions was approximately the same in 1972 as it [was in 1996]." *Id.* While criminal cases constituted 17% of the district court's case filings in 1996, it amounted to one-third of the district court's filings in 1972. *Id.* at 46. However, there is evidence that criminal cases are taking up more of the trial courts' time, even though they are not the majority of cases filed. For example, more criminal cases are going to trial, and criminal trials have become more lengthy. *See id.* at 47-48.

expertise in criminal law? While some prosecutors ultimately enter private practice and do defense work, it is not clear whether this is the case for many of these sitting judges.

President Clinton appointees were likewise wealthy with 44% of them worth more than \$1 million, and only one nominee (4%) worth less than \$200,000.⁹⁹ While the traditional appointees were wealthier (62.5% were worth more than \$1 million), three of the traditional appointees were worth less than \$200,000.¹⁰⁰ His non-traditional appointees to the courts of appeals likewise came largely with judicial experience (85.7% of them) and over half were ex-prosecutors (57.1%).¹⁰¹ While these numbers are somewhat skewed because of the few nominees who were confirmed during this period (only thirteen),¹⁰² they still paint a picture of a nontraditional appointee career track that may not add as much diversity as might at first be thought.

While many, including Chief Justice Rehnquist, have argued that the federal bench does not pay enough to attract qualified judicial candidates (unless they are independently wealthy),¹⁰³ I suggest that presidents may not be looking in all the places they could for judicial appointees. Prosecutors are common appointees for both President Bush and President Clinton.¹⁰⁴ Where are the public defenders? Legal aid lawyers? Public interest lawyers who have done work for the NAACP or other organizations? Should only rich people sit on the federal bench? Even though this bench may appear diverse, it is not that diverse in terms of such background factors as socioeconomic status and career track.

Another issue from cognitive psychology gives further pause about appointing judges who have practiced on only one side of an issue, whether they be former prosecutors, former civil defense lawyers from big firms, or others. Law Professor Deborah Rhode has pointed out that lawyers who advocate a particular position have an increased likelihood of adopting that position them-

99. Goldman et al., *supra* note 11, at 243 tbl.2.

100. *Id.*

101. *Id.* at 248 tbl.5.

102. *See id.*

103. See Michael J. Frank, *Judge Not, Lest Yee be Judged Unworthy of a Pay Raise: An Examination of the Federal Judiciary Salary "Crisis,"* 87 MARQ. L. REV. 55, 55 (2003) (describing the views of Chief Justice Rehnquist on federal judicial salaries).

104. See *supra* text accompanying notes 86, 96.

selves.¹⁰⁵ Cognitive conservatism, whereby people have a tendency “to register and retain information that is compatible with established beliefs or earlier decisions,” and cognitive dissonance, whereby “[a]fter making a decision, individuals tend to suppress or reconstrue information that casts doubt on that decision,” both may have an impact on judges who have been looking through the lens of one side or another of an issue for too long.¹⁰⁶ As Professor Rhode points out, “the very act of advocating a particular position increases the likelihood that proponents will themselves come to adopt that position. . . . The more closely that individuals identify with their professional role, the less sensitive they may become to problems in its normative foundations or practical consequences.”¹⁰⁷ Thus, a judge who has been a prosecutor for a good part of her career is likely to identify with the prosecution’s position more readily than with the defense’s position. Indeed, in Jennifer Segal’s study of President Clinton’s appointees to the district courts, she found both traditional and nontraditional appointees had consistently ruled against outgroups, including criminal defendants.¹⁰⁸ It takes a whole lot of self-awareness to avoid this tendency.

Another aspect of the debate about appointments has been judicial ideology. While the Bush Administration has nominated judges who were active in conservative legal groups, such as the Federalist Society,¹⁰⁹ President Clinton had a very difficult time appointing judges affiliated with any groups that were thought liberal.¹¹⁰ For example, he had difficulties appointing an ex-ACLU board member and a poverty lawyer. Marsha Berzon was associate general counsel for the AFL-CIO for a number of years.¹¹¹ She was vice president of the Northern California ACLU for two years and a member of its board of directors for eight years.¹¹² “[I]t took well over two years for her to be confirmed for a position on the

105. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 686 (1994).

106. *Id.* at 685–86.

107. *Id.* at 686. See generally Chris Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44 (2002) (describing study of judges showing that they are subject to many of the same cognitive biases as other people).

108. See Segal, *supra* note 23, at 147–48.

109. Goldman et al., *supra* note 79, at 286, 289, 296.

110. Goldman et al., *supra* note 11, at 232–33, 235–36.

111. *Id.* at 232.

112. *Id.*

U.S. Court of Appeals for the Ninth Circuit.¹¹³ Nominated on January 27, 1998, she was not confirmed until March 9, 2000.¹¹⁴ She, like some of President Bush's recent nominees,¹¹⁵ was subject to repeated holds that delayed her appointment.

A similar story can be told by Richard Paez, a poverty lawyer who worked for the Legal Aid Foundation of Los Angeles before he became a Los Angeles municipal judge.¹¹⁶ First nominated on January 25, 1996, he was not confirmed until March 9, 2000—more than four years later.¹¹⁷ He was subjected to holds from “conservative Republican senators who purported to see liberal activism in a decidedly moderate judicial record.”¹¹⁸

In contrast, the George W. Bush Administration has appointed some highly ideologically conservative judges.¹¹⁹ Yet, although there was some delay for circuit nominees, his district court nominees have not had as difficult a time as those of President Clinton.¹²⁰ In addition, President Bush's judges were much further ideologically conservative than President Clinton's judges were ideologically liberal.¹²¹ For example, President Bush has appointed judges such as Paul Cassell to the federal district court in Utah.¹²² A Federalist Society member, Cassell has taken positions against Miranda rights.¹²³ As a victim's advocate, he has argued that no innocent person has been executed in this country for roughly the last half century¹²⁴ and suggested that so few inno-

113. *Id.* at 233.

114. *Id.*

115. See Goldman, *supra* note 74, at 254 tbl.2 (indicating delay during the 107th Congress, while President George W. Bush was in office, comparable to during the 105th Congress, while President Clinton was in office).

116. Goldman et al., *supra* note 11, at 235.

117. *Id.* at 235–36.

118. *Id.* at 236.

119. Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 88 JUDICATURE 20, 25–28 (2004).

120. See *supra* Part.III.

121. Carp et al., *supra* note 119, at 26–27.

122. Jonathan Groner, *Bush May Hire Lobbyist For Nominations*, LEGAL TIMES, Mar. 18, 2002, at 1.

123. Eugene Volokh, *Our Flaw? We're Just Not Liberals*, WASH. POST, June 3, 2001, at B3. Volokh argued as amicus before the Supreme Court of the United States that Miranda warnings were not constitutionally mandated and that, therefore, a federal statute could effectively overrule the case. *Id.* The Supreme Court, however, disagreed. See *Dickerson v. United States*, 530 U.S. 428, 432, 444 (2000).

124. Edward Cohn, *Paul Cassell and the Goblet of Fire: A Conservative Professor's Adventure in the Liberal Legal System*, AM. PROSPECT, Aug. 28, 2000, at 32.

cent people were executed in the death penalty system—at least as it was in 1988—that the possibility of an innocent person being executed should not be a factor in the debate on the death penalty.¹²⁵ Recent events in Illinois and elsewhere suggest that Judge Cassell was incorrect.¹²⁶ While Judge Cassell may be a very good judge, I am wondering why it is acceptable for the Bush Administration to appoint him but somehow not acceptable for the Clinton Administration to appoint the more moderate judges that it ultimately chose, or even the purportedly “liberal” Paez or Berzon.

Events also have suggested that federal judges, even with life tenure, who take provocative positions in cases are subject to continued political pressure that can make their jobs difficult.¹²⁷ Political scientist Jennifer Segal conducted an interesting study of the Southern District of New York federal bench¹²⁸ in the wake of the controversy surrounding the decision of district judge and President Clinton appointee Harold Baer in *United States v.*

125. See Steven J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121 (1988) (arguing that the risk of executing an innocent person “is too small to be a significant factor in the debate over the death penalty”). Another one of President Bush’s appointees, Lavenski Smith, appointed to the United States Court of Appeals for the Eighth Circuit, has likewise worked for conservative groups, such as right to life organizations. See *Unborn Child Amendment Comm. v. Ward*, 943 S.W.2d 591, 592 (Ark. 1997) (noting Lavenski Smith as the attorney of record for the Unborn Child Amendment Committee, which was litigating in an attempt to halt abortions at a state-run hospital).

126. See Michael L. Radelet, *Introduction: Wrongful Convictions of the Innocent*, 86 JUDICATURE 67 (2002) (noting that “[h]istory has proven [Markman and Cassell] to be wrong”); see also Gerald Kogan, *Errors of Justice and the Death Penalty*, 86 JUDICATURE 111, 112 (2002) (“Having seen the dynamics of our criminal justice system over the years, there is absolutely no question in my mind that we have executed people who either did not fit the criteria for execution specified by the legislature of the State of Florida or who, in fact, were factually not guilty of the crime for which they were executed.”); Lawrence C. Marshall, *Do Exonerations Prove that “the System Works?”*, 86 JUDICATURE 83 (2002) (reviewing thirteen cases of inmates sentenced to death who were later exonerated, only three of whom would have had convictions reversed on appeal); George Ryan, *Closing Remarks by Former Illinois Governor George Ryan, Remarks at the Race to Execution Symposium* (Oct. 25, 2003), in 53 DEPAUL L. REV. 1719 (2004) (recognizing that former Illinois Governor George Ryan pardoned four people on the basis of innocence in January 2003); Joshua Herman, *Comment, Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1783 & n.41 (2004) (noting that “[t]he risk of executing an innocent person was the most significant factor behind Governor Ryan’s decision” to declare a moratorium on executions in Illinois).

127. Segal, *supra* note 23, at 148.

128. See Jennifer A. Segal, *Judicial Decision Making and the Impact of Election Year Rhetoric*, 84 JUDICATURE 26, 27, 31–33 (2000).

Bayless.¹²⁹ In *Bayless*, Judge Baer ruled that drugs seized from the back of a car Bayless was driving and a confession police obtained later were inadmissible because the police had no reasonable suspicion that warranted pulling Bayless over in the first place.¹³⁰ One of the facts that the police relied upon was that four men, who had placed some bags in the trunk of the car Bayless was driving, purportedly fled once they saw the police watching them.¹³¹ In his decision, Baer stated that

residents in this neighborhood [have] tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding [an earlier investigation of an anti-crime unit in the particular neighborhood], had the men not run when the cops began to stare at them, it would have been unusual.¹³²

Baer was heatedly criticized after the decision.¹³³ Newt Gingrich stated that “[t]his is the kind of pro-drug-dealer, pro-crime, anti-police and anti-law enforcement attitude that makes it so hard for us to win the war on drugs.”¹³⁴ Judge Baer eventually reversed his decision.¹³⁵ Reviewing decisions by both President Clinton’s appointees as well as Republican appointees reveal that critiques of President Clinton’s appointees such as Harold Baer, who was said to be pro-defense or, more derisively, pro-crime and pro-drug dealer, in criminal cases, were without empirical support.¹³⁶ Instead, “very few pro-defendant decisions were made by any of these judges sitting in this district” from January 1994 to July 1997.¹³⁷ “[T]hese judges as a group were overwhelmingly pro-prosecution.”¹³⁸ They might well be overwhelmingly pro-prosecution because so many of them are ex-prosecutors.¹³⁹ A more diverse bench might add differences in perspective that could enrich the debate about such issues as the Fourth Amendment.

129. 913 F. Supp. 232 (S.D.N.Y. 1996).

130. *Id.* at 242–43.

131. *Id.* at 236.

132. *Id.* at 242.

133. See, e.g., Jennifer A. Segal, *Judicial Decision Making and the Impact of Election Year Rhetoric*, 84 JUDICATURE 26, 29–30 (2000).

134. *Id.* at 30 (quoting Ian Fisher, *Gingrich Asks Judge’s Ouster for Ruling Out Drug Evidence*, N.Y. TIMES, Mar. 7, 1996, at B4).

135. *United States v. Bayless*, 921 F. Supp. 211, 217–18 (S.D.N.Y. 1996).

136. Segal, *supra* note 133, at 27.

137. *Id.* at 32.

138. *Id.*

139. See *supra* text accompanying note 96.

VI. CONCLUSION

One is left wondering whether it would be possible to appoint a Thurgood Marshall to the bench modernly. I am concerned about what this means for the development of the law. Will we have great dissents, thoughtful decision-making, and judges who are forced to view cases from the perspectives of others who are not like them? Or, will it be such a homogeneous bench in terms of background that we will miss the sometimes great decision-making that comes from debate between judges of differing viewpoints?