Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record

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Jimmy Carter's leadership on global human rights issues has recently been recognized with the 2002 Nobel Peace Prize. What has not been sufficiently recognized to date is his trailblazing leadership in appointing women to the federal bench -- naming five times more women than all of his predecessors combined. Carter's appointment of significant numbers of women to the bench was motivated by his commitment to women's equality as a human right and set the stage for his successors to name women in numbers vastly departing from the tokenism pre-Carter. That more than twenty percent of George W. Bush's confirmed judges are women[1] is directly attributable to Carter's groundbreaking achievement.

Only one woman served among 97 judges on the federal courts of appeal and five women among nearly 400 district court judges when Carter took office in January 1977.[2] By the time he left office in January 1981, Carter had appointed forty women to Article III courts of general jurisdiction[3] -- 11 at the appeals court level and 29 at the district court.

The first eight women judges, pre-Carter, were:

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[1] This data is accurate as of the mid-term election of 2002. Judicial Biographical database on Federal Judicial Center website www.fjc.gov.

[2] Likewise, there was only one African American on the court of appeals and sixteen African Americans and five Hispanics on the district court before Carter. "Wide Search Is On for U.S. Judges, With Politics Still a Major Factor," New York Times at A1 (April 22, 1979).

[3] This paper addresses women's life-tenure appointments to Article III courts of general jurisdiction -- the U.S. Supreme Court, courts of appeal, and district courts.

Name	Court	President	Year Confirmed
1. Florence Ellinwood Allen	6th Cir.	Roosevelt	1934
2. Burnita Shelton Matthews	D.D.C.	Truman	1949
3. Sarah Tilghman Hughes	N.D.Tex.	Kennedy	1962
4. Constance Baker Motley	S.D.N.Y.	Johnson	1966
5. June Lazenby Green	D.D.C.	Johnson	1968
6. Shirley Mount Hufstedler	9th Cir.	Johnson	1968
7. Cornelia Kennedy	D.Mich.	Nixon	1970
8. Mary Anne Richey	D.Ariz.	Ford	1976[4]

Carter's appointment of more than token numbers of women constituted a clear break with his predecessors. Indeed, 15.8 percent of Carter's 259 judicial appointees were female, as compared with less than one percent of each of his predecessors'.[5]

At least three factors contributed to Carter's achievement. First, Carter worked to reform the judicial appointments process by introducing citizen nominating commissions and merit selection principles, where political patronage and senatorial prerogative had previously prevailed. This effort was critical to his appointment of women insofar as it loosened the constraints of tradition that favored men's appointment. Second, the late 1960s/early 1970s' resurgence of the women's movement and entry of large numbers of women into the legal profession brought significant pressure to bear on Carter to name women to high office generally and to judgeships specifically.

[4] Judicial Biographical database, Federal Judicial Center website <www.uscourts.fjc.org>.
[5] Sheldon Goldman and Elliot Slotnick, "Clinton's first term judiciary: many bridges to cross," 80 Judicature 254, 261, 269 (1997). In appointing 259 judges, Carter named approximately forty percent of the then-sitting federal judges, more than any of his predecessors. Carter's record in overall number of judges appointed would soon be surpassed by Reagan, who appointed 372 judges over the course of his

Notwithstanding these first two factors, Carter would not have succeeded in naming historic numbers of women to the bench without the presence of a third factor -- the passage of the Omnibus Judgeship Act of 1978 [hereinafter the "OJA"], creating 152 new judgeships, thirty-five at the court of appeals level and 117 at the district court level. The vast majority of Carter's women judges, and every one of his female court of appeals candidates, was named to the bench following the OJA's enactment. The presence of a Democratic-controlled Senate throughout Carter's term was likewise instrumental to his judicial appointments success, where a high percentage -- 88.2 percent -- of Carter's judicial nominees were confirmed.[6]

I. Carter's Judicial Appointments Reforms Were Critical To His Success in Naming Women

A. Carter's Commitment to Judicial Reform as Governor of Georgia and 1976 Presidential Candidate

As Governor of Georgia, Carter reformed the judicial appointments process by establishing citizen commissions charged with relying on merit selection principles to generate names of judicial candidates. As presidential candidate, Carter pledged to replicate this model at the federal level.

Then-Governor (and prospective presidential candidate) Carter highlighted his judicial reform record in a May 1974 Law Day speech at the University of Georgia Law School:

> I have refrained completely from making any judicial appointments on the basis of political support or other factors and have chosen, in every instance, superior court judges, quite often state judges, appellate court judges, on the basis

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two terms, constituting nearly one-half of the federal judges then in active service. Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 238, 336 (1997).

[6] As compared with 65.9 percent when Bill Clinton faced a Republican-controlled Senate. See Roger E. Hartley and Lisa M. Holmes, "Increasing Senate scrutiny of lower federal court nominees," 80 Judicature 274, 278 (1997) (chart indicating whether a president worked with Senate of his own or opposing party, and its effect on length of confirmation of judicial nominees and percent of nominees confirmed).

> of merit analysis by a highly competent, open, qualified group of distinguished Georgians. I'm proud of this.[7]

Given the efficacy of the Georgia state reforms, "President Carter decided while he was still a candidate for president that he would try to put in a similar system for the selection of federal judges in the event he was elected."[8] In a statement submitted to the Democratic Party Platform Committee, candidate Carter endorsed the merit selection of judges through reliance on citizen nominating commissions:

> All federal judges and prosecutors should be appointed strictly on the basis of merit without any consideration of political aspects or influence. Independent blue ribbon judicial selection committees should be utilized to provide recommendations to the President when vacancies occur from which the President must make a selection.[9]

As President, Carter succeeded in reforming the judicial appointments process, at least at the court of appeals level, by establishing citizen nominating panels, emphasizing merit selection principles, and providing greater access to women's and other civil rights advocacy groups pressing for diversity on the bench. Before turning to his reforms, a brief look at the political traditions shaping judicial appointments pre-Carter.

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[7] Governor Jimmy Carter, "Transcription of Law Day Speech, University of Georgia, Athens, Georgia," (May 4, 1974), on file with the Carter Presidential Library. Carter declared his intentions for the presidency on December 12, 1974. Carter, Keeping Faith (year) at ix.

[8] Bell, "Federal Judicial Selection" at 25.

[9] Carter's June 16, 1976 statement to the Democratic Party platform committee, quoted in Richard E. Cohen, "Choosing Federal Judges — The Senate Keeps Control," National Journal 355 (March 3, 1979). Ford echoed Carter in his support of merit selection of federal judges during the 1976 campaign and the Republican party platform mirrored the Democrats' in espousing a commitment to appointing women judges.

B. Traditions governing federal judicial appointments before Carter

Historically, responsibility for naming district court candidates had fallen within the purview of the senator or senators of the president's party from the state where the vacancy arose. Naming candidates to fill district court vacancies was viewed as a senatorial "perk," providing senators with a tool for meting out political patronage.

By contrast, responsibility for naming court of appeals candidates had fallen more within the presidential purview than that of the home state senators because the region governed by a given appeals court extended beyond the boundaries of any one state. As a result, no one or two senators had the same degree of interest in, nor influence over, a nomination to the appeals court as they had with the district court. Additionally, presidents traditionally took more interest in court of appeals than district court appointments because appellate judges were thought to exercise more influence over the development of the law and were therefore considered more instrumental in implementing the president's judicial-political agenda.[10]

Senators nevertheless exerted significant influence over appellate court appointments because a senator from the state where a given vacancy arose possessed near veto power over that vacancy through the use of the "blue slip," a unique Senate tradition, that worked as follows: the Senate Judiciary Committee's chief counsel distributed blue slips to the senators from the judicial nominee's home state; if one of the senators noted an objection to the nomination on the

[10] The first eight women on the federal bench were appointed according to these traditional practices. Two of the first eight were named to the District of Columbia district court (Burnita Shelton Matthews in 1949 and her successor, June Lazenby Green, in 1968), over which the president had substantial leeway because there was no home state senator. Two others were named to courts of appeals (Florence Ellinwood Allen to the Sixth Circuit in 1934 and Shirley Hufstedler to the Ninth Circuit in 1968), over which the president likewise had greater influence as explained above.

blue slip, the nomination was crushed and no confirmation hearing was held; if the senators returned the blue slips without noting objections, then a confirmation hearing was scheduled.[11]

Senators' influence over judicial appointments continued largely unchanged until President-elect Carter negotiated a compromise with the Chair of the Senate Judiciary Committee in the winter of 1976, giving the President greater leeway over court of appeals appointments while leaving district court appointments largely to Senate prerogative. Senators' influence was eroded further when Edward M. Kennedy became Chair of the Senate Judiciary Committee in 1979 and announced that the withholding of a blue slip would no longer necessarily block a nomination.

C. Carter wrenches court of appeals appointments away from Senatorial prerogative and political patronage

i. Compromise with Senate Judiciary Committee Chair

President-elect Carter and Attorney General-designee Bell[12] met with Senator James O. Eastland of Mississippi, the long-time Chair of the Senate Judiciary Committee, at the Georgia Governor's mansion in December 1976 to negotiate certain judicial appointments reforms, ultimately agreeing to a compromise on the allocation of power between the Senate and the White House over district and appellate court judgeships. Carter and Bell met with Eastland because his assistance was necessary to implement Carter's intended changes. Carter and Bell informed Eastland of the President-elect's intent to establish a merit selection commission for court of appeals appointments and of the administration's plan to encourage senators to do the same in their home states for purposes of district court appointments. Carter and Bell sought an

[11] See generally Goldman, Picking Federal Judges at 12.
[12] Bell had previously served as a Circuit Judge with the U.S. Court of Appeals for the Fifth Circuit from 1962 to 1976. He resigned from the bench to return to his law partnership at King & Spalding in Atlanta.

assurance of cooperation from Eastland, which they obtained.[13] In Bell's view, "Had it not been for [Eastland], we wouldn't have been able to make the success that we made."[14]

Following the inauguration, Carter housed his judicial selection process in two offices – those of Attorney General Bell and the White House Counsel, Robert Lipshutz.[15] Carter charged Bell and Lipshutz with identifying women and minority candidates. Within the Justice Department, Barbara Babcock, Assistant Attorney General for the Civil Division, was responsible for generating names of women judicial candidates, while Drew Days, Assistant

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He served as Attorney General from January 1977 through August 1979, when he again resigned to return to his law practice. He was replaced by Deputy Attorney General Benjamin Civiletti.

[13] According to Bell:

> Senator Eastland had told me and said to me several times later that he was very proud of the fact that we had a Southerner for President, something that he had not ever expected to see during his lifetime. He wanted to help in any way he could to make certain that President Carter's tenure was a success.
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> Senator Eastland advised us that day that the senators considered the judgeships, both district and circuit judges, to be senatorial patronage. I stated that I had always understood that the district judges were the patronage of the senators if they were of the same party, as were the United States Attorneys, but that the president reserved the patronage of appointing circuit court judges. Senator Eastland said that this was formerly true, but during the decline of the presidency in the Watergate years, the senators had moved in on the circuit judgeships as well.
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> President-elect Carter explained the Georgia commission system to Senator Eastland, and Senator Eastland concluded the meeting by stating that he would support the commission idea for circuit judgeships but that he would do no more than try to persuade the senators to use commissions in selecting district judges. He was true to his word and notified the senators that during the Carter administration the circuit judges would be selected by the president from lists derived through commission interviews and recommendations. He was also true to his word in urging senators to use commissions in selecting district judges, and many did.

Bell, "Federal Judicial Selection," at 26. See also "Wide Search Is On for U.S. Judges, With Politics Still a Major Factor," New York Times, A1 (April 22, 1979) (reporting, "President Carter, who in his campaign urged merit selection of all Federal judges and prosecutors, obtained control over the selection of appeals court judges. In an arrangement with former Senator James O. Eastland, then chairman of the Senate Judiciary Committee, the senators of the President's party retained control over district court judges and United States Attorneys.").

[14] Oral History Interview with Griffin Bell, on file with the Federal Judicial Center (May 9, 1995) at 19.

[15] Lipshutz served as White House Counsel until October 1979, at which time he resigned and was replaced by Lloyd Cutler. Prior to serving as Carter's White House Counsel, Lipshutz had been a partner in the Atlanta law firm of Lipshutz & Macey and was Treasurer of Carter's 1976 presidential campaign.

Attorney General for Civil Rights, generated names of minority candidates.[16] Michael Egan, the Associate Attorney General, reviewed potential candidates with Bell. Lipshutz in turn worked closely with his Deputy and Senior Associate White House Counsels, Margaret McKenna and Douglas Huron, in considering judicial candidates.

Tension soon arose between Bell and Lipshutz's offices over the identification of women and minority candidates, with the White House Counsel's Office expressing concern that the Attorney General's Office was not giving sufficient priority to Carter's diversity goals,[17] and the Attorney General's Office countering that it was attending to these goals, but that there was a limited number of qualified women and minority candidates.[18] The White House Counsel also charged the Attorney General with marginalizing it from the judicial selection process. In response, the President instructed Bell to forward names of potential candidates to the White

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[16] Oral History Interview with Barbara Babcock, on file with the Federal Judicial Center's History Office (May 19, 1995) at 4.

[17] Lipshutz strongly supported Carter's diversity goals with regard to the judiciary. In a speech to the D.C. Bar, Lipshutz linked Carter's emphasis on merit selection with his goal of diversifying the federal bench:

> The President has two goals in the selection process. Two goals of equal importance. One is to continue to appoint only judges of high quality; the other is to open the selection process to groups, such as minorities and women, which historically have had little representation on the federal bench.
>
> The President's two goals of quality and inclusiveness are compatible. He believes that, and those of us who are assisting him believe it. . . .

Robert J. Lipshutz, Address to the D.C. Bar (January 25, 1979) at 4, on file with the Carter Presidential Library.

[18] Responding to criticism by women's groups, Bell ascribed the modest nature of women's judicial appointments to the lack of qualified female candidates, "insist[ing] that there are not many minority members and women to choose from because they make up only a small percentage of the total number of lawyers." In Bell's view, "a great number of white female lawyers have been in practice less than eight years, so they are not regarded as qualified for the bench." "Wide Search is on for U.S. Judges, With Politics Still a Major Factor," New York Times, A1 (April 22, 1979).

Though slow to recommend women and minority judicial candidates, Bell made several speeches as Attorney General touting Carter's merit selection philosophy. See, e.g., Griffin B. Bell, Address to the American Law Institute on Merit Selection (May 18, 1977); Griffin B. Bell, Remarks on Carter's Merit Selection Plan (Feb. 25, 1978); Griffin B. Bell, Address to the American Law Institute on Merit Selection (May 29, 1978), all on file with the Carter Presidential Library. These speeches did not cite Carter's goal of diversifying the federal bench, however.

House Counsel's Office at the same time that the Justice Department received their names from the President's merit selection panels and/or individual senators. The President also arranged to meet jointly with the Attorney General and White House Counsel to discuss judicial appointments.[19] Despite the President's intervention, tension between Bell and Lipshutz's offices persisted.[20]

ii. **Carter establishes U.S. Circuit Judge Nominating Commission**

Within a month of entering office, Carter issued an executive order creating the U.S. Circuit Judge Nominating Commission, charging it with using merit selection principles to recommend court of appeals candidates of diverse backgrounds.[21] Organized into thirteen regional panels -- one for each of the then-eleven circuits (First through Tenth plus District of Columbia) and two additional panels for the Fifth and Ninth Circuits (due to their

[19] Bell, "Federal Judicial Selection" at 29 (recalling that Carter sought to resolve the tension between the offices of the Attorney General and White House Counsel by forming a committee to review the merit selection panels' and individual senator's recommendations. In addition to Bell and Lipshutz, this committee was composed of Hamilton Jordan, Jody Powell, and Frank Moore, Carter's key political advisors. According to Bell, Bell would "then give the President the recommendation along with the views of the group. The system worked well.").

[20] As illustrative of the tension, see Memorandum from Margaret McKenna, Deputy White House Counsel, and Doug Huron, Senior Associate White House Counsel, to Bob Lipshutz, White House Counsel, at 1 (October 12, 1978) (revealing tension between White House Counsel's Office and Attorney General's Office over reliance on diversity principles in filling OJA seats), on file with the Carter Presidential Library. McKenna's memo declared:

> We believe that Justice's proposal leaves too little substantive responsibility in the White House. The 152 judges appointed by the President under the Omnibus Judgeship Act will be one of the enduring monuments of this Administration, and it is important that issues of both policy and politics are fully considered before the appointments are made. The Justice Department is properly most concerned with the competence of individual nominees. It is the White House's function, however, to examine the pool of competent candidates and to factor in political considerations and affirmative action requirements. Justice should not have final authority, on paper or in reality, to select judges.

Id.

[21] Executive Order 11972 (Feb. 1977).

disproportionate size)[22] -- the Commission was tasked with submitting five names for each vacancy. These so-called "merit selection panels" were intended to break the hold of politicians and the organized bar over judicial appointments.

Seeking to bring greater diversity to the selection process through the composition of the panels themselves, the administration directed that panels be staffed in part with women, minorities, and non-lawyers.[23] The Attorney General was responsible for naming the panels' chairs (with the exception of the Eighth Circuit chair, who was named by Vice President Mondale of Minnesota), all of whom were male,[24] while the White House was tasked with selecting their members.[25] White House political advisors Hamilton Jordan and Frank Moore exerted substantial influence over panel membership, steering some appointments to long-time Democratic party supporters, including the Mayor of Detroit, the president of the United Automotive Workers Union, several former Congressmen, and the counsel to the Mayor of Chicago.[26]

Women's and other civil rights advocacy groups worked with the White House in proposing names of women and minorities to serve on the merit selection panels. Susan Ness of the National Women's Political Caucus' Legal Support Caucus, for example, met with the White House Counsel in the weeks following the establishment of the U.S. Circuit Judge Nominating

[22] Executive Order 11972 (Feb. 1977). In May 1977, Carter issued two more executive orders related to the selection of federal judicial officers. The first, Executive Order 11992 (May 24, 1977), created a citizen nominating commission for non-Article III federal judicial officers, and the second, Executive Order 11993 (May 24, 1977), expanded the jurisdiction of the merit selection panel for the D.C. Circuit to include the D.C. District Court in light of the absence of home-state senators to fill these vacancies. The panel was directed to use the same guidelines for selecting district court judges as for appellate court.
[23] See, e.g., Executive Order 12059, section 2(c) (May 1978) (instructing, "Each panel shall include members of both sexes and members of minority groups, and each panel shall include at least one lawyer from each State within a panel's area of responsibility").
[24] Oral History Interview with Griffin Bell, on file with the Federal Judicial Center's History Office (May 9, 1995), at __.
[25] See Bell, "Federal Judicial Selection" at 26.

Commission to assist in recommending women to serve on the panels.[27] Likewise, the Judicial Selection Project, a civil rights advocacy group concerned with judicial appointments reform, proposed names of individuals to serve on the nominating panels.[28] In a memorandum to an administration colleague, Senior Associate White House Counsel Doug Huron suggested that "most of the panels should include one or more members suggested by the Judicial Selection Project" because "the groups affiliated with the Project worked hard to come up with a lengthy list of possible panelists – many of whom are well qualified – and they will be closely monitoring our efforts to get more minority and female judges selected." Huron concluded, "If only a few or none of their suggested panelists are appointed, they will question our good faith at the outset."[29] Closely monitoring the number of women, minorities, and non-lawyers appointed to the panels,[30] the White House Counsel's Office was pleased to note in the end that forty-four women and twenty-seven people of color were among the ninety-nine individuals named to the first nine panels.[31]

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[26] "Wide Search Is On for U.S. Judges, With Politics Still a Major Factor," New York Times, A1 (April 22, 1979).

[27] Goldman, Picking Federal Judges at 252.

[28] See, e.g., Letter from Stephanie Savage of the Judicial Selection Project to Laurie Lucey, Assistant to Landon Butler in the Old Executive Office Building (April 24, 1978) (forwarding extensive list of names of prospective nominating commission members on recommendation of Susan Ness of the Judicial Selection Project); Letter from Stephanie Savage of the Judicial Selection Project to Laurie Lucey, Assistant to Landon Butler, Old Executive Office Building (April 27, 1978) (submitting extensive list of names of prospective members of the circuit court nominating panels), both on file with the Carter Presidential Library.

[29] Memorandum from Doug Huron, Senior Associate White House Counsel, to Laurie Lucey, Assistant to Landon Butler, Old Executive Office Building (April 21, 1978), on file with the Carter Presidential Library.

[30] See, e.g., Memorandum from Robert Lipshutz, White House Counsel, to Doug Huron, Senior Associate White House Counsel, regarding United States Circuit Judge Nominating Commission, at 1 (February 10, 1977) (instructing, "Please monitor the establishment of these committees after the President has signed the Executive Order."); Memorandum from Doug Huron, Senior Associate White House Counsel, to Hamilton Jordan regarding Members of Circuit Judge Nominating Panels, at 1 (February 22, 1977) (observing, "The membership [on each panel] is also to be representative of minorities and females. There should, and can, be five or six women on each panel, with minority representation based loosely on population percentage."), both on file with the Carter Presidential Library.

[31] Memorandum from Doug Huron, Senior Associate White House Counsel, to Bob Lipshutz, White House Counsel, at 1 (November 6, 1978) (noting, "I believe that our office's participation is largely responsible

In charging the panels with identifying court of appeals candidates, Carter's February 1977 executive order directed them to look to those "whose character, experience, ability, and commitment to equal justice under law, fully qualify them to serve in the Federal judiciary."[32] The order highlighted the following desirable attributes: membership in good standing of at least one state bar, integrity and good character, sound health, outstanding legal ability, commitment to equal justice under law, and judicial temperament.[33] The order further directed the panels to consider candidates who would satisfy a "perceived need" of a given court, interpreted as empowering the panels to pursue Carter's goal of diversifying the courts through the nomination of women and minority candidates where none or few had served before.[34]

In May 1978, Carter promulgated a second executive order "clarify[ing] and amend[ing] the responsibilities of the various panels of the United States Circuit Judge Nominating Commission"[35] to make explicit his desire that the panels "make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees."[36] Then, in October 1978, in anticipation of the OJA's passage, the Justice Department issued guidelines to the U.S. Circuit Judge Nominating Commission, reminding members to "note the President's desire to consider qualified minority and female lawyers for appointment as Circuit Judges."[37]

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for the fact that on the first nine panels selected – a total of 99 members – 44 were women, 27 were members of minority groups and a large number were Carter supporters."), on file with the Carter Presidential Library.

[32] Executive Order 11972, section 1.

[33] Executive Order 11972, section 4.

[34] Executive Order 11972, section 4(c) (providing, "To implement the above standards, a panel may adopt such additional criteria or guidelines as it considers appropriate for the identification of potential nominees and the selection of those best qualified to serve as United States Circuit Judges."); see generally Susan Carbon, "The U.S. Circuit Judge Nominating Commission: a comparison of two of its panels," 62 Judicature 233, 234 (1978).

[35] Executive Order 12059, prologue.

[36] Executive Order 12059, section 4(d).

[37] Justice Department guidelines to the panels of the United States Circuit Judge Nominating Commission, at 1 (October 2, 1978), on file with the Carter Presidential Library.

Carter's introduction of merit selection panels was critical to his effort to appoint women judges insofar as the traditional mechanisms of Senatorial prerogative and political patronage favored male candidates. As political scientist Elaine Martin has noted, because "women, as a group, are not as politically active and powerful as men," Carter's reforms "allowed qualified women to compete more effectively for federal judicial office" by "de-emphasizing political activism and influence" as credentials for selection.[38]

Despite the promise of reform, Carter's panels failed to nominate any women to the first twelve court of appeals vacancies in the first two years of the administration.[39] The National Women's Political Caucus' Legal Support Caucus, among others, expressed disappointment with Carter's failure.[40] Contributing to the problem were delays in establishing the regional panels and the Justice Department's failure to inform the panels of Carter's diversity goals for several months after they had begun their screening activities.[41] That the panels were staffed in part with

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[38] Elaine Martin, "Women on the Federal Bench: A Comparative Profile," 65 Judicature 306, 308 (1982).

[39] In the same period, four men of color were appointed to the courts of appeals: Leon Higginbotham to the Third Circuit, Damon Keith to the Sixth Circuit, Theodore McMillian to the Eighth Circuit, and Thomas Tang to the Ninth Circuit. "Judge Bill to Test Merit Selection," National Law Journal, 1, 30 (Oct. 9, 1978) (reporting no women and four minority men were nominated by Carter to fill twelve court of appeals vacancies between his inauguration in January 1977 and passage of the OJA in October 1978).

[40] *See, e.g.,* Susan Ness, "Women Judges -- Why So Few?" *Graduate Woman,* November/December 1979, at 10; *see also* Goldman, Picking Federal Judges at 270.

[41] In their October 1978 memo to Lipshutz, highlighting delays and other problems with the Justice Department's implementation of Carter's goal of diversifying the federal judiciary, McKenna and Huron asserted:

> We . . . need to be involved in this process, since Justice has not communicated to the panels the President's concern about affirmative action. It was Margaret [McKenna] who first raised this issue at a meeting of panel chairmen in July 1977, some three months after five panels had begun operations.

They noted further:

> It was Doug who last spring negotiated with Justice to add affirmative action language to the Executive Order establishing the panels. And both of us have successfully urged Justice to revise its instructions to panels to eliminate arbitrary barriers to minority and female recruitment (e.g., rigid, lengthy experience standards).

long-time Democratic Party operatives also contributed to the ongoing politicization of the court of appeals selection process.[42]

At the same time that Carter established nominating panels and introduced merit selection principles at the court of appeals level, he lobbied senators to adopt these reforms at the district court level. To this end, Carter sent a handwritten note to every Democratic senator encouraging them to establish merit selection commissions in their home states.[43] Carter also used public gatherings to underscore the need for district court merit selection commissions.[44]

Memorandum from Margaret McKenna, Deputy White House Counsel, and Doug Huron, Senior Associate White House Counsel, to Bob Lipshutz, White House Counsel, at 2 (October 12, 1978), on file with the Carter Presidential Library.

[42] "Wide Search is On for U.S. Judges, With Politics Still a Major Factor," New York Times at A1 (April 22, 1979) (reporting that Hamilton Jordan, Carter's chief political advisor, "had the final voice on the makeup of the President's judicial selection panels.").

[43] See Speech by Griffin Bell on Merit Selection of Judges (Feb. 25, 1978) (recounting, "Senator Eastland said he would help the President persuade senators to establish judicial-selection commissions in their states for the selection of candidates for federal district judges. To this end, the President personally wrote a longhand letter to every Democratic senator urging that the senators establish commissions for the selection of candidates for federal district judge positions."), on file with the Carter Presidential Library.

> In retrospect, Bell recalls:
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> > We set out to convince the senators who were Democrats, and who were expecting the district court patronage, to establish commission of their own on a state level to open up the process and consider more applicants than would ordinarily be considered. This was difficult because many of the senators had lists of their own and in some instances had been waiting for a long time to make appointments of friends and supporters to district judgeships. . . .
> >
> > With respect to those states where the senators were members of the Republican Party, in every instance they agreed to a commission selection system. They were allowed to appoint the commission but had nothing to do with selecting those from the list comprised by the commission. This was easy to accomplish because otherwise the patronage in those states would have gone to the local Democratic party. This worked out well and these commissions were able to, and did, bring forth the names of very good candidates.

Bell, "Federal Judicial Selection" at 27.

[44] At a town hall meeting in Clinton, Massachusetts, shortly after entering office, Carter commended Massachusetts Senators Kennedy and Brooke for forming a commission, emphasizing that the country needs "to move toward appointing federal judges on the basis of merit and ability instead of cheap political pay-off." Jimmy Carter, Remarks at the Clinton Town Meeting (March 16, 1977), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1977, Vol. I at 382.

The President's lobbying met with only limited success, senators having established district court merit selection commissions in just fourteen states prior to the OJA's passage.

D. ABA Standing Committee on Federal Judiciary Thwarts Carter's Efforts to Diversify Bench

Carter's efforts to reform the judicial appointments process and name more women and minority candidates to the bench were stymied by the ABA Standing Committee on Federal Judiciary's system for evaluating federal judicial candidates. Consistent with practices dating from the Eisenhower era, Carter forwarded his prospective candidates' names to the ABA Standing Committee for its review prior to submitting his judicial nominations to the Senate. Those candidates who received a "qualified" or better rating were forwarded to the Senate, while those rated "unqualified" would be abandoned.[45] The ABA's rating system emphasized several elements -- including a minimum of twelve to fifteen years in practice and substantial trial experience[46] -- that effectively eliminated female and minority candidates.[47] Because women and people of color were relative newcomers to the legal profession, they lacked the years of practice and diverse litigation experience held by most white male judicial candidates. Because of historic discrimination, many of Carter's female and minority judicial candidates had not worked in law firms, but had instead worked in a range of other settings, including government agencies, public interest organizations, and state and local courts, providing them with different types of practice experiences than the white male candidates. Given the ABA's emphasis on length of

[45] The ABA rated candidates as "unqualified," "qualified," "well qualified," or "exceptionally well qualified."

[46] "The Committee on Federal Judiciary: What It Is and How It Works," 63 ABA Journal 803, 807 (June 1977) (in publishing its first pamphlet setting forth guidelines for evaluating judicial candidates, the Standing Committee stated, "The committee believes that ordinarily a prospective appointee to the federal bench should have been admitted to the bar for at least twelve to fifteen years.").

[47] On this point, Bell noted, "We had some problems because we were trying to follow the ABA standard of fifteen years' practice experience, and many of the women didn't have fifteen years . . . . Women didn't get into law schools until the sixties." Oral History Interview with Griffin Bell, on file with the Federal Judicial Center's History Office (May 9, 1995) at 1-2.

practice and trial litigation experience, Carter's female judicial candidates received disproportionately lower ratings than his men. Though over 62 percent of Carter's judicial appointees received one of the ABA's top two ratings, only 29.7 percent of his female judicial candidates did.[48]

The manner in which the ABA Standing Committee investigated judicial candidates also worked to the disadvantage of women and minorities because of their "outsider" status within the white male legal establishment. The ABA Standing Committee gathered information on a particular candidate by assigning a committee member from the candidate's region to conduct interviews with local practitioners and judges. This process was subject to potential bias where almost all of the ABA committee members were white males, as were most practitioners and judges consulted. Together, they evaluated women and people of color who were relatively new to the profession and who had different practice experiences than their own, not surprisingly disadvantaging the non-traditional candidates.

In one of its updates to members, the National Women's Political Caucus' Legal Support Caucus highlighted women judicial candidates' struggles with the ABA Standing Committee:

> We have been receiving reports that women are having an extremely difficult time passing muster with the ABA Committee on the Federal Judiciary. It seems that some members of that panel have a hard time accepting that judicial fitness does not require that the candidate come from their mold.[49]

[48] Elaine Martin, "Women on the federal bench: a comparative profile," 65 Judicature 306, 309 (1982); see also Elliot E. Slotnick, "The paths to the federal bench: gender, race and judicial recruitment variation," 67 Judicature 371, 380-81 (March, 1984).

[49] NWPC memorandum from Susan Ness, Chair of the NWPC Legal Support Caucus, to Legal Support Caucus Members, at 2 (June 9, 1979), on file with the Schlesinger Library on the History of Women, Harvard University.

Asking Caucus members to forward any information on the attitudes of individual ABA committee members with regard to women's rights, civil rights, and/or public interest law, the Caucus prepared for a "confrontation with the ABA"[50] over its ratings of women candidates.

An opportunity to confront the ABA soon arose. Having been selected as Carter's prospective nominee for the Eighth Circuit, Professor Joan Krauskopf's name was submitted to the ABA for evaluation. The ABA rated Krauskopf unqualified on the grounds that she lacked trial experience and that her area of expertise, family law, was too narrow.[51] Women's advocacy groups expressed outrage when Carter abandoned Krauskopf's candidacy following the ABA evaluation:

> Krauskopf had been recommended unanimously by the 8th Circuit Judge Nominating Commission. In addition, the judges on the Eighth Circuit bench passed a resolution stating that an otherwise qualified attorney should not be disqualified from sitting on that court solely because of a lack of trial experience.
>
> Despite repeated assurances from White House and Justice Department staff that Carter would nominate Krauskopf regarding (sic) of the ABA evaluation, all it took was one meeting with Attorney General Bell for Carter to reverse his course . . . .[52]

Krauskopf's nomination could not be rescued, but other women's nominations were saved through women's advocacy groups' lobbying efforts. For example, Stephanie Seymour's appointment to the Tenth Circuit was threatened when the ABA rated her unqualified on the ground that she did not have sufficient trial experience. In response to pressure from interest groups advocating women's appointments, along with Assistant Attorney General Barbara

[50] NWPC memorandum from Susan Ness, Chair of the NWPC's Legal Support Caucus, to Legal Support Caucus Members, at 2 (June 9, 1979), on file with the Schlesinger Library on the History of Women, Harvard University.
[51] NWPC Legal Support Caucus Report, at 1 (Oct. 23, 1979), on file with the Schlesinger Library on the History of Women, Harvard University.
[52] NWPC Legal Support Caucus Report, at 1 (Oct. 23, 1979), on file with the Schlesinger Library on the History of Women, Harvard University.

Babcock and Attorney General Bell, the ABA revised Seymour's rating upward to "qualified" and her nomination was saved.[53]

At the same time that the ABA's evaluation system presented obstacles to Carter's diversification efforts, the ABA House of Delegates passed a resolution at its annual meeting in August 1977 advocating the merit selection of judges.[54] Emphasizing the non-partisan nature of merit selection panels, the House of Delegates adopted this resolution at this time because certain of its members were concerned for the ongoing politicization of Carter's judicial selection panels.[55]

The ABA ratings of Carter's women and minority judicial candidates ultimately improved, with two key factors contributing to this change. First, members of Carter's White House Counsel's Office met with representatives from the ABA Standing Committee to persuade them to revise their ratings criteria to recognize non-traditional practice settings and value diversity in judicial candidates' backgrounds. These administration officials warned ABA committee members that they must either amend their evaluation system and start assigning higher ratings to women and minority candidates, or Carter would simply ignore the ABA evaluation process and submit his nominations to the Senate regardless of ABA ratings, rather

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[53] See Oral History Interview with Barbara Babcock, on file with the Federal Judicial Center's History Office (May 19, 1995) at 11-12, 19-20; see also Goldman, Picking Federal Judges at 267.

[54] "Report of House of Delegates Proceedings," in Annual Report of the ABA, Including Proceedings of the 100th Annual Meeting, Vol. 102, at 511-12 (1977). The resolution stated, inter alia:

> *Be It Resolved,* That the American Bar Association supports the principle of non-partisan merit selection of Federal judges; and
>
> *Be It Further Resolved,* The American Bar Association recommends that the President of the United States establish a non-partisan United States Circuit Judge Nominating Commission to recommend for nomination as circuit judges persons whose character, experience, ability and commitment to equal justice under law fully qualify them to serve in the federal judiciary . . . .

Id.

than withhold nominations of candidates deemed unqualified by the ABA, as had been the custom. Carter met directly with the ABA Standing Committee on November 17, 1978, shortly after the OJA's enactment, to request the ABA's help in filling the 152 new seats.[56]

Also contributing importantly to this turn-around was the 1980 naming of Brooksley Landau (now "Born") to be the first female chair, and the only woman member, of the fourteen-person Federal Judiciary Standing Committee. Under Landau, the Standing Committee revised its ratings criteria to place less emphasis on length of experience, reducing its criterion of "at least twelve to fifteen years"[57] to "at least twelve years."[58] In doing so, the Committee recognized "that women and members of certain minority groups have entered the profession in large numbers only in recent years and that their opportunities for advancement in the profession may have been limited."[59] Following this revision of its criteria, the ABA ratings of Carter's women and minority nominees improved.

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[55] "Report of the House of Delegates Proceedings," Annual Report of the ABA, Including Proceedings of the 100th Annual Meeting, Vol. 102, 511-12 (1977).

[56] "Report of the Standing Committee on Federal Judiciary," in Annual Report of the ABA Including Proceedings of the 102nd Annual Meeting, Vol. 104, 335, 336 (1979) (recounting, "On November 17, 1978, at the invitation of President Carter, the entire Committee and the Association's President, S. Shepherd Tate, met with President Carter and Attorney General Griffin B. Bell at the White House. The Committee expresses its appreciation to President Carter for his thoughtfulness in asking the Committee to meet with him and for his gracious remarks about the work of the Committee.").

[57] American Bar Association, "The Committee on Federal Judiciary: What It Is and How It Works," 63 ABA Journal 803, 807 (June 1977).

[58] Elliot E. Slotnick, "The ABA Standing Committee on Federal Judiciary: a contemporary assessment," in Judicial Politics: Readings from *Judicature* 217, 221, 222 (Elliot E. Slotnick, ed., 1992).

[59] Elliot E. Slotnick, "The ABA Standing Committee on Federal Judiciary: a contemporary assessment," in Judicial Politics: Readings from *Judicature* 217, 221, 222 (Elliot E. Slotnick, ed., 1992) (quoting American Bar Association, Standing Committee on Federal Judiciary: What It Is and How It Works 3 (1980)).

II. Carter's commitment to women's equality and the impact of the resurgent women's movement on judicial appointments

A. Sources of Carter's commitment to women's equality

Carter's commitment to women's judicial appointments had many and varied sources, including his commitment to civil rights[60] and his familiarity with, and support for, the women's movement in particular. Also significant were his religious beliefs, which informed his commitment to human rights generally and to civil rights and women's rights specifically.[61]

Carter's commitment to women's equality of opportunity was shaped in part by the women around him, including administration officials Margaret McKenna, the Deputy White House Counsel,[62] and Roe v. Wade advocate, Sarah Weddington, his liaison to women's groups. Underscoring the important role played by Carter's female presidential advisors in his appointment of women judges, Babcock later observed, "I think that all the women judges would

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[60] In Keeping Faith, his presidential memoirs, Carter describes his growing awareness of the injustices of segregation and his evolving understanding of, and participation in, the civil rights movement. He observes:

> It was deeply moving to see the end of legal segregation in the South and to observe the immediate benefits that came to all of us. I was not directly involved in the early struggles to end racial discrimination, but by the time my terms as state senator and governor were over, I had gained the trust and political support of some of the great civil rights leaders in my region of the country. To me, the political and social transformation of the Southland was a powerful demonstration of how moral principles should and could be applied effectively to the legal structure of our society.

Id. at 145-46.

[61] That Carter conceived of women's rights as a human rights issue is clear. In proclaiming Women's Equality Day in 1977, Carter declared, "Equal rights for women are an inseparable part of human rights for all." Jimmy Carter, Proclamation 4515: Women's Equality Day, 1977 (Aug. 26, 1977), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1977, Vol. II at 1503. See, e.g., Oral History Interview with Barbara Babcock, on file with Federal Judicial Center's History Office (May 19, 1995) at 4 ("I don't really know him and never really got to know him at all, but I think from everything that I've read and heard of him, he's such a deeply moral person, and he would think it would be right.").

[62] Babcock recalls the centrality of McKenna's role as follows: "It was wonderful, the way she really threw her weight around. She was [Lipshutz's] deputy, and not the President, but she would say, 'This is what the White House wants.' It was great assurance. She had a lot to do with getting the names through." According to Babcock, "It was very much a collective effort among women." Oral History Interview with Barbara Babcock, on file with the Federal Judicial Center's History Office (May 19, 1995) at 5-6.

never have been appointed again without the strong presence of women bosses in the Carter administration. It was very, very striking."[63]

Another factor contributing to Carter's commitment to diversifying the bench was his deep skepticism, as a non-lawyer, toward the legal profession, which he viewed as a closed "good ol' boys network." Carter sought to open the judiciary by introducing a more democratic appointments process and to make the judiciary more broadly representative of the American people by appointing women and people of color. According to Bell, Carter wanted to make "the bench more reflective of the population, not of the lawyer population, but of the population, which would mean you had to find Hispanics, blacks, women, and Asians in some areas."[64] Bell later observed, "[Carter was] very fair in his approach to things and believe[d] in open government and want[ed] everything democratized."[65] Carter thought it imperative to appoint black judges to each of the federal courts in the former confederacy, given the South's concentration of black populations and history of racial discrimination.[66] Likewise, Carter sought to appoint a woman to every court of appeals.[67]

Converging with Carter's commitment to appoint more women judges was women's rapidly expanding entry into the legal profession. Women's expectations of judgeships grew as

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[63] Oral History Interview with Barbara Babcock, on file with the Federal Judicial Center's History Office (May 19, 1995) at 3.

[64] Oral History Interview with Griffin Bell, on file with the Federal Judicial Center's History Office (May 9, 1995) at 11-12.

[65] Oral History Interview with Griffin Bell, on file with the Federal Judicial Center's History Office (May 9, 1995) at 12-13.

[66] See Bell, "Federal Judicial Selection" at 28 (reporting, "[Carter] had a meeting with a group of black leaders from the South, including Dr. Martin Luther King, Sr., and Mrs. Coretta Scott King, at the White House . . . . He told the group that he was instructing me to immediately set out to find at least one black federal judge for each of the states of the old Confederacy. . . . [T]his goal was reached except as to the states of Mississippi and Virginia."). See also Oral History Interview with Griffin Bell, on file with the Federal Judicial Center's History Office (May 9, 1995) at 13 ("[H]e told me, in front of them, that he expected me to get at least one black district judge in each southern state.").

[67] Oral History Interview with Barbara Babcock, on file with the Federal Judicial Center's History Office (May 19, 1995) at 22 (noting, "We wanted to appoint at least one woman in every circuit."). This effort fell short by several circuits -- the First, Fourth, Seventh, and Eighth.

their representation in the legal profession increased, and Carter's pledge to appoint more women judges was in part a response to these changed expectations. It was also a response to the rising activism of women's legal and political advocacy groups who pressed the issue of women's judicial appointments on the presidential agenda.[68]

B. Carter's commitment to women's equality underlies his effort to appoint women judges

Carter's public statements reveal two principles animating his appointment of women to high office, including judgeships: providing equal opportunity to women and creating a more representative government. Addressing the Ad Hoc Coalition for Women six weeks after entering office, Carter noted, "We have appointed strong, vigorous, sometimes controversial women spokesmen to positions of crucial importance. They have not been token appointments." He assured the women's rights advocates, "[M]y own effort to ensure adequate women to represent you and others in this country will be continuing. It is not going to slack off."[69] 1977, the year Carter entered the White House, was the year in which the United States hosted the International Women's Year Conference. Carter commemorated this event by repeatedly emphasizing the importance of women's equality of opportunity.[70] Likewise, in proclaiming the

[68] The pressure brought to bear by women's legal and political advocacy groups was critical in altering the political landscape in which women's judicial candidacies were considered. The influence of women's advocacy groups in putting women's judgeships on the presidential agenda -- in both the 1976 presidential election and the subsequent Carter administration -- is addressed in my "Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda," 14 *Yale Journal of Law and Feminism* (2002) (forthcoming).

[69] Jimmy Carter, Remarks to Ad Hoc Coalition for Women (March 10, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. I at 356. The Coalition was composed of representatives of women's rights groups.

[70] In thanking Bella Abzug for chairing the International Women's Year Conference, and Gloria Steinem and Betty Ford for their roles in representing the United States at the conference, Carter declared, "I'm proud of this effort, and I'm proud to be part of it." Jimmy Carter, Remarks at a Reception for Members of the National Women's Political Caucus (March 30, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. I at 544. Other members of the National Commission on the Observance of International Women's Year included Maya Angelou, the poet, former congresswoman Martha Griffiths, Mildred Jeffrey, chair of the National Women's Political Caucus, civil rights leader

anniversary of the ratification of the Nineteenth Amendment Women's Equality Day, Carter urged all citizens "to dedicate themselves anew to the goal of achieving equal rights for women under the law."[71] As part of this celebration, Carter initiated a project to eliminate sex discrimination from the laws and policies of the United States, declaring, "This country has a commitment to equality of opportunity for all citizens."[72] Then, in November 1977, Carter issued an executive order reaffirming a Johnson-era order prohibiting sex discrimination in federal employment. Carter used this opportunity to encourage the heads of all federal departments and agencies to promote the employment opportunities of women through reliance on merit principles:

> Today, I ask that you work, aggressively and creatively, to provide maximum employment opportunities for women in the Federal career service. This means developing, within merit principles, innovative programs to recruit and hire qualified women and to be sure they have the opportunity for satisfying career development.[73]

Carter's commitment to women's equality was thus both substantive and symbolic. He was committed to women's equality of opportunity as a substantive matter and believed that women's presence on the bench, as a symbolic or representative matter, would promote greater public trust and confidence in the judiciary.

Emblematic of Carter's commitment to women's equality with men was his unwavering support for the Equal Rights Amendment (ERA). During his administration, the ERA

Coretta Scott King, and NOW president, Eleanor Smeal, all of whom had been appointed by Carter. See Jimmy Carter, Appointment of Members and Presiding Officers of National Commission on Observance of International Women's Year, 1975 (March 28, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. I at 544.

Following the International Women's Year Conference, Carter established a National Advisory Committee for Women, co-chaired by Bella Abzug and Carmen Votaw, president of the National Conference of Puerto Rican Women. See National Advisory Committee for Women (June 20, 1978), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1978, Vol. I at 1134-35. Carter established the Committee "to promote equality for women in the cultural, social, economic, and political life" of the nation. Executive Order 12050, prologue.

[71] Jimmy Carter, Proclamation of Women's Equality Day (Aug. 26, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. II at 1504.

[72] Jimmy Carter, Memorandum on Sex Discrimination for the Heads of Executive Departments and Agencies (Aug. 26, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. II at 1504.

ratification battle waged in the states, and Carter provided steady support both for its ratification and for efforts to extend the original ratification deadline, doing so through numerous public speeches[74] and lobbying of key legislators at both the state (ratification) and federal (ratification extension) levels.[75] Rosalynn Carter and daughter-in-law Judy Carter joined him in these efforts.[76] Carter's public addresses evidenced his view of the ERA as a human rights issue, as when he declared, "[O]ur failure to pass the equal rights amendment hurts us as we try to set a standard of commitment to human rights throughout the world."[77]

Further evidence of Carter's commitment to women's equality with men was his proposal to institute a universal draft registration that would include women as well as men.[78] Intended in large part to show the United States' military resolve in the face of the Soviet invasion of

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[73] Jimmy Carter, Memorandum on the Federal Employment of Women for the Heads of Departments and Agencies (Nov. 17, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. II at 2034.

[74] Illustrative of his public remarks on the ERA, in an address to the National Commission on the Observance of International Women's Year, Carter pledged to work to ensure passage of the ERA. Jimmy Carter, Remarks at a Reception of the National Commission on the Observance of International Women's Year (March 22, 1978), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1978, Vol. I at 553.

[75] For example, Carter addressed a joint session of the Illinois legislature, which was then debating ratification of the ERA, reminding them of Illinois' status as the first state to ratify the Nineteenth Amendment and underscoring the impact of their ERA vote on equality of opportunity for women. Jimmy Carter, Remarks at Joint Session of Illinois Legislature (May 26, 1978), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1978, Vol. I at 989-90.

[76] See, e.g., Interview with President and Mrs. Carter (Dec. 14, 1978), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1978, Vol. II at 2260. At a National Women's Political Caucus reception, Carter highlighted his wife's and daughter-in-law's work on behalf of the ERA. Jimmy Carter, Remarks at a Reception for Members of the National Women's Political Caucus (March 30, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. I at 545.

[77] Jimmy Carter, Remarks at a Reception for Members of the National Women's Political Caucus (March 30, 1977), *reprinted in* Public Papers of the Presidents of the United States: Jimmy Carter, 1977, Vol. I at 545. Likewise, on signing the resolution extending the ERA's ratification deadline by three years, Carter spoke of the importance of equal rights for women and men under the law, equating them with human rights. Jimmy Carter, Remarks on Signing H.J. 638 (Oct. 20, 1978), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1978, Vol. II at 1801.

[78] See generally Kerber, No Constitutional Right at 278-99.

Afghanistan in late December 1979, Carter's proposed draft registration system would enable the United States to mobilize quickly should military action prove necessary.[79]

Carter's statement to Congress transmitting the registration proposal invoked women's equality with men. Calling attention to the fact that "women are now providing all types of skills in every profession," Carter proceeded to honor women's service in the military,[80] where women had enlisted for many years, constituting as many as ten percent of recruits in some services.[81] Carter linked his registration proposal with the ERA, still under consideration in the states, and with women's assumption of the "responsibilities of citizenship" in all areas of national life:

> Just as we are asking women to assume additional responsibilities, it is more urgent than ever that the women in America have full and equal rights under the Constitution. Equal obligations deserve equal rights.[82]

Furthering his equality argument, Carter asserted, "There is no distinction possible, on the basis of ability or performance that would allow me to exclude women from an obligation to register."[83] Carter was careful to add, however, that he had no intention of assigning women to combat duty.[84]

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[79] See Jimmy Carter, State of the Union Address (Jan. 23, 1980), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1980-81, Vol. I at 198; see also Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1980-81, Vol. I at 290. Of course, Carter's draft registration proposal may also be seen in the context of the Iranian hostage crisis, which began in November 1979 with the seizure of the U.S. Embassy in Teheran.

[80] Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1980-81, Vol. I at 290 (explaining in formal equality terms, "My decision to register women is a recognition of the reality that both women and men are working members of our society. It confirms what is already obvious throughout our society – that women are now providing all types of skills in every profession. The military should be no exception.").

[81] Kerber, No Constitutional Right at 279 (observing that "the Defense Department [had earlier] asked Congress to repeal the laws excluding women from combat duty," but that Congress had refused; and noting that, by 1981, "nearly 74,000 women were in the Army alone.").

[82] Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1980-81, Vol. I at 290-91.

[83] Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1980-81, Vol. I at 290.

[84] Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1980-81, Vol. I at 290.

Historian Linda Kerber assesses Carter's impulse toward universal registration as "consistent with his characteristic skepticism regarding the gendered traditions of the military services." As further evidence of this skepticism, Kerber cites Carter's efforts, in conjunction with women's rights groups, "to change what it took to be excessive veterans' preference policies in civil service hiring," which accorded substantial disadvantages to women in government employment because of their many fewer opportunities for military service.[85] Kerber acknowledges that "women in the military was a second-order issue for the President," of course, "who believed in equal obligation but was primarily concerned with responding to the Soviet Union."[86]

After animated hearings focussed largely on women's registration, Congress amended Carter's proposal to include only men.[87] Carter did not veto the Military Selective Service Act of 1980, creating a male-only registration system, and the government set about preparing to implement it. Almost immediately, the Carter administration was called on to defend the male-only draft registration system in the face of an equal protection challenge pending before the

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[85] Kerber, No Constitutional Right at 278. See, e.g., Jimmy Carter, Remarks to the National Federation of Democratic Women (April 28, 1978), *reprinted in* Public Papers of the Presidents: Jimmy Carter, 1978, Vol. I at 798-99 (noting women's disadvantage at hands of current veterans' preference and proposing ten year cap).

[86] Kerber, No Constitutional Right at 280.

[87] Testimony offered by women's rights advocates in favor of Carter's universal draft registration proposal reflected the formal equality ideology of the women's movement. For example, Judy Goldsmith of NOW "asserted that if there were to be registration and a draft, 'they must include women. As a matter of fairness and equity . . . Any registration or draft that excluded females would be challenged as an unconstitutional denial of rights under the Fifth Amendment.'" Likewise, former congresswoman Bella Abzug testified, "If we have registration, I think clearly both men and women should be included and I believe that if they are not and it goes to the courts, the courts would probably so decide, with or without the ERA." Kerber, No Constitutional Right at 285 (quoting congressional testimony of Goldsmith and Abzug). Abzug's prediction of the judicial outcome was right in the short-run and wrong in the long, as is revealed in the discussion of Rostker v. Goldberg that follows.

Representatives of Schlafly's STOP ERA movement vehemently opposed Carter's proposal, invoking women's fundamental differences from men. Kathleen Teague testified, "We expect our servicemen to be tough enough to defend us against any enemy – and we want our women to be feminine and human enough to transform our servicemen into good husbands, fathers and citizens upon their return from battle." Kerber, No Constitutional Right at 287 (quoting Teague's congressional testimony).

Supreme Court. Originally filed during the Vietnam War, and later recaptioned to name Carter's Selective Service Director, Bernard Rostker, the case of Rostker v. Goldberg challenged men's and women's disparate obligations in military service. A three-judge district court struck down the Military Selective Service Act of 1980 as violative of the Fifth Amendment's equal protection guarantee, reasoning that the failure to register women constituted a "badge of inferiority," and enjoined implementation of the male-only registration.[88]

Decided on direct appeal from the district court shortly after Carter left office in 1981, the Supreme Court upheld the draft registration system on the ground that women were not eligible for combat duty in any of the military services[89] and, therefore, that no equal protection interests were harmed by restricting the draft registration to men insofar as women were not similarly situated with men. Writing for the majority, Justice Rehnquist declared, "The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality," distinguishing the all-male registration from an "all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration," which would be presumptively unconstitutional. [90]

While noisily defeated, Carter's proposal for a female draft registration was indicative of his support for women's equality generally, on both a substantive and symbolic level.

III. Omnibus Judgeship Act of 1978 As Key to Carter's Success

[88] Goldberg v. Rostker, 509 F. Supp. 586 (E.D. Pa. 1980).
[89] As either a matter of statutory law or service policy.
[90] Rostker v. Goldberg, 453 U.S. 57, 77-79 (1981). In a dissent joined by Brennan, Justice Marshall avowed, "The Court today places its imprimatur on one of the most potent remaining public expressions of 'ancient canards about the proper role of women," thereby "categorically exclud[ing] women from a fundamental civic obligation." 453 U.S. at 86 (Marshall, J., dissenting).

While Carter's ERA support and universal draft registration proposal signified his commitment to women's equality with men, the congressional and public fury surrounding his registration proposal, along with concerns generated by the Rostker v. Goldberg litigation, fanned the flames of ERA opponents, who feared the amendment would mandate women's military service on the same terms as men, contributing in part to its defeat. See, e.g., Jane J. Mansbridge, Why We Lost the ERA (1986).

in Appointing Women Judges

Carter made little progress in diversifying the federal bench in his first two years in office. No women were nominated to any of the twelve court of appeals vacancies during this period, and only a handful of women were named to the district court.[91] It was not until enactment of the Omnibus Judgeship Act ("OJA") in October 1978 that Carter made significant progress in appointing women and minorities to district and appellate court benches.[92] Indeed, thirty-five of Carter's forty women judges were appointed following the OJA, including all eleven of his appeals court appointees and twenty-four of his twenty-nine district court appointees. Not all of these post-OJA appointments were made to OJA seats, however. Some, like Phyllis Kravitch's appointment to the Fifth Circuit, Carter's first female court of appeals nominee, were made to fill vacancies created by judges' retirements or deaths. Nonetheless, the political will and/or capital to appoint women came with the OJA's enactment.

In signing the OJA into law, Carter declared:

> This Act provides a unique opportunity to begin to redress another disturbing feature of the Federal judiciary: the almost complete absence of women or members of minority groups. Of 525 active judges, only 29 are black or Hispanic, and only nine are women – and almost half of these have been appointed during my Administration.
>
> I am committed to these appointments, and pleased that this Act recognizes that we need more than token representation on the Federal bench.[93]

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[91] "Judge Bill to Test Merit Selection," National Law Journal 1, 30 (Oct. 9, 1978).

[92] The Carter administration maintained careful records of the number of women and minorities appointed to the federal bench. At the time of the OJA, for example, the White House Counsel's Office prepared a document setting forth the number of women, Hispanics, and blacks appointed by Carter. The list included the names of the first six women – Elsijane Roy, Ellen Burns, Mary Lowe, Patricia Boyle, Norma Shapiro, and Mariana Pfaelzer – all of whom were named to district court benches. "Appointment of Women to the Federal Bench Under President Carter," at 1 (Oct. 27, 1978), on file with the Carter Presidential Library.

[93] President's Signing Statement accompanying Executive Order No. 12059 (Oct. 20, 1978), on file with the Carter Presidential Library. Illustrative of the administration's high hopes for filling OJA seats with women and minorities was a May 1979 American Judicature Society article authored by the White House Counsel's Office. In it, Lipshutz and Huron highlighted Carter's merit selection principles and diversity goals in the context of the opportunities presented by the OJA. Robert J. Lipshutz and Douglas B. Huron, "Achieving a more representative federal judiciary," 62 Judicature 483 (May 1979).

The Carter administration swung into action to fill these new seats, assisted in part by the ongoing lobbying of women's and other civil rights advocacy groups. Immediately following the OJA's enactment, the NWPC's Legal Support Caucus circulated a memorandum to its members seeking names of women to submit to Carter to fill the OJA seats.[94] Likewise, the Judicial Selection Project proposed guidelines for naming district court judges that were intended to implement Carter's diversity principles in the OJA's aftermath.[95]

Carter issued another executive order in November 1978 that was central to his post-OJA strategy, calling upon senators to form merit selection commissions to name district court candidates of diverse backgrounds in their home states.[96] As with the U.S. Circuit Judge Nominating Commission, Carter encouraged senators to appoint women and minorities, lawyers as well as non-lawyers, to serve on these citizen commissions.[97]

Before forwarding senators' recommendations of district court nominees to the president, the Attorney General was instructed to consider "whether public notice of the vacancy has been given and an affirmative effort has been made, in the case of each vacancy, to identify qualified candidates, including women and members of minority groups."[98] Bell reassured the President

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[94] NWPC memorandum from Susan Ness, Chair of the NWPC Legal Support Caucus, to Legal Support Caucus Coordinators, Friends Working on Judgeships and Administrative Committee, at 1 (Nov. 17, 1978), on file with the Schlesinger Library on the History of Women, Harvard University.

[95] See, e.g., Letter from Charles R. Halpern, Judicial Selection Project, to Griffin B. Bell, Hamilton Jordan, and Robert Lipshutz (Oct. 20, 1978) (concerning selection of district judges); Letter from Robert J. Lipshutz, White House Counsel, to Charles R. Halpern, Judicial Selection Project, at 1 (Oct. 27, 1978) (thanking Halpern for submitting "proposed standards and guidelines for selection of United States district judges"); Letter from Charles R. Halpern, Judicial Selection Project, to Douglas Huron, Senior Associate White House Counsel, at 1 (Dec. 4, 1978) (commenting on Carter's post-OJA executive order setting forth guidelines for the district court nominating commissions and suggesting questions for the nominating commissions to answer regarding the number of women and minorities they considered), all on file with the Carter Presidential Library.

[96] Executive Order No. 12097, concerning "Standards and Guidelines for the Merit Selection of United States District Judges" (Nov. 8, 1978).

[97] Department of Justice, "Suggested Guidelines for U.S. District Judge Nominating Commission," section IB (recommending, "A commission should include lawyers and non-lawyers, persons of both sexes and members of minority groups."), on file with the Carter Presidential Library.

[98] Executive Order No. 12097, section 1-1-104.

that the Justice Department would "impress upon the Senators your desire that there be greater representation of women and minorities on the federal judiciary."[99] The Carter administration also encouraged senators to be flexible in terms of years and types of experience regarding district judge candidates so as not to eliminate women and minorities.[100]

Well aware of the deference traditionally accorded senators with regard to district court appointments, Carter recognized that he could only recommend, and not direct, the formation of district court merit selection commissions by individual senators. To encourage senators' reliance on merit selection principles, Carter went so far as to accept recommendations from states with two Republican senators so long as they had used merit selection panels. Carter's efforts to persuade senators to form judicial selection commissions achieved modest success, with thirty states boasting commissions after the OJA's enactment, where only fourteen had operated before. Over two-thirds of Carter's post-OJA district court appointments came from states using merit selection commissions.[101]

While women ultimately received a substantial number of OJA seats, they did not fare well early in the process of filling the new judgeships. Reporting on the dearth of women's appointments to OJA seats, the NWPC's Legal Support Caucus called upon its members to press the Carter administration and senators to appoint more women:

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[99] Memorandum from Griffin B. Bell to the President (undated) at 2, on file with the Carter Presidential Library.

[100] Department of Justice, "Suggested Guidelines for U.S. District Judge Nominating Commission," section IIIC ("Outstanding Legal Ability. . . . The commission should not confine its considerations to persons in any one type of legal work but should seek out and consider a wide range of prospects in all segments of the legal profession, including persons in the practicing bar, government service and on state courts. Whatever the background, the individual must have demonstrated an industriousness and a high level of competence in the law and be well regarded professionally by other lawyers. A proposed nominee should normally have 12 to 15 years of legal experience, although the commission should maintain some flexibility so as to avoid the elimination of superior candidates."), on file with the Carter Presidential Library.

[101] W. Gary Fowler, "Judicial Selection under Reagan and Carter: a comparison of their initial recommendation procedures," 67 Judicature 265, 269 (1984).

> The picture for women is bleak. As outlined in the enclosed press release, halfway through the process of appointing lawyers to fill the 152 new judgeships, it appears that women will receive merely a handful of those slots. It is hardly enough to make an impact on the federal judiciary.

Ness outlined how Caucus members could help:

> The game is not over yet . . . President Carter has not yet formally submitted any names to the Senate Judiciary Committee, chaired by Senator Kennedy (D-MA). Many senators have yet to submit the names of their candidates to the Justice Department. With public pressure, we may be able to influence the remaining senators and to turn around decisions, which have already been made – such as where all white male lists were submitted by the senators.

Emphasizing the urgency of the matter, Ness declared, "The time is now. And time is running out. It requires hard work and hard politics. But the stakes – lifetime judicial appointments – are worth our effort."[102]

Three weeks later, the NWPC adopted a resolution urging Carter "to hold firm on his commitment to making the judiciary more representative by not acting on the male-only recommendations by senators, by urging those senators to submit additional names of women, and by considering the names of women forwarded by other groups to the Justice Department."[103] The NWPC resolution called upon the President and senators "to demonstrate their commitment to a more representative federal judiciary by nominating and recommending women to at least 30 percent of the newly created judgeships," mirroring the percentage of women then in the legal

[102] NWPC memorandum from Susan Ness, Chair of the NWPC Legal Support Caucus, to Legal Support Caucus Coordinators and Friends, at 1 (Jan. 7, 1979), on file with the Schlesinger Library on the History of Women, Harvard University.
[103] NWPC, "Resolution Passed at the Steering Committee Meeting in Washington, D.C." (Jan. 28, 1979), on file with the Schlesinger Library on the History of Women, Harvard University.

profession, and pressed the President to "nominate at least one women (sic) to each of the eleven circuit courts."[104]

Like the NWPC's Legal Support Caucus, the Judicial Selection Project was outspoken in its criticism of the lack of diversity among Carter's initial OJA candidates. Its July 1979 "Judicial Selection Update" reported:

> The President has nominated 71 of the 152 judgeships created under the Omnibus Judgeship Act of 1978. Of those, 19 were nominated to the Circuit Court, including 13 men (12 white and one black) and 6 women (5 white and one

[104] NWPC, "Resolution Passed at the Steering Committee Meeting in Washington, D.C." (Jan. 28, 1979), on file with the Schlesinger Library on the History of Women, Harvard University. The NWPC resolution stated in full:

> WOMEN AND THE FEDERAL JUDICIAL SYSTEM - I
>
> WHEREAS women have historically been excluded from participating in the federal judicial system as judges; and
> WHEREAS the President of the United States has urged women to apply for federal judgeships; and
> WHEREAS, in response to the President's request, women's names have been forwarded to the Administration, and
> WHEREAS some senators have recommended to the Justice Department only males to fill the new judgeships created by the Omnibus Judgeship Act,
> NOW THEREFORE, we urge the President of the United States to hold firm on his commitment to making the judiciary more representative by not acting on the male-only recommendations by senators, by urging those senators to submit additional names of women, and by considering the names of women forwarded by other groups to the Justice Department.
>
> WOMEN AND THE FEDERAL JUDICIAL SYSTEM - II
>
> WHEREAS the Omnibus Judgeship Act creates 117 new U.S. District Court Judgeships and 35 Court of Appeals Judgeships, and
> WHEREAS that Act recognizes the need to correct the imbalance on the federal judiciary, and
> WHEREAS the President of the United States has repeatedly announced his intention to nominate women to the federal judiciary, and
> WHEREAS women now comprise only 2 percent of the federal judiciary in the United States, and
> WHEREAS only one of the 97 judges on the U.S. Court of Appeals is a women (sic),
> NOW THEREFORE BE IT RESOLVED:
> That the NWPC urge the President of the United States and members of the U.S. Senate to demonstrate their commitment to a more representative federal judiciary by nominating and recommending women to at least 30 percent of the newly created judgeships, and
> That the President nominate at least one women (sic) to each of the eleven circuit courts.

Id.

> black). Fifty-two individuals were nominated to the District Court, including 43 men (38 white and 3 black) and 9 women (7 white and 2 black).[105]

In the meantime, senior White House officials told the President of their concern that satisfactory numbers of women and minorities were not being named to OJA seats. Presidential advisors Sarah Weddington and Louis Martin emphasized the political consequences of failing to appoint sufficient numbers of women and minorities in a memo invoking Carter's re-election aspirations:

> We are very concerned that your commitment to significantly increase the number of minority and women judges be carried out. This is important for a number of reasons:
>
> 1. With equal division, one-half of the persons selecting the next nominee will be women. Women are a large portion of the voting public. The Memphis convention adopted a statement that 51 of the judges should be women. The minority vote is extremely important to the reelection effort.
>
> 2. The issue is a very simple one and one that is easily understood by both minorities and women and therefore it becomes a key issue. Feelings in both groups across a broad spectrum are very strong. Both groups will focus on the judgeship issue to gauge our commitment and our truthfulness.
>
> 3. There are few other initiatives we can make to appeal to either group because of financial constraints. This one "doesn't cost money."[106]

Shortly after Weddington and Martin's memo alerting the President to the likely political fallout of failing to name more women and minorities, the administration redoubled its efforts to persuade senators to honor Carter's diversity goals. The White House Counsel proposed that Carter meet with the chairs of the district court selection commissions to persuade them to recommend more women and minority candidates. Emphasizing that "[t]here should be no conflict between merit selection and finding qualified women and minorities," Lipshutz advised the President to suggest that the commission chairs "be 'creative' in their selection process; not

[105] Judicial Selection Project, "Judicial Selection Update," at 1 (July 6, 1979), on file with the author.

only to look at traditional paper credentials, but also . . . consider the past history of discrimination against minorities and women in the legal profession."[107]

Prompted by Lipshutz's memo, Carter sent a letter to every senator requesting that they "redouble [their] efforts, whether personal or through a nominating commission, to find qualified lawyers" who were women and/or minorities.[108] Carter circulated a similar letter to the chairs of the court of appeals selection panels, seeking to increase the number of women and minorities recommended to fill those judgeships.[109]

The pre-OJA tension between the White House Counsel's Office and the Attorney General's Office over implementing Carter's diversity goals persisted in the post-OJA period. The White House Counsel's Office continued to express frustration with the lack of women and minority candidates forwarded to the President by the Attorney General. Illustrative of this frustration is a January 1979 memorandum from McKenna to Lipshutz, Jordan, and Moore, attaching a chart of the Attorney General's OJA recommendations, that highlighted that of 59 to date, "4 . . . are women; 6 are minorities. Since 2 of the minorities are women, 51 of the 59 recommendations are white men."[110] Noting that these figures had gone public in a NWPC press release, and underscoring the negative consequences for Carter's reelection bid of this shortage of women and minority candidates, McKenna declared:

> These groups are our natural constituents. With the austere budget we have, there is little we can do which will please them. The 152 vacancies can be used as an indicator of our commitment to these groups. It is a clear yardstick; it is statistical; and the end result, as opposed to the process, will be what the groups

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[106] Memorandum from Sarah Weddington and Louis Martin, Special Assistants to the President, to President Carter, at 1 (Jan. 11, 1979), on file with the Carter Presidential Library.
[107] Memorandum from Robert Lipshutz, White House Counsel, to the President, at 1 (Feb. 13, 1979), on file with the Carter Presidential Library.
[108] Lipshutz and Huron, 62 Judicature at 485.
[109] Lipshutz and Huron, 62 Judicature at 485.
[110] Memorandum from Margaret McKenna, Deputy White House Counsel, to Robert Lipshutz, Hamilton Jordan, and Frank Moore, at 1 (Jan. 11, 1979), on file with the Carter Presidential Library.

> look at. They will not question why the Senate did not recommend women and minorities; they will just question why the President did not nominate women and minorities.[111]

By contrast, Bell attributed difficulties in the judicial appointments process to undue meddling by the White House Counsel's Office:

> I had to go in to see the President with the list [of candidates], and he would have his staff, four or five people on the staff, interfering with the process, which was fine. They all thought they were in charge too. I would rank [the candidates], and they would challenge the ranking.[112]

"Meddling" notwithstanding, Bell later ascribed importance to Lipshutz's role in monitoring the number of women and minorities named to judgeships: "Lipshutz . . . was very anxious to get all the women and minorities he could. He was like a self-appointed advocate for the people who had been excluded, which was good."[113]

Ultimately, the judgeships struggle between the White House Counsel and the Attorney General was resolved by their resignations in the fall of 1979. Their successors, White House Counsel Lloyd Cutler and Attorney General Benjamin Civiletti, did not do battle in the same way over Carter's judicial appointments, which were increasingly overshadowed by Carter's reelection bid and the Iranian hostage crisis.[114]

In the end, ten of the thirty-five OJA appellate court judgeships, or nearly thirty percent, went to women, while 24 of the 117 district court seats, or approximately one fifth, went to

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[111] Memorandum from Margaret McKenna, Deputy White House Counsel, to Robert Lipshutz, Hamilton Jordan, and Frank Moore, at 1-2 (Jan. 11, 1979), on file with the Carter Presidential Library. Huron echoed McKenna's sentiments in a memorandum to Jordan the following day, declaring "To have reached this point in the selection process and have a situation where only eight of 59 candidates recommended by Senators are either minorities or women is crazy and politically perilous." Memorandum from Doug Huron, Senior Associate White House Counsel, to Hamilton Jordan, at 1 (Jan. 12, 1979), on file with the Carter Presidential Library.

[112] Oral History Interview with Griffin Bell, on file with the Federal Judicial Center's History Office (May 9, 1995) at 5-6.

[113] Oral History Interview with Griffin Bell, on file with the Federal Judicial Center's History Office (May 9, 1995) at 6.

women. While modest in the context of Carter's stated goals and advocacy groups' expectations, these appointments represented a breakthrough in women's opportunities for service on the federal bench.

IV. Comparative backgrounds of Carter's male and female judges

Carter's appointment of women judges reflected his commitment to women's equality with men; nevertheless, there were notable differences in the backgrounds of his male and female judicial appointees. By and large, these differences were reflective of men's and women's overall experiences in the legal profession. For example, Carter's women appointees were younger on average, had practiced fewer years, and had less trial experience than his male appointees. Carter's women judges came disproportionately from state and local courts, government service, and public interest practices as compared with his male judges, a higher percentage of whom came from private law practices.[115] Less than one quarter of Carter's female judges were law firm partners at the time of appointment, though eighteen of forty had served as law firm partners at some point in their careers.[116] This disparity in law firm background between Carter's male and female candidates is well explained by women's lesser opportunities for law firm employment before 1980. By contrast, a substantial number of Carter's women judges had served as government attorneys prior to their appointment, with twelve working as government attorneys at the federal level, five at the state, two at the county, and eight at the city level.

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[114] See generally Carter, Keeping Faith.
[115] Elaine Martin, "Women on the federal bench: a comparative profile," 65 Judicature 306, 310 (1982).
[116] See Federal Judicial Biographical Database at <www.fjc.gov>. See generally Elliot E. Slotnick, "The paths to the federal bench: gender, race and judicial recruitment variation," 67 Judicature 371, 382-83 (March 1984) (observing, "The modal job from which white male candidates moved to the federal bench was the private practice of law — nearly half (49.6 percent) of these candidates followed that route. Approximately half as many non-traditional nominees (25.7 percent) came to the federal bench from such

Significantly more of Carter's female than male appointees were serving as judges on state, county, or other local courts at the time of their appointment to the federal bench. Of Carter's forty female appointees, twenty-one had been state or local judges at the time of their appointment, and two were serving as U.S. magistrate judges.[117] That more than half of Carter's female appointees were sitting judges, a pattern not true of his male appointees, suggests that women were held to a different, and higher, standard than men, demonstrating judicial temperament on a lower court and establishing a track record of opinions for evaluation.

To Carter's credit, this difference in prior judicial experience may have been motivated by a desire to reassure senators who were skeptical of women's qualifications to serve as judges. Political scientist Elaine Martin hypothesized that this propensity to select women from sitting judgeships reflected senators' discomfort with appointing women to the federal bench:

> One of the major reasons for emphasis on prior judicial experience as a standard for federal judicial office has been to have a public record of judicial performance in order to better predict future performance. Hence, we may conjecture that since the senators preferred judicial experience more for women than for men, they were also more apprehensive about possible female judicial behavior.[118]

Carter's women candidates were significantly less politically active prior to federal court nomination than were their male counterparts. Their lesser rate of political participation was consistent not only with women's overall lesser rate of political participation, but with these

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positions, underlining the reality that prominent law practices of the kind which serve as incubators for federal judges were not widely staffed by non-white and female attorneys.").

[117] See generally Elliot E. Slotnick, "The paths to the federal bench: gender, race and judicial recruitment variation," 67 Judicature 371, 383-84 (March 1984) (reporting, "The modal job held by members of all categories of non-traditional nominees prior to their current appointment was another judgeship — with 59.5 percent of the non-traditional nominees already sitting as judges as compared to only 39.4 percent of the white males.").

[118] Elaine Martin, "Women on the federal bench: a comparative profile," 65 Judicature 306, 312-13 (1982).

women's particular backgrounds on state and local benches insofar as "[a] high degree of judicial experience would naturally be associated with less partisan activity."[119]

Conclusion: An Unmitigated Success?

Carter broke new ground in appointing large numbers of women to the bench, from which no subsequent president has or could significantly depart. Indeed, Clinton expanded upon Carter's breakthrough achievement by naming over one hundred women in his two terms. While George W. Bush has retreated from the Clinton expansion, he has not returned to the pre-Carter tokenism either, where women constitute over twenty percent of Bush's confirmed judges as of the 2002 mid-term election.

Carter's efforts to diversify the judiciary were not an unmitigated success, however. Rather, his progress in diversifying the bench was limited as compared with the scope of his commitment, the efforts of many administration officials, and the pressure exerted by women's and other civil rights advocacy groups. That Carter achieved limited success in diversifying the federal judiciary was due in large measure to the intractable nature of political forces and expectations, which led him to name some political cronies to his merit selection panels and to award some judgeships as a matter of patronage. As the New York Times reported at the time:

> Despite sentiments from both the White House and Congress concerning merit selection and the need to remove judgeships from politics, Federal judgeships continue to be used as political patronage — to reward campaign supporters, mend fences, cement political organizations and create I.O.U.s.[120]

Other factors limiting his success included delays in establishing merit selection panels, slowness in communicating Carter's diversity goals to them, and struggles with the ABA over the evaluation of female and minority candidates. Likewise, senators strongly resisted Carter's

[119] Elaine Martin, "Women on the federal bench: a comparative profile," 65 Judicature 306, 308, 310, 312 (1982).

advocacy of merit selection principles at the district court level, with the result that Carter's appointments of women to the appeals court far outpaced those to the district court as a percentage of sitting judges.

Still, Carter's appointment of five times as many women judges as all of his predecessors combined stands as one of his administration's ground-breaking human rights achievements.

[120] "Wide Search Is On for U.S. Judges, With Politics Still a Major Factor," New York Times, A1 (April 22, 1979).