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Women Judges in Minnesota

By Sally Kenney

We may soon return to our country's high water mark of two of nine U.S. Supreme Court Justices who are women (compared to four of nine in Canada). With all the attention a new U.S. Supreme Court nominee garners, it is easy to presume that women are making steady progress securing representation within state and federal judiciaries, but are we? Only 22.5% of President Bush's appointments to the federal bench over the last eight years were women, compared to 29.5% of President Clinton's. In the blink of an eye, we can reverse progress without noticing. Two circuit courts, including our own Eighth Circuit, are one retirement away from reverting to all-male courts. (The last nine appointments have been men; only one woman, Judge Diana Murphy, has ever served).¹ Judge Ann Montgomery surprised a group of us recently by reporting that the judicial appointments that the federal judges themselves make for magistrate and bankruptcy judges in this country are only half as diverse as the Article III judges that the President appoints with the advice and consent of the Senate. A New York Nominating Commission recommended only men to replace Chief Judge Judith Kaye; a recent Florida Nominating Commission is made up of only men; and the Governor of South Dakota, the last state to appoint its first woman to its state supreme court in 2002, mocked the very idea that diversity should be a factor in judicial appointments as he appointed another man to the court; and South Dakota's senators recommended only men to President Obama for its federal district court opening.

How are women doing in the state of Minnesota? We have receded from a majority of the Minnesota Supreme Court to 2 of 7. Nine of 19 appeals court judges are women and

96 out of 289 district court judges (33%). Overall, 31% of Minnesota's judges are women. We rank 12th among the states, behind Vermont (41%), Montana, Hawaii, Oregon, Rhode Island, Massachusetts, Washington, Nevada, Maryland, Kentucky, and Colorado, but well ahead of South Dakota and Idaho with a mere 13%.² While all states have had at least one woman serving on their state's highest appellate court, three states have reverted to all-male: Idaho, Pennsylvania, and Indiana. Minnesota's high numbers, however, mask significant regional variation. Unlike 1989, no districts are all men, but some are heavily skewed, for example, 91% of the Eighth Judicial District's judges are men. The high number of women judges in the metro area drives up the state's average.

Since political scientist Beverly Blair Cook began her pioneering research on women judges in the 1970s, political scientists have set out to discover what factors enhance the probability of a gender diverse and representative bench. By 1984, social scientists could no longer explain women's low representation in the judiciary by the low numbers of women lawyers. That explanation worked when the pool of women lawyers was small, but can no longer explain the missing women. Equal employment opportunity analysis of the qualified labor pool would lead us to expect more women serving as judges. We need to acknowledge that women's under representation is not going to correct itself—women do not just magically “trickle up” in the fullness of time. Much as defenders of the status quo counsel patience, increasing the number of women lawyers will not do the trick. Nor does the method of judicial selection explain women's absence or the state-to-state variations. It turns out that some merit selection

systems choose relatively high numbers of women while others do not and women sometimes do well under some state's elective systems and not under others.

Research by political scientists has shown that governors and presidents stand a higher probability of appointing women if a court has no women members.³ Selectors want at least token representation and the credit and attention for appointing a first. The bad news is that after that initial barrier is breached, the fact that women may be woefully underrepresented no longer increases the probability a woman will be selected: "pressures to increase gender diversity may be largely satisfied at a relatively low level."⁴ The only factor that seems to increase women's likelihood of being appointed appears to be the size of the court. President Clinton, for example, was much more likely to appoint women to larger than smaller courts, once one woman served. The number of women lawyers, the number of women lower court judges, or the fact that a woman is vacating the seat do not help explain whether the selector will choose a woman.

In Minnesota, 31% of Governor Carlson's appointments to the district court were women, 32% of Jesse Ventura's appointments to all courts were women, and 39% of Governor Pawlenty's appointments to all courts as of August 31, 2008, were women. Contrary to evidence in some states, at least in Hennepin and Ramsey Counties, recent election results suggest voters not only do not discriminate against women candidates for judges but may favor them. Commission on Judicial Selection Demographic Data show that 24% of the applicants for district court since 1991 have been women. Researchers for the American Judicature Society found that in the 1990s, nominating commissions tended to recommend women proportionate to their applicant numbers. They also found that more diverse nominating commissions both attracted more diverse nominees and tended to recommend more diverse slates.⁵ A recent study by the Brennan Center for Justice found nominating commissioners in the ten states studied varied as to whether they saw their roles as headhunters who took responsibility for recruiting a diverse candidate pool versus those who saw their role as background checkers who passively waited for candidates to apply. The report made a number of recommendations for increasing diversity including encouraging commissioners to actively recruit diverse candidates, training commissioners on implicit bias, and making diversity of commissioners and judges an explicit statutory goal.⁶

The records of recent governors and the judicial nominating commission are commendable. We must be vigilant, however, and not assume that progress is inevitable. In all the fanfare over President Reagan's appointment of Sandra Day O'Connor to the U.S. Supreme Court, few noticed that he appointed less than half of the number of women to the federal bench than had President Carter. Minnesota Women Lawyers led the way to se-

cure the appointment of Rosalie Wahl to the Minnesota Supreme Court in 1977.⁷ It is time to recommit this organization to the cause of moving from 30% to parity, a very different challenge than breaking the gender barrier. MWL should actively work to increase the number of women applicants, should work to ensure that women serve on the nominating commissions (and not only as lay members), should encourage governors to select high numbers of women, and that, as we go forward as a state to consider new ways of choosing judges, we make a diverse and representative judiciary an explicit statutory goal and seize the opportunity presented by the discussion of judicial selection to raise the diversity issue.

¹ www.theinfinityproject.org

² http://www.nawj.org/us_state_court_statistics_2009.asp. Last accessed May 28, 2009. More recent numbers for Minnesota than the NAWJ's were obtained from Nancy Dietl for the 2008 Minnesota State Bar Association (MSBA) report, *Diversity & Gender Equity in the Legal Profession: Best Practices Guide*.

³ Kathleen Bratton and Rorie L. Spill. 2005. "Diversifying the Federal Bench: Presidential Patterns." *The Justice System Journal* 26(2): 119-133. Bratton and Spill. 2002. "Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts." *Social Science Quarterly* 83(2): 504-518. Bratton and Spill 2001. "Clinton and the Diversification of the Federal Judiciary." *Judicature* 84(5): 256-261.

⁴ Bratton and Spill 2002, 515.

⁵ Kevin M. Esterling and Seth S. Andersen. 1999. "Diversity and the Judicial Merit Selection Process." In *Research on Judicial Selection 1999*. Chicago: American Judicature Society.

⁶ Torres-Spelliscy, Ciara, Monique Chase, and Emma Greenman. 2008. *Improving Judicial Diversity*. New York: Brennan Center for Justice.

⁷ Sally J. Kenney, "Thank you for Being Ready: Minnesota's First Supreme Court Justice, Rosalie Wahl." http://www.hhh.umn.edu/centers/wpp/case_studies.html#kenney2