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THE FEDERAL JUDICIARY ENGENDERED

*Carl Tobias**

The dearth of women named to cabinet level positions in the Bush Administration does not augur well for appointment of women to the federal bench.¹ Equally discouraging was Mr. Bush's campaign response to the question whether there should be special efforts to select more women for the federal judiciary: "[I] remain committed to appointing to the bench the best qualified candidates we can find—regardless of . . . gender—and the record shows that we have been successful in fulfilling this commitment."² The record compiled by the Administration in which he served as Vice-President for two terms was deplorable.

Thirty-one women were appointed to the federal bench during those eight years.³ In sharp contrast, 41 women had been appointed in the preceding four years of the Carter Administration.⁴ Given the substantial increase in the number of women lawyers between 1980 and 1988, this disparity is glaring.

The Reagan Administration compiled this dismal record by refusing to undertake any special efforts to seek out and appoint women.⁵ The Administration relied, as have administrations since that of President Eisenhower, on the American Bar Association (ABA) Standing Committee on Judiciary which plays an instrumental role in the selection of federal judges. Women attorneys frequently do not follow career paths valued by the ABA; hence they are under-represented in the pool of eligible lawyers from which selections are made.⁶ President Reagan also essentially returned to the traditional

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1. The two women named, Elizabeth Hanford Dole as Secretary of Labor and Carla Hills as United States Trade Representative, are attorneys.

2. *The Candidates Respond*, 74 A.B.A. J., Oct. 1988, at 52, 57 (hereinafter *Candidates*).

3. Wald, *Women in the Law*, 24 TRIAL No. 11, Nov. 1988, at 75.

4. *Id.* at 75.

5. I rely substantially in this paragraph and in the remainder of this piece on Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136 (1987); and on Slotnick, *Gender, Affirmative Action and Recruitment to the Federal Bench*, 14 GOLDEN GATE U.L. REV. 520 (1984).

6. "ABA [Standing Committee on Judiciary] ratings often have been criticized for their conservative bias against non-traditional judicial candidates." Martin, *supra* note 5, at 139. For more discussion of the ABA and its role, see Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 35-42 (1990); Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment* (Pts. 1 & 2), 66 JUDICATURE 348, 385 (1983); Moran, *ABA Panel: Custom and*

notion of "senatorial courtesy" while abandoning the merit-based selection commissions employed during the Carter Administration. Those panels have been characterized as the most efficacious technique yet devised for expanding the number of women in the eligible pool of potential candidates.⁷ Moreover, President Reagan emphasized conservative ideology, especially allegiance to traditional family values and opposition to women's rights, as a basis for appointment.⁸ This was said to include a litmus test on abortion which systematically excluded many potential female candidates.

To improve the situation, the Bush Administration should mount a concerted effort to recruit and nominate a significant number of highly qualified women to the federal judiciary. Precise numbers or percentages are difficult to formulate and may strike some as suggesting "quotas" or "affirmative action appointments." There is no reason, however, why this Administration could not achieve the modest goal of naming at least as many women as were appointed in the Carter Administration, particularly given the dramatic increase in women lawyers during the interim.

This effort should be instituted because women now comprise 20 percent of practicing attorneys.⁹ Women have demonstrated that they possess all of the qualifications crucial to excellent service on the federal bench: independence, intelligence, integrity, industry and temperament. One need only look to Justice Sandra Day O'Connor, Chief Judge Patricia McGowan Wald, Circuit Judges Ruth Bader Ginsburg and Amalya Kearse and District Judge Constance Baker Motley for proof of this proposition. Moreover, appointment of additional women could strengthen the federal judicial process because their presence on the bench might help to reassure American citizens that the system of justice is fair and neutral.¹⁰

Privilege Reign, LEGAL TIMES, Oct. 17, 1988, at 11. Women are also underrepresented in law and are less likely than men to have judicial experience or political experience that would acquaint senators with them. Martin, *supra* note 5, at 138. For discussion of women's career paths and their comparative political inactivity, see Slotnick, *supra* note 5, at 545-61.

7. Martin, *supra* note 5, at 141. For more discussion of the panels and of the Carter Administration process of federal judicial selection, see Slotnick, *supra* note 5, at 530-35. President Carter appointed more women to the federal bench than had been named in the country's whole history. *Id.* at 521.

8. Martin, *supra* note 5, at 141.

9. Wald, *supra* note 3, at 75.

10. See S. NESS, WOMEN AND THE FEDERAL JUDICIARY: AN ASSESSMENT OF THE PAST FOUR YEARS (1980); Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978). Cf. Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544 (1987) ("feminine jurisprudence" (generally attributable to women) is more likely to include Jeffersonian republicanism than "masculine jurisprudence" (generally attributable to men)). See also Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988); Martin, *Men and Women on the Bench: Vive La Différence?*, 73 JUDICATURE 204 (1990).

The goal of increasing the number of women appointed can be achieved through the Bush Administration's recognition that there are multiple, equally valid qualifications for appointment. Indeed, George Bush himself has acknowledged that the ABA Standing Committee on the Judiciary which rates all nominees as exceptionally well qualified, well qualified, qualified or unqualified has over-emphasized major trial court experience:

This approach fails to take into consideration the importance of legal scholarship and also unfairly penalizes many excellent lawyers, who, having practiced outside of major urban areas or served in government, have not had many opportunities to engage in complex corporate litigation.¹¹

The most important criterion for appointment should be a convincing demonstration that nominees possess the requisite qualities of intellect, experience, equanimity and the like. There is no reason why partnership in a large law firm (which makes many lawyers essentially administrators) or active political party involvement should be considered a better qualification for service on the federal district court bench than litigating cases in federal court as an attorney in the United States Attorney's Office or a public defender's office. Correspondingly, large firm experience and political activity should not necessarily be more highly valued in the selection process for service on a federal appeals court than a law faculty member's rigorous analytical scholarship on the Constitution or other areas of federal law.

It also may be advisable to re-institute the concept of nominating commissions.¹² These panels substantially increased the number and kinds of participants in the selection process. For instance, state bar organizations, practicing lawyers, lay persons, and women's groups officially worked with traditional participants in that process—the President, the Senate, and the ABA.¹³ The commissions were able to identify many more potential women nominees who were highly qualified but did not have certain experience traditionally assigned considerable weight, such as active political party involvement,¹⁴ while the panels were and were able to contribute to the success of the women's candidacies.¹⁵

President Bush should abandon certain detrimental aspects of

11. *Candidates*, *supra* note 2, at 56.

12. I rely most in this paragraph on L. BECKSON & S. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980); Martin, *supra* note 5, at 140-41; and Slotnick, *supra* note 5, at 530-35.

13. See L. Berkson & S. Carbon, *supra* note 12.

14. See generally Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 *JUDICATURE* 488 (1979); Randall, *The Success of Affirmative Action in the Sixth Circuit*, 62 *JUDICATURE* 486 (1979).

15. Martin, *supra* note 5, at 140.

the Reagan Administrations' judicial selection process. Nominees' ideological "correctness" should be de-emphasized. President Bush has already publicly disavowed use of the litmus tests said to have been employed during the Reagan Administration.¹⁶

This is not to say that ideology should be irrelevant. The procedures for selecting federal judges cannot and should not be completely removed from politics. Indeed, the terse appointment provision of the Constitution indicates the framers' belief that politics would be central to decisionmaking on judicial appointments as a necessary part of the system of checks and balances.¹⁷ Mr. Bush has stated that he intends to appoint moderate people of conservative views who will interpret the law rather than legislate from the bench.¹⁸ If by these statements the President means that he will nominate women like the two distinguished attorneys named as Secretary of Labor and as United States Trade Representative, his nominees will easily win Senate confirmation and will be very well qualified members of the federal judiciary.

The Bush Administration should promptly initiate a vigorous effort to seek out and nominate highly qualified women as federal judges.

16. See *Candidates*, *supra* note 2, at 56.

17. The President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges . . ." U.S. CONST. art. II, § 2. For a concise treatment of the relevant history, see Mathias, *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200 (1987).

18. *Candidates*, *supra* note 2, at 57.