

**The Relevance of Gender: A Case Study of Judicial
Appointments at the State Level¹**

**Marianne Githens
Goucher College**

Information gathered as a participant observer on the Maryland judicial nominating commission and from hearings on gender bias in the Maryland courts, along with interviews, will be used to show that the attitudes of the gatekeepers toward women were less decisive than previous research suggested in having women appointed to the bench. It will be argued that the credentials of the male applicants played a more crucial role in the deliberations of the judicial nominating commission than positive attitudes towards women or gender neutral views.

For the most part, women's representation on the benches of state courts resembles that of women at the federal level. The vast majority of state judges are men, and the higher the level of the court, the more likely it is that the judge is a man. Maryland is certainly no exception to this pattern. Prior to 1951 no woman sat on the bench of a Maryland court. The first and only woman to sit on the highest court in the state, the Court of Appeals, was appointed in 1979, and when she died, she was not replaced. In 1989 only one woman sat on the Court of Special Appeals, the next highest court, and of the total of 222 judges sitting in all of Maryland's state courts; ten women sat on the circuit courts and eight on the district courts. It was not until 1981 that the first and only African American woman was appointed. (See Table 1)

What accounts for this pattern? Is it a function of the size of the female applicant pool, or are there barriers which keep women out? What role does the judicial selection process play? How significant is the role of gatekeepers to women's appointment to judgeships? The judicial selection process for appointment to the district and circuit courts in Baltimore, Maryland, will be used as a case study to pose some answers to these questions. It will be argued that while the size of the eligible pool of female applicants and the extent to which the judicial selection process is

Table 1.

Gender Representation on the Maryland Courts

	District	Circuit	Special Appeals
Men	92	110	20
Women	8	10	1

open as opposed to closed may account in part for the pattern of women's appointment to the bench of the Maryland courts, the role of the gatekeepers is less decisive than previous research suggested. A case will be made that the credentials of the white men seeking judicial appointments play a more crucial role in the recommendation of candidates than positive attitudes toward women or gender neutral views.

The Maryland Trial Court Judicial Nominating Commission for the Eighth Judicial Circuit recommends candidates for the Baltimore City circuit and district courts. My membership on this commission between 1983 and 1988 provided me with a unique opportunity to observe first-hand the process for recommending candidates for the judiciary. This experience along with interviews of others who have served on Maryland's judicial nominating commissions, the findings of a Special Joint Committee on Gender Bias in the Maryland Courts created by Chief Judge Robert C. Murphy of the Court of Appeals, and lengthy structured questionnaires submitted by candidates to the judicial nominating commission will be used to posit answers to the question, why so few women judges? Special attention will be given to the function played by the gatekeepers in the appointment process, and some inferences will be drawn about the factors which influence judicial selection.

Women's Recruitment to the Bench: Some Explanations

Early research dealing with the recruitment of women to public office attributed their limited numbers to their unwillingness to make themselves available as candidates (Rule, 1981; Fowlkes, et. al., 1979; Welch, 1978). Explanations for the paucity of women judges echoed similar themes. The number of women in the judiciary was ascribed to the

Commonwealth

size of the eligible pool, or to the nature of the selection process, or to the role of the gatekeepers. According to the eligible pool thesis, the number of qualified female applicants was just too few to alter the existing pattern of judicial appointments (Epstein, 1981). There was some evidence to support this explanation.

Until the 1970s, women constituted less than ten percent of law school graduates; as a consequence, the total number of women possessing the credentials necessary to be appointed judges was nominal. (Martin, 1987) Moreover, the tendency of the American Bar Association to favor older, well-to-do, business-oriented, corporate attorneys resulted in higher ratings for men whose career patterns more closely followed their own, and in lower ratings for women who were less likely to have these personal characteristics (Carp and Stidham, 1985b). Women lawyers whose careers often did not conform to the patterns valued by the American Bar Association were frequently considered as less suitably qualified (Castillo, 1981; Slotnick, 1984). Since state bar associations reflected the ABA standards, few women met the established criteria for being appointed judges at the state level.

As compelling as this evidence might seem at first, there are other equally plausible explanations. Women's perceptions of limited opportunities for professional advancement, discrimination or the use of selection criteria favoring male life styles may just as easily account for the limited number of women appointed to the bench. For example, women may believe that there is a glass ceiling. Research on ambition has indicated that when individuals see little chance to move up the professional ladder, they often opt for alternative careers (Schlesinger, 1966). Overt or covert discrimination is another possible explanation. In a study of women state legislators, for example, Welch indicated that discrimination may affect their recruitment (Welch, 1978). A similar situation may exist for women seeking judicial appointments. Bar association criteria used to evaluate candidates for judgeships may also place women at a disadvantage (Slotnick, 1984). In short, other explanations may account for the meager appointment of women to the bench.

Other research on women in the judiciary focused on the impact of the selection process rather than on the existence of an eligible pool. Three criteria characterize a closed door system: competency to sit on the bench as reflected in the bar associations' rating, the pattern of judicial experience, and political party activism. Until 1976 federal judges were

selected by the closed door process. Slotnick contended that white male dominance of the federal courts was related to this process. She writes:

Successful aspirants are generally well endowed with "traditional" measures of professional success including elite socioeconomic backgrounds and educational training, high status and high income legal careers and, perhaps, a partisan political background which helps create "access" to patronage oriented federal judgeships in the first place." (1984, 372)

An alternative to the closed door system was introduced during the Carter Administration. Seeking to broaden the candidate pool, the President set up the U.S. Circuit Judge Nominating Commission whose task it was to seek out well qualified women and minorities. He also encouraged Senators to use merit selection panels to nominate federal district court judges. State bar associations, practicing attorneys, non-lawyers, women's and minorities' organizations and sitting judges officially joined those who traditionally determined merit: the American Bar Association, the United States Department of Justice, the Senate and the President. By drawing individuals with more diverse backgrounds into the selection process, these merit panels not only broadened the search for eligible women but were also successful in advocating their candidacy. These changes were credited with dramatically increasing the number of women candidates (Randall, 1979). Three-fourths of the women appointed were nominated by merit commissions, as opposed to less than two-thirds of the men (Martin, 1987).

A return by the Reagan and Bush administrations to a closed door system seemed to underline the importance of the selection process. When Reagan stopped pushing for merit panels, they were all but abandoned by many of the Senators, and the number of women appointed to the courts dropped. A return to the traditional patterns of judicial experience and party activism in combination with an emphasis on political ideology has often been credited with reducing the number of women whom Reagan and Bush appointed to the federal courts (Martin, 1987).

The various studies that attributed the number of women judges to the size of the eligible pool or to the judicial selection process seemed at odds with research on women in legislatures which found that gender patterns were too complex to be assigned to any single cause. Drawing on

Commonwealth

this body of literature, Cook argued that both structures and attitudinal biases frustrated women's recruitment to the judiciary (1978; 1980). She suggested a new paradigm which consisted of three variables: the pool of eligible female candidates, the gatekeepers' willingness to recognize the presence of eligible women, and an acceptance of the legitimacy of women candidates' claim to serve in the judiciary. Allen subsequently expanded Cook's model to include a political culture which valued acting with integrity and individual achievement and economic characteristics (1984). In Allen's view an urbanized environment structured attitudes in gatekeepers favorable to the appointment of women to the bench, and along with political culture, especially a moralistic or individualistic one, enhanced women's appointment to the judiciary. Both Cook's and Allen's models perceived the number of women judges as dependent on: (1) the number of qualified applicants available to be appointed; i.e. the eligible pool, (2) a willingness of the gatekeepers involved in the selection and the appointment process to seek out qualified women; i.e. an open recruitment process, and (3) a positive attitude on the part of the gatekeepers about women's ability to fulfill the role of a judge.

How well do these various explanations account for the appointment of women to the judiciary in Maryland and what role did the Baltimore City trial court judicial nominating commission play between 1983 and 1988? How important was its gatekeeping function to the appointment of women judges?

The Judicial Selection Process in Maryland

In Maryland, there is a four tier court system.² At the bottom is the district court which has jurisdiction primarily in cases involving misdemeanors and arraignments. The next higher court is the circuit court which handles a broad array of civil and criminal cases. Above that are the Court of Special Appeals and the state's highest court, the Court of Appeals. Since criminal cases not involving a federal offense, cases arising under state law which do not involve an issue of federal constitutionality, cases involving domestic or family law and a vast array of civil cases are heard and decided at the state court level, these courts are more likely to have an impact on the daily lives of the ordinary citizen than the federal courts. Therefore, it is particularly important for the average citizen to perceive the judicial selection process for these courts as unbiased. The pattern of women's judicial appointment at the state level becomes

Marianne Githens

significant because, in the opinion of the Special Joint Committee on Gender Bias in the Courts, an absence of women judges raises questions about "whether the state's system of justice takes into account their needs, experiences and interests" (Report of the Special Joint Committee on Gender Bias in the Courts, 1989, 97).

Prior to the 1980's, the qualifications for a judgeship in Maryland were much the same as they were at the federal level prior to Carter's Administration: bar association ratings, judicial career and party activism. The state judicial selection process became open door in 1981 when legislation was passed establishing nominating commissions. Commissions were created to review candidates for each of the appeal courts and for each of the district and circuit court jurisdictions. Legislation establishing the district and circuit court nominating commissions specified that they were to consist of thirteen individuals appointed by the governor. Six of the members had to be lawyers with the remainder "ordinary", non-lawyer citizens. In addition there was a chair who might be either a lawyer or an ordinary citizen.

The procedures for the commissions are clearly outlined in a manual distributed to each member at the time of his/her appointment. All members of the commissions are expected to be present when the candidates wishing to be considered for appointment to the district or circuit court are interviewed. Any member who misses more than two meetings a year is removed. All individual wishing to be considered for an appointment to either the district court or the circuit court must be interviewed by the commission. Prior to the interview, each candidate completes a fairly extensive, structured questionnaire that provides details about age, background, educational attainment, employment record, health, complaints that might have been brought against the candidate by the various ethics and grievance committees of the local and state bar associations, and any litigation in which the candidate was personally involved. The commission uses this information to assess a candidate's qualifications and suitability to serve as a judge. In addition, the Administrative Office for the Maryland Courts solicits letters of recommendation and state bar association ratings. Candidates are then interviewed by the entire commission. After all the candidates are interviewed, the commission members discuss the applicants and vote. The names of those candidates receiving a majority of the commissioners' votes are forwarded to the governor. Ordinarily, no less than three names are

Commonwealth

forwarded, and the governor may only appoint an individual whose name appears on the commission's list.³

Findings The Applicant Pool

Between October, 1983, and March, 1988, the Trial Court Judicial Nominating Commission for the Eighth Judicial Circuit of Maryland met approximately three times a year and on average interviewed twelve candidates for each opening. Since the commission met only when a vacancy on the district or circuit court occurred, the actual number of meetings varied from one year to the next. A total of seventy-three individuals appeared before the commission during this period. Some appeared before the commission more than once, with one candidate appearing every time. Those unsuccessful in obtaining the commission's endorsement the first time appeared a second or third time. Successful candidates' names remain on the gubernatorial appointment list for only one year. As a consequence, some who were recommended but not appointed to the bench within a year returned to the commission in order to be recommended again.⁴

The bulk of the candidates ranged in age from thirty-five to fifty-five. The oldest candidate was sixty-three.⁵ Similar to the pattern found at the federal level, the women appearing before the commission tended to be slightly younger on average than the men.⁶ The majority of candidates interviewed were white men (57.5%). Women constituted 20.5% of the candidates, and African Americans 26%.⁷

Almost all of the candidates possessed at least two university degrees: a bachelor's degree and a law degree.⁸ On the whole, the women and African American candidates had more distinguished academic records. For example, the majority of the women applicants were in the top quarter of their classes in law school. This was not the case for the majority of the white men. The women and African American candidates were also more likely to have made law review or to have published and to have consistently enrolled in special mini-courses updating them on changes in the law than their white male counterparts. They tended to have somewhat more breadth in their legal experience, although it was most likely to be in the public sector. The women candidates and African Americans, on the whole, also received stronger letters of recommendation than the white male candidates did. The letters of recommendation written on behalf of the women and African Americans were more likely to cite examples of

Marianne Githens

achievement, legal scholarship and professional demeanor and to contain more positive adjectives and unqualified, enthusiastic endorsements, whereas the letters for the white men were more general and less enthusiastic. Finally, the women and African American candidates tended to have somewhat higher bar association ratings.

The majority of the candidates (52%) were employed in the public sector; five were judges, three of whom were up for reappointment,⁹ some were employed by the courts as the equivalent of magistrates or hearing officers, the remaining were either public defenders or state prosecutors. Here again though, there were some interesting differences between the men and women. Twelve of the fifteen women (80%) were employed in the public sector, whereas only 62.5% of the African Americans were. White men, although more likely to be employed in the public sector than African Americans, were more likely to come out of private practice than women. (See Table 2.) The bulk of the remaining white men were employed in the state prosecutor's office. In contrast, the women were much more likely to have served as judicial hearing officers, for example in the Orphan's Court, or to have been employed by the state as public defenders for the indigent.

Of the seventy-three candidates appearing before the commission, twenty-three were recommended to the governor.¹⁰ Of the fifteen women who appeared before the Commission, ten (66.6%) were recommended. The percentage was somewhat less (37.5%) for the sixteen African American men who came before the Commission. Only seven of the white male candidates (16.6%) were recommended. (See Table 3.)

The actual appointment of judges rested with the governor. It is interesting to note that the gender and racial distribution of the commission's recommendations were not reflected in his appointments; the largest number of appointments went to African American men, two thirds of whom received appointments. In contrast, only half of the women recommended were appointed to the bench, while just a third of the white men received an appointment. (See Table 4.)

Discussion

On the surface, these findings seem to corroborate previous studies. Allen's assumption about the importance of an urban environment is borne out by the fact that the first woman appointed to the Maryland court was from Montgomery County, an affluent, "urban-oriented",

Table 2.

Applicants Appearing Before the Nominating Committee
By Race, Gender and Employment in Percentages

	Male	Male	Female	Female
	White	African American	White	African American
Public	71	63	80	100
Private	29	37	20	-
Total No	42	16	12	3

Table 3

Candidates Recommended by Race and Gender in Percentages

	Male	Male	Female	Female
	White	African American	White	African American
Recommended	16.6	37.5	75	33.3
Not Recommended	83.4	62.5	25	66.6
Total No	42	16	12	3

Marianne Githens

Table 4.

Judicial Appointments by Race and Gender in Percentages

	Male	Male	Female
	White	African American	*
Appointed	42.8	66.6	50
Not Appointed	57.1	33.3	50
Total No	7	6	10

* Only one African American woman was recommended, and although she was not appointed during the first year her name appeared on the commission's list, she was appointed the second time that she was recommended.

Washington suburb. In 1989 all the women who sat on the Maryland bench were from metropolitan areas.¹¹ No woman sat on the circuit court bench in any of the more rural Maryland counties.

As far as the recruitment of women is concerned, the Baltimore judicial nominating commission did, perhaps, encourage the emergence of an alternative pool of candidates, although the evidence for this is certainly not conclusive. Other factors might just as easily account for the number of women applicants. Certainly the increase in the number of women graduating from the two law schools in Baltimore during the nineteen seventies increased the number of women lawyers between the ages of thirty-five and forty-five. This alone may be the reason why there was an expanded pool of women applicants. Although it is possible that before the creation of merit panels many women attorneys may not have been recommended by the "old boy" dominated bar association networks, between 1983 and 1988 women's state, local and specialized bar ratings were stronger than they were for white male candidates.¹² In short, an expansion of the gatekeepers to include nominating commissions may have had a substantial effect on the pool of candidates recruited and recommended for the Maryland bench, but this is by no means certain.

The higher success level of African Americans recommended by the Commission in getting judicial appointments would seem to support earlier research findings about the role which party activism plays in the appointment process. The emergence of an organized, African American political presence in Baltimore City and the role played by the Black Caucus in the Maryland legislature might well explain the high percentage of African Americans appointed. Although there was a Women's Caucus in the state legislature as well, women's political organizations had less electoral clout. Perhaps this might be the reason why a smaller percentage of the women recommended received judgeships.

These interpretations fail to describe, however, the gate keeping function of the commission. In theory, the commissioners, that is to say the gatekeepers, were crucial to the judicial selection process, for any candidate whose name was recommended to the governor had to receive a majority of the votes cast by the commissioners. Consistent with the intent of merit panels, the membership reflected community diversity. Approximately half of the commission members were drawn from outside the legal profession. Five out of the thirteen members were African American, with one chairing the Commission for four years. Three of the commissioners were white women, one of whom was an attorney. The

Commonwealth

commissioners played a direct role at two points in the selection process: the candidate's interview and the discussion of each candidate which preceded the vote on the decision to recommend.¹³ Practice differed from theory, however, in several important ways. All the commissioners were not equal in the power which they exerted, nor were the two stages of the process equal in importance. During the interview stage, the commissioners exerted very little influence.

By and large, the interviews were quite tame with little effort on the part of the commissioners to structure the interview.¹⁴ Generally the commissioners were quite cordial, but highly inconsistent in their questioning. Rarely were two candidates asked the same question. Although the guidelines distributed by the Administrative Office of the Courts suggested asking a set of questions which would test the candidate's capacity for judicial reasoning, and demonstrate her or his judicial demeanor, the commission rarely followed the prescribed format. Instead, questions often simply moved chaotically from one topic to another. On occasion, the African American commissioners asked rather hostile and leading questions of those candidates whom they suspected of harboring racist sentiments. One of the women commissioners occasionally sought to question candidates about their views on sentencing those convicted of spouse abuse. This type of questioning was not typical, however.

Ordinarily, civility ruled the day. There were only two occasions when a commissioner became clearly antagonistic in the questioning. Although in both cases, the candidate was not recommended, it was the subsequent discussion of the candidate, and not the interview which determined the outcome. Four of the men endorsed by the commission were already judges, and consideration of their candidacy was a mere formality.¹⁵ Only one woman seeking an appointment to a higher court was a judge. Her appearance was hardly a formality; she was subjected to extensive questioning about her activities as a judge in the district court and queried about why she was not content to remain where she was.¹⁶

The experiences of other Maryland judicial nominating commissions suggest that the interview was more critical elsewhere. At first, this might be interpreted as supporting Allen's position that an urban environment is more tolerant than a rural one. However, biased questioning characterized the interview stage in other urban as well as rural jurisdictions. For example, a significant difference in the questions posed to male and female candidates was reported in both Prince Georges and Montgomery counties (Report of the Special Joint Committee on Gender

Bias in the Courts, 1989, 97). In these counties as well as elsewhere in the state, and despite the existence of a state equal rights amendment, women were often queried about their marital status, their husbands' occupations, their children, and if they did have children, what child care arrangements would be made. No such questions were asked of the male applicants. As reported by the Special Committee on Gender Bias:

Members of the commission ask women applicants about their children, their husband's activities, their opinions on abortion and whether their spouse will be "sharing in the decision-making process." Unmarried applicants are immediately suspect and are subject to inappropriate questions about personal life activities (Report of the Special Joint Committee on Gender Bias in the Courts, 101).

In Baltimore City, these kinds of questions were only occasionally asked by the commissioners, and in general the interview played a secondary role in the commission's discussions and recommendations. The discussion stage, on the other hand, was very important. Like the interviews, the discussions were not structured. They tended to be dominated by the lawyers with two of the commissioners continually interjecting stories about the idiosyncrasies of various candidates. Hearsay evidence and gender stereotypes abounded. Although none of the discussions tended to focus exclusively on professional qualifications, the professional careers of the male applicants were discussed in much greater detail than those of the female candidates. The tenor of discussions of African American male candidates was different than that of either white men or the women, although, interestingly enough, African American females were discussed in the same manner as the other women applicants, and not as African Americans.

All the discussions began with a quick, superficial evaluation of the candidate's performance during the interview. Discussions of the white male candidates usually then proceeded to an extensive evaluation of their careers, the tone of which was almost always negative. Many of these candidates had worked for a number of years as public prosecutors. The States Attorney's Office where many were employed had recently undergone a reorganization. Part of the reforms involved an increased work load and the enforcement of the rule that no one working in the States

Commonwealth

Attorney's Office could hold a second job. As might have been expected, there were some objections to these changes. The majority of the white male candidates who either had or presently worked in the state prosecutor's office mentioned these reforms as the reason why they wanted a judicial appointment. Several actually said that they wanted to be a judge because they would not have to work long hours. During the discussion of these candidates, their poor, ill-prepared court room presentations, their general laziness and their unwillingness to do extra work were mentioned by the lawyer members of the commission. Anecdotal stories supporting these evaluations were often recounted.

In contrast, with one exception, white men who were already judges were discussed in highly deferential terms. The exception to this was a judge who had acquired a reputation for his racist and sexist biases. He was criticized by three of the African American and two of the women commissioners. These criticisms were quickly countered by a number of the remaining commissioners who testified to his "knowledge of the law" and his ability to move cases along "quickly."

There were three exceptions to this pattern. In one case, the candidate had been hospitalized, and there was some discussion of the illness and its impact on his behavior. The second involved a candidate who had openly expressed a sexual preference for children. The third concerned a politically well connected state prosecutor who, although always very well prepared, had established a reputation for being very hard on criminals. In discussing his qualifications, considerable emphasis was given to the details of his personal life.¹⁷ These were the only instances where there was any substantive discussion of the male applicants' personal lives or physical appearances.

With the possible exception of the candidates who were already judges, there were only a few white male candidates whose work was clearly respected by everyone. The evaluation of these applicants was particularly telling. There was considerable speculation about what hidden professional faults they might have, the assumption being that if they were not seriously flawed in some way, they would not be applying for a judicial appointment. In one discussion of a candidate with impeccable credentials some commissioners expressed serious reservations about him, because "if he's that good, he'd never want to sit on the circuit court." Indeed, the general consensus among the majority of the commissioners was that if these applicants were as good as they looked, they would never forego a lucrative partnership in a law firm for an appointment to the bench.

Marianne Githens

Invariably these discussions ended in dire predictions about the decline in the standards for judicial appointment and the need to increase judicial compensation to make it competitive with the private sector.

The white male candidates were discussed in terms of their professional qualifications and careers. At the same time, most of the white male applicants were regarded with suspicion and assumed to be too incompetent to make it in a respectable law firm. As a consequence, although the male judges were recommended easily, few of the other white male candidates had their names forwarded to the governor.

The evaluation of African American male candidates was quite different in tone and emphasis. Their personal behavior was much more likely to be the focus of the Commission's discussion. Complaints against these applicants which had been brought to the Grievance Committee of the State Bar were treated much more seriously than those lodged against white male candidates. A number of these complaints concerned the timely filing of motions and may have reflected the fact that many of these applicants had been associated with very small law firms or were solo practitioners. Such explanations were usually dismissed by a majority of the commissioners, however, and instead personal flaws were cited to account for the grievance. Professional performance was not criticized as harshly as that of white men.

The tone of the discussion of the female candidates was also quite different. Although African American male candidates were more likely to be evaluated on the basis of their personal characteristics and behavior, the discussions were not as intense, negative or scathing as they were for the female candidates. Invariably, the women applicants, including the woman who already was a judge, were evaluated on the basis of sex stereotypic criteria by both the lawyer and non-lawyer commissioners.

Comments about their physical appearance figured prominently; one highly qualified woman with an extraordinarily impressive record of court room experience was not recommended because she wore "red shoes", another because she tried, it was claimed, to use her "sex appeal" to influence the judge and the jury. "A woman who acts sexy can never be a good judge." was the way one commissioner summed it up. One woman who had been cited three times for her outstanding performance as a public defender was not recommended the first time she appeared before the Commission because she was unmarried but had a child. "This will send a bad message to the public and diminish respect for the bench.", one commissioner declared.¹⁸ An effort was made to block the

Commonwealth

recommendation of another candidate because she was dating a leading, influential attorney. "The only thing she's got going for her is ...", was the comment of one of the commissioners. A woman's family life was often discussed in some detail, and evaluations of her suitability for a judicial appointment were based on how successful, or as far as some of the commissioners were concerned, how unsuccessful she had been in managing her family life. These comments and evaluations were articulated primarily by the lawyer members of the commission, probably because the lawyers tended to dominate the discussion stage: commissioners who were not lawyers often made similar comments.¹⁹

Apparently this conduct was not unusual. In 1989 more than two thirds of Maryland's women judges (69%) indicated that they were aware of gender bias in the selection process (Report of the Special Joint Committee on Gender Bias in the Courts, 99). Roberta McCarthy, an attorney from Prince Georges County testified before the Special Joint Committee about the higher standards applied to female applicants. The same theme was repeated by a member of the Baltimore Commission who also spoke about the existence of a double standard. A number of witnesses who appeared before the Special Joint Commission stated that women who worked in the public sector were often evaluated harshly because they lacked private sector experience. Both responses to the survey on gender bias and testimony at public hearings held throughout the state display the extent to which both the lawyer and non-lawyer members of the judicial nominating commissions held and acted on negative stereotypes of women. At the Baltimore commission and elsewhere in the state, the question was raised again and again about the ability of women to control a courtroom because of "their small voices and stature." In testimony given to the Montgomery County hearing, Jo Benson Fogel reported comments, such as "He has a wife and family. She has a husband. She doesn't need this job and he does." Almost always, when a female applicant's courtroom performance was evaluated, her use of "sex appeal" to achieve an outstanding record was mentioned.

The operation of the Baltimore nominating commission is very similar to the findings of the Maryland Special Joint Committee. Indeed, throughout the state, women applicants were evaluated differently than their male counterparts, and were more likely to be gauged in terms of negative stereotypes. In her testimony to the Special Joint Commission Paula Peters described as hysterical the reaction of the male members of one nominating commission to the possibility of recommending a woman.

On the evidence presented at its hearings the Special Joint Committee concluded that

To the extent that the judicial nominating process is affected by discriminatory attitudes, stereotypes and criteria such as those described to the Committee, female candidates will not be given a fair opportunity to be appointed to the bench. (102)

Conclusion

The operation of the Baltimore City Trial Court Nominating Commission calls into question the importance that earlier studies have attached to the positive attitudes of gatekeepers and suggest the need for a significant modification of existing explanations for the limited number of women judges. Gatekeepers' willingness to recognize the presence of eligible women and to accept them as legitimate candidates may be important, but it does not account for the recommendations of the Baltimore City judicial nominating commission. To the contrary, the deliberations of the Baltimore nominating committee and the findings of the Joint Special Committee point to pervasive opposition to the appointment of women judges. Indeed, the Special Joint Committee on Gender Bias mentioned examples of male commissioners' hostility to women candidates, and described them as "nothing short of astonishing." Negative stereotyping of women candidates was not restricted to men commissioners either. While it is true that on some occasions, the African Americans and women on the Baltimore commission worked together to support women or African American male candidates, this was, by no means, always the case. For example, one of the woman members was antagonistic to the female applicants on the grounds that, if a woman made even the smallest mistake after she was appointed to the bench, all women attorneys would be discredited. Both the findings of the Special Joint Committee and the deliberations of the Baltimore nominating commission indicate that, despite the efforts of those gatekeeper sympathetic to expanding the pool of eligible women and African American candidates, stereotypic criteria were used as the basis for evaluating all candidates during the decade of the eighties.

How can one then explain that, although the Baltimore nominating commission employed negative gender stereotypes in its evaluation of the female applicants and often manifested overt gender bias, it recommended

Commonwealth

for judgeships approximately two-thirds of all the women appearing before it. In contrast, it recommended only one-fifth of the white male applicants and just somewhat over a third of the African American males. The recommendation of so many female candidates seems at odds with the importance that earlier studies have attached to the significance of positive attitudes on the part of gatekeepers. How does one account for the high percentage of women recommended to the governor by the Baltimore commission? The answer may be related to the status attached to the judiciary and the qualifications of the white male applicant pool. During the nineteen eighties, partners in large Baltimore firms who were most likely to be white and male earned salaries far in excess of those paid to judges. Perhaps the decade's emphasis on material goods and individualism encouraged the pursuit of occupations which were financially lucrative rather than those which were oriented to public service. As a result fewer white males with strong professional credentials were tempted to pursue a career on the bench. This attitude was mentioned on a number of occasions during the commission's deliberations. For example, when the commission discussed highly qualified white male candidates, almost everyone wondered why they would leave private practices where they could earn so much more, and many of the commissioners were suspicious when the white male applicants talked of giving something back to the community. The commissioners speculated that with attractive opportunities and financial gains in the private sector available to white men with strong qualifications, only those with no future would seek a judgeship. These views were, to some extent, reinforced by the fact that many of the white men who did seek a judgeship were in marginal practices, never expected to become a partner in a large firm, or had nothing to look forward to but the heavy case loads of the States Attorney's office. Faced with white male candidates whom the majority of commissioners considered unqualified, other applicants had to be considered and recommended. While bemoaning the decline in quality of the candidates and predicting a collapse in the American legal system, many of the commissioners simply could not bring themselves to recommend many of the white male applicants.

For women and African Americans, the situation was quite different. Although women are attending law schools in greater numbers, life after law school is not particularly promising for them. Regardless of their standing in law school, women tend not to be recruited in the same numbers as men to the more prestigious Baltimore law firms and few are

offered partnerships when they are recruited. Given these conditions, perhaps women lawyers view the public sector as offering more prestige and opportunities for upward mobility. If this is the case, a judgeship is a highly desirable option. Perhaps this accounts for the fact that so many well-qualified women sought appointments to the bench. Similarly, African Americans have reduced choices in the private sector. Might it not be that for women and African Americans an appointment to a judgeship represents high status and prestige; whereas for white men it means a partnership?

The findings reported here suggest that the size of the white male applicant pool may be an important factor in women's appointment to the judiciary. Perhaps, when there is a well-qualified male pool, the paradigm developed by Cook and Allen may play a role in the appointment of women to the court. However, when the pool of qualified male candidates is small, the positive attitudes of the gatekeepers may be much less critical. The actions of the Baltimore City trial court nominating commission suggest that the size of the eligible pool of white men may really be the deciding factor.

Endnotes

1. An appointment to serve on a Maryland judicial nominating commission between 1983 and 1989 provided me with a unique opportunity as a participant observer to examine some of the factors affecting judicial appointments to the bench of a state court.
2. In addition to these four levels, there are specialized courts such as the Orphans Court. "Masters", rather than judges hear cases in these courts, and the appointment process is different.
3. The names sent to the governor remain on the list for one year. If there are already several names on the list, a commission, with the permission of the governor, will sometimes forward less than three names. Permission to "short list" is usually automatic, provided a pool of three candidates already exists.

Commonwealth

4. On several occasions a candidate was recommended the first time, but not the second. The reasons for such changes varied considerably.
5. No one under the age of thirty may be appointed a judge in Maryland.
6. The majority of those appointed judges were in their mid-forties; the majority of women between the ages of 35 and 44. Consequently the age of the women applying was not a liability to their appointment.
7. There were 19 African Americans in all, sixteen of whom were men. There were 15 women, three of whom were African American. Here the African American women are counted in the category of both African American and women. Elsewhere in the text they are discussed within the category of women rather than African American because this best reflects the Commission's treatment of them.
8. Four of the older candidates had an LL.B. degree but had subsequently upgraded their education by taking special courses and seminars.
9. Incumbency did not automatically ensure a positive recommendation, although in all cases except one, judges were treated with "kid gloves". Great deference was shown to them both during the interview and in the subsequent discussion stage.
10. See also notes 2 and 3.
11. Women sat on the benches of Baltimore City and Baltimore, Frederick, Montgomery and Prince Georges counties.
12. In Baltimore City, there is a city bar association, and in addition a women's bar association and the Monumental Bar Association which is predominantly African American.
13. As a member of the commission, I was able to keep extensive notes of the discussions surrounding the recommendation of the candidates to the governor. Rules of confidentiality, however, prohibit the discussion of specific individuals.

Marianne Githers

14. Commissioners who were close friends, relatives, business associates or who had close connections of any sort with the candidates were required to disqualify themselves.

15. One of the judges seeking the commission's endorsement for reappointment refused to appear, claiming that his record spoke for him. The Commission decided, without discussion, to accept the questionnaire which the judge submitted in lieu of an interview and subsequently endorsed his candidacy.

16. When asked during the interview why she wanted to move from the district to the circuit court, the applicant mentioned that being a judge in the district court was a gruelling experience. In the subsequent discussion of her qualifications, one commissioner argued in favor of recommending her for the circuit court on the grounds that the district court was too taxing on her physically. This reason appeared to sway several members who had previously seemed hostile to recommending her. In contrast no male district court judge was asked why he was not content with remaining where he was, and physical well-being was not suggested as a reason for recommending him.

17. This applicant was not recommended by the commission the first time he appeared it. Extensive political pressures was subsequently exerted on his behalf, and he was recommended the next time he applied to the commission. He was appointed shortly thereafter to the bench and has proved to be a very good judge; his courtroom is known for its intelligence and fairness.

18. Although this decision was subsequently reversed when the candidate appeared before the commission a second time, there was still very considerable opposition to recommending her because of her "unmarried" status.

19. The proceedings of the commission were confidential. Therefore, candidates could only informally be advised of the discussion which had taken place. Some informal leaks of the kinds of comments which were being made was one of the factors which led to the creation of the Special Joint Committee on Gender Bias in the Courts.

Commonwealth

References

- Allen, D.W. 1984. *Conditions and Consequences of Women on State Supreme Courts*. Dissertation, University of Wisconsin.
- Berkson. 1980. "Carter's Judicial Selection System: How Well Does It Work". *Judges* 19: 4.
- Berkson and Carbon. 1980. *The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates*. Chicago: American Judicature Society.
- Carp and Stidham. 1985. *The Federal Courts*. Washington, D.C.: Congressional Quarterly Press.
- _____. 1985b. "Recruitment of Women to State Supreme Courts: Cultural and Economic Conditions". Presented at the annual Midwest Political Science Association Meeting, Chicago.
- Carroll, S. 1985. *Women As Candidates in American Politics*. Bloomington: University of Indiana Press.
- Castillo. 1981. "Women Ask Rise in Status as Lawyers". *New York Times*. Feb. 10, A-8.
- Cook, B. 1978. "Women Judges: The End of Tokenism" in W. L. Hepperle & L. Crites, eds. *Women in the Courts*. National Center for State Courts, 1978; 84-105.
- _____. 1980. "Political Culture and the Selection of Women Judges in Trial Courts" in D. Stewart, ed. *Women in Local Politics*, Scarcrow Press, 1980: 130-148.
- _____. 1984. "Women Judges: A Preface to Their History". 14 (3) *Golden Gate University Law Review*: 573-610.
- Epstein, Cynthia. 1981. *Women in Law*. New York: Basic Books.
- Fowlkes, D. et al. 1979. "Gender Roles and Party Roles". *American Political Science Review* 73: 772-780.
- Goldman, B. 1983. "Reagan's Judicial Appointments at Mid-Term: Shaping the Bench In His Own Image". *Judicature* 66: 335.
- _____. 1985. "Reorganizing the Judiciary: The First Term Appointments". *Judicature* 68: 313.
- Mandel, Ruth. 1988. "The Political Woman", in *The American Woman: A Status Report 1988-89*. Sara E. Rix, ed. New York: W.W. Norton & Co.
- Martin, Elaine. 1982. "Women on the Federal Bench : A Comparative Profile". *Judicature* 66: 306.

Marianne Githers

- _____. 1987. "Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations". *Judicature* 71: 136-142.
- Maryland Special Joint Committee. 1989. *Report of the Special Joint Committee on Gender Bias in the Courts*. Annapolis, Maryland: Administrative Office of the Courts.
- Randall, S. 1979. "The Success of Affirmative Action in the Sixth Circuit", *Judicature* 62: 486.
- Ries, P. & Stone, A.J. eds. 1992. *The American Woman 1992-1993: A Status Report*. New York: W.W. Norton.
- Rosenwasser, S.M. and Dean, N.G. 1989. "Gender Role and Political Office: Effects of Perceived Masculinity/Femininity of Candidate and Political Office". 13 *Psychology of Women Quarterly*: 77.
- Rule, W. 1981. "Why Women Don't Run: The Critical Contextual Factors in Women's Legislative Recruitment". *Western Political Quarterly* 34: 60-77.
- Schlesinger, J. 1966. *Ambition and Politics*. Chicago: Rand McNally.
- Slotnick, E.E. 1984. "The Paths to the Federal Bench: Gender, Race and Judicial Recruitment". *Judicature* 67: 377-383.
- _____. 1983. "The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment - Part I"; "The ABA Standing Committee on the Federal Judiciary - Part II". *Judicature* 66: 348, 385.
- Welch, S. 1978. "Recruitment of Women to Public Office". *Western Political Quarterly* 31: 372-380.
- Williams, C. 1990. "Women, Law and Politics: Recruitment Patterns in the Fifty States". *Women and Politics* 10: 103.