NATIONAL WOMEN'S LAW CENTER
Thirty years of EXPANDING THE POSSIBILITIES

WOMEN'S RIGHTS AT STAKE: WHY JUDICIAL APPOINTMENTS MATTER

The Power of the Federal Courts Over Issues Critical to Women

Over the last 30 years the federal courts have given life and meaning to legal rights for women, through their interpretation of the Constitution's equal protection and privacy guarantees and their application of federal statutes aimed at eradicating sex discrimination and other arbitrary barriers to women's advancement. All of these precious gains are jeopardized by the appointment of judges to the federal courts – not only the Supreme Court, but the lower courts as well – who do not support the fundamental rights and principles that are critical to women.

The legal rights and principles at stake include:

- the right to privacy, which protects against government intrusion into personal matters including marriage, pregnancy, contraception and abortion;
- the right to equal opportunity in the workplace;
- the right to equal opportunity in education, including in high school and collegiate athletics;
- the right to be free of sexual harassment at work and at school;
- the ability to enforce rights to benefits for low-income women, families, and children under federal programs and laws; and
- the authority of Congress to pass effective laws penalizing violence against women, prohibiting discrimination in the workplace, and providing other key protections for the health, safety and welfare of the American people.

It's Not Just the Supreme Court: Lower Federal Courts Are Powerful Too

The Supreme Court has the final say in interpreting the Constitution and federal statutes. But the lower federal courts (the Courts of Appeals and the District Courts) also wield enormous power over the lives of women, and of all Americans.

- The vast majority of cases in the federal system never reach the Supreme Court. The Supreme Court decides fewer than 90 cases each year, while the Courts of Appeal receive over 60,000 new filings and federal District Courts receive over 320,000 new filings each year. The lower federal courts are thus the final decision-makers in most cases.

- In many areas, the Supreme Court's decisions leave wide latitude for lower court judges to interpret and shape the law. For example, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Supreme Court ruled that states may impose restrictions on abortion as long as they do not place an "undue burden" on a woman who seeks to

terminate her pregnancy. The Supreme Court gave little guidance on when a burden is "undue," and some lower court judges decided that even substantial obstacles placed in a woman's path were not. By the time the Supreme Court first reviewed any lower court's application of the "undue burden" standard in 2000 (eight years later), countless women had irrevocably lost their right to choose because of erroneous lower court rulings.

- Some Court of Appeals judges have gone so far as to disregard precedents of the Supreme Court altogether. The Fifth Circuit did so in the highly sensitive area of affirmative action, and the Fourth Circuit did so with respect to the Miranda rule (which entitles arrestees to be warned of their right to remain silent).

- District Court judges (the trial courts in the federal system), though subject to review by the Courts of Appeals, also exercise significant power. They make factual determinations that are given great deference by the reviewing courts, direct the flow of evidence, and, in taking the first crack at applying the law in a dispute, frame the issues at stake.

Tilting the Courts to the Right

Beginning with the Reagan and George H.W. Bush Administrations, the federal Courts of Appeals shifted significantly to the right. Then, during the Clinton Administration from 1995 through 2000, the Senate refused to confirm an inordinately high number of nominees to the Courts of Appeals – blocking over one-third of President Clinton's nominations to these courts – which meant that the balancing process that normally takes place over time, as administrations change, did not occur. The judicial selections of the current Bush Administration, most of whom have been confirmed by the Senate, have continued to move the Courts of Appeals to the right. Here are some examples of opinions by President Bush's appointees to the federal Courts of Appeals:

- **Janice Rogers Brown,** who was a Justice on the California Supreme Court, and now sits on the D.C. Circuit, has said the courts may not bar racial slurs in the workplace and questioned whether women subjected to verbal sexual harassment can legally challenge it at all. Judge Brown wrote a concurring opinion in a sexual harassment case in which she argued that an employer should never be held strictly liable for the harassment unless the victim had been subject to an *adverse* employment consequence. This narrow reading of the requirement of a "tangible employment action" under Title VII contradicts the position taken by the Ninth and Tenth Circuits, and the Equal Employment Opportunity Commission.

- **Raymond Gruender** of the Eighth Circuit advocated upholding a South Dakota law that would commandeer the doctor-patient relationship in the service of an ideological agenda. The 2005 law requires doctors performing abortions to tell their patients that the procedure will "terminate the life of a whole, separate, unique, living human being" and that the patient has "an existing relationship with that unborn human

being." Doctors who refuse to make these "disclosures" could face criminal prosecution. Judge Gruender argued that the disclosure was truthful, non-misleading and non-ideological on its face. Fortunately, the other judges on the panel disagreed and struck down the law. However, the case has been granted en-banc review, meaning that it will be considered anew by the entire Eighth Circuit of which 7 of 11 judges are Bush-appointees.

- **D. Brooks Smith**, appointed to the Third Circuit, led that court to turn from upholding the rights of all employees to be free from discrimination to openly tolerating the unequal treatment of women in religious institutions. When the Third Circuit first heard the case of Lynette Petruska, a female Chaplain who was allegedly fired by Gannon University because of her gender, the court in a split decision affirmed Petruska's right to bring a claim under Title VII. Judge Edward R. Becker declared that "employment discrimination unconnected to religious belief, religious doctrine or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects." Judge D. Brooks Smith, whose record on sex discrimination led the National Women's Law Center to oppose his appointment, dissented. Unfortunately, due to Judge Becker's untimely passing, the case was reheard by Judge Smith and two senior (semi-retired) judges who were not on the original panel. This time, Judge Smith's opinion prevailed, resulting in a final decision holding that there is no limit on a religious institution's selection of who will perform "spiritual functions," even where there is ample evidence that racism or sexism, not religious conviction, motivated the decision.

These decisions and many others issued by Bush-appointed judges illustrate the importance of defending women's rights in the context of the judicial nominations process. The confirmation of individuals who lack respect for fundamental constitutional and civil rights is directly correlated to court decisions which weaken protections against discrimination and other important rights for women. It is, therefore, of the utmost importance that each nominee be carefully scrutinized, and if a record of supporting such opinions are uncovered, vigorously opposed.