GAO

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General Accounting Office
Washington, D.C. 20548

General Government Division

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March 8, 1996

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

This letter responds to your May 4, 1995, request that we review the methodology of any final draft or published reports of the task forces on gender, racial, and/or ethnic bias formed by the federal circuit courts of appeals. We reviewed the published Ninth Circuit report[1] on gender and the two District of Columbia Circuit task force draft final reports[2] on the effects of gender and the effects of race and ethnicity on the operations of the federal courts. No other task forces had issued final draft or published reports as of June 1, 1995.

BACKGROUND

As described in our September 18, 1995, report to you,[3] 9 of the 12 federal circuit courts of appeals had, as of June 1, 1995, formed task forces to study gender, racial, and/or ethnic issues. The Eleventh Circuit had created an ad hoc committee, and the Fourth and Fifth Circuits had not established task forces. Two circuits, the Sixth and the Ninth, had established two task forces each, one on gender and one on racial/ethnic issues. The Ninth Circuit's task force was established by its Circuit Conference, and the remaining task forces were established by each circuit's Circuit Council.

The Ninth and D.C. Circuit task forces were created in 1991 and 1990, respectively. The Ninth Circuit task force was established partly in response to a request from its Lawyer Representatives Coordinating Committee to examine the role of gender in the circuit. Created in part as a result of the recommendations of the Study Committee on Gender Bias

[1]"The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force," Southern California Law Review, (Vol. 67, No. 4, May 1994).

[2]"Draft Final Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias," (January 1995) and "Draft Final Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race and Ethnic Bias" (January 1995). Both reports were published in their final form in January 1996.

[3]Federal Judiciary: Observations on Selected Issues (GGD-95-236BR, Sept. 18, 1995).

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in the District of the District of Columbia Bar, the D.C. Circuit task force was charged with determining whether and to what extent gender, race, and ethnicity affected the operations and proceedings of the federal courts of the D.C. Circuit.

The American Bar Association (1991), the Judicial Conference of the United States (1993), the Report of the National Commission on Judicial Discipline and Removal (1993), and the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) have all encouraged studies of bias in the federal courts. The 1994 legislation encouraged an examination of the effects of gender with regard to a wide range of participants in the federal courts, including judges, other court employees, litigants, witnesses, jurors, and attorneys.

Both the Ninth Circuit and D.C. Circuit task forces' reports have emphasized that the purpose of their studies was not to assess whether gender, racial, and/or ethnic bias actually existed in either Circuit, but to assess the effects of gender and race/ethnicity on court operations. As an example of the effects examined, the Ninth Circuit task force study mentioned the effect of gender on professional interactions in the courtroom, in chambers conferences, and settlement negotiations.

The final published reports of the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias include a "statement of disassociation" by seven judges of the D.C. Circuit Court of Appeals, who disagreed with the studies' methodologies and conclusions. The published reports also include the task force's response. [4]

SCOPE AND METHODOLOGY

We reviewed three reports produced by two circuits. We examined the published report of the Ninth Circuit's Gender Bias Task Force and the final draft reports of the Special Committee on Gender and the Special Committee on Race and Ethnicity of the D.C. Circuit Task Force on

[4]The Circuit was split over whether to adopt the task force reports. After reviewing the reports and comments from judges, court employees, and the public, the Circuit Council (which includes district judges in addition to circuit court of appeals judges) adopted four "action" items (reflecting Council policy) and seven "referral" items (covering matters referred by the Council to the Courts, their Chief Judges, or unit managers.) Ultimately, the published reports included a statement on the Council's action, both the statement of disassociation and the task force's response, and other critiques and statements in support of the task force reports. In the preface to the published reports, the Chief Judge of the Circuit noted that disagreements over the methodology and scope of such an undertaking should be aired. The Chief Judge also noted that the dialogue between the contending judges will allow any interested reader to examine fully all potential issues, and reflect on them as may be deemed appropriate.

Gender, Race and Ethnic Bias. These were the only circuit task forces that had at least a final draft report available for review by June 1, 1995. Our objective was to assess independently each study's methodology, without regard to any previous appraisals of the reports—critical or supportive. Therefore, we based our review of each study solely on the objectives, methodologies, analyses, conclusions, and recommendations provided in the report, and did not examine methodological details that were not described in the report. We evaluated each study's research methodologies according to their appropriateness to the reported objectives. Also, we assessed the consistency of each report's findings, conclusions, and recommendations with the methods used. Two analysts independently reviewed each study and identified similar strengths and weaknesses. We did our work between June and September 1995 in accordance with generally accepted government auditing standards.

RESULTS IN BRIEF

The Ninth and D.C. Circuit task force studies each contain some conclusions about the existence of biases in court operations and some recommendations that appear to flow from a finding of bias. However, the methodologies used in these studies were not appropriate to draw such conclusions or to support such recommendations. For such conclusions to be supportable, the methodologies would need to include such elements as consistent and clearly defined benchmarks for examining the representation of women and minorities; data on applicant pools when examining personnel issues such as hiring or promotions; and factual data, in addition to perceptual data, measuring court processes and operations.

Each of these studies, however, covers a broad range of topics pertaining to court operations and provides a variety of useful descriptive data and some statistical data that can serve as baseline measures for future descriptive studies in these Circuits. Through focus groups, surveys, and other research methods, the studies done by both Circuits' task forces obtained data from a variety of participants, such as lawyers and judges, about their perceptions of the effects of gender or race/ethnicity on the courts and court participants. Overall, the methods selected in each study were appropriate for describing court participants' perceptions and experiences about court worklife.

STUDIES INCLUDED SOME STATEMENTS THAT WERE NOT CONSISTENT WITH THE STUDIES' STATED OBJECTIVES OR THE METHODOLOGIES EMPLOYED

The reports of both the Ninth and D.C. Circuit task forces state that their purposes were to describe the possible effects of gender or race/ethnicity on court operations and not to assess the existence of bias in the circuit. However, each study includes statements about the existence of bias in court operations that overreach the study's methodologies. The methodologies used in these studies do not provide the information necessary to reach conclusions about the existence or nature of any bias.

The Ninth Circuit task force report states: "At the outset, the Task Force decided not to impose a definition of 'gender bias' in the federal system nor to look for bias per se. Rather, our questions were about the effects of gender." [5] The report of the D.C. Circuit task force Committee on Gender states that its purpose was "to begin, not with the question of what constitutes 'bias,' but rather with the question of how people are treated, and how they perceive they are treated." [6] The report of the D.C. Circuit task force Committee on Race and Ethnicity places its study in the context of earlier reports such as The Report of the Federal Courts Study Committee in April 1990, which noted the "potential for invidious discrimination in judicial branch employment practices and, more generally, in how the judges and court staff deal with the general public and litigants." [7] The D.C. task force said it does not believe its report should be viewed as a study of race and ethnic bias, at least as legally defined. The report notes that "no legal conclusions can or should be drawn from the comparisons that are made in this study." [8]

Despite these declarations, all three studies reach conclusions and make recommendations about the existence of bias in court operations. For example, the following comments are taken from the Ninth Circuit task force report:

" 'Gender bias' in this task force report, as in the state task force reports, focuses primarily on bias against women, who suffer most from gender bias." (p. 732)

[5]Ninth Circuit task force report, p. 765. Italics in the original.

[6]D.C. Circuit task force draft final report on gender, p. 10.

[7]D.C. Circuit task force draft final report on race and ethnicity , p. 8.

[8]D.C. Circuit task force draft final report on race and ethnicity, p. 31, footnote 50.

"The Report of the Ninth Circuit confirms that the gender bias documented at the state level also exists in the federal system." (p. 742)

"Moreover, the Ninth Circuit's gender bias study, begun at the circuit level, is now moving to the districts and beyond." (p. 962)

Examples from the D.C. Circuit's task force's race and ethnicity final draft report include:

"...[T]he Report explores if and how these relationships are affected by racial and ethnic diversity or bias..." (p. 6)

"Minorities ... reported a significantly higher amount of differential treatment based on race or ethnicity, and a much higher percentage perceived significant bias in the system." (p. 140)

"For the most part, however, both perceptions and reports of specific instances of bias were much more common among minority than white attorneys." (p. 143)

Finally, the D.C. Circuit task force's final draft report on gender, while somewhat more cautious than the other reports about the types of pronouncements made, offers the following statements:

"Although the data collected by the Committee do not indicate that women attorneys experience bias at the hiring level, women litigators in general do not appear to advance professionally as quickly as their male colleagues. Many factors may contribute to this pattern..." (p. 44)

"The Attorney Survey data indicate that, while overt gender bias in the courtroom is the rare exception, a significant minority of female practitioners report experiencing certain types of subtle behavior from trial judges..." (p. 45)

"... [B]ehaviors suggestive of gender bias are uncommon in the interactions among attorneys in proceedings taking place before a judge...[T]he same cannot be said of some attorney interactions outside of the judge's view." (p. 52)

These kinds of conclusions cannot be made from the methodologies or data used in these studies. To draw such conclusions, it would be necessary to locate or develop clearly defined and appropriate benchmarks for examining the representation of women and minorities in different court-related positions, such as judges, attorneys, law clerks, court clerks, and secretaries. For example, the D.C. Circuit task force's final draft reports on gender, race, and ethnicity state that women

represented about 40 percent of the District Court and Court of Appeals law clerks in 1993 and 1994, and Asian Americans were 6 percent of the District Court and Court of Appeals law clerks in March 1994. However, neither report directly provides benchmarks to assess whether these numbers are relatively large or small.[9] Without appropriate benchmarks it is difficult to determine whether women and minorities are underrepresented, overrepresented or appropriately represented. In addition, using the data from the studies, one cannot determine whether women are better represented among secretaries than attorneys and better represented among attorneys than judges because of biases in the personnel practices of the court, or because differences in qualifications, seniority, and/or interests between men and women exist.

The Ninth Circuit task force study on gender and the D.C. Circuit task force study on race and ethnicity in particular appear to draw conclusions about the presence of gender or racial bias. However, when examining such personnel issues as hiring, promotions, and appointments, the studies seldom attempt to determine what the characteristics of the applicant pool or the pool of eligible persons were; in some cases, the studies state that such data were unavailable. Without such information—for example, how many women or minorities possessed the requisite qualifications to be clerk of court—there is no clear basis to judge whether minorities or women were actually disproportionately selected (or over- or underselected) for court-related positions. Moreover, the analyses presented do not address whether any differences found result from actual bias or discrimination or some other factor that should be eliminated, or result from differences in qualifications, professional interests, or self-selection. For example, the D.C. Circuit task force on race and ethnicity study acknowledges that the task force did not have information on the demographics of the criminal justice bar in D.C. and that data were not available on the race and ethnicity or qualifications of applicants to the attorney panels from which court-appointed defense attorneys were chosen.[10] Nevertheless, the report recommends that the courts should consider ways to increase the appointment of minority attorneys on such panels for the district court and court of appeals.[11]

[9]The D.C. Circuit task force report on gender does indicate that women constituted 43 percent of law school students nationally in 1993. However, it does not discuss whether this percentage should be used as a benchmark to assess the representation of women among law clerks in the D.C. Circuit.

[10]D.C. Circuit task force final draft report on race and ethnicity, p. 92, footnote 165.

[11]D.C. Circuit task force final draft report on race and ethnicity, pp. 245-246.

Many of the results in the reports measure employees' (typically attorneys) perceptions of and experience with court worklife. Factual data are not frequently presented to measure court processes and operations more objectively. Perceptions of differential treatment are important and may be used as baseline data on participants' observations of the fairness of various court processes and operations. However, data on perceptions are not necessarily evidence that gender and/or racial bias exists. Moreover, while the task forces obtained fairly good overall response rates of about 50 to 65 percent of the attorneys surveyed, it is possible that those who responded were among those with the strongest interest in and views on the issues in the surveys. If this is true, the survey responses may not be representative of the views of the total sample surveyed. Therefore, when interpreting survey results, it is essential to be able to compare the characteristics, such as gender or race, of those who responded with the characteristics of the total sample of persons surveyed. We recognize this is not always possible. While the Ninth Circuit task force was able to report separate response rates for the male and female attorneys in its survey,[12] the D.C. task force on race and ethnicity did not have data on the race or ethnicity of the total sample of persons surveyed. Therefore, the task force could not determine response rates by race or ethnicity. In such cases, more than usual caution should be used in reaching conclusions based principally on the survey data.

STUDIES USED APPROPRIATE METHODS TO DESCRIBE COURT OPERATIONS AND PROVIDE A VARIETY OF USEFUL DESCRIPTIVE DATA

Despite statements in these reports that overreach the studies' methodologies, each of these studies contains useful descriptive data about court operations and the perceptions of court participants on the effect of gender, race, and ethnicity on those operations.

The Ninth and D.C. Circuit task forces used a variety of research methods to collect information. The methods included surveys of and/or interviews with judges, attorneys, and (in the case of the D.C. Circuit task force) nonjudicial employees of the court; focus groups, breakout sessions, and roundtables; and reviews of public records about demographic characteristics of the judiciary, bench and bar committees, and specially

[12]The Ninth Circuit task force report provided data on attorney response rates by gender (p.1021). There was virtually no difference in the male and female response rates by gender for federal judges, federal public defenders, and assistant U.S. attorneys. However, for attorneys in private civil practice, the response rates were 60 percent for women and 45 percent for men. For attorneys in private criminal practice, the response rates were 82 percent for women and 57 percent for men.

appointed panels and positions. The Ninth Circuit task force also used various data gathered by two U.S. Attorney Offices, seven Federal Public Defender Offices, and several special advisory committees. The D.C. Circuit task force studies used additional data from the U.S. Sentencing Commission, U.S. Department of Justice, the U.S. Marshal's Service, the Pretrial Services Agency, the Federal Public Defender, the Office of the U.S. Attorney for the District of Columbia, the Administrative Office of the U.S. Courts, the National Association of Law Placement, the Federal Judicial Center, and the Washington Metropolitan Area Council of Governments.

These studies, individually and collectively, explore an impressively wide range of topics in an effort to assess the effects of race, ethnicity, and gender in the operations of federal courts. Each study attempts to provide demographic information on court employees and on attorneys who practice in the courts; considers the experiences of women and/or minorities in the hiring, promotions, and appointment practices of the courts; and reports gender and/or racial differences in such diverse areas as courtroom interactions, working conditions, and sentencing outcomes. Each study draws on information from surveys of members of the bench and bar as well as federal court employees, in-person interviews, focus groups, and a wide variety of prior studies and other secondary sources.

The survey and focus group data provided information on the perceptions of court participants on a wide variety of court activities and operations, and on the fairness of court activities, including self-reported experiences of differential treatment. On the basis of descriptive information provided in the reports, the surveys appear to have been professionally designed, that is, the methodologies appear to have been developed with consideration given to generally accepted social science research methods, and each report seems careful to cite the data sources used to support conclusions. The data reported in these studies can serve as some of the baseline data for subsequent studies that may attempt to determine changes in the perceptions of women and minorities and the participation levels of minorities and women in court operations.

AGENCY COMMENTS AND OUR EVALUATION

We sent a draft of our report to the Administrative Office of the U.S. Courts (AOUSC) for comment. AOUSC forwarded the report to the Ninth and D.C. Circuit Court Executives. Representatives of the D.C. Circuit Task Force and the Ninth Circuit Executive, on behalf of the Ninth Circuit,

provided us written comments on a draft of this report, which are printed in full in enclosures I and II.

Although the Ninth Circuit Executive and the D.C. Circuit Task Force representatives generally agreed with our description of their studies and methodologies, each expressed concern about certain quotations we had excerpted from their reports. They said the cited statements were accurate, but taken out of context. We cited these quotations to show that the task forces had at times characterized their findings, conclusions, and recommendations in terms of gender-based or race-based bias. We did not question the accuracy of the task force statements.

Commenting on our finding that their methodologies did not include appropriate benchmarks, the task force and circuit representatives asserted that we were holding their studies to a legal standard. However, we believe that studies undertaken to learn whether certain groups are under- or overrepresented in certain positions, or under- or overselected in certain personnel actions, should contain benchmark and/or applicant pool data on who is interested in and eligible for those positions or actions. We believe this is good social science research practice, regardless of whether a study is conducted to establish a legal basis for discrimination.

The task force and circuit representatives also took exception to our comments about the representativeness of the survey data, especially in light of our observation that response rates were fairly good overall. We think it is consistent to note that even with reasonably good response rates survey respondents may not be representative of the total sample surveyed. This is always possible if the response rate is less than 100 percent. This is particularly true in attitudinal surveys about topics on which some persons are much more passionate than others.

After we received the D.C. Circuit Task Force's comments, we received a letter from Judge Laurence Silberman of the D.C. Circuit Court of Appeals. He noted that we had received comments from the task force but not from the judges (himself included) who had disassociated themselves from the task force's reports. Judge Silberman commented on three issues in our draft report regarding (1) our awareness of the controversy surrounding the reports, (2) why we had not critiqued the reports against their original purpose of proving or disproving bias, and (3) why we had not criticized certain methodological implementation aspects that he considered to be problems. We were aware of the controversy but added some language in

our final report to more clearly reflect that awareness. We also added some language to more clearly state that, since we had been requested to assess whether the final reports issued by the task force were supported by the methodologies they employed, we accepted as the starting point for our analyses the purposes stated in the task force's final reports. Similarly, we added language to clarify that our scope was limited to the description of the methodologies as contained in the task force reports and that this did not enable us to comment on all aspects of the implementation of those methodologies.

We are sending copies of this letter to the Chair and Ranking Minority Member of the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary; the Ranking Minority Member of the Subcommittee on Administrative Oversight and the Courts, Senate Committee on the Judiciary; the Chair and Ranking Minority Members of the House and Senate Subcommittees on Commerce, Justice, and State, the Judiciary, and Related Agencies, Committee on Appropriations; the Director of the Administrative Office of the United States Courts; the Director of the Federal Judicial Center; and the Circuit Executives of each of the 12 regional courts of appeals.

If you have any questions about this letter, please call me on (202) 512-8777.

Sincerely yours,

Norman Rabkin

Norman J. Rabkin
Director, Administration
of Justice Issues

Enclosures

Comments From the D.C. Circuit

D.C. Circuit Task Force Responses to Revised GAO Draft

October 11, 1995

Thank you for the opportunity to comment on the revised draft of the GAO letter on the Gender and Race Bias Task Force studies. First, we appreciate the revised version's recognition of how much "useful information on how gender and race or ethnicity are related to" the operations of the courts in our circuit is contained in the Reports and of the "impressive range of topics" addressed, and that "[o]verall, the methods selected in each study were appropriate for describing court participants' perceptions and experiences" of court worklife.

Indeed, we regret that, having concluded that overall the research methods used were appropriate and produced much useful information, and having given so much time to examples of what the GAO believed to be statements "not consistent with study objectives [or] methodology," the GAO did not provide more detailed examples of what it found to be the useful, descriptive data provided. The Reports themselves, of course, were researched and written by active members of our local Bar.

We do take issue, however, with the GAO's several assertions on pages 6-10 that the statements quoted from the D.C. Reports are not adequately supported by the methodology and data set forth in the report. The specifics of our criticisms are as follows:

A. **Conclusions About the Existence of Perceived Bias (page 3)**

On page 3 of the draft report, GAO states: "Some statements in the reports give the appearance of conclusions about the existence of biases in court operations. The methodologies used in these studies were not appropriate to draw such conclusions." We have already made the point in our original comments of August 18, 1995 to GAO that neither the intent of the report nor its effectuation was to prove or disprove intentional bias. The revised GAO report acknowledges this only to a limited extent.

With respect to the parts of the report that GAO takes to be assertions of bias, however, we make the additional point that since the purpose of the reports is to help the courts improve their relationships with the various communities they serve, the standard of proof should not be the same as would be appropriate in a judicial proceeding to determine the exixtence of actionable discrimination. If a company initiated an internal study to address issues of bias, it would not limit the study to a search for actionable bias; it would look for ways the company could make workplace relationships better and more productive. We believe GAO should have analyzed the reports from that perspective, instead of evaluating whether the reports make out legal cases that would stand up in a courtroom proceeding.

B. Specific Statements About the Existence of Perceived Bias (pages 6-7)

On pages 6 and 7 the GAO report cites several statements from the reports which, it claims, "overreach the study's methodology." We do not believe the statements cited from the race and ethnicity report support this conclusion. The first quotation is from the introduction and merely states that the report will explore "if and how these relationships are affected by racial and ethnic diversity or bias . . . ." The comment reaches no conclusions, but acknowledges that, if we found evidence of bias, it would be reported. In fact, as noted below, we did find some evidence of bias in the attorney survey respondents' reports of actual experiences and observed behavior in court.

The second cited sentence states: "Minorities . . . reported a significantly higher amount of differential treatment based on race or ethnicity, and a much higher percentage perceive significant bias in the system." Aside from the importance of perceptions, which we have already discussed, the sentence accurately reports that the attorney survey showed evidence not just of different perceptions, but of different treatment as well. For example, far more African Americans than whites reported being mistaken for a nonlawyer while in court. Although we have previously focused on defending the use of perception data, we cannot forget that the surveys do reveal more than just perceptions. Many survey questions ask about and the responses reflect the actual experiences of the respondents and the observed behavior of judges, lawyers and courtroom officials in the courthouse.

We make the same response to the third cited sentence: "For the most part, however, both perceptions and reports of specific instances of bias were much more common among minority attorneys than white attorneys." That statement accurately reflects the results of the attorney survey, which called for reports of behavior and experiences as well as perceptions.

C. Conclusions About the Presence of Racial Bias (page 8)

GAO asserts on page 8 that the race and ethnicity report "appear[s] to draw conclusions about the presence of . . . racial bias." To support this statement, GAO first cites generally the conclusions presented in the courthouse worklife section. As we have previously stated, however, the worklife section did not endeavor to prove violations of Title VII. Our investigation did, however, reveal racial tension in the workplace. One cannot understand that problem without understanding the demographics of the workplace, including the numbers of minorities in high-level positions. Those numbers may not be evidence of intentional discrimination and the Reports do not conclude they are, but, fairly read, it is information the courts need to have in order to address the racial issues present in the courthouse workplace.

GAO also states on page 8 that the race and ethnicity report recommends that "the courts should consider ways to increase the appointment of minority attorneys" on the CJA panels, despite the fact that "data were not available on the race and ethnicity or qualifications of applicants to the attorney panels from which court-appointed defense attorneys are chosen." The special committee did not, of course, attempt to prove that specific qualified minorities were rejected, and that is not

the basis of the recommendation. Rather, we concluded that, in a courthouse where minorities believe that they do not get a fair shake (as the survey data clearly demonstrate), it might help the situation to involve more minority attorneys in the CJA process. Increased diversity is a positive value in an environment in which racial distrust is so clearly evident.

D. The Reliability of the Race Attorney Survey (page 9)

On page 9, GAO questions the reliability of the attorney survey because the "task force on race and ethnicity did not have data on the race or ethnicity of the total sample of persons surveyed." First, our social scientists approved the survey's methodology and concurred that the response rate of over 50% established the reliability of the survey. Second, to complain that we did not know in advance the race and ethnicity of those surveyed is to ask for the impossible. There is simply no way that we could have obtained that data. Finally, it is more than a little ironic that a repeated theme of the GAO report is the absence of baseline data on race and ethnicity. One of our principle recommendations is that the courts need to obtain such data. It is the opponents of the task force who have resisted the collection of any data. If GAO is concerned about this issue, it should support our recommendations on data collection.

E. Statements and Conclusions About the Existence of Gender Bias (page 7)

The report is inaccurate when, at page 7, it states (with respect to the three quotes from the gender report that appeared above, as well as quotes from the other reports), that "These kinds of conclusions cannot be made from the methodologies or data used in these studies," and goes on to imply that one would need benchmarks that are not supplied.

The first quote from the D.C. Gender Report, at page 44, having to do with advancement professionally (and the fact that our data did not indicate bias at the hiring level), is a summary, supported by analysis of our survey data showing, *inter alia*, that among women and men who are in private practice and who graduated from law school in 1980 and later, 42% of the men but 28% of the women are partners--a statistically significant difference. Draft Final Report at 70.

The second quote--"that while overt gender bias in the courtroom is the rare exception, a significant minority report experiencing certain subtle behaviors from judges"--is well supported by the survey data, e.g., Draft Final Report at 45 (25% of women report judges often or sometimes cutting women lawyers off while allowing men lawyers more leeway); *id.* at 47 (12% of women, compared with 2% of men, report judges assuming they were not lawyers). No further benchmarks are required.

The third quote, that behaviors suggestive of bias are uncommon in interactions among attorneys in proceedings before a judge but the same cannot be said of some attorney interactions outside the judges' view--is likewise based on and supported by survey data, e.g., at pages 64-65 (58% of women lawyers report men lawyers often or sometimes interrupt women lawyers more than

men lawyers in out-of-court litigation settings; other data also set forth there).[1]

On page 8, the GAO report is critical of the D.C. Circuit Report for failing to provide benchmarks to assess whether the numbers of women and minority law clerks are large or small. While it notes in a footnote that we, in the gender report, provide the 43% law school enrollment figure, GAO implicitly criticizes us for not suggesting whether this should be used as a benchmark. However, GAO should note that we carefully explain in the text at page 25 that because "[l]ittle data are available on the gender make-up or qualifications of those who seek clerkships in these courts," that the lack of that "systematic data . . . makes it impossible to determine whether, if there are either fewer or more women law clerks than one might expect from law school enrollment figures," what factors contribute to this. There is, of course, an irony in criticizing the Reports for the very absence of data that the Reports themselves have sought unsuccessfully to collect and that judges opposing the Task Force inquiry have refused to provide.

This seems to us an explanation of why we need to be cautious in using the 43% as a benchmark. We don't know how well it corresponds to applications. Moreover, the very limited data we did get, see Draft Final Report at 25 n.48, suggest that a smaller percentage of women may be applying in the circuit court than in the district court.

Conclusion

In conclusion, while we are pleased that the latest GAO version recognizes the usefulness of these Reports in providing a base for future evaluations for progress in making the courthouse a fairer place in which to work and practice, we are compelled to observe that the GAO evaluators seem indeed to be "stretching" to find in the case of the D.C. Circuit Reports (each several hundred pages long) a few undocumented "assertions" or "conclusions" of bias. We do not believe that they were successful in doing so, as demonstrated above, and we are sorry they felt so urgently the need to do so. We continue to maintain that a fair and impartial reading of the Reports would have concluded that their worth in describing the courthouse environment as well as the experiences and

[1]If the GAO suggestion is that simply because lots of women report this experience does not make it true, there are two responses: (1) with these kinds of numbers attorney reports are a pretty good indicator--we take people's word on the census, etc; and (2) though men report this behavior in much lower numbers, they report more of it directed against women than men, and they report more of it in out-of-court than in-court settings. Draft Final Report at 64 (10% of men report seeing women interrupted more than men in out-of-court settings, compared with 4% who report observing this in court); *id.* at 65 n.59 (10% of men report women being interrupted more than men in out-of-court settings; 5% of men report men being interrupted more than women in out-of-court settings). The latter statistic means that twice as many men report women being disproportionately interrupted as report men being disproportionately interrupted in such out-of-court settings.

perceptions of those who work in it far exceeded any unavoidable and, we believe, quite minor gaps in data completeness.

Comments From the Ninth Circuit

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October 11, 1995

Mr. Norman J. Rabkin
Director, Administration of Justice Issues
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Washington, DC 20548

By Fax, 3 pages; Hard Copy to Follow

Dear Mr. Rabkin:

Thank you for the opportunity to comment anew on the General Accounting Office's expanded assessment of the methodological soundness of the work of the bias task forces in the federal Judiciary. We have been asked to respond orally within four working days. It is our custom, however, to preserve our comments in writing and we do so here. As we are sure that Senator Grassley would want a complete record on this matter, we will provide him with these comments as well.

We acknowledge the generally accurate description of the Ninth Circuit's gender bias study and the recognition of the quality of its work. However, the first full paragraph on page 3, and at page 6 and thereafter, the draft GAO report makes several serious errors about the Ninth Circuit's work which it would be appropriate to correct prior to publication.

On page 6, the GAO report lists three brief quotations from the Ninth Circuit study that the writers of the GAO report believe overreach the study's methodology. We are surprised and object to the mischaracterization that is occasioned by taking the statements out of context. Each of these statements is supported by the research presented in the study. The first citation simply states that our study focuses primarily on bias against women, who suffer most from gender bias. This statement is both accurate and grounded in the findings (in the bibliography at page 1065 and in the working papers). It is consistent with the findings in the many state court studies on gender bias.

The second statement, confirming that the gender bias documented at the state level also exists in the federal system, is amply based upon the research into the state court work (through some 25 state studies that focused on the experiences of women, listed at page 1065) and on the data collected on the federal side. The final quotation is the most surprising: "Moreover, the Ninth Circuit's gender bias study, begun at the circuit level, is now moving to the districts and beyond." This is a completely objective and accurate statement that the work

of studying the effects of gender was not only taken up at the circuit level, but was also being undertaken by several districts within the circuit and by courts outside the circuit. This is not a conclusion based upon the data. It is a simple statement of fact. Perhaps your reviewers misunderstood this statement. Ample evidence of that phenomena was included in the study, both within the very same paragraph of the quotation and only five pages later, under "B. The Accomplishments Thus Far: Programs, Committees, and Policies" (at page 967).

We respectfully submit that the comments that the GAO report has isolated from the Ninth Circuit's study are careful *not* to overreach the study's methodology and are fully supported by the data included within the confines of the final report. To characterize them otherwise is misleading and incorrect.

We reiterate our earlier comment concerning the reviewers' continued insistence (at page 8) on the necessity of determining the characteristics of the applicant pool or the pool of eligible persons before the study may make observations about personnel issues such as hiring, promotions, and appointments. As I stated in my letter of August 18, 1995:

> Applicant pool information is used to provide a basis for analysis of bias in civil rights lawsuits. Collection of such information is difficult and costly to obtain and was definitely *not* the purpose of the Ninth Circuit's gender bias task force. The task force simply sought to document what positions and roles men and women actually held in the Ninth Circuit in order to explore their perceptions of how gender might influence those appointments. This is a far different inquiry from that suggested by the GAO draft report. The language in the draft report misleads readers into thinking that the Ninth Circuit's study set out to draw conclusions about the presence of gender bias based upon the kinds of data and analysis relied upon in civil rights lawsuits–when in fact the Ninth Circuit's task force undertook no such effort.

Our earlier comments urged that the reviewers make study-specific comments to assist the readers who may be undertaking similar studies of their own. Commendably, this revised draft has generally succeeded in doing so. However, at a few points of criticism, the draft GAO report refers to both the Ninth and the District of Columbia Circuits, but the specific criticism is to work of the District of Columbia Circuit (at pages 7 and 8).

At another point, the draft GAO report is inconsistent when it appropriately acknowledges that the survey response rates are "fairly good overall" (at page 9), but then seeks to undercut the validity of the survey data by dismissing the responses as possibly only from interested parties. As our task force report clearly indicated (at pages 1024-1025), and as

I pointed out in my earlier comments, "The wide variations in response patterns among both male and female respondents and the general consistency of responses with the focus group findings suggest a general absence of non-response bias." Thus the professionals who conducted our surveys took steps to minimize the potential lack of representativeness of the survey results.

We appreciate the time and attention that the General Accounting Office has given to the examination of these three completed task force studies. All of us in the federal courts who are involved in these studies are concerned about methodology and we welcome the opportunity this review has provided for opening a dialogue on constructively improving the process.

The Ninth Circuit remains proud of its leadership in this area. It is obvious from recent events that issues of gender, race, and ethnicity continue to profoundly affect the perception of justice. We hope to continue to examine these issues and to support the work of our judges, lawyers, and researchers who are striving, through reports such as that by the Ninth Circuit Gender Bias Task Force, to fulfill their commitment to improving the administration of justice for all.

Sincerely,

Gregory B. Walters, Ph.D

cc: Hon. Charles E. Grassley

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