



2004

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Mary L. Clark

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### Recommended Citation

Mary L. Clark, *One Man's Token is Another Woman's Breakthrough - The Appointment of the First Women Federal Judges*, 49 Vill. L. Rev. 487 (2004).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol49/iss3/2>

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## Article

### ONE MAN'S TOKEN IS ANOTHER WOMAN'S BREAKTHROUGH? THE APPOINTMENT OF THE FIRST WOMEN FEDERAL JUDGES

MARY L. CLARK\*

#### I. INTRODUCTION

NO women served as Article III judges in the first one hundred and fifty years of the American republic.<sup>1</sup> It was not until Franklin Delano Roosevelt named Florence Ellinwood Allen to the U.S. Court of Appeals in 1934 that women were included within the ranks of the federal judiciary.<sup>2</sup>

This Article examines the appointment of the first women federal judges, addressing why and how presidents from Roosevelt through Ford named women to the bench, how the backgrounds and experiences of these nontraditional appointees compared with those of their male colleagues and, ultimately, why it matters that women have been, and continue to be, appointed.

To better understand the significance of the appointments of these first women, what follows are brief highlights of two traditions shaping federal judicial appointments and women's participation therein: (1) the Senate's advice and consent power; and (2) the ABA Standing Committee on Federal Judiciary's evaluation of judicial candidates.

#### II. TRADITIONS GOVERNING FEDERAL JUDICIAL APPOINTMENTS AND THEIR IMPACT ON WOMEN'S NOMINATIONS

##### A. *The Evolving Role of the Senate*

As a matter of historic practice extending through much of the present day, responsibility for naming district court candidates has fallen largely with the senator or senators of the president's party from the state

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\* Visiting Associate Professor of Law, American University's Washington College of Law. Previously, Ms. Clark served as a Visiting Lecturer and Research Scholar at Yale Law School and as a Supreme Court Fellow with the Federal Judicial Center.

1. This Article addresses women's life-tenured appointments to federal courts of general jurisdiction—the U.S. Supreme Court, courts of appeal and district courts.

2. See Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131, 1132 (2003) (noting President Roosevelt's appointment of women to federal bench). Allen served on the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, Ohio. See *id.* at 1132 (identifying court).

in which a judicial vacancy has arisen.<sup>3</sup> Responsibility for filling district court vacancies was viewed as a “perk” of the senator’s office, providing a tool for distributing political patronage.<sup>4</sup>

By contrast, responsibility for naming court of appeals candidates has fallen more within the purview of the president and less within that of the Senate.<sup>5</sup> This is, in part, because the geographic region governed by any given court of appeals extended well beyond the boundaries of any single state, typically encompassing three or more states.<sup>6</sup> As a result, no one or two senators had the same degree of interest in, or influence over, a given court of appeals vacancy. Additionally, presidents have taken more interest in court of appeals appointments because these judges were thought to exercise greater influence over the development of the law than were district judges and were thus considered more instrumental in implementing a president’s judicial-political philosophy.<sup>7</sup>

Despite the greater presidential interest in, and control over, court of appeals appointments, senators continued to exert influence over these seats insofar as a senator from the state in which a given judicial vacancy arose could veto a nomination by returning a “blue slip” with an objection noted, or by refusing to return the blue slip at all.<sup>8</sup> This blue slip privilege was a unique Senate tradition that worked as follows: the chief counsel to the Senate Judiciary Committee distributed a blue slip to each of the senators from the state in which the judicial vacancy had arisen; if one of the

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3. See SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 9-14, 215 (1997) (identifying responsibility for filling vacancies and illustrating process). It did not matter whether the vacancy was created by retirement, death, resignation or newly authorized judgeship. See *id.* at 9-10 (pointing out reasons for judicial vacancies).

4. See *id.* at 14 (identifying political patronage as consideration in selection).

5. See Clark, *supra* note 2, at 1135 (noting power to name appellate court candidates falls with president). During the period addressed in this Article (Roosevelt through Ford), responsibility for generating potential court of appeals candidates and reviewing district court candidates was centered nearly exclusively in the attorney general’s and deputy attorney general’s offices in the Justice Department. See GOLDMAN, *supra* note 3, at 11, 18 (discussing attorney general’s involvement and examining president’s involvement in judicial selection through communications with attorney general). More recently, responsibility for judicial appointments has been shared with the White House, specifically the Counsel’s Office and the president’s political advisers. See *id.* at 9-10 (explaining mechanics of judicial selection during administration of Franklin Roosevelt).

6. See RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 12-23 (2d ed. 1994) (exhibiting development of district court system across United States and vast geographic areas encompassed by early districts). The exception, of course, is the U.S. Court of Appeals for the District of Columbia Circuit, for which there are no home-state senators. See *generally id.*

7. See Clark, *supra* note 2, at 1135 (discussing interest of presidents). To complete the picture, Supreme Court appointments have historically fallen within the president’s purview, subject to the Senate’s advice and consent, as with all Article III appointments. See *id.* at 1136 (discussing Senate’s influence).

8. See *id.* (discussing “blue slips”); see also GOLDMAN, *supra* note 3, at 12 (same).

two senators noted an objection to the nomination on the blue slip, or refused to return it, then no confirmation hearing was held and the nomination was crushed.<sup>9</sup> If the blue slips were returned without any objections noted, then a confirmation hearing was scheduled.<sup>10</sup>

Senators' not insignificant influence over court of appeals appointments remained largely unchanged until President-elect Carter and Attorney General-designee Griffin Bell negotiated a compromise with fellow southerner and long-time Senate Judiciary Committee Chair, Mississippi Senator James O. Eastland, giving the president greater leeway over court of appeals appointments and leaving district court appointments largely to the Senate.<sup>11</sup> Soon thereafter, Eastland's successor as Judiciary Committee Chair, Senator Edward M. Kennedy, tried to limit the blue slip privilege by scheduling a confirmation hearing even when the blue slip had not been returned.<sup>12</sup>

Beginning in 1977, under Carter, the increased presidential influence over judicial appointments at the court of appeals level promoted women's access to opportunity, shifting appointments towards merit selection and away from the "old boy" network of political patronage.<sup>13</sup> This move from a political reward system to one based on merit increased women's viability as judicial candidates because women have historically been less involved in partisan politics.<sup>14</sup> Carter's reliance on merit selection also promoted women's judgeship opportunities insofar as the selection panels typically included women and other minorities as citizen or professional representatives.<sup>15</sup> Women's likelihood of obtaining judgeships also expanded when new judgeships were created, as for example when Con-

9. See Clark, *supra* note 2, at 1136 (outlining process).

10. See GOLDMAN, *supra* note 3, at 12 (discussing process). One commentator described the process as:

At the Senate Judiciary Committee, the Counsel for the committee sends out "blue slips" to the two senators from the nominee's state. . . . [I]f a blue slip is returned marked "objection" by either senator "regardless of party," "the custom is that no hearing will be scheduled." But if the blue slips are returned marked "no objection," "counsel, with approval of Chairman, places notice in Congressional Record scheduling hearing on the nomination, usually not less than seven days hence."

*Id.* (footnote omitted).

11. See Clark, *supra* note 2, at 1136 (addressing result of negotiations).

12. See *id.* ("Senators' influence was eroded further when Edward M. Kennedy became Chair of the Judiciary Committee in 1979 and announced that the withholding of a blue slip would not necessarily block a nomination."). Despite this attempt at reform, the blue slip privilege has largely persisted. See *id.*

13. See Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 307 (1982) (noting there has been a "traditional, Anglo-Saxon, elitist, male bias in the American judicial system").

14. See *id.* at 311 (noting that literature indicates that women are far less politically active than men).

15. See *id.* at 311-12 (noting Carter's use of merit selection).

gress authorized 152 new judgeships during Carter's presidency.<sup>16</sup> Women's judgeship opportunities grew at these times in large part due to a lessened perception that women were "taking" men's seats.

In light of the divergent traditions governing district court and court of appeals appointments, it is not surprising that the first woman named to an Article III judgeship was at the court of appeals level, and that the first woman named to the district court bench was in the District of Columbia, where the absence of a home-state senator in the District of Columbia has historically given the president substantial leeway to fill judgeships there.<sup>17</sup> It is surprising, however, that six of the first eight women judges were confirmed to district court seats, over which presidential influence has been constrained. These first appointments of women will be addressed in Parts III and IV below.

B. *The Burgeoning Role of the ABA's Standing Committee on Federal Judiciary in Evaluating Judicial Candidates*

The ABA's Standing Committee on Federal Judiciary ("ABA Standing Committee") was established in 1946 to investigate, evaluate and rate candidates for the U.S. Supreme Court, courts of appeal, district courts and Court of International Trade.<sup>18</sup> The Committee is composed of fifteen members—one representative from each of the federal judicial circuits plus one member-at-large.<sup>19</sup> Until 1983, the Standing Committee employed a five-level rating system for court of appeals and district court nominees—exceptionally well qualified, well qualified, qualified, not qualified and not qualified by reason of age<sup>20</sup>—and a three-level ranking system for Supreme Court nominees—well qualified, not opposed and not qualified.<sup>21</sup>

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16. See *id.* at 308 (suggesting merit selection required by Omnibus Judgeship Act).

17. See Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 560 n.49 (2002). With the creation of the position of D.C. Delegate to the U.S. House of Representatives, now held by Eleanor Holmes Norton, the District's elected officials have exerted greater influence over judicial appointments in D.C.

18. See ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS I (2002) (noting "Committee evaluates professional qualifications of persons nominated" for each court).

19. See *id.* (consisting of "two members from the Ninth Circuit, one member from each of the other twelve federal judicial circuits and one member-at-large").

20. This five-level ranking system was subsequently revised to eliminate the "not qualified by reason of age" rating in the early 1980s. See ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 4-5 (1983). The "exceptionally well qualified" rating was later developed in 1989. See ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 7 (1991).

21. The Standing Committee amended its rating system for Supreme Court nominees in 1991 to include three rankings: well qualified, qualified and not qualified. See ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 9 (1991).

Soon after its formation, the ABA Standing Committee sought to influence who was nominated for federal judgeships by working behind the scenes to generate names of prospective candidates and defeat the selection of others. In light of the conflict of interest presented by the ABA Standing Committee's dual activities in proposing and investigating nominees, the ABA eventually limited its activities to evaluating candidates.<sup>22</sup> The ABA Standing Committee's evaluation became a formalized part of the Senate confirmation process in 1952.<sup>23</sup> According to the arrangement then agreed on by the ABA and the Eisenhower administration, names of prospective candidates were forwarded to the ABA for evaluation prior to Federal Bureau of Investigation (FBI) investigation and formal submission to the Senate.<sup>24</sup> The ABA would informally evaluate judicial candidates by using the personal data questionnaire developed by the Justice Department and conducting interviews with lawyers and judges from the candidate's region.<sup>25</sup> If the candidate later passed the FBI investigation, the ABA would formally submit its evaluation report to the Senate.<sup>26</sup>

Because the ABA Standing Committee was not established until 1946 and did not become a regular part of the confirmation process until 1952, the Committee did not evaluate either Allen or Matthews. The first woman to be evaluated by the ABA and later confirmed to a judgeship was Sarah Tilghman Hughes, who was rated "not qualified by reason of age" because she was 65.<sup>27</sup> Looking to the first eight women in the aggregate,

22. *See id.* (discussing importance of "integrity and independence of the Committee").

23. *See* GOLDMAN, *supra* note 3, at 88 (formalizing Committee's role in selection process); *see also* ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 2 (1991) ("The United States Senate, through the Senate Judiciary Committee, has requested the opinion of the Committee on every federal judicial nomination since 1948 and the Committee has been consulted by every President concerning almost every federal judicial appointment since 1952."). President George W. Bush broke with tradition by vetting his candidates first with the conservative Federalist Society and then with the ABA at the time of formal submission to the Senate. Bush threatened to exclude the ABA from the judicial evaluation process altogether, claiming the ABA's process was too infected with liberal ideology. *See The Real Problem in Making Judges*, N.Y. TIMES, NOV. 1, 2002, at A1 (criticizing President Bush's plan for accelerating confirmation of judicial nominees).

24. *See* GOLDMAN, *supra* note 3, at 10-11 (describing selection process).

25. *See id.* at 10 (same).

26. *See id.* (same).

27. *See* Robert S. La Forte, *Hughes, Sarah Tilghman (1896-1985)*, available at <http://www.tsha.utexas.edu/handbook/online/articles/view/HH/fhu68.html> (last visited Apr. 1, 2004) (detailing professional career of Hughes). One commentator described the refusal of Hughes's candidacy as follows:

In 1961 [Hughes] asked Senator Ralph Yarborough and Vice President Lyndon B. Johnson to recommend her for the federal judgeship of the northern district of Texas. Her age, sixty-five, caused the American Bar Association and Attorney General Robert F. Kennedy to oppose her selection. . . . When President John F. Kennedy appointed her in October 1961, she became the first woman to serve as a federal district judge in Texas.

their ABA ratings improved over time, such that the last three received “well qualified” ratings.<sup>28</sup> This was not true of President Carter’s women judges, who received disproportionately lower ratings than his male appointees, and Carter threatened to bypass the ABA as a result, asserting that he would submit nominations directly to the Senate without an ABA evaluation. In response to this threat, the ABA amended its evaluation criteria to take into account certain differences in women’s career patterns,<sup>29</sup> with the result that the ratings disparity between women and men shrank.

### III. THE FIRST EIGHT WOMEN ARTICLE III JUDGES

The first eight women Article III judges were:<sup>30</sup>

Name	Court	Appointing President	Years of Active Federal Judicial Service
1. Florence Ellinwood Allen	6th Cir.	Roosevelt	1934-59 (Sr. status: 1959-66) <sup>31</sup>
2. Burnita Shelton Matthews	D.D.C.	Truman	1949-68 (Sr. status: 1968-83)
3. Sarah Tilghman Hughes	N.D. Tex.	Kennedy	1966-75 (Sr. status: 1975-85)

*Id.* (explaining appointment decisions).

28. *See, e.g.,* GOLDMAN, *supra* note 3, at 181-82 (Hufstедler was described to one judge as having better credentials than any other woman lawyer).

29. The ABA’s amendments to its criteria included lowering the minimum years-in-practice requirement to reflect women’s more recent entry into the legal profession and decreasing the emphasis placed on litigation experience.

30. *See* Federal Judicial Center, *Federal Judges Biographical Database*, at <http://www.fjc.gov/newweb/jnetweb.nsf/hisj> (last visited Apr. 1, 2004) [hereinafter *Federal Judges Biographical Database*] (providing information about all judges that served on U.S. district courts, U.S. courts of appeal, U.S. Supreme Court and other life-tenured courts since 1789). While women were appointed to Article III seats on a largely once per presidential administration basis, African Americans were appointed at a somewhat faster rate, though the first African American was named sixteen years after the first woman. *See id.* William Henry Hastie became the first African American appointed to a life-tenured position on a federal court of general jurisdiction when he was named to the U.S. Court of Appeals for the Third Circuit by Truman in 1950. *See id.* (discussing appointment of African American judge). Roosevelt had earlier named Hastie to a territorial court in the U.S. Virgin Islands. *See id.* (discussing Roosevelt appointment). The first African American federal district court judge—James Parsons of the U.S. District Court for the Northern District of Illinois—was appointed almost a dozen years later, in 1961, by Kennedy. *See id.* (noting Kennedy appointment).

As for the comparative rates of appointment of women and African Americans, Kennedy appointed three African American men and one white woman, while Johnson appointed eight African American men, one African American woman and two white women. *See id.* (discussing Kennedy appointments). Thereafter, Nixon named six African American men and one white woman, and Ford named three African American men and one woman before Carter undertook to integrate the courts by gender and race. *See id.* (noting Nixon appointments).

31. “Sr. status” denotes “senior status,” when a judge has retired from active service, no longer handling a full caseload.

4. Constance Baker Motley	S.D.N.Y.	Johnson	1966-86 (Sr. status: 1986-Present)
5. June Lazenby Green	D.D.C.	Johnson	1968-84 (Sr. status: 1984-Present)
6. Shirley Mount Hufstедler	9th Cir.	Johnson	1968-79
7. Cornelia Kennedy	D. Mich.	Nixon	1970-79 (district court) 1979-99 (court of appeals) (Sr. status: 1999-Present)
8. Mary Anne Reimann Richey	D. Ariz.	Ford	1976-83

Women's percent representation in judicial appointments was negligible, bordering on infinitesimal at this time:

Appointing President	Number of Court of Appeals Appointments	Number of District Court Appointments	Total Number of Lower Court Appointments	Total Number of Women Appointed	Women as % of Total Lower Court Appointments
Roosevelt	50	133	183	1 (court of appeals)	0.546%
Truman	26	97	123	1 (district court)	0.813%
Eisenhower <sup>32</sup>	45	126	171	0	0.000%
Kennedy	20	103	123	1 (district court)	0.813%
Johnson	41	126	167	3 (2 district court, 1 court of appeals)	1.796%
Nixon	45	179	224	1 (district court)	0.446%
Ford	12	52	64	1 (district court)	1.563%

Johnson was the only president to appoint more than one woman to the bench. Nevertheless, his record in appointing three women did not depart from the tokenism characterizing women's appointments pre-Carter, in light of his having nominated 167 lower federal court judges.<sup>33</sup>

An examination of the backgrounds and bench experiences of the first eight women judges follows.

A. *Florence Ellinwood Allen* (active federal judicial service: 1934-59)

Florence Ellinwood Allen was appointed to the U.S. Court of Appeals for the Sixth Circuit by President Franklin Delano Roosevelt in 1934, making her the first woman appointed to an Article III judgeship on a court of

32. Eisenhower appointed a woman to the U.S. Customs Court, Mary Donlon, in 1945, but did not name any women to Article III courts. See GOLDMAN, *supra* note 3, at 142-43 (detailing Donlon's appointment to bench). Donlon was named to a vacancy created by the retirement of Genevieve Cline, who was the first woman to sit on any federal bench when President Calvin Coolidge appointed her to the U.S. Customs Court in 1928. See *id.* at 51 (discussing eventual appointment of Mary Donlon to lifetime federal judgeship position).

33. "Lower federal court appointments" as used here includes only district court and court of appeals appointments.



general jurisdiction.<sup>34</sup> A unanimous Senate confirmed Allen fewer than ten days after her nomination.

Born in 1884 in Salt Lake City, Utah, Allen obtained her B.A. in 1904 from the College for Women of Western Reserve University (now part of Case Western Reserve University in Cleveland).<sup>35</sup> After college, Allen pursued music studies at the University of Berlin, returning to Cleveland in 1906 when she again enrolled at Western Reserve, obtaining her M.A. in political science in 1908 while lecturing on music at the Laurel School for Girls and serving as a music critic and music editor for the *Cleveland Plain Dealer*.<sup>36</sup>

Soon thereafter, Allen became interested in the law as a career, prompted by her passionate engagement with women's rights issues. Because the law school at Western Reserve excluded women, Allen instead enrolled at the University of Chicago Law School, in 1909, where she was the only woman in her class of one hundred.<sup>37</sup> By the close of the winter quarter, Allen ranked second in her class.<sup>38</sup> Finding the environment at Chicago inhospitable to women, Allen transferred to New York University (NYU) Law School in 1910. NYU's law school was more progressive, having opened its doors to women in the 1890s. She graduated second in her LL.B. class in 1913.<sup>39</sup>

While attending law school, Allen worked in the settlement house movement with the New York League for the Protection of Immigrants and was active with the National College Women's Equal Suffrage League, through which she met Maud Wood Park, one of the League's founders and foremost American suffragists.<sup>40</sup> Allen campaigned for woman suf-

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34. See *Florence E. Allen Named Federal Judge; First Woman to Get Place on Circuit Bench*, N.Y. TIMES, Mar. 7, 1934, at 9 [hereinafter *Allen Named Federal Judge*] (commenting on Florence E. Allen being first woman named to sit at circuit court level).

35. See 4 WHO WAS WHO IN AMERICA 22 (1961-68) [hereinafter WHO'S WHO (1961-68)] (providing educational background for Allen).

36. See *id.* (continuing background); see also *Allen Named Federal Judge*, *supra* note 34, at 9 (providing background).

37. See *Allen Named Federal Judge*, *supra* note 34, at 9 (discussing legal career choice); see also Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 282 (1995) (noting that Allen was only female in class).

38. See Ginsburg & Brill, *supra* note 37, at 282 (noting that Allen "finish[ed] winter quarter second in her class").

39. See WHO'S WHO (1961-68), *supra* note 35, at 22 (providing educational background); see also Judge Phyllis A. Kravitch, *The Burnita Shelton Matthews Memorial Lecture in Law: Women in the Legal Profession: The Past 100 Years*, 69 MISS. L.J. 57, 63 (1999) (noting that Allen, who graduated from NYU Law School, was first woman lawyer to achieve national prominence).

40. See Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. REV. 39, 40 (1993) (detailing history and career of Florence Ellinwood Allen); see also Ginsburg & Brill, *supra* note 37, at 282 (discussing work with Park).

frage in Ohio in the summer of 1912, and in doing so gained recognition throughout the state.<sup>41</sup>

After graduating from NYU and passing the Ohio bar exam, Allen discovered that no Cleveland law firms would hire her. She instead established her own law office in Cleveland, where she practiced from 1914 to 1919, all the while volunteering with the Cleveland Legal Aid Society and serving as counsel to the Ohio Woman Suffrage Association. According to Justice Ginsburg, "When the suffragists won a victory in the City of East Cleveland, Allen successfully defended the city charter suffrage amendment before the Ohio Supreme Court."<sup>42</sup> This was a significant case, "establishing the right of women to vote in Cleveland, Lakewood, and Columbus prior to the enactment of the 19th Amendment."<sup>43</sup> Allen was also active at this time with the National Association of Women Lawyers, the International Federation of Women Lawyers, the Federation of Business and Professional Women, the Daughters of the American Republic and the Women's City Club of Cleveland.<sup>44</sup> These women's organizations proved to be important supporters of Allen's subsequent judicial career, consistently advocating her election and appointment to state and federal benches.

After five years in private practice, Allen was appointed an assistant Cuyahoga County prosecutor in 1919, the first woman to hold this office.<sup>45</sup> "Upon her hiring, the county prosecutor was reported as saying, 'I consider that Miss Allen will do a man's job in our office. I rate her as the equal of virtually any male attorney.'"<sup>46</sup> The following year, Allen was elected to a judgeship on the Cuyahoga County Court of Common Pleas, making her the first woman in the nation to be elected to a court of general jurisdiction.<sup>47</sup> Her election to the Court of Common Pleas followed ratification of the Nineteenth Amendment to the U.S. Constitution earlier

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41. See Cedarbaum, *supra* note 40, at 40 (discussing involvement in woman suffrage campaign).

42. Ginsburg & Brill, *supra* note 37, at 282 (describing Allen's influence in woman suffrage movement).

43. Judge Harold N. Stephens, Address at a Testimonial Dinner for Judge Florence E. Allen, Waldorf Astoria Hotel (Nov. 8, 1948) [hereinafter Judge Stephens Address] (transcript available in the NYU Bureau of Public Information).

44. See Florence E. Allen, Biographical Questionnaire of the Bicentennial Committee of the Judicial Conference of the United States 9 (on file with the Federal Judicial Center's History Office).

45. See Kravitch, *supra* note 39, at 63 (reporting that Allen was first female prosecutor in country).

46. *Id.* at 63 (reporting sentiment of county prosecutor on work of newly hired female attorney).

47. See *id.* at 69 (noting new judgeship); see also Ginsburg & Brill, *supra* note 37, at 282 (discussing Allen's legal background and her surge through judicial ranks).

that year,<sup>48</sup> and women's votes were significant to Allen's electoral success.<sup>49</sup>

According to a 1921 article in *The Woman Citizen*, Allen had at first resisted becoming a candidate for the common pleas court but was ultimately persuaded to do so by a number of Cleveland women's organizations. The article reveals:

[T]he Cleveland Business Women's Club adopted a resolution urging Governor Cox to appoint Miss Allen to fill the place. Miss Allen herself remonstrated with the club members fearing that it might look as if the club were dabbling too much in politics or as if she were at the bottom of the plan herself. After that initial step, practically every woman's organization in Cleveland endorsed Miss Allen for the judgeship.<sup>50</sup>

Allen "was finally argued into becoming a candidate for the office after the women were enfranchised for she saw in her candidacy an opportunity to do much good, from a woman's point of view."<sup>51</sup> Before the judicial vacancy arose, Allen had given thought to running for legislative office, believing "she could work more effectively for certain policy ends, including world peace, from a legislative rather than a judicial body."<sup>52</sup>

48. See U.S. CONST. amend. XIX (guaranteeing women right to vote).

49. See Edith E. Moriarty, *Woman Elected Judge*, WOMAN CITIZEN, July 1921 (reporting that Allen was elected judge "by the largest popular vote ever given a candidate for the bench in that county. Miss Allen led the ticket with the three men judges who were elected falling far behind her total").

50. *Id.* (describing initial support for Allen).

51. *Id.* (noting Allen's aspiration to do much good in her candidacy).

52. Beverly B. Cook, *The First Woman Candidate for the Supreme Court—Florence Allen*, in SUPREME COURT HISTORICAL SOCIETY PUBLICATIONS: 1981 YEARBOOK (1981), available at <http://www.supremecourthistory.org/myweb/81journal/cook81.htm> [hereinafter *First Woman Candidate*] (considering career in legislature). Allen's belief about whether she could be more effective in a legislative or judicial position shifted toward the judiciary at least in part because of her difficulties in obtaining Democratic Party endorsements for elective office. See *id.* (showing shortcomings of attempt in legislature); see also Beverly B. Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314, 321 (1982) [hereinafter *Supreme Court Candidates*].

[A]s a candidate for elective office she usually ran as an independent with the backing of women's groups, since the Democratic Party did not offer its endorsement. The party did not back her for the U.S. Senate in 1926, but she did win the party nomination in 1932 for her unsuccessful campaign for the U.S. House. After winning two elections for the state supreme court as an independent, she was apprehensive about a third term and turned her ambitions toward the life-tenured federal judiciary.

*Id.*

Of special relevance, Allen's father had been a member of the U.S. House of Representatives from Utah when Allen was a child. See Miriam B. Murphy, *Clarence E. Allen Was Utah's First Congressman*, HIST. BLAZER (Dec. 1995), available at [http://historytogo.utah.gov/ceallen\\_.html](http://historytogo.utah.gov/ceallen_.html) (discussing Allen's father's profession).

Allen's judicial career progressed swiftly after her initial election, such that, in 1922, she was elected as an Independent to the Ohio Supreme Court, where she served two six-year terms as an associate justice.<sup>53</sup> She received tremendous support from women, who formed "Florence Allen Clubs" to campaign for her.<sup>54</sup> Once on the Court, Allen ruled in favor of a number of progressive causes, including holding that a psychiatric evaluation was a matter of right for defendants claiming not guilty by reason of insanity.<sup>55</sup> After becoming the first woman to serve on a state court of last resort, Allen was re-elected "by a landslide" in 1928.<sup>56</sup>

Allen's political ambitions did not stop with the Ohio Supreme Court. While serving as an associate justice, Allen ran for the U.S. Senate from Ohio in 1926, failing to obtain the Democratic nomination. She also ran for the U.S. House of Representatives from Ohio in 1932, winning in the Democratic primary but losing in the general election.<sup>57</sup> In 1930, the *Christian Science Monitor* ran an article advocating the appointment of women to the federal bench, giving particular attention to Allen. According to one of Allen's biographers, this article prompted President Herbert Hoover to ask his attorney general to look into the question of appointing women to the bench, but Hoover did not pursue Allen's candidacy.<sup>58</sup>

In 1933, a vacancy arose on the U.S. Court of Appeals for the Sixth Circuit, encompassing Kentucky, Michigan, Ohio and Tennessee. Allen's appointment to this seat was the product of lobbying by politically influential women, including the First Lady, Eleanor Roosevelt, and Mary [Molly] Dewson, the powerful head of the Women's Division of the Democratic National Committee. When President Roosevelt entered office in 1933, Dewson worked with the First Lady to generate names of potential female appointees, including Allen.<sup>59</sup> Women's groups in Cleveland also wrote to

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53. See Percilla Lawyer Randolph, *Judge Florence Allen*, 19 *WOMEN LAW. J.* 15 (1932) ("Judge Allen was elected Judge of the Court of Common Pleas in 1920 by the greatest vote ever given any judicial candidate of that Court, leading the entire judicial ticket of ten Candidates. She was elected to the Supreme Court of Ohio in 1922 and re-elected in 1928 by a 352,000 majority.")

54. See Ginsburg & Brill, *supra* note 37, at 282-83 ("In 1922, Judge Allen ran for a slot on the Ohio Supreme Court. Once more, the women of Ohio organized her campaign, forming Florence Allen Clubs throughout the state.")

55. See John A. Russ IV, *Florence Ellinwood Allen*, pt. 8, at <http://www.stanford.edu/group/WLHP/papers/flo.html> (last visited Apr. 1, 2004) (citing Evans v. Ohio, 123 Ohio St. 132 (1930)) (discussing Allen's accomplishments while Justice for Supreme Court of Ohio).

56. See Kravitch, *supra* note 39, at 64 (noting Allen won by great number of votes). "In the vote for her reelection, her plurality over her opponent was approximately 350,000." Judge Stephens Address, *supra* note 43.

57. See N.R. Howard, *Miss Allen Talks of Women's Gains: First Woman Named a U.S. Circuit Judge Thinks Suffrage Improves Politics*, *N.Y. TIMES*, Mar. 25, 1934, at IX, 2:6 (detailing Florence E. Allen's life, achievements and aspirations).

58. See generally JEANETTE E. TUVE, *FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN* (1984).

59. See 2 BLANCHE WIESEN COOK, *ELEANOR ROOSEVELT, 1933-1938* 67-69 (1999) (finding Eleanor Roosevelt and Molly Dewson "actually controlled pa-

the President advocating Allen's nomination, as did suffrage leader Maud Wood Park and Roosevelt's Labor Secretary Frances Perkins, the first female cabinet official.<sup>60</sup> The Cleveland chapter of the National Association for the Advancement of Colored People (NAACP) opposed Allen's nomination, however, citing an Ohio Supreme Court decision in which Allen had concurred that rejected a civil rights claim against Ohio State University for maintaining separate housing facilities for black and white students.<sup>61</sup>

Allen credited her success in being named to a federal judgeship to "the great woman movement. The place didn't come to me—you gave it to me,"<sup>62</sup> referring to the women's movement. Nevertheless, Roosevelt's attorney general, Homer Cummings, asserted, "Florence Allen was not appointed because she was a woman. All we did was to see that she was not rejected because she was a woman."<sup>63</sup> Echoing this sentiment, a *Washing-*

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trouage for women directly"). Following her Senate confirmation, Allen expressed her gratitude to Dewson by telling her, "you helped me over the biggest hurdle." TUVE, *supra* note 58, at 108; *First Woman Candidate*, *supra* note 52 (quoting 1934 letter from Allen to Dewson).

Historian Cynthia Harrison has written at length about Roosevelt's motives for appointing historic numbers of women to Senate-confirmed posts, including Allen. See CYNTHIA ELLEN HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 52-53 (1988). She argues that women's appointments were a relatively simple token of presidential esteem intended to win women's votes and avoid deeper engagement with the sometimes fractious women's rights struggle. Harrison writes:

Ever since suffrage had been won in 1920, both the Republican and the Democratic parties had religiously offered something to women . . . . As the first decade after women's suffrage wore on, however, it became clear that women, riven [sic] as they were by class interests and philosophical outlooks, were not going to form a consolidated bloc of voters, and male politicians relaxed. After that, few legislative initiatives spoke directly to women's needs, but in order not to alienate the women who were concerned about women's advancement, presidential administrations assiduously publicized the names and positions of women appointed to federal posts. Franklin Roosevelt, under the guidance of Democratic politician Molly Dewson, surpassed his predecessors by far: whereas Hoover had appointed three women to significant Senate-confirmed posts in eight years, in twelve years Roosevelt named seventeen.

*Id.*

60. See TUVE, *supra* note 58, at 108-09 (mentioning supporters of Allen). According to Judge Stephens, who was one of Allen's biggest political supporters and a family friend, "238 individuals, three labor organizations, 81 social and political associations, and 32 lawyers urged Judge Allen's appointment" to the Sixth Circuit. Judge Stephens Address, *supra* note 43.

61. See *State ex rel. Weaver v. Bd. of Trustees of Ohio State Univ.*, 185 N.E. 196, 198-99 (Ohio 1933) (finding that no advantages or privileges had been denied).

62. TUVE, *supra* note 58, at 136 (quoting *Columbus State Journal* (Feb. 24, 1934)).

63. FLORENCE E. ALLEN, TO DO JUSTLY 95 (1965). Barbara Babcock echoed this sentiment during the Carter administration when asked how it felt to be named an assistant attorney general because she was a woman. Babcock responded, "[I]t feels a lot better than not getting it because I'm a woman." Interview by Sarah Wilson with Barbara Babcock (May 19, 1995), in *Federal Judicial*

*ton Post* editorial declared, "Both Secretary [Frances] Perkins, the first woman Cabinet member, and Judge Allen have won their appointments strictly on the basis of merit. Their training, expertise and demonstrated ability would have singled them out for preferment if they had been men."<sup>64</sup>

Despite the attorney general's goodwill toward Allen, the FBI's background report, prepared at the time of Allen's nomination, was infected with gender bias. Though observing that, "Applicant is able, accomplished speaker and prominent leader of women in suffrage, pacifism and other reforms,"<sup>65</sup> and that "[s]ome members of Cleveland Bar favor her appointment alleging able, fair, independent, conscientious, judicious, legal mind and well qualified in every respect,"<sup>66</sup> the FBI report emphasized:

[A] large minority of prominent members [of the] Cleveland bar and U.S. District Judges [redacted] strongly oppose appointment, alleging applicant is not qualified to hear involved patent, tax, admiralty and other matters before Circuit Court and has no knowledge of Federal practice and is untrained, unethical and politically ambitious with aspirations to U.S. Supreme Court.<sup>67</sup>

Ultimately, the report concluded, "Many members term her appointment as lamentable, laughable, disastrous and would make the Circuit Court appear ridiculous and would lower the high traditions of that bench. Many members admit a natural prejudice against women in the judiciary, particularly Federal, as being naturally unqualified."<sup>68</sup> Roosevelt nevertheless proceeded with Allen's appointment.

Following her investiture on the Sixth Circuit, Allen was subjected to overt sex discrimination by some of her colleagues:

To say that she received a very cool reception from her new colleagues is a gross understatement. In addition to one judge who, it is reported, was so upset at the idea of a female colleague that he literally took to his bed for several days, three of the remaining five judges refused to offer her congratulations.<sup>69</sup>

Likewise, Allen was excluded from joining her colleagues at lunch because they dined at an all-male club while sitting in Cincinnati.

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Center, *Diversifying the Judiciary: An Oral History of Women Federal Judges* (on file with the Federal Judicial Center's History Office).

64. *Judge Allen*, WASH. POST, Mar. 8, 1934, at 8.

65. Memorandum for the Director of the Federal Bureau of Investigation by F.A. Tamm (Feb. 15, 1939).

66. *Id.*

67. *Id.*

68. *Id.*

69. Kravitch, *supra* note 39, at 64.

Allen's most important case as a federal judge presented a constitutional challenge to the federal government's authority to sell electricity generated by the Tennessee Valley Authority (TVA), one of Roosevelt's first initiatives as president. The plaintiffs, private power companies, sought to enjoin the TVA's operation as unfair competition.<sup>70</sup> Allen presided over the three-judge panel that heard this challenge over the course of several months in 1937. The U.S. Supreme Court affirmed the panel's judgment upholding the TVA's constitutionality.<sup>71</sup>

A Supreme Court vacancy arose while Allen was presiding over the TVA case, and Allen may have been considered for appointment to the Court at this time. As political scientist Beverly Blair Cook, the foremost expert on Allen's judicial career, explains:

The timing of the . . . vacancy was awkward, since Judge Allen was presiding over the critically important TVA case. A nomination to the Supreme Court before the decision came down might appear to be the most blatant form of bribe. But [Allen] evidently cherished some hope for elevation, nevertheless, which the district judges working on the TVA case with her recognized. On the morning of the announcement of Reed's appointment to the Sutherland seat, Judge John Gore told Judge Allen to smile when she entered the courtroom, so that the watching reporters could not impute to her a disappointment.<sup>72</sup>

Allen's candidacy enjoyed broad support among women's advocacy groups: "Allen was supported by such organizations as the American Association of University Women, the Business and Professional Women, the General Federation of Women's Club, New York Women's Trade Union League, American Legion Auxiliary, Women's Bar Association of D.C., and Women Lawyers of New York City,"<sup>73</sup> as well as women judges:

Women judges also rallied behind the only woman in the federal court system (Article III Courts). Judge Sarah Hughes, later appointed to the U.S. District Court by President Kennedy, wrote several times on her Texas state court stationery: "I believe that she is thoroughly qualified and that she would bring honor to the Court." Judge Dorothy Kenyon of The New York Municipal Court wrote to the President that "So many distinguished women have urged her elevation to the bench that it is perhaps unnecessary to add my voice to the others." She enclosed a summary of

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70. See HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 149 (Richard Fallon et al. eds., 5th ed. 2003) [hereinafter HART & WECHSLER] (discussing Congress's power to confer standing).

71. See generally *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137-39 (1939).

72. *First Woman Candidate*, *supra* note 52.

73. *Id.*

Allen's legal opinions. . . . Judge Annabel Matthews, the first woman on the Tax Court, and a Republican, wrote that women lawyers took great pride in Allen's record as a great liberal and jurist.<sup>74</sup>

Publicly, Allen "took the . . . position that she had 'no political ambition whatever,' that 'I am not a candidate for any appointment.'" <sup>75</sup> Nevertheless, "the headquarters of the [Supreme Court] campaign was firmly established out of Florence Allen's own home and office [by 1939]. Judge Allen's cousin, who made her home with the judge, was in charge of communications among the scattered supporters."<sup>76</sup>

Allen undertook to write two books as part of her only slightly veiled Supreme Court "campaign." The first, published during the most active period of her Supreme Court consideration, in 1940, was *This Constitution of Ours*.<sup>77</sup> Allen delegated "the task of collation and the integration of other research material to women friends" and, "[u]pon publication, she sent autographed copies to the Justices of state Supreme Courts, to university professors, to Solicitor-General Biddle, to Eleanor Roosevelt, to William Allen White, and to lawyers in large firms. She even persuaded a friend to write a complimentary review for the University of Chicago Law Review."<sup>78</sup> Taking the tone of a social studies reader for a lay audience, the book did not receive critical attention from legal scholars. "Had Roosevelt invited Frankfurter to evaluate the book," Cook suggests, "[Allen] would necessarily have come off poorly as a scholar."<sup>79</sup>

Allen's second book, a memoir entitled *To Do Justly*, was begun at the same time as *This Constitution of Ours*, but was not published until one year before her death. According to Cook, "Putnam's provided Allen an advance and expected a manuscript by the fall of 1940. If the story of her life sold widely, as Eleanor Roosevelt's had, she might be able to develop the national constituency which she needed to undergird her Supreme Court ambitions."<sup>80</sup> Despite these considerations, Allen did not complete the book for another twenty-five years.<sup>81</sup>

No fewer than twelve Supreme Court vacancies arose during the Roosevelt and Truman presidencies, and women's groups considered Allen a strong candidate for each. As Cook makes clear, however, neither Roosevelt nor Truman ever seriously considered Allen for elevation to the High Court. Put simply, appointing a woman to the Supreme Court was

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74. *Id.*

75. *Id.* (citation omitted).

76. *Id.*

77. FLORENCE E. ALLEN, *THIS CONSTITUTION OF OURS* (1940).

78. *First Woman Candidate*, *supra* note 52.

79. *Id.*

80. *Id.*

81. *See id.*



far ahead of public sentiment at the time.<sup>82</sup> Allen's High Court prospects, if any, may have been brought to a halt by a news report that Allen's Sixth Circuit judgments had been reversed more than "any other prominent federal judge."<sup>83</sup> She was outraged by what she saw as an ill-motivated account of her record. Years later, Allen recalled, "[T]he malice behind the article was evident. They meant to kill me off forever."<sup>84</sup> Catherine Waugh McCulloch,<sup>85</sup> Allen's friend and an early woman lawyer and suffrage advocate promptly wrote to Roosevelt's attorney general to "set the

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82. In *First Woman Candidate*, *supra* note 52, Cook addresses why Allen was never seriously considered for the Court, looking principally to the absence of public and/or political support:

President Roosevelt would have been moving ahead of public opinion in choosing a woman justice in the 1930's. The Gallup polls, responsive to the news reports of Allen's candidacy, posed the issue to the public in 1938: "Would you favor the appointment of a woman lawyer to be a judge on the U.S. Supreme Court?" A very large minority, 39%, were favorable. But the public was expressing a theoretical support for females in government, because the Gallup poll reported a different level of response to a more concrete question: "Would you like to see the next appointment to the U.S. Supreme Court go to a man or a woman?" Only 18% wanted a woman who would necessarily have been Florence Allen. News reporters sensed that the political elite as well as the public rejected the notion of a woman on the Court in the 1930's. The *Baltimore Sun* claimed that: "A lot of people have recoiled from the prospect of a woman on the Supreme Court. To them the thing is almost unthinkable."

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... [A]ppointments to the Supreme Court could become his own political liabilities. He had not been close to the reactions of the judges on the Sixth Circuit, who were opposed to her joining them, nor would the unhappiness of the party in Ohio affect him as much as would the Senator. On the other hand, he was immediately cognizant of the feelings of the Supreme Court Justices in Washington, of the Supreme Court Bar, of his Solicitor General, and national party leaders in Congress and the Democratic National Committee. The political costs might escalate. As the public opinion polls showed, the political rewards would be small. The letter-writing campaign which worked so well in 1934 to win an office largely controlled by state political figures was simply not effective in winning a nomination which involved the complex political calculations of a President.

*Id.*

83. Drew Pearson & Robert S. Allen, *The Daily Washington Merry-Go-Round: Florence Allen*, COLUMBUS DISPATCH, Mar. 24, 1939 (reporting that "Judge Allen's record perhaps is worse than any other prominent federal judge's"). Allen, or one of her supporters, prepared a memo in response to the *Dispatch* piece that noted that Allen had been reversed only three times through 1939, including her service on both the Ohio Supreme Court and the Sixth Circuit. *See* *Reversals of Decisions of Judge Florence Allen* (undated memorandum) (on file with author) (discussing few instances where Judge Allen was reversed).

84. ALLEN, *supra* note 63, at 112-13.

85. McCulloch was an 1886 graduate of the Union College of Law, now Northwestern University Law School. She became "the first female justice of the peace when she was elected to that position in Evanston, Illinois, in 1907, serving until 1913." Mary L. Clark, *The First Women Members of the Supreme Court Bar, 1879-1900*, 36 SAN DIEGO L. REV. 87, 105 (1999).

record straight.”<sup>86</sup> Whether the news report in fact had an impact on Allen’s prospects is unclear. Cook suggests not, given the lack of public and political support for such a nontraditional appointment.

As for Allen’s Supreme Court prospects under Truman, he went so far as to have an administration aide consult Chief Justice Fred Vinson<sup>87</sup> on the possibility of her appointment to the Supreme Court and was told that it would undermine the collegiality of the Court, with justices no longer able to discuss cases with their feet up and robes off.<sup>88</sup>

Shortly before retiring from active service in 1959, Allen became the first woman chief judge in the federal system, holding the position of chief judge of the U.S. Court of Appeals for the Sixth Circuit from 1958 to 1959. She was named chief judge by virtue of seniority and, as chief judge, became the first woman to serve on the Judicial Conference of the United States, the judiciary’s governing and policy-setting body.<sup>89</sup> Allen died in 1966 while serving as a senior circuit judge.<sup>90</sup>

In the end, women’s groups, as well as Allen herself, saw Allen as a role model of an intelligent, accomplished woman. Writing at the time of her federal court appointment in 1934, Allen noted, “I have tried with all that is in me to justify the presence of women on the courts.”<sup>91</sup> In seeing herself as a role model, Allen observed:

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86. Russ, *supra* note 55, pt. 10 (citing Catharine Waugh McCulloch’s letter to U.S. Attorney General Frank Murphy (Apr. 17, 1939)) (noting Judge Allen had only been reversed three times at that point in her career; twice while on Supreme Court of Ohio and once while on Sixth Circuit).

87. Chief Justice Vinson had been a colleague of Allen’s on the Sixth Circuit from 1938 to 1943.

88. See HARRISON, *supra* note 59, at 56 (citing Oral History Interview with India Edwards (Jan. 16, 1969)) (noting that aide reported to Truman, “The Justices don’t want a woman. They say they couldn’t sit around with their robes off and their feet up and discuss their problems”).

89. One measure of women’s progress in the federal judiciary is their participation in court governance and policy-making through the Judicial Conference of the United States. Congress created the Conference of Senior Circuit Judges in 1922 to oversee the administration of the federal courts. That organization later became the Judicial Conference, over which the chief justice presides. In addition to the chief justice, the Judicial Conference is composed of the chief circuit judges and one district judge from each of the regional circuits. The Judicial Conference formally convenes twice a year, conducting its business during the year through a series of committees and subcommittees. Membership on Judicial Conference committees is much broader than membership on the Judicial Conference itself. Assignments to these committees, especially to leadership positions on prestigious committees, are highly coveted and are administered by the chief justice. See WHEELER & HARRISON, *supra* note 6, at 23 (discussing generally federal court system today). The second woman to serve on the Judicial Conference of the United States was Constance Baker Motley, as chief judge of the U.S. District Court for the Southern District of New York in 1982-83. See generally *id.*

90. See *Florence E. Allen Dies; Retired Federal Jurist*, WASH. POST, Sept. 14, 1966, at B6.

91. *Supreme Court Candidates*, *supra* note 52, at 326.

[I]t's so worth-while being a judge, because, if I make good, I can help prove that a woman's place is as much on the bench, in City Council, or in Congress, as in the home. This entrance of woman into other fields of activity can but demonstrate that her latent capabilities are unmined gold that the world cannot afford to be without.<sup>92</sup>

Allen recognized that "her work must be as nearly letter-perfect as possible because people are ten times more critical of a woman in an unprecedented position than of a man in the same position."<sup>93</sup> Judges Motley and Hufstедler would later echo this sentiment.

B. *Burnita Shelton Matthews* (active federal judicial service: 1949-68)

Burnita Shelton Matthews became the first female federal district court judge when President Harry Truman named her to the U.S. District Court for the District of Columbia in 1949.<sup>94</sup> Matthews's father was serving as clerk of the local chancery court in Mississippi when Matthews was born in 1894, and Matthews expressed interest in becoming a lawyer as she grew up. She was instead sent to the Cincinnati Conservatory of Music, where she studied piano, while her brother, a gifted pianist, enrolled in law school.<sup>95</sup> Matthews met her future husband, a lawyer with the Judge Advocate Corps, while teaching piano in Georgia. They married in 1917.<sup>96</sup> When her husband was called up for service in World War I later that year, Matthews moved to Washington, D.C., worked at the Veterans Administration and attended law school at night at National University, a precursor to George Washington University Law School.<sup>97</sup>

As a law student, from 1917 to 1920, Matthews participated in woman suffrage pickets of the White House led by Alice Paul. She did not tell her fellow law students, all male, of her picketing activities because she understood that they were critical of suffragists.<sup>98</sup> When asked if being the only woman in her class made it difficult, Matthews replied:

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92. Russ, *supra* note 55, pt. 7 (quoting Elliott Field, *Interesting People: The First Woman Judge of a Common Pleas Court Believes in "Speeding Up Justice"*, AM. MAGAZINE (Oct. 1921)).

93. Constance Marshall, *Judge Allen: Pioneer*, WOMAN CITIZEN, June 1926, at 5.

94. See GOLDMAN, *supra* note 3, at 90. Truman nominated a second woman, Frieda B. Henncock, for the U.S. District Court for the Southern District of New York in 1951, but her nomination was defeated in the Senate Judiciary Committee following the ABA's rating of "unqualified." See *id.* at 87.

95. Suffragists Oral History Project, Burnita Shelton Matthews: Pathfinder in the Legal Aspects of Women 2 (1973) (on file with the Bancroft Library, University of California-Berkeley) [hereinafter Oral History of Matthews].

96. The Matthews family did not have children.

97. See Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on U.S. Trial Courts*, N.Y. TIMES, Apr. 28, 1988, at D27 (highlighting life and career of Burnita S. Matthews).

98. See Kate Greene, *Torts Over Tempo: The Life and Career of Judge Burnita Shelton Matthews*, 61 J. MISS. HIST. 181, 186 (1994) (quoting Interview by Amelia R.

I wouldn't say that it did. . . . They had a lot to say about the marches and picketing. They didn't think that the women who were putting on this great campaign and bothering the President were very patriotic, and the women were greatly criticized. You would hear a lot in the law school how the men felt about it. However, I was elected vice-president of my class. A very nice man got up and said that I was a member of the class and that I was a very earnest and capable student. He nominated me and I was elected. On the whole, the men were very nice to me, and many of them today are still friends of mine.<sup>99</sup>

As for her professors, Matthews recalled that some "told little jokes that would put women in their places," citing as an example a professor who described Belva Lockwood, presidential candidate on the woman suffrage ticket and the first woman admitted to the U.S. Supreme Court Bar, as an incompetent lawyer.<sup>100</sup> Also while in law school, Matthews assisted Alice Paul in her work for the National Woman's Party, researching state laws that discriminated against women. Matthews's compilation of discriminatory laws, published in a pamphlet entitled *The Denial of Justice to Women: A Summary of Discriminations*,<sup>101</sup> was intended to raise the collective consciousness of laypersons to sex discrimination issues.

After graduating from National University Law School in 1920, from which she obtained both an LL.B. and an LL.M., Matthews passed the District of Columbia Bar exam, but "the local bar association [a voluntary bar association separate from the official bar] refused to accept her application for membership, returning the check she sent for membership dues" on the grounds of sex.<sup>102</sup> At the same time, in applying for a position with the Veterans Administration's General Counsel's Office, Matthews was told "it would never hire a woman in the legal department,"<sup>103</sup> despite her having worked for the Veterans Administration during law school. Thereafter, Matthews became even more active with the National Woman's Party, serving as its counsel for almost thirty years until her federal court appointment in 1949.

At the National Woman's Party, Matthews was an early proponent of the Equal Rights Amendment, testifying regularly before Congress in favor of its adoption. Matthews spoke and wrote regularly on women's civil and

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Fry with Burnita Shelton Matthews (Apr. 29, 1973), in *Oral History of Matthews*, *supra* note 95).

99. *Oral History of Matthews*, *supra* note 95, at 15.

100. *Id.* at 13.

101. National Woman's Party, *The Denial of Justice to Women: A Summary of Discriminations* (on file with author).

102. Matthews included the check returned from the D.C. Bar Association in the papers she donated to Harvard University's Schlesinger Library on the History of Women. See Greenhouse, *supra* note 97 (discussing obstacles faced in her legal career).

103. *Id.*

political rights.<sup>104</sup> She also drafted legislation guaranteeing women's right to serve on juries in the District of Columbia, which was enacted in 1927,<sup>105</sup> long before the Supreme Court's decision in *Hoyt v. Florida*<sup>106</sup> made it the national standard. Another key issue for Matthews was elimination of protective labor legislation for women, which put her at odds with many women's rights advocates of the time. Matthews understood such legislation as perpetuating discrimination against women in the workplace insofar as it cast women as the weaker sex in need of protection and created disincentives for employers to hire women, whose work hours and pay were regulated while men's were not. Matthews also worked to reform inheritance and citizenship laws to eliminate gender bias and sought equal treatment for women in laws regarding pay and the bringing of lawsuits.<sup>107</sup>

In addition to her work on behalf of the Party, Matthews formed a law practice with two women, Laura Berrien and Rebekah Greathouse, who were Party activists.<sup>108</sup> Matthews practiced primarily in the area of property law.<sup>109</sup> As Justice Ginsburg tells it:

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104. See, e.g., Burnita Shelton Matthews, Speech Regarding Equal Rights Amendment, Address at the General Federation of Women's Clubs (May 1934) (on file with the Federal Judicial Center's History Office); Burnita Shelton Matthews, *Women Should Have Equal Rights with Men: A Reply*, 12 A.B.A. J. 117 (1926) (on file with the Federal Judicial Center's History Office) (arguing in favor of Equal Rights Amendment to U.S. Constitution that would require all protections in labor legislation to be gender neutral).

105. See Bill Brinkley, *Never Underestimate the Power of a Feminist, Judge Proves*, WASH. POST, Nov. 7, 1949, at B1 (reviewing accomplishments and trials of Burnita Matthews's life); Interview with Judge Burnita Shelton Matthews of the U.S. District Court for the District of Columbia, in COURT HISTORIAN 1 (June 1994) (on file with the Federal Judicial Center's History Office).

106. 368 U.S. 57 (1961) (holding that statute allowing but not requiring women to serve on jury is constitutional).

107. See Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL'Y 1, 9 (2001). Justice Ginsburg noted:

She framed a 1935 statute revising the District of Columbia law on descent and distribution to eliminate preferences for males. She had a hand in writing laws for Maryland and New Jersey that gained for women teachers pay equal to that received by their male colleagues. Matthews also assisted in changing South Carolina's law so that married women could sue and be sued without their husbands' permission. And she helped to achieve 1931 and 1934 federal nationality law changes that, in large but not total measure, evened out citizenship rights for women and men.

*Id.*

108. See Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 667 n.313 (1998) (noting that later in life Matthews was appointed as Washington College of Law instructor).

109. See J.Y. Smith, *Burnita S. Matthews, 93, Dies; First Woman Federal Trial Judge*, WASH. POST, Apr. 27, 1988, at B6 (noting that while much of her work involved real estate transactions, she earned reputation as women's rights advocate).

The local (D.C.) bar knew Burnita Matthews less for her feminist activities than for her expertise in the field of eminent domain. When the federal government condemned the headquarters building of the National Woman's Party near the Capitol, Matthews' . . . representation led to the largest condemnation award the United States had yet paid.<sup>110</sup>

The condemnation at issue was to pave the way for the new Supreme Court building.<sup>111</sup>

Despite having been refused admission to the D.C. Bar Association, Matthews was a leader of the District's legal profession. In addition to teaching evidence from 1942 to 1948 at the Washington College of Law,<sup>112</sup> Matthews was president of the Women's Bar Association of the District of Columbia<sup>113</sup> and of the National Association of Women Lawyers (NAWL).<sup>114</sup> In response to criticism that NAWL was duplicative of the ABA once the ABA began admitting women in 1918, Matthews "argued that the ABA and other sexually integrated bar associations rarely gave women committee appointments or leadership positions."<sup>115</sup> Indeed, this denial of access to leadership opportunities has impeded women in the federal judiciary since the time of their first appointments.<sup>116</sup>

In 1949, Truman appointed Matthews, age fifty-three, to a newly created seat on the U.S. District Court for the District of Columbia. Matthews thus became the second woman confirmed to a federal court of general jurisdiction and the first woman to serve at the district court level. At the time of Matthews's appointment, twenty-seven new judgeships had been created by Congress, including three on the District of Columbia district court, over which the president had substantial leeway, given the absence of a home-state senator.

India Edwards, head of the Women's Division of the Democratic National Committee, vigorously lobbied Truman to appoint Matthews to one

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110. Ginsburg, *supra* note 107, at 9 (noting that National Woman's Party is now housed on Constitution Avenue in historic Sewell-Belmont House).

111. *See id.*

112. The Washington College of Law was led by women deans for much of the time that Matthews taught there. *See* Clark, *supra* note 108, at 674 (stating that Washington College of Law was led by women deans and women faculty and attended by a majority female student body).

113. Matthews was president from 1925-26, shortly after the WBA's 1917 founding.

114. Matthews led NAWL from 1934-35. *See* Burnita Shelton Matthews, Biographical Questionnaire of the Bicentennial Committee of the Judicial Conference of the United States 9 (on file with the Federal Judicial Center's History Office).

115. Virginia O. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth Century America*, 28 *IND. L. REV.* 227, 248 (1995) (noting that Matthews made this statement while serving as president of NAWL).

116. *See* note 333 and accompanying text; *see also* text accompanying note 151.

of these newly created seats.<sup>117</sup> In an October 1949 letter to Truman, Edwards wrote, “[I] beg[ ] that one woman be included in the twenty-seven new judges whom you will nominate soon. . . . I do feel that there will be a bad reaction to the naming of so many new judges and not one woman among them.”<sup>118</sup> According to the *Washington Post*, Edwards warned Truman, “‘If among the twenty-seven new judges there is not one woman included, then I think every law school should close its doors to women.’”<sup>119</sup> With particular regard to Matthews, Edwards wrote, “‘If there is any chance that Mrs. Matthews could be included in your list of nominations for the U.S. District Court for the District of Columbia, I am sure she would do credit to you, to our party, and to my sex.’”<sup>120</sup>

Matthews’s appointment, like Allen’s before her, was thus made possible by the advocacy of influential women and women’s groups.<sup>121</sup> Just as

117. See GOLDMAN, *supra* note 3, at 90, 97 (discussing how Truman appointed Matthews to bench). India Edwards began working for the Democratic Party as a volunteer in the 1940s. She rose to become vice chairman of the Democratic National Committee (DNC) in 1950. With regard to Edwards’s influence with Truman, the *Washington Post* reported:

In 1949, an impassioned letter from Mrs. Edwards to President Truman was instrumental in winning the appointment of the first woman to sit as a judge on a U.S. District Court. Mrs. Edwards was also known for obtaining ambassadorships and other top posts for women, for mobilizing women behind the Democratic Party and for sensitizing the party to women’s concerns.

Martin Weil, *India Edwards, Pioneering Woman in Democratic Party, Dies at 94*, WASH. POST, Jan. 16, 1990, at B5.

Harrison recounts Edwards’s method in lobbying for women’s appointments, judicial and otherwise, as follows:

As the head of the Women’s Division, Edwards devised a procedure for getting women into appointment slots that served as a model for her successors. First, she scouted among Democratic women’s organizations for names of women able to hold government jobs and checked their qualifications; then she found jobs that they could fill. Before going to the president, she got the necessary clearances from party officials, senators from the nominee’s state, and executive officers. After Truman made the nomination and the Senate approved it, Edwards fulfilled her share of the bargain by making sure the appointment got plenty of publicity. Women journalists, who always believed that women appointees made good copy, were willing collaborators.

HARRISON, *supra* note 59, at 55-56 (“In urging Truman to accept women appointees, Edwards emphasized the political consequences of ignoring women voters.”).

At the Democratic Party convention in 1952, Edwards became the first woman nominated for the vice presidency. Edwards promptly refused the nomination, declaring that men were not yet ready for a woman in this role. See Weil, *supra*, at B5 (noting that Edwards once stated, “[M]en don’t want women messing around in politics.”).

118. GOLDMAN, *supra* note 3, at 97 (quoting Edwards’s letter to Truman).

119. Weil, *supra* note 117, at B5.

120. GOLDMAN, *supra* note 3, at 97 (quoting Edwards’s letter to Truman).

121. See, e.g., Robert Riggs, *Women Crusaders Build Fire Around White House*, LOUISVILLE COURIER-J., July 23, 1949, at S6.

The campaign to have the appointment go to a voteless resident of the District of Columbia, rather than to a deserving Democrat, has been or-

Roosevelt's nomination of Allen came in response to lobbying by Dewson, the head of the Democratic National Committee's Women's Division, Truman's nomination of Matthews was made principally in response to lobbying by Edwards, Dewson's successor.<sup>122</sup> According to the U.S. attorney general involved in Matthews's appointment, "The pressures were so great that we felt we had to go along."<sup>123</sup> Despite making history with Matthews's nomination, when asked by a reporter whether any of his candidates to fill the twenty-seven new judgeships were "interesting ones that might make better news," Truman replied only, "No. You have them all."<sup>124</sup>

With Matthews's nomination pending in the Senate, Judge T. Alan Goldsborough of the U.S. District Court for the District of Columbia, one

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ganized by Mrs. Ann Dodge Goodbee, an energetic 39-year-old Washington lawyer who comes from Louisiana. To further her cause, Mrs. Goodbee has been traveling around the country, getting endorsements from women's organizations. She has bagged endorsements from the Federation of Women's Clubs in Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, South Dakota, Tennessee, West Virginia, as well as from a long list of business and professional women's organizations. Mrs. Goodbee has fairly well created the impression among politicians that failure to appoint Mrs. Matthews will be considered a personal affront by millions of women voters who would, in their anger, punish the entire Democratic Congressional ticket in 1950 unless they get this appointment.

*Id.*

Women's appointments to high-level positions were something politically active women could agree on:

Women's organizations, despite their disputes over other matters, agreed unanimously on the desirability of increasing the number of women in higher government positions. Women in public office, women leaders argued, would represent women's interests, show that deserving women could attain opportunities commensurate with their abilities, offer examples to other employers that women performed admirably in responsible jobs, and make available to the nation the wisdom that educated and talented women possessed.

HARRISON, *supra* note 59, at 53.

122. Edwards's insistence that a woman be appointed to a judgeship was far ahead of public sentiment at the time:

The matter of women appointments did not concern the general public, however. Truman's appointments came in response to the requests of Edwards and other women lobbyists. Only a handful of letters arrived at the White House from outside Washington, and public opinion polls showed that the electorate did not want the President to turn over more power to women in government.

HARRISON, *supra* note 59, at 56-58.

123. Alexander Solomon, *Burnita S. Matthews*, at 24 (2001), at <http://www.stanford.edu/group/WLHP/papers/matthews.burnita.2001.pdf> (quoting Elise Morrow & Sylvia Brooks, *The Lady Who Told Off the President*, SAT. EVENING POST, July 6, 1951).

124. President Harry Truman, *Two Hundred and Tenth News Conference at the White House* (Jan. 5, 1950), at <http://www.trumanlibrary.org/publicpapers/viewpapers.php?pid=574> (introducing Truman's twenty-seven new candidates for judgeship).



of Matthews's future colleagues, publicly stated that, while "Mrs. Matthews would be a good judge," there was "just one thing wrong: she's a woman."<sup>125</sup> Matthews's *New York Times* obituary reported similar treatment at the hands of other colleagues: "She received an icy welcome from her fellow judges, who agreed among themselves to assign her all the 'long motions,' the most technical and least rewarding part of the court's docket."<sup>126</sup>

Once on the bench, Matthews "curtailed her public activities in promotion of the Equal Rights Amendment,"<sup>127</sup> citing the inappropriateness of explicit political activity by a sitting judge. At the same time, she hired only female law clerks "in order to show [her] confidence in women," at a time when most judges did not hire women clerks.<sup>128</sup> Matthews's hiring of female clerks exclusively was consistent with her definition of a "good feminist" as one who "is loyal to women as women."<sup>129</sup>

Matthews was an able jurist. Her *Washington Post* obituary noted that she "carried a heavy caseload and while doing so earned a reputation for having fewer of her rulings reversed on appeal than any of her colleagues."<sup>130</sup> Her most notable case was the 1957 bribery trial and acquittal of Jimmy Hoffa, then Teamsters Vice President.<sup>131</sup> In 1968, Matthews assumed senior status, continuing to hear cases until 1983 on both the District Court for the District of Columbia and, by designation, on the U.S. Court of Appeals for the District of Columbia Circuit, making her the first woman to serve on that court. Matthews died in 1988 at the age of 93.<sup>132</sup> The *New York Times* obituary reported, "Judge Matthews retained a strong sense of her own role as a pioneer, and never wavered in her commitment to expanding opportunities for women."<sup>133</sup>

### C. Sarah Tilghman Hughes (active federal judicial service: 1962-75)

Sarah Tilghman Hughes was originally named to a newly created seat on the U.S. District Court for the Northern District of Texas by President

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125. Greenhouse, *supra* note 97, at D27 (recounting public opposition to Matthews's nomination).

126. *Id.* (discussing reaction to Matthews's judgeship).

127. Oral History of Matthews, *supra* note 95, at 4.

128. Clark, *supra* note 108, at 667 n.313 (noting that while Matthews was student at National, she did not tell her fellow students that she participated in woman suffrage pickets of White House).

129. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 75 (1987) (quoting Matthews).

130. Smith, *supra* note 109, at B6 (noting Matthews's accomplishments during years as federal judge).

131. *See id.* (discussing noteworthy cases over which Matthews presided during her tenure).

132. *See* Greenhouse, *supra* note 97, at D27 (noting that Matthews never retired, as her senior status allowed her to reduce her workload during her later years on bench).

133. *Id.* (remarking on Matthews's philosophy in hiring only women to be her law clerks).

John F. Kennedy in September 1961. The Senate having adjourned without taking action on Hughes's appointment, Kennedy re-nominated Hughes to the same seat in January 1962, to which she was confirmed two months later.

Born in Baltimore in 1896,<sup>134</sup> Hughes taught science at Salem College in North Carolina following her 1917 graduation from Goucher College.<sup>135</sup> After two years of teaching, Hughes enrolled at National University Law School, graduating in 1922, two years after Matthews.<sup>136</sup> Hughes worked as a police officer with the D.C. Police Department's Women's Bureau throughout her years in law school.<sup>137</sup>

Upon graduating, Hughes moved to Dallas, where she sought employment with a number of law firms and was refused by all.<sup>138</sup> Eventually settling into private practice there for twelve years, Hughes also ran for the Texas House of Representatives and was elected twice, in 1931 and 1933. As a state representative, Hughes worked on legislation guaranteeing women's equal rights to jury service. Then, in 1935, the Texas Governor, James Allred, named Hughes to a two-year term on the Fourteenth District Court of Dallas County.<sup>139</sup> "According to Hughes, she had gone to see the governor, a political ally of hers, to support someone else for judge. After talking to her, Allred decided to ignore her advice and appoint her to the bench."<sup>140</sup> Thereafter, Hughes was elected to seven four-year terms on the Fourteenth District Court, serving as a state trial judge until her appointment to the federal district court.

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134. See *Hughes, Sarah Tilghman*, in *WHO'S WHO OF AMERICAN WOMEN* 392 (11th ed. 1979) (providing biography).

135. See History of the Federal Judiciary, Sarah T. Hughes, available at <http://www.fjc.gov> (last visited Mar. 30, 2004); see also Barbara Bader Aldave, *Women in the Law in Texas: The Stories of Three Pioneers*, 25 ST. MARY'S L.J. 289, 293 (1993) (noting Hughes's graduation from college with degree in biology and subsequent science teaching experience).

136. See Aldave, *supra* note 135, at 293 (chronicling Hughes's early legal career). Whether Hughes and Matthews knew one another at National is not known, although one imagines that they did as they were two of only a handful of women on campus. Hughes's husband also graduated from National's law school in 1922. See *id.* (discussing Hughes's marriage to her law school classmate). The Hughes family did not have any children. See Sarah Hughes, Biographical Questionnaire of the Bicentennial Committee of the Judicial Conference of the United States 15 (on file with the Federal Judicial Center's History Office) [hereinafter Hughes, Biographical Questionnaire]; see also Burt A. Folkart, *Fateful Flight from Dallas: Sarah T. Hughes, The Judge Who Swore In Johnson, Dies*, L.A. TIMES, Apr. 25, 1985, at A3 (noting her husband's death and lack of surviving children).

137. See *Hughes, Sarah Tilghman*, *supra* note 134, at 392 (commenting on Hughes's employment while attending law school).

138. See Folkart, *supra* note 136, at A3 (noting that Hughes offered her legal services to every Dallas law firm).

139. See Aldave, *supra* note 135, at 292 (noting departure from unwritten Texas rule that only men could serve in state's judiciary).

140. Judge Mark Davidson & Kent Rutter, *The Making of a Justice: The 1958 Joe Greenhill/Sarah T. Hughes Race for the Supreme Court*, 63 TEX. B.J. 961, 962 (2000) (discussing Hughes's appointment to federal bench).

Hughes ran unsuccessfully for Congress in 1946 and for the Texas Supreme Court in 1958, making her the first woman to run for the Texas high court.<sup>141</sup> In a July 1950 interview with the *Christian Science Monitor*, “Hughes urged women to ‘attach themselves to the party of their choice, go into precinct meetings, and run for office.’ This she considered a moral obligation because of the difficulty of finding qualified women willing to be candidates.”<sup>142</sup> Nevertheless, when Hughes was nominated for the vice presidency on the Democratic ticket in 1952, she withdrew her name before a vote was taken, and the nomination instead went to Senator John A. Sparkman of Alabama.<sup>143</sup>

In addition to her partisan political activity, Hughes was active in a number of women’s professional and voluntary associations. From 1931 to 1984, she was involved with the Federation of Business and Professional Women’s Clubs (BPW) at the city, state, national and international levels, serving as president of the National Federation from 1950 to 1952, and as vice president of the International Federation from 1953 to 1959. Among other things, the BPW pressed for women’s appointments to judicial and executive branch positions, which surely helped Hughes win her federal judgeship. Hughes was likewise active with the NAWL and the American Association of University Women (AAUW), serving as national chair of the AAUW’s Committee on the Status of Women from 1940 to 1946.<sup>144</sup>

Hughes likely came to Kennedy’s attention as a potential judicial candidate through her role as Dallas County chair of the 1960 Kennedy-Johnson campaign.<sup>145</sup> Hughes’s appointment also benefited substantially from her acquaintance with Vice President Johnson, whom she had known through Texas politics for more than two decades.

The ABA’s Standing Committee on Federal Judiciary rated Hughes not qualified by reason of age. In the Senate Judiciary Committee hearing on Hughes’s nomination, the chairman, Senator Edward Long of Missouri, observed, “[T]he nominee looks more like 45 than 65 in his opinion. I do not want to prejudge the action of this subcommittee, but the views of the ABA do not impress the present occupant of the Chair the

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141. See Hughes, Biographical Questionnaire, *supra* note 136, at 10 (noting that Hughes lost Texas high court race by small margin).

142. CURRENT BIOGRAPHY: WHO’S WHO AND WHY 268-69 (Ann Rothe, ed., 11th ed. 1951).

143. See William E. Farrell, *Women on the Ticket*, N.Y. TIMES, July 11, 1984, at A18 (reporting that Hughes, as well as India Edwards, long-time chair of DNC’s Women’s Division, “were placed in nomination for the second spot on the Democratic ticket in 1952”). That year, 1952, was the same year that Eisenhower was first elected to the presidency.

144. See Hughes, *Sarah Tilghman*, *supra* note 134, at 392 (providing synopsis of Hughes’s life and accomplishments); see also Hughes, Biographical Questionnaire, *supra* note 136, at 9.

145. See Folkart, *supra* note 136, at A3 (noting Hughes also assisted Johnson in his 1948 race for Senate).

least bit.”<sup>146</sup> Testifying on behalf of Hughes’s appointment, Senator Ralph Yarborough, the senior senator from Texas, asserted that the ABA must have misunderstood the relevant statute on federal judicial retirement—that the statute did not mandate sixty-five as the retirement age, but rather conferred full-pay retirement benefits beginning at sixty-five to judges with substantial years in service.<sup>147</sup> Aubrey Gasque, Director of the Administrative Office of the U.S. Courts,<sup>148</sup> concurred with Yarborough’s interpretation.<sup>149</sup>

Also testifying at Hughes’s confirmation hearing was Vice President Johnson:

[I]t is a great privilege for me, and a high honor to come here today to testify to the qualifications, the patriotism, the character and the outstanding ability of Judge Hughes and the other judges that are under consideration. . . . I have known Judge Hughes all the time that I have been in public life. I have never known a more competent public servant, a more humane public servant, or one possessed with more wisdom or more judiciousness in the discharge of her duties. It is with a great deal of pleasure that I join with the senior senator from Texas [Yarborough] in urging her appointment to the bench.<sup>150</sup>

Directly addressing the issue of the ABA’s “unqualified by reason of age” rating, Johnson stated:

I fully share the Chairman’s views concerning the recommendation made by the Bar Association. . . . Judge Hughes is a very young lady in my book. She will make one of the great judges of our time. I would hope that the committee would confirm her unanimously and that the Senate would follow that example.<sup>151</sup>

With Johnson’s and other high-level support, Hughes was confirmed.

Once on the bench, Hughes presided over a constitutional challenge to the conditions of confinement at the Dallas County jail, declaring them

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146. *Nomination of Sarah T. Hughes to Be United States District Judge for the Northern District of Texas: Hearing Before the Subcomm. of the S. Comm. on the Judiciary*, 88th Cong. 2 (1962) [hereinafter *Nomination of Sarah T. Hughes*] (statement of Sen. Edward Long, Chairman, S. Comm. on the Judiciary).

147. *See id.* at 6-8 (statement of Sen. Ralph W. Yarborough) (commenting also that it was “grave mistake” to place “emphasis on age rather than qualifications of the person, upon mere number of years passed in life, rather than on mental alertness [or] physical health”).

148. One of the functions of the Administrative Office of the U.S. Courts is to administer judges’ pay and benefits.

149. *See Nomination of Sarah T. Hughes, supra* note 146, at 15 (statement of Aubrey Gasque, Dir. Admin. Office, U.S. Courts) (agreeing with view expressed by Senator Yarborough regarding age requirements for federal judges).

150. *Id.* at 4 (statement of Vice President Lyndon B. Johnson).

151. *Id.* (statement of Vice President Lyndon B. Johnson).

overcrowded and unsanitary. Hughes ordered the construction of a new prison facility.<sup>152</sup> Hughes also heard a number of race discrimination cases, including *Hawkins v. Coleman*,<sup>153</sup> alleging racial bias in the Dallas Independent School District. Hughes found a pattern of discrimination in the disproportionate frequency of corporal punishment and suspension against blacks in *Hawkins*. As for sex discrimination, Hughes held that the male orderly and female aide jobs at issue in *Schultz v. Brookhaven General Hospital*<sup>154</sup> required essentially the same skills and were performed under similar working conditions, thereby invoking the equal pay provisions of the Fair Labor Standards Act. Moreover, Hughes served on the three-judge panel that considered the constitutional challenge to Texas abortion prohibition in *Roe v. Wade*.<sup>155</sup>

Hughes is probably best known for having administered the presidential oath of office to Johnson following Kennedy's assassination in Dallas on November 22, 1963. Johnson's swearing-in ceremony was held aboard Air Force One as it sat on the runway of Love Field in Dallas, and Hughes was called in to officiate. Hughes is the only woman in American history to administer the oath of office to a president. Hughes took senior status in 1975 and died in 1985.<sup>156</sup>

#### D. *Constance Baker Motley* (active federal judicial service: 1966-86)

Constance Baker Motley became the first African American woman appointed to the federal bench when she was named to the U.S. District Court for the Southern District of New York by Johnson in 1966. Born in New Haven, Connecticut in 1921,<sup>157</sup> Motley received her B.A. from New York University in 1943.<sup>158</sup> As a third-year student at Columbia University

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152. See Nita Thurman, *Sarah T. Hughes to Be Honored*, DALLAS MORNING NEWS, Sept. 5, 1996, at 25A (noting just one of many cases over which Hughes presided that altered social and political fabric of City of Dallas during turbulent period of late 1960s and 1970s).

153. 376 F. Supp. 1330 (N.D. Tex. 1974) (finding that statistically significant disparities in suspension rates between African American and Caucasian students were sufficient to show racially discriminatory school disciplinary policies).

154. 305 F. Supp. 424 (N.D. Tex. 1969) (ruling that disparities between payment of male orderlies and female hospital aides constituted sex-based wage discrimination).

155. 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd in part and rev'd in part*, 410 U.S. 113 (1973) (holding that woman's right to choose whether to have children was fundamental right protected by Ninth and Fourteenth Amendments of U.S. Constitution).

156. See Folkart, *supra* note 136, at A3 (remarking on Hughes's career as both state and federal judge).

157. See *This Week in Black History*, JET, Jan. 27, 1992, at 46 (noting that Motley was appointed federal judge on January 25, 1966).

158. See LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH 136 (1994) (discussing Motley's educational background).

Law School in 1945-46, Motley worked as a law clerk at the NAACP Legal Defense and Education Fund (NAACP LDF) in New York.<sup>159</sup>

After graduating from Columbia, Motley stayed on as an attorney with the NAACP LDF through 1965, when she was elected Manhattan Borough President.<sup>160</sup> While at the NAACP LDF, Motley worked with Thurgood Marshall on *Brown v. Board of Education*<sup>161</sup> and other landmark litigation, including the lawsuits that resulted in the integration of the Universities of Alabama, Georgia and Mississippi, among others. In addition to her work on school desegregation, Motley litigated cases concerning race discrimination in "housing, transportation, recreation and public accommodations."<sup>162</sup> Motley argued ten cases in the U.S. Supreme Court, winning nine of them.<sup>163</sup> She also appeared regularly in the courts of appeal, including "one particularly busy day in 1962 when [she] argued four cases on appeal in the Fifth Circuit,"<sup>164</sup> then encompassing much of the Deep South.

In 1964, Motley became the first African American female elected to the New York State Senate. The following year, she was elected Manhattan Borough President, the first African American and the first female to assume this office.<sup>165</sup> In a speech on African Americans and political leadership, Motley addressed the question of women's political participation as follows:

The trend of greater participation by women in national political life, as voters and as representatives, will tend gradually to raise the quality level of candidates. Surveys have shown that women are inclined to be more concerned with ethics, community projects, good schools and furthering general welfare, which con-

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159. See CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER THE LAW: AN AUTOBIOGRAPHY* 58 (1998) (discussing Motley's work experience during law school).

160. See *id.* at 206 (chronicling Motley's rise to public office). Motley married soon after graduating from Columbia and had one child, a son, in 1952. See *id.* at 208 (noting birth of Motley's son).

161. 347 U.S. 483 (1954) (abandoning doctrine of "separate but equal" in public education).

162. William E. Hellerstein, *Foreword: Judge Constance Baker Motley*, 62 *BROOK. L. REV.* 529, 530 (1996) (discussing Motley's accomplishments as civil rights litigator).

163. See WASHINGTON, *supra* note 158, at 139 (recounting Motley's accomplishments as Supreme Court advocate).

164. *Id.* (discussing Motley's extensive trial experience). Motley summarized her experience as a civil rights attorney at the NAACP LDF as follows:

I used to work for Thurgood Marshall at the NAACP Legal Defense Fund. I had tried a number of major civil rights cases for the Defense Fund. I represented James Meredith in his long fight to enter the University of Mississippi. I argued ten cases before the U.S. Supreme Court and won nine of them.

*Id.* at 128.

165. See *This Week in Black History*, *supra* note 157, at 46 (noting that Motley was elected by unanimous vote of city council).

cern is reflected in their voting habits. Women representatives, likewise, reflect in the conduct of their political careers a deep interest in, and dedication to, the higher aspects of public service. This is probably due, in part, to the fact that women still must prove themselves professionally in competition with men in an atmosphere of considerable prejudice against their sex. But it must also be due to the natural and valuable tendency of women to desire passionately a world without war and a society without chaos.<sup>166</sup>

Motley's ideas about women's impact on politics, especially with regard to women being held to a higher standard, resonate strongly with those of Allen before her and Hufstедler to follow.

Shortly after election as Borough President, Motley was named to the U.S. District Court for the Southern District of New York by President Johnson.<sup>167</sup> The *New York Times* reported her nomination as front-page news.<sup>168</sup> Senator James O. Eastland, long-time chair of the Senate Judiciary Committee and senior senator from Mississippi, stalled Motley's nomination for seven months.<sup>169</sup> As part of his effort to derail her candidacy, Eastland claimed that Motley had been active in the Young Communist League.<sup>170</sup> Motley believed the opposition to her appointment to be motivated by both gender and racial bias: "There was tremendous opposition to my appointment, not only from southern senators, but from other federal judges. Some of this opposition was racial, but some of it had to do with my being a woman."<sup>171</sup>

Having been rated "qualified" by the ABA, Motley was confirmed by the Senate in August 1966. Motley credited her selection by Johnson to her work as an attorney in the civil rights movement, and not to her gen-

166. Constance Baker Motley, *Speech on Political Leadership of African Americans* 7 (1964) (transcript available from the Sophia Smith Collection at the Neilson Library of Smith College, Massachusetts).

167. See Constance Baker Motley, *My Personal Debt to Thurgood Marshall*, 101 *YALE L.J.* 19, 23 (1991) (providing synopsis of Motley's nomination and confirmation hearings). According to Motley, "Johnson had initially submitted my name for a seat on the Court of Appeals for the Second Circuit, but the opposition to my appointment was so great, apparently because I was a woman, that Johnson had to withdraw my name." *Id.*

168. See *Mrs. Motley Is Chosen for a Federal Judgeship Here: Court Post Due for Mrs. Motley*, *N.Y. TIMES*, Jan. 26, 1966, at A1 [hereinafter *Mrs. Motley Is Chosen*] (reporting Motley's appointment by President Johnson).

169. See *WASHINGTON*, *supra* note 158, at 128 (describing Senate-led opposition to women and African American nominees).

170. See *Mrs. Motley Wins Senate Approval: Confirmed as U.S. Judge—Eastland Charges Red Link*, *N.Y. TIMES*, Aug. 31, 1966, at 33 (reporting that Eastland's accusations of Motley's participation in Young Communist League were challenged by bipartisan supporters).

171. *WASHINGTON*, *supra* note 158, at 128.

der.<sup>172</sup> When she met with Johnson on the day of her appointment, “[H]e told me he had called every civil rights leader in the country and every one of them was backing my appointment 100 percent.”<sup>173</sup> In light of that, she concluded, “The power of Black voters and the strength of the civil rights lobby helped me win confirmation.”<sup>174</sup> Johnson told Motley that Ramsey Clark, Johnson’s attorney general and son of Supreme Court Justice Tom Clark, “was the first person to bring [Motley] to his attention. He said that Clark was in the Supreme Court one day when [Motley] argued a case. After the argument Clark went directly to the White House and urged Johnson to appoint [Motley] to the bench.”<sup>175</sup>

Motley’s selection by Johnson was also furthered by her active participation in New York politics, including her acquaintance with New York’s junior senator, Robert F. Kennedy. A contemporary news account of Motley’s nomination quoted Kennedy as stating, “Her legal background . . . combined with her outstanding public service in various elective offices in New York State, provides every assurance that her service on the bench will be outstanding.”<sup>176</sup> In the end, however, Motley recognized, “being appointed to the federal judiciary is a matter of sheer, unadulterated luck. You have to be in the right place at the right time.”<sup>177</sup>

Motley received mixed treatment from colleagues and litigants as an African American woman judge. She recalled several of these snubs as follows:

When I was introduced as a new judge at a Second Circuit Judicial Conference, the master of ceremonies said, “And now I want to introduce Connie Motley who is doing such a good job on the District Court.” In contrast, everyone else was introduced with a full blown curriculum vitae. Similarly, in 1968 when I was introduced by the chairman of the Seminar for New Federal Judges, my introduction went as follows: “Judge Motley has served on the Board of United Church Women and the Board of Trustees of the Y.W.C.A.” Former Supreme Court Justice Tom Clark, who

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172. See *id.* (emphasizing her civil rights work and lack of female lawyers on federal bench). Motley summarized her selection as follows:

In 1966, as a result of my work in the civil rights field, I was appointed to the United States District Court for the Southern District of New York by President Johnson. I was the first woman and the first Black to be appointed to the District Court for the Southern District of New York. I was also the first Black woman ever appointed to the federal judiciary anywhere in the nation.

*Id.* In her autobiography, Motley observes that her district court appointment was due to her “accomplishments as a civil rights lawyer,” and not “because [she] was a woman.” MOTLEY, *supra* note 159, at 226.

173. WASHINGTON, *supra* note 158, at 129.

174. *Id.*

175. Motley, *supra* note 167, at 23.

176. *Mrs. Motley Is Chosen*, *supra* note 168, at A1.

177. WASHINGTON, *supra* note 158, at 132.



was helping chair the meeting, was so astounded by this introduction that he asked the master of ceremonies to let him have the microphone. Clark then told the assembled new judges about the ten cases I had argued before him when he was still on the bench.<sup>178</sup>

In addition to being slighted in introductions, Motley was subjected to insensitive treatment by her colleagues, as when the Second Circuit held its annual meeting at the Century Club in Manhattan, from which women were excluded above the first floor. Years later, Motley learned that the only way she was able to join her colleagues upstairs was because they misled the club staff into believing she was their secretary.<sup>179</sup>

Motley was confronted with periodic motions seeking her recusal, particularly in employment discrimination cases, on the grounds that Motley, as an African American female, could not hear the matter in an unbiased manner. In ruling on one such motion, Motley declared:

It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination. I am a woman, and before being elevated to the bench, was a woman lawyer. These obvious facts, however, clearly do not, ipso facto, indicate or even suggest the personal bias or prejudice required by [the relevant provision]. The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, therefore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal.<sup>180</sup>

"Indeed," as Motley concluded, "if background or sex or race of each judge were . . . sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds."<sup>181</sup>

Motley supported the appointment of more women and minorities to the bench on the ground that their participation instilled greater public confidence in the judiciary:

There is a need for more women and more minorities in the federal judiciary, but not because I think they bring something totally different to the bench than white men. I don't think women and minorities have a particular view on contract law that's totally

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178. Motley, *supra* note 167, at 24.

179. See WASHINGTON, *supra* note 158, at 142 (describing one of many instances in which Motley experienced discrimination while serving as federal judge).

180. Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

181. *Id.*

different from white men. Rather, I believe that having more women and minorities in the federal judiciary—and the federal courts are a major part of the national government—builds confidence in the government. It makes people feel that the government is fair, in that it includes people from all segments of the population. It says that the courts are fair, in that women, Blacks, Hispanics, Asians, and other minorities are included among the judges. It says that the court system is not an all-white male institution as it once was. When I first came on the bench, that could have been said of the federal judiciary.<sup>182</sup>

Elsewhere, Motley spoke of the importance of women's and minorities' appointments as signaling their talents to the general public: "As the first black and first woman, I am proving in everything I do that blacks and women are as capable as anyone."<sup>183</sup>

Motley served as chief judge of the Southern District of New York from 1982 to 1986, the first woman and African American to hold that position. During the 1982-83 term, Motley served by invitation on the Judicial Conference of the United States, only the second woman member of the Judicial Conference of the United States and the first to serve by invitation, as a district judge, rather than automatically, as a circuit judge. Motley assumed senior status in 1986. In a fitting tribute to the history of women on the federal bench, Motley received the New York Women's Bar Association's Florence Allen award for excellence in judicial service in 1995.

E. *June Lazenby Green* (active federal judicial service: 1968-84)

President Johnson named June Lazenby Green to fill Matthews's seat on the U.S. District Court for the District of Columbia when Matthews assumed senior status in 1968, thus perpetuating a "woman's" seat on that court. As with Matthews's appointment, there was no home-state senator. Accordingly, the President had greater flexibility to fill this vacancy, easing the appointment of a woman. Matthews administered the oath of office to Green, making her the first female federal judge, and the first federal judge overall, to be sworn in by another woman.<sup>184</sup>

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182. WASHINGTON, *supra* note 158, at 132.

183. National Women's Hall of Fame, *Women of the Hall: Constance Baker Motley*, at <http://www.greatwomen.org/women.php?action=viewone&id=111> (last visited Jan. 22, 2004).

184. See Bill Miller, *Saluting History That's Not Man-Made; At Ceremony, Pioneering Female Judges Recall Firsts*, WASH. POST, Mar. 26, 1998, at J1 (highlighting relationship between Matthews and Green as two of first women judges appointed to federal judiciary).

Born in Arnold, Maryland, in 1914,<sup>185</sup> Green had obtained her J.D. from the Washington College of Law in 1941.<sup>186</sup> According to her *Washington Post* obituary, Green became interested in the law as a career while helping her husband with his law studies at Georgetown University Law Center.<sup>187</sup> Upon graduating from law school, Green served as a claims adjuster and later as a claims attorney with Lumberman's Mutual Casualty, an insurance company in Washington. Thereafter, Green was in private practice in Washington and Annapolis, Maryland, from 1947 to 1968. She served as president of the Women's Bar Association of the District of Columbia from 1955 to 1957 and was named Woman Lawyer of the Year in 1965 by the same organization.

Appointed to the bench in 1968, Green took senior status in 1984. While on senior status, Green heard one of her most significant cases, *Women Prisoners of the D.C. Department of Corrections v. District of Columbia*,<sup>188</sup> a class action brought by female inmates alleging unconstitutional prison conditions and sexual harassment. Green ordered the city to work toward preventing sexual harassment of women prisoners and specified administrative and physical improvements to the facility. As one commentator has observed:

The Women Prisoners litigation represents a revolutionary step toward correcting the epidemic of rape and sexual misconduct within women's correctional facilities in the District of Columbia. District Judge Green's assessment of the situation and her response provide insight into possible policy recommendations to prevent future sexual violations in both women's and men's correctional facilities.<sup>189</sup>

Green continued to hear cases until her death in 2001.

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185. See Resumé of June Lazenby Green (undated) (on file with the Federal Judicial Center's History Office), available at <http://www.fjc.gov/servlet/tGetInfo?jid=910> (last visited Mar. 15, 2004) [hereinafter Green Resumé] (summarizing Green's background and legal career).

186. See *id.* (providing description of Green's education). Green did not attend college prior to enrolling in law school, a not uncommon practice of the period. The Washington College of Law, which soon thereafter merged with American University, had been founded by and for women and was led by a woman dean at the time of Green's enrollment.

187. See Bart Barnes, *Federal District Judge June Green Dies at 87*, WASH. POST, Feb. 3, 2001, at B1 (reviewing life and accomplishments of June Green). Green married in 1936 and did not have any children. See Green Resumé, *supra* note 185 (noting that Green did not have children).

188. See *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 968 F. Supp. 744 (D.D.C. 1997) (ordering variety of measures to prevent sexual harassment and improve health of prisoners).

189. Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 217-18 (1999) (discussing prevalence of rape and other sexual misconduct in prisons, inadequacy of deliberate indifference standard and possible solutions).

F. *Shirley Ann Mount Hufstedler* (active federal judicial service: 1968-79)

Shirley Ann Mount Hufstedler was nominated to the U.S. Court of Appeals for the Ninth Circuit by President Johnson in 1968, becoming only the second woman confirmed to a seat on the federal court of appeals, nine years after Allen's retirement from active service. Hufstedler's seat on the appeals court was created by the 1968 Omnibus Judgeship Act, which, as with Matthews and Hughes before her, gave the President greater leeway to fill a vacancy than would a vacancy caused by a sitting judge's retirement or death.

Born in Denver in 1925, Hufstedler obtained her B.A. from the University of New Mexico in 1945 and her LL.B. from Stanford Law School in 1949. In an oral history interview with the Federal Judicial Center's History Office in 1995, Hufstedler recalled her friends' surprise at her determination to pursue a legal career. She was not daunted by others' reactions to her plans, however:

There was sometimes a suggestion there must be something very odd about me. It was in the course of time when women didn't [attend law school]. The social dictates were very strong against that. So were the professional dictates. That never, ever bothered me, because I had been making my own market, finding my own jobs, finding my own way since I was thirteen years old, so that didn't daunt me in the least.<sup>190</sup>

Hufstedler attributed her interest in a legal career primarily to her desire to serve as a professional. She had first contemplated a career in the Foreign Service, but abandoned that idea when she "found out what happened to women in the Foreign Service—nothing."<sup>191</sup> Hufstedler "believed that the law would give me more choices for career development than any other available route. I had only a hazy idea about what lawyers actually did."<sup>192</sup>

Hufstedler was one of five women to enroll at Stanford Law School in 1946,<sup>193</sup> a number that dwindled to two by the end of her first

190. Oral History Interview with Shirley Ann Mount Hufstedler 5 (Mar. 10, 1995) (on file with the Federal Judicial Center's History Office) [hereinafter Oral History Interview with Hufstedler].

191. LYNN GILBERT & GAYLEN MOORE, PARTICULAR PASSIONS 192 (Gen. Publ'g Co. Ltd. 1981).

192. *Id.*

193. See Jeannette Smyth, *The Education of Shirley Mount Hufstedler: What's a Nice Judge Like You Doing in Baghdad-on-the-Potomac?*, WASH. POST, Jan. 27, 1980, at D1 (noting that Hufstedler's class at Stanford Law School contained notable collection of ambitious, well-connected achievers). According to this article:

The Stanford law school class of 1949, from which Shirley Mount graduated 10th, is known in California as "The Wonder Class." Many were veterans on the G.I. Bill, and they did not mess around. They still don't. . . . Warren M. Christopher, law review editor, went on to become California Gov. Edmund G. (Pat) Brown's aide, and is now the gimlet-eyed No. 2 man at the State Department. Fred Dutton, a poker-playing rogue then

year.<sup>194</sup> When asked what it was like to be one of two women students, Hufstedler responded, "It never occurred to me to be concerned about it. I knew I was entering a profession that was strictly gendered male. So I had no difference in expectations when that turned out to be what it was."<sup>195</sup> Hufstedler did not sense that any of her male law school colleagues regarded her as having taken a "man's place" in the class, but did note that "there would be a little fun made" at women's expense in certain courses.<sup>196</sup>

The only distinction was sometimes—which would be unacceptable today, I just took it as par for the course—in a criminal law class, a professor would have a tendency to call on the women with respect to the cases involving violence and sex. There would be a little fun made, but not mean, in tort classes, about what a reasonable woman would do. Things like that. But that was a reflection of the society. I didn't make it specific to the law school.<sup>197</sup>

According to Hufstedler, "That's the way it was."<sup>198</sup>

Upon graduating, Hufstedler married a fellow Stanford Law student. They had served on the *Stanford Law Review* together, where Hufstedler was the only woman.<sup>199</sup> Hufstedler was offered a clerkship on the California Supreme Court, but turned it down in order to join her husband who had accepted a position with a law firm in southern California.<sup>200</sup> Hufstedler looked for work as a litigator in private practice in Los Angeles, "which was about as popular a suggestion as Typhoid Mary being nominated for Dairy Queen. It was one of these things that just wasn't done.

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as now, was also an aide to Brown, was JFK's Capitol Hill connection in the State Department, a Bobby Kennedy insider. Ben Priest went on to become the equal among equal partners at Los Angeles' heavy-duty law firm, O'Melveny and Myers. Seth Hufstedler became a partner in Beardsley, Hufstedler. Beardsley was a friend of Earl Warren's. . . . The old boy network denies there is one, or that Shirley Mount Hufstedler would use it to run for the Supreme Court.

*Id.*

194. See GILBERT & MOORE, *supra* note 191, at 193 (discussing Stanford class of 1949).

195. Oral History Interview with Hufstedler, *supra* note 190, at 7.

196. *Id.* at 7-8.

197. *Id.* at 8.

198. *Id.*

199. See *id.* at 11 ("My husband and I were on the law review together, and eventually that led us to commit matrimony.").

200. See *id.* at 12 ("I had been offered a clerkship in the California Supreme Court, which I turned down because by the time I had graduated from law school, my husband and I had decided to get married. He was going to practice in Southern California, probably in the Los Angeles area, and I was not about to live in San Francisco for a clerkship while he was in Los Angeles. So I said good-bye to that job.").

Again I had to figure out how I was going to do what I wanted to do. And I did.”<sup>201</sup>

Finding no positions with Los Angeles law firms open to her, Hufstedler instead worked for one solo practitioner, followed by another. Reflecting on her career in her 1995 oral history interview, Hufstedler observed, “[E]very time I wanted to do something, I had to invent a way to do it because there was no path for me.”<sup>202</sup> Hufstedler explained her strategy as follows:

What I did all the time is I rendered unto Caesar and kept my head to myself. There was no use in trying to fight against a stone wall. What you do is you think about how you’re going to get around it, make up your mind how you’re going to do it, and then you go do it. That’s what I did.<sup>203</sup>

Following the birth of her only child, a son, Hufstedler practiced law from home for five years, handling complex litigation issues for some of the larger Los Angeles firms. At this time, Hufstedler was also president of the Women Lawyers Club of Los Angeles, which had been founded in 1912 by five women graduates of the University of Southern California Law School in response to women’s exclusion from Los Angeles’s official bar association.<sup>204</sup> Thereafter, Hufstedler became actively involved with the National Women’s Political Caucus and was a charter member of the National Organization for Women (NOW).<sup>205</sup> Hufstedler later resigned from NOW because it “had become so conspicuously political and litigation-oriented, that I couldn’t stay, not while on the bench.”<sup>206</sup>

In her last year in private practice, 1960, Hufstedler was retained by one of her former Stanford Law professors to serve as Special Legal Consultant to the California attorney general to work on a case involving water rights to the Colorado River, which was before the U.S. Supreme Court on original jurisdiction. Pat Brown and Stanley Mosk each served as California’s attorney general while Hufstedler was working on this case, and Hufstedler’s work with them proved instrumental to her subsequent judicial career:

Stanley Mosk had a great deal to say to Governor Pat Brown about various persons’ potential for appointment to the bench. Both men were thoroughly familiar with my work. Chuck Beardley, with whom I had been associated, had been a good friend of

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201. *Id.*

202. *Id.* at 14.

203. *Id.* at 16.

204. *See id.* at 18-19 (discussing Hufstedler’s involvement in California women’s associations).

205. *See id.* at 27 (noting Hufstedler’s membership in national legal associations for female attorneys).

206. *Id.* at 42.

Pat Brown's for many years. It was this combination of circumstances, personally knowing and having people know the quality of my work who turned out to be in positions of great significance in appointing powers that unquestionably influenced my appointment.<sup>207</sup>

In addition to her connections, Hufstedler attributed her first judicial appointment to her gender: "[Another] reason was that Pat was an astute politician. There were no women on the Los Angeles County Superior Court, and he realized there was a political plus in appointing a female to that court. Those things came together and I was appointed to the Superior Court."<sup>208</sup> Initially appointed in 1961, Hufstedler stood unopposed for re-election to the Los Angeles County Superior Court in 1962, serving through 1966, when she was named associate justice of the California Court of Appeals, Second District. Hufstedler remained on the California Court of Appeals until her 1968 appointment to the Ninth Circuit.

In addressing why President Johnson selected her for appointment to the federal appeals court, Hufstedler speculated that then first lady, Lady Bird Johnson, might have had some influence and that the budding women's movement was likewise instrumental.<sup>209</sup> Despite the importance of the women's movement to her selection, Hufstedler did not recall being contacted by any women's groups while under consideration for the Ninth Circuit.<sup>210</sup> The ABA rated Hufstedler "well qualified," the first woman to receive this rating.<sup>211</sup>

During Hufstedler's Senate confirmation hearing, Senator Thomas Kuchel of California read from his 1967 letter to the president then recommending Hufstedler for appointment to the U.S. Supreme Court:

On the Superior Court she gained the respect of her 120 colleagues for distinguished performance in the conduct of exceptionally complicated trials. They honored her first by selection as a Law and Motions Judge, second by elevation to their Court's Appellate Division, hearing appeals from the Municipal Courts. She wrote some ten thousand memorandum decisions plus a number of longer opinions in complex cases. . . . Los Angeles lawyers tell me that her superlative performance on the Superior Court has made her a "living legend." I have read some of her

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207. *Id.* at 17.

208. *Id.*

209. *See id.* at 23, 25 (speculating on impetus behind Hufstedler's nomination).

210. *See id.* at 27 (indicating lack of involvement by women's groups in nomination process).

211. *See Nomination of Shirley M. Hufstedler, of California, to Be United States Circuit Judge, Ninth Circuit, Vice a New Position Created Under Public Law 90-347, Approved June 18, 1968, 90th Cong. 2 (1968)* (statement of Sen. James Eastland) (indicating that majority of ABA members on Standing Committee on Federal Judiciary found Hufstedler to be "well-qualified" for appointment).

longer opinions. They show depth, lucidity, and power worthy of a Supreme Court opinion.<sup>212</sup>

While serving on the Ninth Circuit, Hufstедler "often found herself alone among her colleagues, many of them Nixon appointees who were not such firm advocates of protecting civil liberties. . . . 'I never felt uncomfortable about being the only woman judge on an all-male court. But philosophically, I felt alone many times.'"<sup>213</sup>

Hufstедler resigned from her seat on the federal appeals court in 1979 to serve as Secretary of Carter's new Department of Education. On her decision to accept the cabinet post, Hufstедler commented:

By taking a [c]abinet post . . . , I gained power to effect change, but I also traded the relative independence and security of a judge for a very different set of legal and political restraints. I can no more rewrite the federal role in education to advance women's rights than I could make up statutes [when I was] a judge.<sup>214</sup>

As Secretary, Hufstедler declared her intention to vigorously enforce Title IX, the statute guaranteeing equality of educational opportunity for girls and boys, men and women: "I intend to use every means at my disposal to ensure absolute compliance with the law, not because discrimination in college athletics is the most pressing problem facing women today, but because Title IX is the preeminent symbol of the Federal government's continuing commitment to women's rights."<sup>215</sup>

At the time of her cabinet appointment, Hufstедler was the leading woman candidate for nomination to the U.S. Supreme Court.<sup>216</sup> She received assurance from the White House that taking the Education Department post would not hamper her High Court prospects.<sup>217</sup> Carter did not see a Supreme Court vacancy in his single term, and thus it fell to his

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212. *Id.* at 4-5 (statement of Sen. Thomas H. Kuchnel).

213. Phyllis Theroux, *The Judge Goes to Washington*, N.Y. TIMES, June 8, 1980, § 6 (Magazine), at 41.

214. Shirley Mount Hufstедler, Address to the Los Angeles Women Lawyers and Women in Business 12 (July 7, 1980).

215. *Id.* at 13.

216. See, e.g., Theroux, *supra* note 213, § 6, at 41, 93 ("The next time there is a vacancy . . . , Shirley Hufstедler is the odds-on favorite to become the first woman appointed to the Supreme Court. 'She's the best qualified,' said Lloyd N. Cutler, counsel to the President, 'and I'd say that even if she were a white Anglo-Saxon male.'"); Smyth, *supra* note 193, at D6 (reporting that constitutional law professors voted her their first choice to fill a Supreme Court vacancy in survey conducted by *National Law Journal*).

217. Rex Granum, White House Deputy Press Secretary, told reporters that in deciding to accept the job, Hufstедler received assurance that it would not prevent her from being considered for the Supreme Court. See Edward Walsh, *Education Nominee Told Her Chances for Supreme Court Not Precluded*, WASH. POST, Oct. 31, 1979, at A3 (revealing White House commitment not to preclude Hufstедler from Supreme Court if she accepted offer to head Education Department).



successor, Ronald Reagan, to make history by appointing the first woman to the U.S. Supreme Court, Sandra Day O'Connor, in 1981.

Following the end of the Carter administration in 1981, Hufstedler returned to private practice in Los Angeles, joining the firm of Hufstedler & Kaus. She currently serves as senior counsel at Morrison and Foerster.<sup>218</sup> In 2000, Hufstedler was honored with the ABA Commission on Women in the Profession's Margaret Brent Women Lawyers of Achievement Award.<sup>219</sup>

In a recent interview with *Experience* journal, Hufstedler advised that for a woman to achieve her level of success, "You need to have stamina, drive, and emotional balance, and willingness to work twice as hard as others who are similarly situated, without the luxury of leisure."<sup>220</sup> In addressing what it takes to be a good judge in particular, Hufstedler cited intellectual capacity, faculty for judgment (both prompt and rational), "temperament, courtesy, and humanity."<sup>221</sup> She explained:

I am not saying that a fine jurist has to be a candidate for sainthood. The kind of person for which one searches for the bench is an individual who has a spacious mind: a person who has a quality of experience, a basic understanding of the law, an appreciation of the limitations and the possibilities of the law, a sense of discipline about adhering to the law whether the judge personally likes it or does not. A fine jurist has to be willing to work very hard. He or she must deal with the persons before them honestly, without fudging the facts and with courage to do what is right under the law no matter how generally unpopular the decision may be.<sup>222</sup>

According to Hufstedler, "Both men and women have these qualities," but:

Many women . . . have some distinct advantages. Because boys and girls in our society are differently socialized from the time they are very little, it is difficult for many men to use the intuition and the compassion with which they were born. Women, more than men, are likely to listen to what is not said, to observe and to appreciate the nuances of behavior. That talent has been both inbred and taught, because women for so many centuries have been dependent on the will and whims of others. Dependents must always be wary and observant because misinterpretation of

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218. See Shirley M. Hufstedler, *Profile of a Winner: Shirley M. Hufstedler—A Life of Achievement*, 11 *EXPERIENCE* 32, 33 (Fall 2000) (mentioning her return to private practice).

219. See *id.* at 32.

220. *Id.*

221. GILBERT & MOORE, *supra* note 191, at 195.

222. *Id.*

the intent and motives of the dominant persons can have grievous effect on them.<sup>223</sup>

As such, Hufstedler asserted the positive impact of gender difference on judicial behavior as one basis for women's appointment to the bench.

G. *Cornelia Kennedy* (active federal judicial service: 1970-99)

Cornelia Groefsema Kennedy was named to the U.S. District Court for the Eastern District of Michigan by Richard Nixon in 1970 and elevated to the U.S. Court of Appeals for the Sixth Circuit by Jimmy Carter in 1979. Born in Detroit in 1923, Kennedy received her B.A. and J.D. from the University of Michigan in 1945 and 1947, respectively. Kennedy served on the board of editors of the *Michigan Law Review*. Upon graduating from law school with high honors,<sup>224</sup> Kennedy served as a law clerk to Chief Judge Harold Stephens of the U.S. Court of Appeals for the District of Columbia Circuit.<sup>225</sup> Kennedy then became an associate in the Detroit law firm of her father, Elmer H. Groefsema, where she specialized in civil litigation. Upon her father's death in 1952, Kennedy became a partner in the Detroit firm of Markle & Markle, where she remained until 1966. Kennedy married in 1960 and had one child, a son, in 1962.<sup>226</sup> Kennedy was elected to the Third Judicial Circuit of the Michigan Circuit Court in 1966. She remained with this court until 1970, when she was named to the federal judiciary.

At Kennedy's first Senate confirmation hearing, Michigan Senator Philip Hart congratulated his home-state colleague, Senator Robert Griffin, "on having persuaded the President to send this name in."<sup>227</sup> Griffin replied:

If she is confirmed, and I am confident that the Committee and the Senate will see the wisdom of that action, she will be the first woman ever to sit on the federal bench in the state of Michigan. This will not be the only first in the distinguished career of Judge Kennedy. She is the first and only woman ever to serve on the Board of Directors of the Detroit Bar Association, which includes more than 3,000 members. She has been the chairman of the Negligence Law Section of the State Bar Association, the only woman ever to serve in that position; the only woman ever to serve as Chairman of the Wayne County Committee on Character and

223. *Id.* at 195-96.

224. See *Nomination of the Honorable Cornelia G. Kennedy, of Michigan, to Be U.S. District Judge, Eastern District of Michigan, Vice Thaddeus M. Machrowicz, Deceased*, 91st Cong. 3 (1970) [hereinafter *Cornelia G. Kennedy Nomination*].

225. This was the same Judge Stephens who was a supporter and family friend of Florence Allen. Cf. Judge Stephens Address, *supra* note 43.

226. See *Cornelia G. Kennedy*, in 2 ALMANAC OF THE FEDERAL JUDICIARY: 6TH CIRCUIT 8 (1997) (noting her child's name as Charles).

227. *Cornelia G. Kennedy Nomination*, *supra* note 224, at 2.

Fitness of Lawyers for the State Bar Association. She is the only woman now serving on the Circuit Court in the Wayne County-Detroit area.

I think a recitation of these accomplishments is enough to demonstrate that she is not here because she is a woman, she happens to be a woman, but she is eminently qualified.<sup>228</sup>

In responding to Senator Griffin, Senator Hart quipped, "As the husband of a woman who is petitioning aggressively for broader recognition for women, I am glad to go home tonight and say that I was here to support this."<sup>229</sup>

Kennedy was a relatively conservative district court jurist on civil rights matters. In *United States v. School District of Ferndale, Michigan*,<sup>230</sup> litigated before Kennedy over the course of several years, the U.S. attorney general sued the state Board of Education and state officials under the Equal Educational Opportunities Act of 1974. Kennedy ruled in favor of the defendants, concluding that the attorney general did not have standing to bring this suit. In granting the defendant's motion to dismiss in *James v. Schlesinger*,<sup>231</sup> Kennedy held that the plaintiff-employee had no standing to sue under Title VII of the 1964 Civil Rights Act to challenge the employer's failure to meet its affirmative action goal in hiring minorities and females. In *Abortion Coalition of Michigan v. Michigan*,<sup>232</sup> Kennedy denied a challenge to the constitutionality of a Michigan statute providing for the licensing and regulation of "freestanding surgical outpatient facilities," most of which were abortion clinics. Kennedy held that the Supreme Court did not intend *Roe* to be read so broadly as to prohibit the regulation of abortion facilities and that the Michigan statute could not be deemed facially unconstitutional as applied to first trimester abortion facilities simply because it narrowed a physician's choice as to where an abortion could be performed. As for Kennedy's rulings in criminal matters, Kennedy denied the defendant's suppression motion in *United States v. Brown*,<sup>233</sup> where the defendant had alleged that incriminating statements were the product of police abuse of force. Concluding that the testimony of police officers was more credible than that of the defendant, Kennedy held the statements admissible as voluntary. In a case brought on habeas

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228. *Id.* at 2-3.

229. *Id.* at 3.

230. 400 F. Supp. 1135, 1141 (E.D. Mich. 1975) (holding that attorney general did not have appropriate standing).

231. No. 75-72473, 1976 WL 560 (E.D. Mich. Apr. 13, 1976) (finding that plaintiffs could not allege injury due to recruitment or hiring practices as they had not been personally injured).

232. 426 F. Supp. 471, 475 (E.D. Mich. 1977) (finding that state may impose reasonable regulations on all surgical procedures, including abortions).

233. 436 F. Supp. 998, 1004 (E.D. Mich. 1974) (finding defendant's testimony not credible because he did not mention his alleged injuries to either of two doctors who examined defendant separately after his arrest).

corpus petition, *Bradford v. Johnson*,<sup>234</sup> Kennedy found a violation of the Fourteenth Amendment due process guarantee where the main prosecution witness had been tortured into providing an incriminating statement against petitioner.

While serving as chief judge of the Eastern District of Michigan, from 1977 to 1979,<sup>235</sup> Kennedy was considered for elevation to the court of appeals by Nixon's successor, President Jimmy Carter. Carter named Kennedy to a new seat on the U.S. Court of Appeals for the Sixth Circuit in 1979, one of the 152 judgeships created by the Omnibus Judgeship Act of 1978. A Republican, Kennedy was selected by Carter in spite of her party affiliation as a demonstration of his commitment to merit selection of judges over traditional political patronage.<sup>236</sup> The ABA rated Kennedy "well qualified" for the appointment.<sup>237</sup> Nevertheless, Kennedy's nomination to the Sixth Circuit was opposed by the National Bar Association, an organization of black attorneys, and by the NAACP on the ground that some of her district court rulings demonstrated insensitivity to racial bias. As reported in the *Washington Post*, Kennedy was confirmed "despite some complaints that she was too apt to rule against plaintiffs in civil rights and police brutality cases."<sup>238</sup>

In 1984, Kennedy was named to a specially designated three-judge panel of the Ninth Circuit, along with judges from the Third and Eighth Circuits, to consider Nevada District Judge Harry Claiborne's constitutional challenge to his indictment for bribery. Claiborne claimed that he was immune from criminal prosecution prior to removal from office by the impeachment process.<sup>239</sup> In a per curiam opinion, the three-judge panel affirmed the Nevada district court's ruling rejecting Claiborne's challenge.<sup>240</sup>

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234. 354 F. Supp. 1331, 1336-37 (E.D. Mich. 1972) (holding that admission of testimony of witness who was tortured violated due process).

235. See Beverly Blair Cook, *Women Judges in the Opportunity Structure*, in *WOMEN, THE COURTS, AND EQUALITY* 155 (Laura L. Crites & Winifred L. Hepperle, eds. 1987) (noting significance of Kennedy's position in light of management challenges posed by such large district).

236. While most of Carter's judicial nominees were members of the Democratic Party, Kennedy was not the only Republican selected by Carter. Carolyn Randall Dineen King, who was named to the Fifth Circuit by Carter, was also a Republican. In selecting Republican women for the bench, Carter sought to demonstrate the evenhandedness of his merit selection system, which replaced political partisanship as the dominant mode of entry into the candidate pool.

237. See *Nomination of the Honorable Cornelia G. Kennedy*, *supra* note 224, at 4 (admitting letter to record stating Kennedy is "Well Qualified").

238. Richard L. Lyons, *On Capitol Hill*, *WASH. POST*, Sept. 26, 1979, at A4.

239. See *United States v. Claiborne*, 727 F.2d 842, 843-44 (9th Cir. 1984) (discussing defendant's motion to quash indictment and dismiss the proceedings on grounds that federal judge is immune from criminal proceedings while on bench).

240. See *id.* at 850-51 (finding asserted "right not to be tried" lacks merit and upholding decision of district court).

Kennedy maintained her largely conservative record on civil rights while on the Sixth Circuit. In *White v. Colgan Electric Co.*,<sup>241</sup> for example, Kennedy reversed the trial court's holding for the plaintiff, an African American employee alleging racial bias in his layoff, concluding that the plaintiff had failed to meet his prima facie burden of establishing discrimination. Likewise, in *Cesaro v. Lakeville Community School District*,<sup>242</sup> Kennedy reversed the trial court's judgment for the plaintiff-employee, who had alleged sex bias in failing to appoint her to a newly created position, concluding that the plaintiff had not established that gender was a factor in the hiring decision. Thereafter, in *Black v. Zaring Homes, Inc.*,<sup>243</sup> Kennedy reversed a jury verdict for an employee in a Title VII sexual harassment case, holding that male co-workers' jokes and comments were insufficiently severe or pervasive to create a hostile work environment. More recently, in *Thompson v. Ameritech Advertising Services*,<sup>244</sup> Kennedy affirmed summary judgment for the defendant on a former employee's retaliation claim under the Michigan Civil Rights Act, reasoning that the plaintiff had failed to establish a causal connection between her termination and her writing of a letter complaining of racial discrimination within the company.

On occasion, Kennedy reversed, in whole or in part, lower court rulings against employment discrimination plaintiffs. Thus, in *Abeita v. TransAmerica Mailings*,<sup>245</sup> Kennedy affirmed in part and reversed in part a summary judgment order, holding that fact issues remained as to whether an employee had been subjected to a sexually hostile work environment. Similarly, in *Frizzell v. Southwest Motor Freight*,<sup>246</sup> Kennedy affirmed in part and reversed in part a summary judgment order, concluding that the plaintiff-employee was entitled to a jury trial on her Family and Medical Leave Act claim concerning her maternity leave.

According to certain media sources, Reagan considered Kennedy for Supreme Court appointment at the time of O'Connor's nomination. This

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241. 781 F.2d 1214, 1218 (6th Cir. 1986) (holding that defendant rebutted plaintiff's prima facie case and plaintiff did not meet his burden of persuasion).

242. 953 F.2d 252, 255-56 (6th Cir. 1992) (holding that even if employer's motive in opening position to outside applicants was discriminatory, plaintiff could still have been hired if there were no better applicants and that at time decision not to hire plaintiff occurred, plaintiff was not most qualified candidate and, thus, no discrimination occurred).

243. 104 F.3d 822, 827 (6th Cir. 1997) (finding that adolescent humor did not create hostile work environment).

244. 40 Fed. App. 90, 92-93 (6th Cir. 2002) (finding defendant offered no evidence of pretext and that close proximity between defendant's complaints and negative performance evaluations alone is not enough to prove retaliation).

245. 159 F.3d 246, 254-55 (6th Cir. 1998) (affirming grant of summary judgment on plaintiff's disparate treatment claims and dismissal of retaliation claim, while reversing summary judgment on hostile-environment harassment claim and state law claims).

246. 154 F.3d 641, 644 (6th Cir. 1998) (holding that plaintiff is entitled to jury trial).

is not surprising given that Kennedy was one of two sitting Republican women federal court judges at the time.<sup>247</sup> Likewise, because she was one of a handful of women in the federal judiciary, Kennedy was invited to serve on a number of federal judicial committees, including the Board of the Federal Judicial Center, 1981-85; Advisory Committee on Codes of Conduct of the Judicial Conference of the United States, 1979-86; Commission on the Bicentennial of the United States Constitution,<sup>248</sup> 1985-92; and Board of the Federal Judicial Fellows Commission, 1981-93.<sup>249</sup> Kennedy's service on the Judicial Conference of the United States Advisory Committee on Judicial Behavior was the first such participation by a woman. Kennedy assumed senior status in 1999.<sup>250</sup>

H. *Mary Anne Reimann Richey* (active federal judicial service: 1976-83)

Mary Anne Reimann Richey was named to the U.S. District Court for the District of Arizona in June 1976 by President Gerald Ford.<sup>251</sup> Richey's judgeship was confirmed two weeks after her nomination.<sup>252</sup> Richey was born in Indiana in 1917 and attended Purdue University from 1937 to 1940 but did not graduate.<sup>253</sup> During World War II, Richey served with the Women Airforce Service Pilots (WASPs) in Sweetwater, Texas, where

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247. See Lou Cannon, *Chance to Name Woman: Jockeying Could Be "Real Headache"*, WASH. POST, June 19, 1981, at A1. The author discussed prospects for a woman's appointment to the Supreme Court:

The White House officials declined to say who was on the list. But any prospective judicial list for a Republican president has at or near the top of it the name of Cornelia Kennedy of Detroit, a 58-year-old member of the 6th U.S. Circuit Court of Appeals who is thought to be an impeccable Republican and especially conservative on law-and-order issues.

*Id.*

Two weeks later, the *Washington Post* treated O'Connor as the leading candidate for the Supreme Court appointment, but nevertheless reported:

Administration sources emphasized that the president has not made a decision, but one well-placed source stressed, as he did last week, that a strong effort is being made to find a "highly qualified woman." The name mentioned most, until now, is that of another conservative Republican jurist, Cornelia Kennedy of Detroit, a 58-year-old member of the 6th U.S. Court of Appeals.

Lou Cannon, *Woman Tops List for Court*, WASH. POST, July 2, 1981, at A1.

248. See *Washington's Movers and Shakers*, NAT'L J., July 5, 1986, at 1683.

249. Kennedy also chaired the National Conference of Federal Trial Judges. See Resumé of Cornelia G. Kennedy (undated) (on file with the Federal Judicial Center's History Office), available at <http://www.fjc.gov/servlet/tGetInfo?jid=1257> (last visited Mar. 15, 2004).

250. See *Federal Judges Biographical Database*, *supra* note 30 (noting Kennedy assumed senior status on March 1, 1999).

251. See BARBARA ANN ATWOOD, *A COURTROOM OF HER OWN: THE LIFE AND WORK OF JUDGE MARY ANNE RICHEY* 269-71 (1998) ("Predictably, the nomination attracted attention because of Mary Anne's gender.").

252. See *id.* at 271 (noting confirmation process moved rapidly).

253. See 9 WHO WAS WHO IN AMERICA 302 (1985-89) [hereinafter WHO'S WHO (1985-89)] (providing significant dates of events in Richey's life).

she tested military aircraft and pulled aerial targets for infantry training.<sup>254</sup>

After the war, Richey attended the University of Arizona College of Law, where she was the only woman in her first-year class.<sup>255</sup> Upon graduating in 1951, Richey entered private practice briefly in Tucson, Arizona, and then was named deputy county attorney for Pima County, Arizona in 1952.<sup>256</sup> Richey was the first female prosecutor in that county.<sup>257</sup> Then, in 1953, Richey joined the U.S. Attorney's Office in Tucson as an Assistant U.S. Attorney and was later promoted to U.S. Attorney, serving from 1960 until 1961.<sup>258</sup> In 1959, Richey married a law school classmate and together they had one child, a daughter, in 1963, when Richey was 46.<sup>259</sup> Richey's work in the U.S. Attorney's Office was followed by a brief tenure in private practice as the husband and wife partnership of "Richey & Reimann" from 1962 to 1964.<sup>260</sup> In 1964, Richey was appointed to a vacancy on the Superior Court of Arizona, Pima County, by the Arizona governor.<sup>261</sup> She won election to three successive four-year terms on the superior court, where she remained until 1976.<sup>262</sup>

254. See ATWOOD, *supra* note 251, at 53-66 (detailing experience as "an invaluable part of her personal history that would inform her decision-making as a judge years later").

255. See *id.* at 75-77 (noting that Richey began law school at age of thirty and was only female student of 113 law students). At this time, Richey was not yet married to William K. Richey; she entered law school using her maiden name, Reimann. See *id.* at 76 (noting name used).

256. See *id.* at 90-93 (noting that Richey accepted offer upon graduation with Tucson law firm of Scruggs, Butterfield & Rucker). Richey sensed from her experience at the firm that she could be a successful trial attorney and sought a position involving more trial exposure. See *id.* at 92-93 (noting desire to leave firm).

257. See *id.* at 93 (noting that Richey was first female in position in county).

258. See *id.* at 99 (noting acceptance of employment and promotion through office ranks); *id.* at 134 (discussing decision to leave U.S. Attorney's Office); see also Resumé of Mary Anne Richey (undated) (on file with the Federal Judicial Center's History Office), available at <http://www.fjc.gov/servlet/tGetInfo?jid=2005> (last visited Mar. 15, 2004) (noting dates of service in U.S. Attorney's Office).

259. See ATWOOD, *supra* note 251, at 129 (noting decision to marry William K. Richey on October 8, 1959). On their fourth wedding anniversary, Richey gave birth to their daughter, Anne Marie. See *id.* at 147 (noting Richey as "oldest first-time mother on record in Pima County" at age of forty-six).

260. See *id.* at 135 (noting Richey's practice in general civil litigation). Throughout her career, Richey was actively involved in community service, participating in the Arizona Governor's Commission on the Status of Women from 1971 to 1973, serving as president of the board of directors of the Young Women's Christian Association of Tucson from 1968 to 1969 and serving as a member of the advisory board to the Salvation Army of Tucson from 1968 to 1983. See WHO'S WHO (1985-89), *supra* note 253, at 302 (listing volunteer activities).

261. See WHO'S WHO (1985-89), *supra* note 253, at 302 (serving terms from 1964 until 1976).

262. See *id.* (same).

Richey was the only woman appointed to the federal bench by President Ford.<sup>263</sup> Carter's 1976 presidential campaign pledge to name more women to the bench likely spurred Ford's nomination of Richey in the summer of 1976, shortly before the fall election.<sup>264</sup> Concurrent to the other women's appointments, this was a gambit to win women's votes. Richey received a "well qualified" rating from the ABA Standing Committee on Federal Judiciary.<sup>265</sup> According to one media source, Reagan considered Richey for the Supreme Court seat to which O'Connor was named in 1981.<sup>266</sup> As with Kennedy, this was not surprising given that they were the only two Republican women federal judges at the time. Richey was the first woman to chair a Judicial Conference subcommittee when she was selected to chair the Subcommittee on Federal-State Relations in 1982.<sup>267</sup> At her death in 1983, Richey was still in active service on the district court.<sup>268</sup>

#### IV. PATTERNS IN BACKGROUNDS AND EXPERIENCES OF THE FIRST EIGHT WOMEN FEDERAL JUDGES

##### A. *Occupation Prior to Federal Judicial Appointment*

The first women judges were drawn from both private practice and public service. Seven of the first eight had practiced privately at some point in their careers. Allen, Matthews, Hughes, Hufstedler and Green all practiced on their own, while Kennedy practiced with her father and Richey with her husband.<sup>269</sup> Motley was the only one among the first

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263. See GOLDMAN, *supra* note 3, at 221 (noting Richey was only successful appointment by Ford). Ford, like Truman, was set to nominate a second woman, Mariana R. Pfaelzer, to a federal district court position in California. See *id.* (noting intention to nominate second woman). She was not nominated, however, because the judicial status report had noted next to her name "doesn't want app't." See *id.* (explaining absence of nomination). Pfaelzer was nominated two years later by Carter. See *id.* (noting later nomination).

264. See *id.* at 238 (noting that Carter promised to fill positions not based on political patronage but on professional qualifications).

265. See ATWOOD, *supra* note 251, at 271.

266. See *id.* at 345-46 (discussing wide speculation that Reagan would appoint either O'Connor or Richey).

267. See *id.* at 345 (recognizing Richey as "seasoned" federal judge, making Burger's appointment not surprising).

268. See WHO'S WHO (1985-89), *supra* note 253, at 302 (noting that Richey died on November 25, 1983, while still in active judicial service).

269. For a discussion of Allen's career prior to her appointment, see *supra* notes 42-58 and accompanying text. For a discussion of Matthews's career prior to her appointment, see *supra* notes 103-16 and accompanying text. For a discussion of Hughes's career prior to her appointment, see *supra* notes 137-44 and accompanying text. For a discussion of Hufstedler's career prior to appointment, see *supra* notes 200-08 and accompanying text. For a discussion of Green's career prior to her appointment, see *supra* note 187 and accompanying text. For a discussion of Kennedy's career prior to her appointment, see *supra* notes 225-26 and accompanying text. For a discussion of Richey's career prior to her appointment, see *supra* notes 256-62 and accompanying text.



eight with no private practice experience, though she had considerable litigation experience with the nation's preeminent civil rights organization.<sup>270</sup>

As for public service, in addition to Motley, who served both in the New York Senate and on the New York City Council, five others came to the federal bench with strong public service backgrounds: Allen as a prosecutor and judge at the local and state levels; Hughes in the Texas House of Representatives and as a state court judge; Hufstедler as a special consultant to the California attorney general and a state court judge; Kennedy as a state court judge; and Richey as a county and federal prosecutor and state court judge. Only Matthews and Green lacked public service backgrounds, but Matthews performed extensive public-spirited work with the National Woman's Party prior to her appointment.

That five of the first eight women served as judges at the state court level prior to their federal judicial appointment<sup>271</sup> suggests a preoccupation on the part of the federal appointing authorities with proven judicial temperament and ability, not evident in the selection of male appointees. Political scientist Elaine Martin has hypothesized this difference in women's credentials as stemming from the appointing authorities' need "to have a public record of judicial performance in order to better predict future performance."<sup>272</sup> Notably, having generated a record of judicial performance, two of the first eight women judges, Allen and Kennedy, were opposed by the NAACP at the time of their Senate confirmation hearings, on the basis of rulings in race discrimination cases heard while they served on state and/or lower federal courts.

### B. *Political Activity Prior to Federal Judicial Appointment*

Just as many early women lawyers were active in the woman suffrage/women's rights movement,<sup>273</sup> so too were many of the first women federal judges. This was especially true of Allen and Matthews, who campaigned

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270. For a discussion of Motley's career prior to her appointment, see *supra* notes 159-66 and accompanying text.

271. The five women judges who served at the state court level prior to their federal judicial appointments are Allen, Hughes, Hufstедler, Kennedy and Richey.

272. Martin, *supra* note 13, at 312 (observing with regard to Carter's nominees, "[W]e may conjecture that since the senators preferred judicial experience more for women than for men, they were also more apprehensive about possible female judicial behavior").

273. See, e.g., Barbara Allen Babcock, *Foreword: A Real Revolution*, 49 KAN. L. REV. 719, 725-31 (2001) (providing illustrations of early women lawyers aiding effort). One author noted:

Perhaps the best evidence of the feminism of these pioneers is the aid they gave to other women, particularly in helping them to become and to be lawyers. [Clara] Foltz always said that her efforts were made to smooth the path for future women. Lelia Robinson, the first woman lawyer in Massachusetts, sought to bring all women lawyers in the country into communication . . . . Ellen Spencer Mussey founded law classes and then a law college for women. The first woman federal judge, Florence Allen,

for woman suffrage while still in law school. Allen was subsequently elected to judgeships at the county and state supreme court level on the strength of her reputation as a woman suffrage leader in Ohio. Allen benefited enormously from the support of newly enfranchised women both in her campaign for judicial election and in her candidacies for the House and Senate seats from Ohio.

Like Allen, Matthews was highly active on behalf of women's civil and political rights, serving as general counsel to the National Woman's Party for several decades, where, among other things, she lobbied for enactment of the Equal Rights Amendment over the course of many years. Indeed, Allen's and Matthews's federal court appointments were considered by some as testaments to their women's rights work.

Four of the other first women were active in politics generally and on behalf of women specifically. Hughes was active in Texas politics, having successfully run for the state trial court seven times, served as a member of the Texas House of Representatives, lost bids for both the Texas Supreme Court and the U.S. House of Representatives and chaired the 1960 Kennedy/Johnson campaign in Dallas County. It was through these activities that Hughes came to Kennedy's and Johnson's appointing attention. Motley was active in elective politics at both the city and state levels in New York, gaining familiarity with the relevant powerbrokers, which facilitated her district court appointment. Hufstедler was an active member of NOW and the National Women's Political Caucus, served as special legal consultant to the California attorney general and was appointed and elected to multiple judgeships in the California state court system prior to her federal appointment. Hufstедler, like Hughes and Motley before her, came to know the powerbrokers in her home state in this manner. Kennedy, like Allen, Hughes and Hufstедler before her, won election to a state or local bench. Finally, Richey was active in Republican politics, serving by appointment on several Arizona state commissions prior to her federal prosecutorial and state and federal court appointments. Thus, seven of the first eight women judges were active in elective and/or appointive politics prior to their federal judicial appointment,<sup>274</sup> a much higher percentage than for subsequent female federal judges.

In addition to their explicit political activity, nearly all of the first eight women were actively involved in leading women's professional associations, ranging from their local women's bar associations to the Federation of Business and Professional Women and the NAWL. In addition,

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worked tirelessly (albeit unsuccessfully) to promote other women for the bench.

*Id.* at 727 (giving examples of women active in movement); *see also* Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1690-94 (1998) (reviewing VIRGINIA DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998)) (highlighting early women lawyers).

274. Judge Green was the only judge who did not participate in politics prior to her federal appointment.

they participated in social service organizations—for example, Allen worked for the New York League for the Protection of Immigrants. These activities likewise served as a basis for political support.

### C. *Educational Background*

It is not surprising, given the period in which they pursued their higher education, that two of the first three women attended women's colleges, with Allen at Western Reserve and Hughes at Goucher. Three of the other judges did not obtain college degrees at all,<sup>275</sup> and two of the remaining three graduated from state universities.<sup>276</sup>

More notably, several of the first women judges obtained their law degrees at schools known for their hospitable environments for women—Allen at New York University, Green at the Washington College of Law and Kennedy at Michigan. Each school was a trailblazer in creating opportunities for women in legal education and the legal profession, with Michigan and the Washington College of Law established on a coeducational basis and NYU opening its doors to women shortly after its founding, all in the latter part of the nineteenth century.<sup>277</sup>

More on the theme of education, three of the first eight women judges served as teachers at some point in their careers, with both Allen and Matthews teaching music before attending law school and Hughes teaching science. This was not surprising given the limited range of women's opportunities at the time. What is surprising is that Matthews worked as a law professor in the 1940s, albeit at a historically "feminist" law school.

### D. *Family Status at Time of Federal Judicial Appointment*

Seven of the first eight women were married at the time of their federal judicial appointment, with only Allen remaining single. One commentator, discussing Allen's single status, observed:

[W]omen in public life in the 1920s were expected to be single. . . . The traditional belief was that women could not manage both a private and public role. . . . Florence Allen was single and able to seek a national and international reputation because she was highly mobile. Her acceptance of invitations to international meetings of women lawyers and peace advocates and to convoca-

275. Judges Matthews, Green and Richey did not have college degrees.

276. Judge Hufstедler graduated from the University of Mexico and Judge Kennedy graduated from the University of Michigan.

277. See VIRGINIA G. DRACHMAN, *WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887 TO 1890* 3-4 (1993) [hereinafter *THE EQUITY CLUB LETTERS*] ("While elite law schools such as Harvard, Yale, Columbia remained closed to women into the twentieth century, women made inroads into other university law schools in the late nineteenth century.").

tions of law schools and women's groups was not contingent upon fulfilling domestic duties first.<sup>278</sup>

Allen lived with her cousin who managed and maintained the household.<sup>279</sup> While on the Ohio Supreme Court, Allen declared, "I don't cook, or sew, or shop, for the simple reason that I haven't the time or energy for these things, any more than the men judges have."<sup>280</sup>

In an analogous fashion, two of the seven women married relatively late in life—Kennedy at thirty-seven and Richey at forty-two. In delaying marriage, Kennedy and Richey could pursue their legal careers in a more single-minded fashion than if they had had husbands and families to attend to.<sup>281</sup> Of the seven who married, four married fellow lawyers, with three marrying law school classmates.<sup>282</sup> This phenomenon of women lawyers marrying male lawyers is one of long-standing tradition in the profession.<sup>283</sup> In many ways, this pattern enabled women to bridge the gap

278. *Supreme Court Candidates*, *supra* note 52, at 318 (noting dated view that women had to choose either profession or family).

279. *See id.* (noting cousin handled domestic duties).

280. *Id.* (quoting Allen's belief that domestic duties interfered with her judicial duties).

281. *See THE EQUITY CLUB LETTERS*, *supra* note 277, at 26 (illustrating marriage was issue with which many early women professionals struggled). One young lawyer, when contemplating marriage to her future husband, asked, "Is it practical for a woman to successfully fulfill the duties of wife, mother, and lawyer at the same time? Especially a young married woman?" *Id.* (posing question to peers). Single women lawyers justified not marrying and starting families because it would be "incompatible with a serious career." *Id.* (revealing most women thought choice between career or family was only option).

282. Judges Matthews, Hughes, Hufstedler and Richey all married fellow lawyers. For a discussion of the marital status of Judges Hughes, Hufstedler and Richey, see *supra* Parts III.C., F. and H. and accompanying text.

283. As Virginia Drachman notes in her study of the Equity Club, a correspondence society of early women attorneys, many of the first women lawyers were married to lawyers. *See THE EQUITY CLUB LETTERS*, *supra* note 277, 27-28 (explaining "marriage enhanced rather than impeded their careers"); *see also* D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 J. LEGAL EDUC. 485, 494-95 (1977) (noting that many of first women lawyers entered legal profession by studying and practicing with their lawyer-husbands). This fact is supported by statistics proving that in 1890, "[A]pproximately one-third of the total number of women lawyers were married women and more than half this number were married to lawyers." *Id.* (providing support). This pattern of women in the law marrying lawyers continued and was true when referring to women lawyers of the 1950s, 1960s and 1970s. *See CYNTHIA FUCHS EPSTEIN*, *WOMEN IN LAW* 340 (1981) (providing examples of marriage announcements between two lawyers).

A study done in the 1960s indicated that almost half of the lawyers interviewed were married to other lawyers. *See id.* (noting studies supporting findings). One author provided an explanation for the marriages between male and female lawyers:

This pattern is probably a reflection of the marital "opportunity structure" in that most couples met in law school or at work. Because women have been in the minority in law school, they have been visible to a wide pool of eligible spouses. Women with professional aspirations or identi-

between the then highly gender-segregated public and private spheres of activity.

Another phenomenon evident in the lives of the first women judges was that of late and limited childbearing. Of the seven who married, three did not have children at all,<sup>284</sup> while four had one child each.<sup>285</sup> No one had more than one child, and Allen, who remained single, did not have any children. Not only did these women limit their offspring, but two of the four with children had them relatively late in life. Kennedy had her first and only child when she was thirty-nine years old, after she had been practicing law for fifteen years and was established as a law firm partner.<sup>286</sup> Similarly, Richey had her first and only child when she was forty-six years old, subsequent to serving as Arizona's first female U.S. Attorney.<sup>287</sup> Like delaying their marriages, putting off childbearing promoted their career success.

#### E. *Nature of Federal Judicial Vacancy to Which Appointed*

Of the first eight women judges, three were appointed to newly created seats,<sup>288</sup> two to courts of appeal<sup>289</sup> and two to the District of Columbia,<sup>290</sup> all of which gave the appointing presidents considerable flexibility to nominate nontraditional candidates. This was how the first women got appointed. Loathe to expend their political capital on appointments of nontraditional candidates (similar patterns to women's appointments held true for people of color in this period), Presidents Roosevelt through Ford largely avoided conflict with the Senate and individual senators (Motley's appointment to the district court in New York being the notable excep-

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ties are also likely to seek men whose occupations will be of the same or higher social rank; this limits their choices to only a few occupations. So it makes "sense" that women lawyers would tend to marry male lawyers.

*Id.* at 341 (providing reasoning for attraction of spouses in legal community).

284. Matthews, Hughes and Green had no children. *See supra* Parts III.B., C. & E. and accompanying text (discussing backgrounds of these judges).

285. Motley, Hufstedler, Kennedy and Richey each had one child. *See supra* Parts III.D., F., G. & H. (noting family history of judges).

286. *See Cornelia G. Kennedy, supra* note 226, at 8.

287. *See WHO'S WHO* (1985-89), *supra* note 253, at 302 (listing significant dates of events in Richey's life, such as becoming U.S. Attorney and having child).

288. Matthews, Hughes and Hufstedler were appointed to newly created seats. *See supra* Parts III.B., C. & F. and accompanying text (indicating appointments of these women to federal judgeships were all to newly created seats). Likewise, Kennedy's elevation to the Sixth Circuit was to a newly created seat. *See* Part III.G. and accompanying text (explaining circumstances leading to Kennedy's position on federal judiciary).

289. Allen and Hufstedler were the first two women appointed as judges at the federal court of appeals level. *See supra* Part III.A. & F. and accompanying text (describing ascent of these two women to positions on courts of appeal).

290. Matthews and Green were the first two women appointed as judges to the U.S. District Court for the District of Columbia. *See supra* Part III.B. & E. and accompanying text (explaining how these two women received judgeships in D.C. district court).

tion), by using their so-called "flexible" appointments to name women. This was by and large a win-win situation, given the political payoff from women's votes assured by these nominations.

#### F. ABA Ratings

Two of the first eight women judges were not subject to the ABA rating system, adopted after their appointments,<sup>291</sup> one was rated not qualified by reason of age,<sup>292</sup> two were rated "qualified"<sup>293</sup> and three were rated "well qualified."<sup>294</sup> Taken as an aggregate, the women's ABA ratings rose over time, from Hughes to Richey,<sup>295</sup> and were higher than those of subsequent women judges.

#### G. Comparison with Later Female Federal Judges

Despite the tokenism characterizing women's judicial appointments in the pre-Carter period, some of the patterns in their occupational, political and personal backgrounds persisted with the next wave of women judges named under Carter. Most notably, these included high levels of public and judicial service prior to federal bench appointment.

One area of significant difference was the high level of political activity by early women judges not seen among the later women. The lesser political activity of subsequent women judges was more consistent with overall patterns of women's political activity. As one author observed, "Women, as a group, are not as politically active and powerful as men."<sup>296</sup> Therefore, Carter's reform of the judicial selection process in the direction of merit selection and away from political patronage enabled many more women candidates to rise to the top.<sup>297</sup>

Another difference, noted earlier, was the higher aggregate ABA ratings of the first women judges as compared with their successors under Carter. While the overall ABA ratings of Carter's judicial appointees were

291. Allen and Matthews were not subject to the ABA rating system. See generally ABA, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2002) (stating that ABA Standing Committee and rating system came into effect in 1946, which post-dated appointments of Allen and Matthews).

292. For a discussion of why Hughes was deemed not qualified by reason of age, see *supra* note 146 and accompanying text.

293. The ABA Standing Committee rated Motley and Green "qualified." See, e.g., *supra* notes 171-72 and accompanying text (discussing Motley's ABA rating).

294. For a discussion of the "well qualified" rating received by Hufstедler, Kennedy and Richey, see *supra* note 28 and accompanying text.

295. For a more complete discussion regarding how the ABA ratings for women judges progressed directly "upward" from Hughes to Richey, see *supra* Part II.B. and accompanying text.

296. Martin, *supra* note 13, at 308 (noting that women are less political); see also *id.* at 311 (contending "literature on political women makes it abundantly clear that women are far less active politically than men").

297. See *id.* at 308 (noting "these changes, by de-emphasizing political activism and influence, allowed qualified women to compete more effectively for federal judicial office").

higher than for any prior presidential administration, this did not prove true for Carter's female nominees because the evaluation criteria used more closely mirrored elite men's backgrounds than women's.<sup>298</sup>

#### V. COMPARISON WITH MALE COLLEAGUES

While the number of women judges appointed before 1977 is so small as to prohibit detailed comparison with their male colleagues, a few observations can be made. Most importantly, the first eight women judges, taken as an aggregate, had significantly more public and judicial service prior to federal judicial appointment than did their male counterparts. As noted above, this phenomenon is likely explained by a greater concern for demonstrated temperament, ability and, ultimately, credibility on the part of women by the federal court-appointing powers. Put simply, women candidates were held to a higher standard.

Likewise, the first eight women judges as an aggregate were a degree more involved in partisan politics prior to federal judicial appointment than were their male colleagues. As noted earlier, this political activity was typically what brought them to the appointing powers' attention.

Women lagged, and continue to lag, far behind men in federal judicial leadership opportunities. This was partly, but not completely, due to differences in seniority levels. Women have served in fewer chief judgeships than men because women, as a group, entered the legal profession later and began to be appointed as federal judges later than men were. This directly impacted which court of appeals judges served as members of the Judicial Conference. Nevertheless, selection of district court judges for Judicial Conference membership and assignment of district and court of appeals judges to Judicial Conference committees was not governed by seniority, and women have served in very few of these positions also. Three of the four female district judges selected for membership in the Judicial Conference to date were chief judges at the time, a pattern not true for men. Like the prior judicial service disparity for federal judicial appointment, the disparity concerning chief district judgeships suggests holding women to a higher standard for federal judicial leadership opportunities.

#### VI. CONCLUSION: WHY SHOULD WE CARE ABOUT WOMEN'S FEDERAL JUDICIAL APPOINTMENTS?

In considering the significance of women's federal judicial appointments,<sup>299</sup> it is useful to start with the particular presidents' motives for

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298. See *id.* at 309 (expressing uncertainty as to why women judges "fared so poorly in comparison to men"). Carter confronted the ABA on this very point, leading to a turn-around on women's evaluations by the Standing Committee. See Clark, *supra* note 2, at 1146.

299. The appointment of women judges and its significance, mainly at the state court level, has been thoughtfully addressed in the political science literature,

naming women judges. Did they believe that women brought something different to the bench? Were they motivated to appoint women in order to create a more representative court? Or, more pragmatically, were they motivated by concern for women's votes?

At bottom, Presidents Roosevelt through Ford appointed women to the bench because they were responding to immediate political concerns for women's votes, and in the case of Motley, African American votes as well.<sup>300</sup> Since the appointment of women judges was primarily a symbolic gesture intended to win women's votes, token appointments were all that were necessary. Only Johnson departed from the once per presidential administration pattern, even then remaining well within the realm of tokenism.

Turning to the broader significance of women's judicial appointments, there are four primary hypotheses as to why it matters. First, because it is important in and of itself that the judicial selection process be marked by equality of opportunity and freedom from discrimination, regardless of the impact on judicial outcomes (the equal opportunity/anti-discrimination hypothesis).<sup>301</sup> Second, because it creates a more representative bench, promoting public trust and confidence that justice will be served (the legitimacy/representativeness hypothesis). Third, borrowing from the political science literature, because it is important to have "insiders" in the system who can advocate "outsider" perspectives (the insider/outsider hypothesis). Fourth, because it instructs present and future generations about women's talents, thereby shattering stereotypes and modeling possibilities of women's achievements (the educational/inspirational hypothesis). And fifth, because women, as women, bring something different to the bench, shaping judicial outcomes in different ways (the difference hypothesis). These hypotheses about the significance of women's participation are important not only to judicial politics but to political systems generally, given recent campaigns for gender parity in electoral politics in France and elsewhere.

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with important work by Beverly Blair Cook, Sue Davis, Sally Kenney, Elaine Martin, Karen O'Connor and others, but seldom addressed in the legal academic literature. Notable exceptions in this latter category are Judith Resnik, Deborah Rhode and Suzanna Sherry.

300. President Johnson may be the sole exception to this principally pragmatic motivation. Focusing on his appointment of African Americans to the bench, most significantly Thurgood Marshall to the Supreme Court, and his support of the Civil Rights Acts of 1964, 1965 and 1968, Johnson was motivated by both a commitment to equality of opportunity and political pragmatism, seeing the two as complementary.

301. A variant of the equal opportunity hypothesis is one that acknowledges the importance of recognition for particular groups previously excluded from the power centers of American society. See, e.g., CHARLES TAYLOR, MULTICULTURALISM: THE POLITICS OF RECOGNITION 25-73 (1994). Taylor wrote: "A number of strands in contemporary politics turn on the need, sometimes the demand, for *recognition*." *Id.* (emphasis in original).



Starting with the last and most controversial hypothesis on gender's impact on judging, political scientists as well as legal academics have considered this question; some have asserted that gender makes a difference in judicial behavior and outcomes, and others have concluded on the basis of empirical research that it largely does not.

Professor Suzanna Sherry of the University of Minnesota Law School, for example, looked to Carol Gilligan's work in addressing whether women bring a different voice to the judiciary, defined as more relational rather than autonomy-emphasizing in its moral reasoning.<sup>302</sup> Sherry suggested that "women judges are identifiably distinct from their male cohorts in three ways."<sup>303</sup> According to Sherry, women judges "make a unique contribution to the legal system by their presence, their participation and their perspective."<sup>304</sup> In another article, Sherry concluded that Justice O'Connor's Supreme Court opinions reflected a "woman's voice" insofar as they exhibited greater regard for the societal context in which legal disputes were decided.<sup>305</sup> Other characteristics of a so-called feminine jurisprudence, according to Sherry, included an emphasis on connection rather than autonomy and on responsibility rather than rights.<sup>306</sup> These conclusions, regarding the different voice of women judges generally, have been disputed by academics as well as by the subjects of the discussions, including Justice O'Connor.<sup>307</sup>

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302. See Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. 159, 163 (1986) [hereinafter *Gender of Judges*] (citing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982), as providing "ground-breaking studies on the development of moral sensibility in men and women"). As a result of her research, Gilligan finds, "It is precisely this dilemma—the conflict between compassion and autonomy, between virtue and power—which the feminine voice struggles to resolve in its effort to reclaim the self and to solve the moral problem in such a way that no one is hurt." *Id.* at 70-71 (describing relational reasoning).

303. *Gender of Judges*, *supra* note 302, at 159 (providing thesis of article).

304. *Id.* (identifying three ways women uniquely contribute to profession).

305. See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-616 (1986) [hereinafter *Civic Virtue*] (focusing on O'Connor's jurisprudence as suggestive of feminine perspective).

306. See *id.* at 584 ("Like the classical paradigm, the feminine perspective views individuals primarily as interconnected members of a community.").

307. See, e.g., Sue Davis, *The Voice of Sandra Day O'Connor*, 77 JUDICATURE 134, 138-39 (1993) (critiquing generalizations made from voting patterns of one justice). One commentator concluded:

[T]he findings presented here do very little to support the assertion that O'Connor's decision making is distinct by virtue of her gender. . . . O'Connor does not appear to speak in "a different voice," but the possibility remains that other women judges do . . . . If women judges indeed speak in a different voice, the proof will not be found by studying only one jurist.

*Id.* at 139 (considering theory that O'Connor brings feminism to federal bench). Justice O'Connor even questioned the proposition that women "speak with a different voice." See SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 190 (2003) ("I am often asked whether women judges speak with a different voice. This is a question that generates widely differing responses. Undaunted by the troubling history

Political scientist and judicial-appointments scholar Sheldon Goldman posited another “different voice” theory. He predicted that “as more and more nontraditional judges are appointed, nontraditional perspectives or sensitivities will be added to the mix of factors that shape American law.”<sup>308</sup>

In comparing the backgrounds of Carter’s female judges with male judges appointed by Carter and his three predecessors, Professor Elaine Martin noted the popularly held belief that women’s presence on the bench positively impacts rulings on issues related to women.<sup>309</sup> Martin described the common perception as:

[T]he mere presence of women judges, no matter their ideology or behavior, will have important policy implications. The theory is that by making the judicial system more representative their presence will further legitimate women’s political participation and make the legal system more just. Their presence might also alter the agenda of political decision-making. In the collegial atmosphere of appellate decision-making, men judges may well be influenced favorably by the mere presence of women judges.<sup>310</sup>

In comparing the judges’ backgrounds, Martin highlighted several differences that might have an impact on judicial outcomes, saving for another day an empirical evaluation of their actual impact.<sup>311</sup> These differences

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of their view, many writers have suggested that women practice law differently than men.”).

308. Sheldon Goldman & Matthew D. Saronson, *Clinton’s Nontraditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 73 (1994) [hereinafter *Nontraditional Judges*] (noting different perspectives will be beneficial to judiciary).

309. See Martin, *supra* note 13, at 307 (finding female presence on bench correlated favorably to issues related to women). One commentator noted:

Observers have popularly assumed that the presence of this unprecedented number of new women federal judges will have a positive impact on judicial policy related to women, and will symbolize the legitimacy of women’s political activism. These assumptions turn on the belief that women will bring a perspective and style to the judiciary different from that brought by men.

*Id.* (discussing same).

310. *Id.* at 313 (noting effect women judges may have on men judges).

311. See *id.* at 307 (finding certain characteristics of each judge may weigh into decisions on bench). The basis of the study of judicial characteristics is that:

[T]he personal, social, political, and economic background characteristics of judges may have a significant, although subtle, impact on policy output. Experience shows that no simple correlation exists that might allow us to consistently predict judicial outcomes simply by knowing the judges’ background. . . . [W]e might expect that if women judges bring to the bench characteristics that somehow differ from those of their brothers, the women judges’ impact on policymaking may also be different.

*Id.* (discussing influences). The author further cautions, “If the only significant difference is in their gender, the question of the impact becomes much more problematic.” *Id.* (cautioning about inferences of impact).

included: (1) women were less likely than men to come from private practice; (2) women were more likely than men to have had prior judicial experience; and (3) women exhibited less partisan political activism than men.<sup>312</sup>

In looking to empirical data on gender's impact on judicial outcomes at the federal district court level, political scientists Thomas J. Walker and Deborah Barrow found no significant differences in rulings between male and female judges in cases involving criminal rights issues or women's rights claims.<sup>313</sup> They did, however, find that women judges were significantly more likely than men judges to look favorably upon positions taken by government litigants and that men were significantly more likely than women to support liberal positions on individual liberties claims.<sup>314</sup> One hypothesis to explain this phenomenon is women's historically disproportionate service in the public sector pre-appointment as compared with men, who traditionally came to the federal bench from a wide range of practice settings, including private law firms.<sup>315</sup>

Political scientists Sue Davis, Susan Haire and Donald R. Songer also tested the difference hypothesis through empirical research.<sup>316</sup> In framing their study, they asked:

How might the alleged different perspective of women manifest itself in judging? Generally, the traditional legal approach could be expected to focus on individual rights, freedom from interference, procedural fairness, and concern for correctly applying appropriate legal rules. In contrast, the "different voice" would speak about connection, care, response, substantive fairness, communitarian values, and context.<sup>317</sup>

Controlling for the party of the appointing president, the authors found no statistically significant differences between male and female federal circuit court judges in ruling on criminal rights issues or obscenity claims, two areas where the authors hypothesized that gender differences, if any, might appear.<sup>318</sup> The authors did, however, find women judges more

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312. See *id.* at 310 (providing statistics indicating differences).

313. See Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 607 (1985). The focus of the research was to "discover if the influx of women and minorities has made a demonstrable difference in the policies and processes of the judiciary." *Id.* at 597 (expressing purpose of study).

314. See *id.* at 608-09 (examining phenomenon of female judges supporting government at higher rate).

315. See *id.* at 609-10 (noting that "women generally have received more favorable treatment at the hands of the government than from nongovernmental sources").

316. See Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 130-32 (1993) (choosing federal intermediate appellate judiciary as subject of study).

317. *Id.* at 130 (contrasting traditional legal approach and "different voice").

318. See *id.* at 131-32 (providing support in statistical data in tables).

sympathetic to plaintiffs' claims in employment discrimination cases, whether race- or sex-based.<sup>319</sup> Importantly, this distinction was present only with judges appointed by Democrats, and not with judges appointed by Republicans.<sup>320</sup>

In yet another study of decided cases, political scientist Jon Gottschall found no statistically significant differences in voting patterns between Carter's white male and white female court of appeals judges on issues of criminal procedure, race discrimination and sex discrimination.<sup>321</sup> Still other studies have found significant differences in men's and women's judicial behavior, namely one study that compared the rulings of several female state supreme court justices to those of their male colleagues.<sup>322</sup> The study revealed that four out of five women took distinctly feminist positions on women's rights issues.<sup>323</sup>

A problem presented by many of these empirical studies is the sheer age of the data because women's participation in the legal profession has grown dramatically over the course of the last thirty years, and differences in backgrounds and experiences that were once obvious at an earlier stage are less apparent now. For much the same reason, another problem with these older studies is the small sample size of women judges.

In a study specifically testing the representative hypothesis, Martin surveyed the membership of the National Association of Women Judges (NAWJ) to determine whether they believed that women judges played a "representative" role as women in the judiciary.<sup>324</sup> Martin found that while resisting the idea that women judges spoke in a "different voice," NAWJ members believed that women judges played an important representative role, seeing them as both "standing for" women, especially as role models for women attorneys, and "acting for" women by supporting the creation of gender-bias task forces in the courts and otherwise heightening judicial colleagues' sensitivity to gender bias.<sup>325</sup>

As for the educative significance of women's judicial service, Sherry has written:

319. *See id.* at 132 (same).

320. *See id.* at 131-32 (noting analysis revealed no statistically significant differences when dealing with Republican presidents).

321. *See* Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Court of Appeals*, 67 JUDICATURE 165, 171-72 (1983) (controlling for race of judge, as well as appointing president, in studying gender's impact on judicial voting behavior).

322. *See* David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232, 234-38 (1987) (providing relevant data and testing measures).

323. *See id.* at 239 ("In four out of five instances, women justices occupy the most extreme position.").

324. *See* Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166, 167 (1993) (focusing study on National Association of Women Judges (NAWJ) that claims as members nearly half of all women judges in United States).

325. *See id.* at 171-73 (detailing findings supporting women judges as role models).

The mere presence of women on the bench serves an educative function. Observing a woman in judicial robes helps shatter the stereotypes held by male judges, and by lawyers and law students of both genders. Additionally, judges occupy a highly visible position of authority, and the example set by women judges reaches far beyond the legal profession. Those non-lawyers who come into direct contact with women judges—as litigants, jurors, and witnesses—absorb a subtle but direct lesson about the role of women in our society.<sup>326</sup>

This stereotype-shattering understanding of the importance of women's judicial service is widely held, though it arguably runs counter to the difference hypothesis if the educative potential of women on the judiciary is seen as challenging gender-difference stereotypes, among others.

Goldman addresses the representative and educative hypotheses in his work as follows.<sup>327</sup> First, Goldman asserts that women's judicial service promotes the overall credibility of the federal judiciary as an institution. He states, "As the judiciary becomes more representative of the American people, it can be expected to increase confidence in the judicial system among women and minorities."<sup>328</sup> With regard to the educative function, Goldman argues that the presence of women and minorities on the bench is important in instructing the public on the groups' competencies, as well as providing role models for nontraditional judges of the future:

[T]he educational effect of large numbers of women and minorities serving as federal judges can be considerable. Men will see women, and whites will see judges of other races, performing ably on the bench. Young women and young people of color will see that hard work and talent can open doors once closed because of gender and race.<sup>329</sup>

Thus, the educative function is coupled with an inspirational effect.

In "Where Is Gender in Agenda Setting?," Political Scientist Sally Kenney recognizes the importance to women as historic "outsiders" to the power centers, including the courts, of having well-placed "insiders" with heightened awareness of women's experiences and women's rights concerns. This analysis applies with particular force to the judiciary, where women judges can serve to make women's experiences and women's rights concerns more palpable to other judges. Hence, the success of the

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326. *Gender of Judges*, *supra* note 302, at 160 (noting that presence of women judges on bench educates male judges, lawyers and law students).

327. *See Nontraditional Judges*, *supra* note 308, at 73 (naming theories).

328. *Id.* (finding increase of minority and women judges will increase minorities' and women's confidence in judicial system).

329. *Id.* (explaining educational effect).

gender- and race-bias task forces following women's judicial appointments in critical numbers.<sup>330</sup>

As this literature survey reveals, well-respected social scientists and legal academics have weighed in on every aspect of the debate over the significance of women's judicial appointments. Few, however, have addressed the first hypothesis—that the significance of women's judicial appointments stems from the importance of applying equal opportunity/anti-discrimination principles. It is here that I locate the central importance of women's judicial appointments, albeit recognizing, as Motley did, that being named to a federal judgeship is largely a matter of luck, given the fewer than one thousand Article III seats. Nevertheless, equality of opportunity is achieved when women are considered for the same percentage of judgeships as they constitute in the pool of interested and qualified candidates.<sup>331</sup> It is then that we can believe that judicial appointment “gatekeepers” are as likely to select a qualified woman as a qualified man.<sup>332</sup> As current patterns of judicial appointments make clear, however, we have not reached this point.<sup>333</sup> Naturally, equal opportunity principles also contemplate equal access to judicial leadership positions from which to govern the courts, where women's appointments to policy-setting committees should reflect their percent composition in the interested, qualified candidate pool.<sup>334</sup>

While concluding that the primary significance of women's judicial appointments is in honoring equal opportunity/anti-discrimination principles (including making affirmative efforts, as needed, to seek out women and minorities), I also understand the importance of women's judicial appointments as promoting public trust and confidence in the fairness of courts that “look like America.”<sup>335</sup> The public is more willing to believe

330. See generally Sally Kenney, *Where Is Gender in Agenda Setting?*, in *WOMEN AND POLITICS* 25:1, at 25 (2002).

331. Historically, however, there have been and continue to be obstacles to women obtaining the same qualifications as men. See, e.g., Cook, *supra* note 235, at 143-56 (noting women's lesser attainment, due to sex discrimination, of certain credentials important to judicial appointment, including: law review editorships, court of appeals and Supreme Court clerkships, certain fellowships, such as Rhodes, and law firm partnerships). Thus, women have not had equal opportunities to enter the pool of qualified candidates.

332. See *id.* at 144 (noting phrase “judicial appointment gatekeepers” coined by Cook); see *id.* at 156 (“There are gatekeeping arrangements at every level of the opportunity structure to provide and apply standards in selecting among candidates. The standards are not, by any means, ideal Weberian bureaucratic standards, but rather describe what the incumbents are like.”).

333. As of May 7, 2004, thirty-four, or nineteen percent, of President George W. Bush's 173 confirmed federal court appointees were female. See *Federal Judges Biographical Database*, *supra* note 30 (listing names of every appointee to date).

334. Women's percentage of federal court leadership positions does not approach their proportional representation in the Article III judiciary.

335. *Nontraditional Judges*, *supra* note 308, at 73. For a further discussion of the effect of courts representing the American populace, see *infra* note 335 and accompanying text.

that justice has been served when the courts are more reflective of the American populace. Hence, there has been a historic emphasis on geographic representativeness in judicial appointments.<sup>336</sup> Nor can the role-modeling and stereotype-shattering function of women's judicial service be underestimated. The presence of women on the bench clearly has an educative and inspirational impact.

As for the difference hypothesis, I recognize that many women at many times have different life experiences than men, and that women may draw on these different experiences in their work, including as federal judges. While I do not subscribe to the difference theory of moral reasoning, I do understand a woman's, as well as a man's, judgment to be informed by their background and life experiences. Thus, my thinking on difference is consistent with that of Elaine Martin—that one should look to differences in backgrounds and experiences, rather than to gender difference in reasoning per se, in considering gender's impact on judicial outcomes. The empirical data examined to date reveals that women reach different judicial outcomes than men in only a narrow range of cases involving employment discrimination claims or government litigants, where women may well draw on their different backgrounds and experiences—with discrimination in the first instance and as government attorneys in the second—to reach different outcomes. In a related manner, a direct impact of women's expanded judicial service has been to support the creation of court-based, gender- and race-bias task forces, again drawing on women's different experiences in confronting discrimination in their lives.

The pre-Carter era of token appointments, during which the first eight women were appointed, clearly did not reflect equal opportunity/anti-discrimination principles. Carter pushed judicial appointments significantly in the direction of equality of opportunity, relying on merit selection and affirmative action principles to name women to nearly one in six judgeships during his single term. His refusal to pledge to name a woman to the Supreme Court in the 1980 presidential election campaign likewise reflected his commitment to equal opportunity/anti-discrimination principles.<sup>337</sup> Carter lost that election to Reagan, a political pragmatist, who, like Roosevelt through Ford before him, sought to address the

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336. See Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUD. 257, 265-70 (considering how geographic representation affects perception).

337. Carter explained his refusal by declaring that he would not pre-judge any candidates by sex. See President Jimmy Carter, Remarks at a White House Reception for National Association of Women Judges (Oct. 3, 1980), in *Papers of the Administration of Jimmy Carter* 2059, Speechwriters' Chronological File, Box 82, Carter Presidential Library ("I can promise, based on my record so far, that women and members of minority groups will be fully considered, but I will not rule out anyone—male or female—on the basis of sex or race or religion or national origin.").

gap in men's and women's votes—here, in support of the Republican Party—by vowing to appoint a woman to the Court.<sup>338</sup>

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338. Reagan, however, fulfilled his pledge by naming Sandra Day O'Connor to the first Supreme Court vacancy of his first term in 1981. See Ed Magnuson, *The Brethren's First Sister: A Supreme Court Nominee—and a Triumph for Common Sense*, TIME, July 20, 1981, at 8 (celebrating first woman appointed to Supreme Court and detailing her accomplishments).



