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## **THE GENDER GAP ON THE MONTANA STATE BENCH**

**Carl Tobias\***  
**[Editor's Note]\*\***

Governor Marc Racicot has a great opportunity to close the gender gap on the Montana state bench. The recent resignations of Justice R.C. McDonough from the Montana Supreme Court and of Judge Jack L. Green from the Fourth Judicial District enable the new governor to remedy the glaring deficiency in the number of women who serve as state court judges. Justice Karla Gray is the only female member of the seven-person Montana Supreme Court, while Judge Dorothy McCarter of the First Judicial District (Broadwater and Lewis and Clark Counties) is the lone woman of thirty-six district court judges in Montana. Indeed, former Supreme Court Justice Diane G. Barz is the only other woman who has served as a judge for a court of record in this state, occupying the office of Supreme Court Justice from 1989 to 1991 and the office of Judge in the Thirteenth Judicial District (Big Horn, Carbon, Stillwater, and Yellowstone Counties) from 1977 to 1989.

Governor Racicot should expeditiously and forcefully act to remedy the gender gap on the state courts for many reasons. First, there is a significant, highly qualified, pool of female attorneys in Montana who could render excellent judicial service. Numerous women have participated in the types of rigorous legal practices which would prepare them well for the bench. These female lawyers are intelligent, industrious, and independent, while they have exhibited the kind of impeccable integrity and appropriately measured judicial temperament to be fine judges. Some of the attorneys have engaged in challenging public law practices, others have been involved in rigorous private law practices, and a number have avidly participated in teaching, scholarship and service at the School of Law.

Governor Racicot should also recognize that the appointment of women raises issues of fairness. Currently there are many excellent female lawyers in Montana who have the requisite qualifications to be distinguished judges and who have earned the right to

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\* Professor of Law, University of Montana. I wish to thank Bari Burke, Melissa Harrison, and Peggy Sanner for valuable suggestions, Cecelia Palmer for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

\*\* While this essay was in press, Governor Marc Racicot appointed the Fourth Judicial District Judge and the Nominating Committee recommended the names of five males for the Supreme Court.

serve on the bench. Female lawyers will also bring to judicial service their life experiences, which should enable them to appreciate and resolve certain difficult issues, such as those involving conflicts between employment and familial responsibilities, better than many of their male colleagues. Considerable evidence suggests that numerous members of society have greater trust in a judiciary that is broadly representative of the society's composition. An important measure of a gubernatorial administration's commitment to improving conditions for women in the civil and criminal justice systems, in the legal profession, and in the society is the effort it expends in naming women to the courts.

Governor Racicot should consider the following suggestions. He should explicitly and forcefully state that his administration considers the appointment of a number of highly qualified women to the state courts an important priority. That pronouncement should encourage a significant number of women to apply for the judgeships which recently opened and which will become vacant in the future. The Judicial Nomination Commission in turn should include some highly competent female attorneys in every group of lawyers whom it recommends to the governor for appointment.

Governor Racicot should then name a significant number of highly qualified women to the state courts. These female attorneys must possess strong intellects, be very industrious, have considerable independence, exhibit unquestioned integrity, and evince properly balanced judicial temperament. The Governor is certainly entitled to select judges with whom he is comfortable politically. Nonetheless, the application of litmus tests, particularly on issues such as abortion, is inappropriate, because it gives the appearance of asking judicial candidates their views on substantive questions which they might have to decide once on the bench.

If Governor Marc Racicot implements the suggestions above, he will be able to close the gender gap on the state courts, appoint lawyers who will render excellent judicial service, increase gender fairness in the judicial system, and improve circumstances for the women of Montana.