

FORDHAM LAW REVIEW



**WOMEN IN THE FEDERAL JUDICIARY: THREE WAY
PAVERS AND THE EXHILARATING CHANGE
PRESIDENT CARTER WROUGHT**

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Reprinted from
FORDHAM LAW REVIEW
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VOLUME LXIV

NOVEMBER 1995

NUMBER 2

ADDRESS

WOMEN IN THE FEDERAL JUDICIARY: THREE WAY PAVERS AND THE EXHILARATING CHANGE PRESIDENT CARTER WROUGHT

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and *Laura W. Brill***

I am delighted to be with you at this grand Carter Center gathering in celebration of women judges. When I attended law school, as other 1950s and 1960s graduates will attest, only a handful of women served as judges in the entire nation. No one in those ancient days even conceived there might one day be a National Association committed to the concerns and well-being of women judges. Today, the National Association of Women Judges has a membership roster upward of 1,000. NAWJ provides resources, companionship, and support for all who work in the federal and state courts, and in administrative tribunals; it has branched out to provide assistance, cooperation, and encouragement on an international level as well.

Before there were women judges in numbers large enough to form a National Association, there were way pavers-brave and bright women who served as judges with extraordinary devotion and distinction. Judges Florence Ellinwood Allen, Burnita Shelton Matthews, and Shirley Mount Hufstедler were among the first women to be seated on the federal bench. Their examples made it less difficult for the rest of us to gain appointment or election to the judiciary, and realistic for legions of women in the future to aspire to-and achieve-a full life in the law. It is appropriate at this conference, I hope you will agree, to recall Abigail Adams' words (as her husband, John, and his nation-making colleagues did not) and to remember these great ladies. That is what I will do in these remarks.

Florence Allen was the first woman to serve on an Article III federal appeals court. An accomplished student of music and classical languages, she graduated Phi Beta Kappa from Western Reserve University in Ohio in 1904. For the next two years, she studied and worked in Berlin, Germany, improving her skill as a pianist and writing music criticism for U.S. newspapers. After adventures abroad, Al-

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** J.D. 1994, Columbia University. The authors acknowledge with appreciation the careful review and helpful suggestions of Justice Ginsburg's 1995-1996 law clerks: Lisa Beattie, Maria Simon, Michael Wang, and Paul Watford. This Address was originally presented by Justice Ginsburg at the Annual Conference of the National Association of Women Judges in Atlanta, Georgia on October 7, 1995.

len returned to Western Reserve where, in 1908, she earned a masters degree in political science. When one of her Western Reserve professors suggested a career in law, she pursued the idea eagerly.

Florence Allen entered the University of Chicago Law School in 1909, the only woman in a class of about 100. She finished the winter quarter second in her class, and her classmates complimented her on her masculine mind-on thinking like a man. Allen herself had a different perception. She once said: "When women of intelligence recognize their share in and their responsibility for the courts, a powerful moral backing is secured for the administration of justice."¹

After a year in Chicago, Allen left for New York to work with lawyer Frances Kellor in the settlement-house movement. She hoped to continue her legal education at Columbia, but Columbia Law School did not then admit women as full-time students, so she enrolled instead at New York University, where the Law School welcomed women and awarded them degrees even before the turn of the century.

During her law school days in New York, in part to support her studies, Allen began working as an assistant to Maud Wood Park, the dynamic head of the National College Women's Equal Suffrage League. When Allen graduated in 1913, she already ranked as a suffrage movement leader. Returning to Ohio, Allen joined the struggle to gain the vote for women in municipal elections. (Ohio women tried a "cities first" approach, undaunted by their failure initially to achieve state-wide suffrage.) 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.

In 1919, in Cuyahoga County, Ohio, Allen became an assistant prosecutor, the first female to hold that rank in the country. Her boss, the head prosecutor, remarked on her ability "to do a man's job." The following year, the Nineteenth Amendment was finally ratified, and enthusiastic suffragists ushered Allen into office as an elected judge on the Cuyahoga County Court of Common Pleas. Again she was first-this time, first woman in the nation elected to sit on a court of general jurisdiction. Allen's fellow judges greeted the former prosecutor with the suggestion that she confine her judging exclusively to domestic disputes. Allen, who never married, turned down the suggestion, saying that, unlike her brethren, she lacked sufficient expertise in the domestic domain.

In twenty months on the trial court bench, Florence Allen disposed of nearly 900 cases. During one trial, which led to the conviction of a mob boss for murder, Allen and members of the jury received death threats. The judge carried on, undeterred.

In 1922, Judge Allen ran for a slot on the Ohio Supreme Court. Once more, the women of Ohio organized her campaign, forming

1. Florence E. Allen, *To Do Justly* 48 (1965).

Florence Allen Clubs throughout the state. Judge Allen became the first woman to serve on any state's highest court, and for that achievement, she earned the accolade "Portia of the Prairies."² She served on the Ohio Supreme Court for eleven years; in the course of her service, she participated in several decisions upholding a variety of Progressive Era reform laws.

Not lacking in ambition, Florence Allen ran for the U.S. Senate in 1926. She campaigned on themes of international peace and an end to war. When the Democrats nominated one of her opponents, Allen ran as an independent. But the memory of World War I was no longer foremost in the public mind, and Allen's peace platform failed to carry the election. Four years later, she ran for a seat in the U.S. House of Representatives. This time, the Democrats supported her bid. Even so, legislative office lay beyond her grasp.

In 1934, President Franklin Delano Roosevelt named Judge Allen to the U.S. Court of Appeals for the Sixth Circuit. At age fifty, she became the first woman in the nation appointed to an Article III federal appeals court. One Sixth Circuit judge was so distressed, he reportedly took to his sickbed for two days following her appointment. Her colleagues routinely dined without her at their all-male club. Those same colleagues initially doubted that a woman could marshal the necessary technical expertise to decide patent law cases, but Judge Allen soon won high regard in this area. She also presided over the pathmarking three-judge district court panel that adjudicated the constitutional challenge to the creation and maintenance of the Tennessee Valley Authority. The Supreme Court affirmed her judgment.

Through her dedicated and persistent hard work, Judge Allen ultimately gained the respect of even her habit-driven detractors. She served on the Sixth Circuit for a quarter of a century, becoming by virtue of seniority the Circuit's Chief Judge in her very last year on the court, 1958-1959. Her name was mentioned time and again as a Supreme Court prospect, but Allen herself was a realist on that score. She accurately predicted that a Supreme Court appointment "will never happen to a woman while I am living."³ President Truman, according to political strategist India Edwards, felt positively about nominating Allen to the Supreme Court, but he was discouraged by the negative reaction of the Chief Justice and the associate justices the Chief consulted. The justices feared that a woman's presence would inhibit their conference deliberations where, with shirt collars open and shoes off, they decided the legal issues of the day.

The life of Florence Allen portrays a catalogue of firsts. She was a model of excellence as both lawyer and judge. She advocated equality

2. Jeanette E. Tuve, *First Lady of the Law: Florence Ellinwood Allen* 66 (1984).

3. Letter from Florence Allen to H.C. Herring (Mar. 17, 1934), in Beverly B. Cook, *The First Woman Candidate for the Supreme Court—Florence E. Allen*, 1981 *Sup. Ct. Hist. Soc'y Y.B.* 19, 19.

for women throughout her life, and decried the double burden of paid work and housework shouldered by most women in the labor force and the professions. She gave this enigmatic advice in a talk to young women in 1926: "Neither forget nor remember that you are a woman, paradoxical as that sounds. Ask no sex favors, and don't be masculine in dress or manners; . . . unconscious femininity is an aid in public life."⁴ I remain uncertain what she had in mind by that counsel. Perhaps she meant: be firm and natural about who you are.

After Judge Allen's 1934 appointment, no women ascended to the federal bench for fifteen years. Then, in 1949, President Harry Truman appointed Burnita Shelton Matthews to the United States District Court for the District of Columbia. She was the first female Article III federal trial court judge in the nation.

A southern, very gentle woman of bright mind and indomitable spirit, Matthews entered a career in law despite her family's misgivings. During the height of the suffrage movement, she attended law classes at National University, now part of George Washington University, where she earned LL.B. and LL.M. degrees, becoming a Master of Patent Law. (Both Allen and Matthews, hardly true to stereotype, had an affinity for that challenging subject.) Matthews attended classes at night while holding down a day job at the Veterans Administration. Weekends, she picketed the White House with other suffragists. Later, she recalled that during those protests,

you could go to the front of the White House, and you could carry a banner, but if you spoke you were arrested for speaking without a permit So, if the press or anyone else asked me why I was there, I didn't answer.⁵

The banner she carried declared her purpose. And no arrest record impeded her admission to the bar.

When Burnita Matthews graduated from law school in 1920, no law firm in the District of Columbia would hire her. Wasting no time on anger, resentment, or self-pity, she devoted her energy to establishing a practice of her own. Believing the Nineteenth Amendment incomplete, she also served as counsel to the National Woman's Party, the group responsible for introducing in 1923 the idea and the original text of an equal rights amendment. The Woman's Party also urged legislators to repeal protective labor laws that applied only to women

4. Sarah L. Wilson, *Florence Ellinwood Allen (1884-1966)*, in *Women in Law* (Greenwood Press, forthcoming 1996) (manuscript at 8, on file with authors) (quoting *Ask No Sex Favors Judge Tells Girls*, *Labor*, July 31, 1926, at 3, in *Florence Allen Papers*, Library of Congress Manuscript Division, Box 2, folder marked "1926 Campaign for Senate"); see also Sarah L. Wilson, *State and Federal Judge Florence Allen Registered Series of Firsts in Long Career*, *St.-Fed. Jud. Observer*, May 1995, at 3.

5. *Judge Burnita Shelton Matthews: Leader of Women's Rights Movement Recalls Suffrage Fight and Appointment to Bench*, 17 *Third Branch*, Mar. 1985, at 1,6 [hereinafter *Matthews Interview*].

and other laws that restricted women's opportunities. Matthews wrote in those early days:

It is, of course, disappointing to women, that men of the legal profession are unable to see equality as equity when applied as between men and women. But then it is not surprising when one remembers that this defective vision, this regard of discriminations as "protection" is traditional.⁶

Burnita Shelton Matthews helped to change that tradition.

The local (D.C.) bar knew Burnita Matthews as a skilled practitioner and expert 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 ever paid. The government put the land to good use. The Woman's Party headquarters made way for the current Supreme Court building.

Like Judge Allen, Judge Matthews received an "icy" welcome from her fellow judges. They assigned her the most technical and least rewarding motions. One District of Columbia jurist was reported to have commented: "Mrs. Matthews would be a good judge, [but there's] just one thing wrong: she's a woman."⁷ The President, however, stated: "This was one appointment about which I had no misgivings, only genuine satisfaction."⁸

Burnita Shelton Matthew's firm hand in managing each case identified the great lady from Mississippi more than her fine lace collar and cuffs, her slim size and soft voice. She presided over major trials, including a criminal trial of Teamsters leader Jimmy Hoffa and a suit brought by Black Muslims for the right to conduct religious services in a local prison. At a time when women faced much professional hostility, Judge Matthews showed her confidence in women lawyers by hiring only women as law clerks. (Her colleagues, in the main, would hire no women, so she attracted clerks of a different, enriching life experience and extraordinary talent.)

Judge Matthews did not retire from service until failing health prevented her from hearing cases. After nearly twenty years on the district court, she took senior status and thereafter sat regularly on court of appeals panels. In 1984, President Reagan wrote a commendation letter to Judge Matthews expressing a sentiment in which all her colleagues concurred: "[I]n furthering the administration of justice . . .

6. Burnita S. Matthews, *Women Should Have Equal Rights with Men: A Reply*, 12 A.B.A. J. 117, 120 (1926).

7. Linda Greenhouse, *Burnita S. Matthews Dies at 93; First Woman on U.S. Trial Courts*, N.Y. Times, Apr. 28, 1988, at D27.

8. *Matthews Interview*, *supra* note 5, at 8.

[Judge Matthews'] diligence, distinguished efforts, and pioneering spirit serve as an inspiration to all."⁹

I had the good fortune to meet Judge Matthews during my years on the D.C. Circuit, and it was a joy to spend time with her. But I am better acquainted with the third judge of whom I will speak, Shirley Mount Hufstedler. Shirley blazed trails as skilled practitioner, sage judge at trial and on appeal, fine teacher, perceptive scholar, and innovative member of the President's cabinet. In each of these roles, her performance sparkled with intelligence and humanity.

Shirley graduated at the top of her class from Stanford Law School, where her notes were in great demand as a study aid among her classmates, including our current Secretary of State, Warren Christopher. She engaged for a decade in private practice. In 1960, she assisted California's Attorney General in the complex Colorado River litigation, then pending before the United States Supreme Court.

Her judicial career began with her appointment to the Los Angeles County Superior Court in 1961; next, the California Court of Appeal in 1966; then her appointment, by President Johnson in 1968, to the United States Court of Appeals for the Ninth Circuit. Judge Hufstedler's opinions on that court demonstrate a fine hand at work. Eleven years after her appointment, President Carter enlisted her to launch the Department of Education as its first Secretary. At the time, she was considered by many to be a top candidate (not just a prime *female* candidate) for Supreme Court appointment. According to her friend Warren Christopher, despite the prospect of higher office, she never tailored her opinions to please the home crowd, or the White House crowd.

In her Department of Education days, Shirley faced skeptics at every turn. Some thought the Department should not have been created. Others thought it should not be run by someone schooled in the judiciary. In the final part of Shirley's term, a *New York Times* interviewer wrote: "Scratching around the soil for detractors yield[ed] no worms . . . [S]he appears to have no enemies and not a single person interviewed for this article came up with anything less than praise."¹⁰

The first time I saw the beautiful Judge Hufstedler, her intelligence and courage made me want to shout Brava! It was at the Association of the Bar of the City of New York, in 1971. The judge had been invited to present the Benjamin N. Cardozo lecture; her topic: A Constitutional Right of Privacy. She spoke movingly of the need to protect "the autonomy of personality from unreasonable state pene-

9. B. S. Matthews, 93, *First Woman Named Federal Trial Judge*, N.Y. Times, Apr. 27, 1988, at B8.

10. Phyllis Theroux, *The Judge Goes to Washington*, N.Y. Times, June 8, 1980, § 6 (Magazine), at 41, 102.

trations.”¹¹ She maintained “that a person must have a right to draw a cloak of secrecy around his personal associations and his more intimate relationships if he is to retain his autonomy,”¹² and she warned of the destructive effects of “governmental voyeurism.”¹³ Caring about Fourth Amendment values was something that equally ambitious but less courageous judges might have muffled in the 1970s.

Later in that decade, Shirley delivered a paper at the Aspen Institute for Humanistic Studies in which she wrote with deep insight of how the myths of a society can cramp the development of its children. “No myths,” she wrote,

have been more pervasive and enduring than those that assure the dominant members of a society that their positions are secure, and even just, and which tell servient members why it is not only their destiny, but their duty to remain where they are If one believes that a human being is inferior and . . . tells the child early enough and often enough about his or her inferiority, the belief will be fulfilled, regardless of the treasures with which he or she was born.¹⁴

In 1981, Shirley returned to private life and practice. She has been an advocate of nuclear arms control and has worked to establish closer relationships with our counterparts in former East Bloc nations. When the *New York Times Magazine* interviewed Secretary Hufstedler in 1980, the reporter fixed on a comment she made while driving by a hill covered with daffodils. “They last such a short time,” Shirley mused. “But they must think it’s worth it to make a brilliant show in exchange for curling up . . . the rest of the year.”¹⁵ Shirley never made that exchange in her own life. She has continued, each day, through every season, to make a brilliant show.

Despite the stellar examples set by Judges Florence Allen, Burnita Matthews, and Shirley Hufstedler, it was not until the election and administration of Jimmy Carter that women gained appointment to the federal bench in more than token numbers. President Carter changed the face of the federal bench. Presidents who followed after him would be measured by his standard.

President Carter appointed some forty women to lifetime federal judgeships.¹⁶ Although this number may not seem large to us today, in its time it was unprecedented—a startling change from the way things were. The Kennedy and Johnson administrations were together responsible for the appointments of just four women to the federal

11. Shirley M. Hufstedler, *The Directors and Misdirections of a Constitutional Right of Privacy* 23 (1971).

12. *Id.*

13. *Id.* at 24.

14. Shirley M. Hufstedler, *Women and the Law* 5 (1977).

15. Theroux, *supra* note 10, at 104.

16. See Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 *Judicature* 282, 287, 293 (1993).

bench.¹⁷ In the following years, the Nixon and Ford administrations did not manage to meet even this meager benchmark. Together, Nixon and Ford named just two women to the bench.¹⁸ So when President Carter appointed those forty women, he far surpassed all prior administrations combined.

In contrast to today's popular, if unenlightened, view of diversity efforts, the key to Carter's success in recruiting women was not to ignore merit, but to rely upon it. The "old boys' network" could not be trusted to identify all the able candidates, so Carter encouraged Senators to establish nominating committees that would evaluate a broad range of candidates for district court judgeships. For potential appeals court nominees, Carter himself established separate merit-based nominating commissions. With more open nominating procedures, increasing numbers of both women and minorities gained serious consideration for the first time, and Carter ushered in a new and lasting vision of the judiciary.

Once President Carter opened the federal judiciary to all who were qualified, there was no turning back. Presidents Reagan and Bush, although sometimes criticized for appointing too few women to the bench, exceeded the standards of the pre-Carter era. Reagan appointed twenty-eight women to the lower federal courts¹⁹ and appointed the first woman to the Supreme Court, my grand colleague, Justice Sandra Day O'Connor. In President Bush's single term in office, he surpassed Reagan's two-term performance and nearly met President Carter's record by appointing thirty-six women.²⁰

With the election of President Clinton, women in the judiciary have again made great strides. Clinton has appointed women in record numbers—forty in the first two years of his presidency,²¹ more than Reagan appointed in his entire eight years as president. By mid-September 1995, President Clinton had nominated 185 individuals to federal district court, court of appeals, and Supreme Court vacancies. Fifty-four of those nominees—close to thirty percent—are women.²²

In terms of both numbers and percentages, Clinton expanded on Carter's initiative in naming women to the federal bench. And for Clinton, as for Carter, quality remained key. Clinton appointees achieved higher ABA ratings on average than the less diverse appointees of the three previous administrations. Clinton's highly affirma-

17. See Sheldon Goldman & Matthew D. Saronson, *Clinton's Nontraditional Judges: Creating a More Representative Bench*, 78 *Judicature* 68, 68 n.1 (1994).

18. See *id.*

19. See Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 *Judicature* 318, 322, 325 (1989).

20. See Goldman, *supra* note 16, at 287, 293.

21. See Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 *Judicature* 276, 277, 281, 287 (1995).

22. Internal White House Memorandum: Clinton Administration Judicial Record, Sept. 14, 1995 (on file with authors).

tive action, it bears emphasis, is not the result of any quota system or ideological screening. As the President himself described the endeavor, he simply "made an extra effort to look for qualified candidates who could serve with distinction[,] . . . contribut[e] to this country[,] and make the Federal bench [more] reflective of the American population."²³ The talents, energy, and intelligence of the judges Clinton has appointed, it should be evident, will strengthen the federal judiciary far into the future.

If the first women judges were here today, they would rejoice at this achievement. They would also advise vigilance, I believe, in maintaining the trend. We should learn by their examples-their persistence and fortitude-to do our best for the sake of the law and for the sake of those for whom we pave the way. It is my hope that those who follow will find the opportunities for which we strove enduring, and that they will have the courage and ingenuity to meet the challenges we do not yet foresee.

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