

2011

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

Mary L. Clark

American University Washington College of Law, mclark@wcl.american.edu

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Courts Commons](#), and the [Women Commons](#)

Recommended Citation

Clark, Mary L. "Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record." *American University Journal of Gender, Social Policy & the Law*. 11, no. 3 (2003): 1131-1163.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN TO THE FEDERAL BENCH: HIS OTHER "HUMAN RIGHTS" RECORD

MARYL. CLARK*

Introduction: Carter's Pathbreaking Achievement	1132
I. Carter's Judicial Appointment Reforms Were Critical to His Success in Naming Women to the Bench	1134
A. Carter's Commitment to Judicial Reform as Governor of Georgia and 1976 Presidential Candidate	1134
B. Traditions Governing Federal Judicial Appointments Before Carter	1135
C. Carter Wrenches Court of Appeals Appointments Away From Senatorial Prerogative and Political Patronage	1136
1. Compromise with Senate Judiciary Committee Chair	1136
2. Carter Establishes U.S. Circuit Judge Nominating Commission	1139
D. ABA Standing Committee on Federal Judiciary Thwarts Carter's Efforts to Diversify the Bench.....	1144
II. Carter's Commitment to Women's Equality and the Impact of the Resurgent Women's Movement on Judicial Appointments	1147
A. Sources of Carter's Commitment to Women's Equality	1147
B. Carter's Commitment to Women's Equality Underlies His Effort to Appoint Women Judges	1149
III. Omnibus Judgeship Act of 1978 As Key to Carter's Success in Appointing Women Judges	1154
IV. Comparative Backgrounds of Carter's Male and Female Judges	1161
Conclusion: An Unmitigated Success?	1163

* Visiting Associate Professor, *Washington College of Law, American University*. Formerly Visiting Lecturer and Research Scholar on Women in the Legal Profession, Yale Law School, and former U.S. Supreme Court Fellow at the Federal Judicial Center, Washington, D.C.

1132 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3]

INTRODUCTION: CARTER'S PATHBREAKING ACHIEVEMENT

Jimmy Carter's leadership on global human rights issues has recently been recognized with the 2002 Nobel Peace Prize.¹ What has not been sufficiently recognized is his trailblazing leadership in appointing significant numbers of women to the federal bench—naming five times as many women as all of his predecessors combined.² Carter's groundbreaking appointment of women judges was motivated by his commitment to women's equality as a human right and was achieved through substantial reliance on merit selection and affirmative action principles.³

Prior to Carter's term in office, a total of eight women had been confirmed to Article III judgeships.⁴ They were:⁵

	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 Hufstедler	9th Cir.	Johnson	1968
7	Cornelia Kennedy	D. Mich.	Nixon	1970
8	Mary Anne Richey	D. Ariz.	Ford	1976

1. See *The Nobel Peace Prize 2002*, THE NOBEL FOUNDATION (2002), at <http://www.nobel.se/peace/laureates/2002/press.html> [hereinafter *The Nobel Peace Prize*] (noting the awarding of the 2002 Nobel Peace Prize to former U.S. President Jimmy Carter).

2. See FED. JUD. CTR., FEDERAL JUDGES BIOGRAPHICAL DATABASE, at <http://www.fjc.gov/history/home.nsf> (last visited July 14, 2003) [hereinafter FEDERAL JUDGES BIOGRAPHICAL DATABASE]; see also Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 287 (1995), at <http://www.stanford.edu/group/WLHP/articles/forham.pdf> (indicating that President Carter changed the face of the federal bench through his appointment of approximately forty women to federal judgeship positions).

3. See generally *The Nobel Peace Prize*, *supra* note 1 (chronicling Carter's commitment to human rights).

4. See Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILLANOVA L. REV. (forthcoming 2004) (manuscript at 1-2, on file with author).

5. See FEDERAL JUDGES BIOGRAPHICAL DATABASE, *supra* note 2.

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1133

Only one woman served among ninety-seven judges on the federal courts of appeal and five women among nearly 400 district court judges when Carter took office in January 1977.⁶ By the time he left office in January, 1981, Carter had appointed forty women to Article III courts of general jurisdiction;⁷ eleven at the appeals court level and twenty-nine at the district court.

Carter's appointment of forty women constituted a clear break with the tokenism of his predecessors. Indeed, 15.8%, or one in six, of Carter's 259 judicial appointees were female, as compared with less than one percent of each of his predecessors' appointments.⁸

At least three factors contributed to Carter's achievement. First, Carter worked to reform the judicial appointments process by introducing citizen nominating commissions, merit selection principles (i.e., "the best candidate for the job"), and affirmative action (seeking out qualified women and/or people of color) where political patronage and senatorial prerogative had previously governed. This effort was critical to his appointment of women, loosening the constraints of tradition favoring men's appointments. Second, the late 1960s/early 1970s' resurgence of the women's movement and entry of large numbers of women into the legal profession brought substantial pressure to bear on Carter to name women to high office generally and to judgeships specifically.

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 ("OJA"), creating 152 new judgeships—thirty-five at the court of appeals level and 117 at the district court level.⁹ 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. On a related note, the presence of a Democrat-

6. 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. See *U.S. Search for Women and Blacks to Serve as Judges is Going Slowly*, N.Y. TIMES, Apr. 22, 1979, at A1 [hereinafter *U.S. Search for Women*].

7. See FEDERAL JUDGES BIOGRAPHICAL DATABASE, *supra* note 2.

8. See Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 261, 268 (1997). In appointing 259 judges, Carter named approximately forty percent of the then-sitting federal judges, more than any of his predecessors. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 238, 336 (1997) [hereinafter PICKING FEDERAL JUDGES]. Carter's record in overall number of judges appointed would soon be surpassed by Reagan, who appointed 372 judges over the course of his two terms, constituting nearly one-half of the federal judges then in active service. *Id.*

9. See generally Omnibus Judgeship Act, Pub. L. No. 95-486, 92 Stat. 1629 (1978).

1134 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

controlled Senate throughout Carter's term was instrumental to his judicial appointments success, not only giving him the opportunity to fill 152 new seats, but also confirming a high percentage of his judicial nominees—88.2% as compared with 65.9% when the next Democratic president, Bill Clinton, faced a Republican-controlled Senate.¹⁰

I. CARTER'S JUDICIAL APPOINTMENT REFORMS WERE CRITICAL TO HIS SUCCESS IN NAMING WOMEN TO THE BENCH

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 using merit selection principles to name potential judicial candidates. As a presidential candidate, Carter pledged to reproduce this model at the federal level.

Before formally announcing his presidential candidacy, Carter highlighted his judicial reform record as governor 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 of merit analysis by a highly competent, open, qualified group of distinguished Georgians. I'm proud of this.¹¹

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."¹² In a statement submitted to the Democratic Party Platform Committee, candidate Carter endorsed the merit selection of judges through reliance on citizen nominating

10. See Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 278 (1997) (publishing a chart setting forth whether a president worked with a Senate of his own party or of an opposing party and its effect on the length of the confirmation process of judicial nominees and the overall percentage of confirmed nominees).

11. Governor Jimmy Carter, Law Day Speech at the University of Georgia, Athens, Georgia (May 4, 1974) (transcript available at Jimmy Carter Presidential Library, available at <http://www.jimmycarterlibrary.org/documents/law.pdf>). Carter declared his intentions for the presidency later that year on December 12, 1974. JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT ix (1995).

12. Griffin B. Bell, *Federal Judicial Selection: The Carter Years*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 25 (1990).

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1135

commissions: "All federal judges . . . 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."¹³ Carter proceeded to implement these very procedures as president.

B. Traditions Governing Federal Judicial Appointments Before Carter

Historically, responsibility for naming district court candidates fell within the purview of the senator or senators of the president's party from the state in which the vacancy arose.¹⁴ Naming candidates to fill district court vacancies was viewed as a senatorial "perk," providing senators with a tool for apportioning political patronage.¹⁵

By contrast, responsibility for naming appellate court 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.¹⁶ 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.¹⁷ 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.¹⁸

Senators nevertheless exerted significant influence over appellate court appointments because a senator from the state where a given

13. Richard E. Cohen, *Choosing Federal Judges—The Senate Keeps Control*, NAT'L J., Mar. 3, 1979, at 355 (quoting Carter's June 16, 1976 statement to the Democratic Party Platform Committee to support merit selection of federal judges and appointment of women judges). 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. See PICKING FEDERAL JUDGES, *supra* note 8, at 300.

14. See PICKING FEDERAL JUDGES, *supra* note 8, at 11.

15. See generally *id.* at 14.

16. See *id.* at 13.

17. See *id.*

18. The first eight women on the federal bench were appointed according to these traditional practices. See Clark, *supra* note 4. Two of the first eight were named to the United States District Court for the District of Columbia (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. *Id.* Two others were named to courts of appeals (Florence Ellinwood Allen to the Sixth Circuit in 1934 and Shirley Hufstедler to the Ninth Circuit in 1968), over which the president likewise had greater influence as explained above. *Id.*

1136 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

vacancy arose possessed near veto power over that vacancy through the use of the “blue slip,” a unique Senate tradition in which the Senate Judiciary Committee’s chief counsel distributed blue slips to the senators from the judicial nominee’s home state.¹⁹ If one of the senators noted an objection to the nomination on the blue slip, the nomination was crushed and no confirmation hearing was held.²⁰ If instead the senators returned the blue slips without noting objections, then a confirmation hearing was scheduled.²¹

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 not necessarily block a nomination.

C. Carter Wrenches Court of Appeals Appointments Away From Senatorial Prerogative and Political Patronage

1. Compromise with Senate Judiciary Committee Chair

With an eye to these traditions, president-elect Carter and Attorney General-designee Bell²² met with Senator James O. Eastland of Mississippi, the long-time Chair of the Senate Judiciary Committee and fellow southerner, at the Georgia Governor’s mansion in December 1976 to negotiate certain judicial reforms, ultimately agreeing to a compromise on the allocation of power between the Senate and the White House over district and appellate court appointments. Carter and Bell recognized that Eastland’s assistance was necessary to implement Carter’s intended changes. Informing Eastland of the President-elect’s plan to establish a citizen nominating

19. See PICKING FEDERAL JUDGES, *supra* note 8, at 10-12.

20. See *id.* at 12.

21. See *id.* at 12 (referring to the general procedure that led to confirmations).

22. 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. He served as Attorney General from January 1977 through August 1979, when he again resigned to return to his law practice. See King & Spalding, LLP, *Attorney Brief; Griffin B. Bell*, at http://www.kslaw.com/attorney_dir/attorneybrief.asp?328 (last visited Aug. 29, 2003). Bell was succeeded by Deputy Attorney General Benjamin Civiletti. See FED. JUD. CTR., FEDERAL JUDGES BIOGRAPHICAL DATABASE, at <http://www.fjc.gov/history/home.nsf> (last visited July 14, 2003).

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1137

commission for court of appeals appointments and to encourage senators to do the same for district court appointments, Carter and Bell sought an assurance of cooperation from Eastland, which they obtained.²³ In Bell's view, "Had it not been for [Eastland], we wouldn't have been able to make the success that we made."²⁴

Once in office, Carter housed his judicial selection process in two departments—those of Attorney General Bell and White House Counsel Robert Lipshutz.²⁵ Carter charged Bell and Lipshutz with making special efforts to identify qualified women and minority candidates through reliance on merit selection and affirmative action principles. Within the Justice Department, Barbara Babcock, Assistant Attorney General for the Civil Division, was responsible for generating names of women candidates, while Drew Days, Assistant Attorney General for Civil Rights, generated names of minority candidates.²⁶

23. 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.

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.

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, *supra* note 12, at 26; see also *U.S. Search for Women*, *supra* note 6, at A34 (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.").

24. Interview by Sarah Wilson with Judge Griffin Bell 9 (May 9, 1995) (on file with the Federal Judicial Center's History Office) [hereinafter Oral History Interview with Griffin Bell].

25. Lipshutz served as White House Counsel until October 1979, at which time he resigned and was replaced by Lloyd Cutler. See CARTER, *supra* note 11, at 63. 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. *Id.* at 48.

26. See Oral History Interview by Sarah Wilson with Barbara Babcock, Professor, Stanford University Law School 3 (May 19, 1995) (on file with the Federal Judicial

1138 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

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 prospective 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,²⁷ and the Attorney General's Office countering that it was attending to these goals, but that there were very few qualified women and minority candidates.²⁸ The White House Counsel also charged the Attorney General with marginalizing or excluding it from the judicial selection process. From thereon, the President arranged to meet jointly with the Attorney General and White House Counsel to discuss judicial appointments and instructed Bell to forward names of potential candidates to the White 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.²⁹

Center) [hereinafter Oral History Interview with Barbara Babcock]; see also *Winning Ways*, STANFORD MAG., Mar.-Apr. 2003, at 5 (highlighting Babcock's work on behalf of women in the legal profession and quoting Justice Ginsburg as noting Babcock's importance in "chang[ing] the complexion of the U.S. Judiciary").

27. 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 4 (Jan. 25, 1979) (on file with the Carter Presidential Library).

28. 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." *U.S. Search for Women*, *supra* note 6, at A34.

Though slow to recommend women and minority judicial candidates, Bell made several speeches as Attorney General touting Carter's merit selection philosophy. However, these speeches did not cite Carter's goal of diversifying the federal bench. See, e.g., Attorney General Griffin B. Bell, Address to the American Law Institute on Merit Selection (May 18, 1977); Attorney General Griffin B. Bell, Remarks on Carter's Merit Selection Plan (Feb. 25, 1978); Attorney General Griffin B. Bell, Address to the American Law Institute on Merit Selection (May 19, 1978) (all on file with the Carter Presidential Library).

29. See Bell, *supra* note 12, at 29 (recalling that Carter sought to resolve the

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1139

Despite the President's intervention, tension between Bell's and Lipshutz's offices persisted.³⁰

2. *Carter Establishes U.S. Circuit Judge Nominating Commission*

Giving emphasis to his judicial reform goals, Carter issued an executive order within a month of entering office that created the U.S. Circuit Judge Nominating Commission, charging it with using merit selection principles to recommend court of appeals candidates with diverse backgrounds.³¹ 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 disproportionate sizes)—the Commission was tasked with submitting five names for each vacancy.³² 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-

tension between the offices of the Attorney General and White House Counsel by forming a committee to review recommendations of the merit selection panels and individual senators). In addition to Bell and Lipshutz, this committee was composed of Carter's key political advisors; Hamilton Jordan, Jody Powell, and Frank Moore. *Id.* According to Bell, Bell would “then give the President the recommendation along with the views of the group. The system worked well.” *Id.*

30. 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 1 (Oct. 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 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.

31. Exec. Order No. 11,972, 42 Fed. Reg. 9659 (Feb. 17, 1977).

32. *Id.* In May 1977, Carter issued two more executive orders related to the selection of federal judicial officers. The first order created a citizen nominating commission for non-Article III federal judicial officers. Exec. Order No. 11,992, 42 Fed. Reg. 27,195 (May 24, 1977). The second order 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. Exec. Order No. 11,993, 42 Fed. Reg. 27,197 (May 24, 1977). The panel was directed to use the same guidelines for selecting district court judges as for the appellate court. *Id.*

1140 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

lawyers.³³ The Attorney General was responsible for naming the panels' chairs (with the exception of the Eighth Circuit chair, who was named by Vice President Walter Mondale of Minnesota),³⁴ while the White House was tasked with selecting the panels' members.³⁵ 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.³⁶ Given these influences on the composition of the panels, the merit selection commission did not fully reflect Carter's diversity goals, where, for example, all of the chairs were male.

Women's and other civil rights' advocacy groups worked with the White House by 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 ("NWPC Legal Support Caucus") met with the White House Counsel in the weeks following the establishment of the U.S. Circuit Judge Nominating Commission to assist in recommending women to serve on the panels.³⁷ 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.³⁸ In a memorandum to an administration colleague, Senior Associate White House Counsel Doug Huron recommended 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

33. See, e.g., Exec. Order No. 12,059 § 2(c), 43 Fed. Reg. 20,949 (May 11, 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.").

34. Oral History Interview with Griffin Bell, *supra* note 24, at 1-2.

35. See Bell, *supra* note 12, at 26.

36. See *U.S. Search for Women*, *supra* note 6, at A1.

37. PICKING FEDERAL JUDGES, *supra* note 8, at 252.

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

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1141

minority and female judges selected.”³⁹ Huron concluded, “If only a few or none of their suggested panelists are appointed, they will question our good faith at the outset.”⁴⁰ Closely monitoring the number of women, minorities, and non-lawyers appointed to the panels,⁴¹ 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.⁴²

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.”⁴³ The order highlighted the following desirable attributes in a judge: 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.⁴⁴ The order further directed the panels to consider candidates who would satisfy a “perceived need” of a given court, intended to empower the panels to pursue Carter’s goal of diversifying the bench through the nomination of women and minority candidates where none or few had served before.⁴⁵ The “perceived need” factor, taken

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

40. *Id.*

41. *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 1 (Feb. 10, 1977) (instructing, “Please monitor the establishment of these committees after the President has signed the Executive Order.”) (on file with the Carter Presidential Library); Memorandum from Doug Huron, Senior Associate White House Counsel, to Hamilton Jordan, Advisor to President Carter, regarding Members of Circuit Judge Nominating Panels 1 (Feb. 22, 1977) (observing, “[T]he 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.”) (on file with the Carter Presidential Library).

42. Memorandum from Doug Huron, Senior Associate White House Counsel, to Bob Lipshutz, White House Counsel 1 (Nov. 6, 1978) (noting, “I believe that our office’s participation is largely responsible for the fact that on the first nine panels selected—a total of ninety nine members—forty four were women, twenty seven were members of minority groups and a large number were Carter supporters.”) (on file with the Carter Presidential Library).

43. Exec. Order No. 11,972 § 1, 42 Fed. Reg. 9659 (Feb. 17, 1977).

44. *Id.* at § 4.

45. *Id.* at § 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).

1142 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

together with the “commitment to equal justice under law,” were important to Carter’s effort to make the courts look more like the nation.

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”⁴⁶ to make explicit his desire that they “make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees.”⁴⁷ Thus Carter again underscored his affirmative action goals. 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.”⁴⁸

Carter’s establishment of a citizen nominating commission charged with using merit selection and affirmative action principles was critical to his effort to appoint women insofar as the traditional mechanisms of Senatorial prerogative and political patronage strongly 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.⁴⁹ Indeed, Carter’s female judicial nominees were far less involved in partisan political activity than his male nominees.

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 his administration.⁵⁰ The NWPC Legal Support Caucus, among others, expressed disappointment with Carter’s failure.⁵¹

46. Exec. Order No. 12,059, prologue, 43 Fed. Reg. 20,949 (May 11, 1978).

47. *Id.* at § 4(d).

48. Justice Department Guidelines to the Panels of the United States Circuit Judge Nominating Commission 1 (Oct. 2, 1978) (on file with the Carter Presidential Library).

49. Elaine Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 306, 308 (1982).

50. 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*, NAT’L L. J., Oct. 9, 1978, at 1, 30 (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).

51. See, e.g., Susan Ness & Fredrica Wechsler, *Women Judges—Why So Few?*, in GRADUATE WOMAN, Nov./Dec. 1979, at 10; see also PICKING FEDERAL JUDGES, *supra*

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1143

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.⁵² That the panels were staffed in part with long-time Democratic Party operatives also contributed to the ongoing politicization of the court of appeals selection process, which worked to women's detriment.⁵³

At the same time that Carter established nominating panels and introduced merit selection and affirmative action 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.⁵⁴ Carter also used public

note 8, at 270.

52. 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. . . . 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).

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

53. See *U.S. Search for Women*, *supra* note 6, at A34 (reporting that Hamilton Jordan, Carter's chief political advisor, "had the final voice on the makeup of the President's judicial selection panels").

54. See Attorney General Griffin B. Bell, Speech 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:

We set out to convince the senators who were Democrats, and who were expecting the district court patronage, to establish commissions 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

1144 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

gatherings to underscore the need for citizen nominating commissions at the district court level.⁵⁵ The President's lobbying met with only limited success, where senators established commissions in just fourteen states prior to the OJA's passage.

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

Carter's efforts to reform the judicial appointments process and name more women and minorities were stymied by the ABA Standing Committee on Federal Judiciary's lower ratings of non-traditional candidates. Consistent with practices dating from the Eisenhower era, Carter forwarded his candidates' names to the ABA Standing Committee for review prior to submitting them to the Senate. Those candidates who received a "qualified" or better rating were forwarded to the Senate, while those rated "unqualified" were abandoned.⁵⁶ The ABA's rating system emphasized several elements—including a minimum of twelve to fifteen years in practice and substantial trial experience⁵⁷—that greatly disadvantaged female and minority candidates.⁵⁸ 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. Likewise, because of historical discrimination against women and people of color in the legal profession, many of Carter's non-traditional candidates had not worked in law firms, the source of many white male judicial candidates, but had instead worked in a

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, *supra* note 12, at 27.

55. See President Jimmy Carter, Remarks at the Clinton Town Meeting (Mar. 16, 1977), reprinted in PUBLIC PAPERS OF THE PRESIDENTS: JIMMY CARTER, 1977, Book I, Jan. 20-June 24, 1977 382 [hereinafter PUBLIC PAPERS, BOOK I] (commending 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").

56. The ABA rated candidates as "unqualified," "qualified," "well qualified," or "exceptionally well qualified." *The Committee on Federal Judiciary: What It Is and How It Works*, 63 ABA J. 803, 807 (June 1977) [hereinafter *The Committee on Federal Judiciary: What It Is and How It Works*] (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.").

57. See *id.*

58. Oral History Interview with Griffin Bell, *supra* note 24, at 1-2 (May 9, 1995) (noting "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.").

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1145

range of other settings, including government agencies, public interest organizations, and state and local courts, providing them with different practice experiences than the white male candidates.

The manner in which the ABA Standing Committee investigated judicial candidates also disadvantaged women and minorities, given their "outsider" status vis-à-vis 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 recent entrants to the profession and who had different practice experiences than those of white males, not surprisingly disadvantaging the non-traditional candidates. Indeed, Carter's female judicial candidates received disproportionately lower ratings than his male candidates. Though over sixty two percent of Carter's judicial appointees received one of the ABA's top two ratings, only 29.7% of his female judicial candidates did.⁵⁹

The NWPC Legal Support Caucus highlighted women judicial candidates' struggles with the ABA Standing Committee in one of its updates to members as follows: "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."⁶⁰ Asking Caucus supporters 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"⁶¹ over its ratings of women candidates.

An opportunity for confrontation soon arose. Having been selected as Carter's candidate for the Eighth Circuit, Professor Joan Krauskopf's name was forwarded 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

59. See Martin, *supra* note 49, at 309; see also Elliot E. Slotnick, *The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation*, 67 JUDICATURE 371, 380-81 (Mar. 1984) (analyzing the ABA's rating of judicial nominees by race and gender).

60. Memorandum from Susan Ness, Chair of the National Women's Political Caucus Legal Support Caucus, to Legal Support Caucus Members 2 (June 9, 1979) (on file with the Schlesinger Library on the History of Women, Harvard University).

61. *Id.*

1146 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

narrow.⁶² Women's advocacy groups were outraged when Carter abandoned Krauskopf's candidacy following the unqualified rating:

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. . . .⁶³

While Krauskopf's candidacy could not be rescued, other women's nominations were saved through lobbying by women's advocacy groups. 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 Babcock and Attorney General Bell, the ABA revised Seymour's rating upward to "qualified" and her name was submitted to the Senate, which confirmed her.⁶⁴

The ABA ratings of Carter's women and minority judicial candidates ultimately improved, with two key factors contributing to this change. First, officials from Carter's White House Counsel's Office met with ABA Standing Committee members to persuade them to revise their ratings criteria to recognize non-traditional practice settings and value diversity in judicial candidates' backgrounds. Carter 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 ignore the ABA evaluation process and submit his nominations directly to the Senate. Carter himself met 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.⁶⁵

62. National Women's Political Caucus Legal Support Caucus Report 1 (Oct. 23, 1979) (on file with the Schlesinger Library on the History of Women, Harvard University).

63. *Id.*

64. See Oral History Interview with Barbara Babcock, *supra* note 26, at 11-12, 19-20; see also PICKING FEDERAL JUDGES, *supra* note 8, at 267.

65. Report of the Standing Committee on Federal Judiciary, in ANN. REPORT OF THE ABA INCLUDING PROCEEDINGS OF THE 102D ANN. MEETING, VOL. 104, 335-36 (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

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1147

The second factor contributing to this turn-around was Brooksley Landau's⁶⁶ chairmanship of the ABA Standing Committee, starting in 1980, the first woman to hold this post. 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"⁶⁷ to "at least twelve years."⁶⁸ 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."⁶⁹ Following this revision, the ABA ratings of Carter's women and minority nominees improved, facilitating the appointment of unprecedented numbers of women and people of color to the federal judiciary.

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 interest in female judicial appointments reflected his commitment to equal opportunity/non-discrimination principles and had many sources, including his commitment to civil rights⁷⁰ and his familiarity with, and support for, the women's movement in particular. Also significant were his religious beliefs, which informed

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.").

66. Now Brooksley Born. *See generally* Interview by Sean Groom with Brooksley Born, in *WASH. LAW.*, Oct. 2003, at 32.

67. *The Committee on Federal Judiciary: What It Is and How It Works*, *supra* note 56, at 803, 807.

68. Elliot E. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment*, in *JUDICIAL POLITICS: READINGS FROM JUDICATURE* 217, 221, 222 (1992).

69. *Id.*

70. 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 as a southerner. 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.

CARTER, *supra* note 11, at 146.

1148 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

his commitment to human rights generally and to civil rights and women's rights specifically.⁷¹ That Carter conceived of women's rights as a human rights issue is clear. In proclaiming Women's Equality Day in 1977, for example, Carter declared, "Equal rights for women are an inseparable part of human rights for all."⁷²

Carter's commitment to women's equality of opportunity was shaped in part by the women around him, including his wife, Rosalynn Carter, his mother, Lillian Carter, and administration officials such as Margaret McKenna, the Deputy White House Counsel,⁷³ and *Roe v. Wade* advocate, Sarah Weddington, who served as Carter's liaison to women's groups. Underscoring the important role that Carter's female presidential advisors played in his appointment of women judges, Babcock later observed, "I think that all the women judges would never have been appointed . . . without the strong presence of women bosses in the Carter administration. It was very, very striking."⁷⁴

Another factor contributing to Carter's commitment to diversifying the bench was his deep skepticism, as a nonlawyer, of the legal profession, which he viewed as a closed "old boys' network."⁷⁵ 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."⁷⁶ In this regard, Carter thought it imperative to appoint black judges to each of the federal courts in the

71. See, e.g., Oral History Interview with Barbara Babcock, *supra* note 26, at 2 ("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.").

72. President Jimmy Carter, Proclamation 4515: Women's Equality Day, 1977 (Aug. 26, 1977), *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS: JIMMY CARTER, 1977, BOOK II, June 25-Dec. 31, 1979 1503.

73. 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. It was very much a collective effort among women." History Interview with Barbara Babcock, *supra* note 26, at 3-4.

74. *Id.* at 2.

75. See Ginsburg & Brill, *supra* note 2, at 288 (indicating that because Carter distrusted the ability of the "old boys' network" to identify all able candidates, he encouraged senators to create nominating committees to evaluate a broad range of candidates).

76. Oral History Interview with Griffin Bell, *supra* note 24, at 5.

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1149

former confederacy, given the South's concentration of blacks and history of racial discrimination.⁷⁷ Likewise, Carter sought to appoint a woman to every federal court of appeals.⁷⁸ Carter's commitment to women's equality was therefore 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 would promote greater public trust and confidence in the judiciary as a symbolic matter.

Carter's commitment to appoint more women judges coincided with the rapidly growing number of women entering the legal profession. Women's expectations of judgeships grew as 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 that pressed the issue of women's judicial appointments onto the presidential agenda at this time.⁷⁹

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: equal opportunity and creating a more representative government. Addressing the Ad Hoc Coalition for Women six weeks after his inauguration, Carter noted, "We have appointed strong, vigorous, sometimes controversial women spokesmen to positions of crucial importance. They have not been

77. See Bell, *supra* note 12, 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, *supra* note 24, at 6 ("[H]e told me, in front of them, that he expected me to get at least one black district judge in each southern state.").

78. Oral History Interview with Barbara Babcock, *supra* note 26, at 13 (noting, "We wanted to appoint at least one woman in every circuit."). This effort fell short by several circuits, specifically the First, Fourth, Seventh, and Eighth Circuits. See generally FEDERAL JUDGES BIOGRAPHICAL DATABASE, *supra* note 22.

79. 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, demanding equality of opportunity and treatment. 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 Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243 (2002); see also Sally J. Kenny, *Where is Gender in Agenda Setting?*, 25:1-2 WOMEN & POL. 25 (2002).

1150 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

token appointments.”⁸⁰ He further 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.”⁸¹ In 1977, the year Carter became president, the United States hosted the International Women’s Year Conference. Carter commemorated this event by emphasizing the importance of women’s equality of opportunity⁸² and establishing the National Advisory Committee for Women “to promote equality for women in the cultural, social, economic, and political life” of the nation.⁸³

Likewise, in proclaiming the 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.”⁸⁴ As part of this celebration, Carter introduced a project to eliminate sex discrimination from U.S. laws and policies, declaring, “[T]his country has a commitment to equality of opportunity for all citizens.”⁸⁵ 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 affirmative action and merit selection 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,

80. President Jimmy Carter, Remarks to Ad Hoc Coalition for Women (March 10, 1977), *reprinted in* PUBLIC PAPERS, BOOK I, *supra* note 55, at 356. The Coalition was composed of representatives of women’s rights groups.

81. *Id.*

82. In thanking Bella Abzug for chairing the Women’s Year Conventions, 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.” PUBLIC PAPERS, BOOK I, *supra* note 55, at 553-54. 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 Coretta Scott King, and NOW president, Eleanor Smeal, all of whom were appointed by Carter. See President Jimmy Carter, Appointment of Members and Presiding Officers of National Commission on Observance of International Women’s Year, 1975 (Mar. 28, 1977), *reprinted in* PUBLIC PAPERS, BOOK I, *supra* note 55, at 525-27.

83. *National Advisory Committee for Women* (June 20, 1978), *reprinted in* PUBLIC PAPERS, BOOK I, *supra* note 55, at 1134-35; Exec. Order No. 12,050, prologue, 43 Fed. Reg. 14,431 (Apr. 4, 1978).

84. President Jimmy Carter, Proclamation 4515: Women’s Equality Day, 1977 (Aug. 26, 1977), *reprinted in* PUBLIC PAPERS, BOOK II, *supra* note 72, at 1504.

85. President Jimmy Carter, Memorandum on Sex Discrimination for the Heads of Executive Departments and Agencies (Aug. 26, 1977), *reprinted in* PUBLIC PAPERS, BOOK II, *supra* note 72, at 1504.

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1151

innovative programs to recruit and hire qualified women and to be sure they have the opportunity for satisfying career development.”⁸⁶

Emblematic of Carter's commitment to women's equality of opportunity with men was his unwavering support for the Equal Rights Amendment (“ERA”). The ERA ratification battle played on during his administration, and Carter provided steady support both for its ratification and for efforts to extend the original ratification deadline, doing so through numerous public speeches⁸⁷ and lobbying of key legislators at both the state (ratification) and federal (ratification extension) levels.⁸⁸ Rosalynn Carter and daughter-in-law Judy Carter joined him in these efforts.⁸⁹ 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.”⁹⁰

Further evidence of Carter's commitment to women's equality of opportunity with men was his proposal to institute a universal draft registration system that included women as well as men.⁹¹ Intended in large part to show the United States's military resolve in the face of

86. President Jimmy Carter, Memorandum for Heads of Departments and Agencies (Nov. 17, 1977), *reprinted in* PUBLIC PAPERS, BOOK II, *supra* note 72, at 2034.

87. 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. See President Jimmy Carter, Remarks at a Reception Honoring the National Commission on the Observance of International Women's Year (Mar. 22, 1978), *reprinted in* PUBLIC PAPERS BOOK I, *supra* note 55, at 553.

88. For example, Carter addressed a joint session of the Illinois legislature, which was then debating ratification of the ERA, reminding them of Illinois's status as the first state to ratify the Nineteenth Amendment and underscoring the impact of their ERA vote on equality of opportunity for women. See President Jimmy Carter, Remarks at Joint Session of Illinois Legislature (May 26, 1978), *reprinted in* PUBLIC PAPERS BOOK I, *supra* note 55, at 989-90.

89. See, e.g., Interview with President and Mrs. Carter (Dec. 14, 1978), *reprinted in* PUBLIC PAPERS, BOOK II, *supra* note 72 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 (Mar. 30, 1977), *reprinted in* PUBLIC PAPERS, BOOK I, *supra* note 55, at 545.

90. President Jimmy Carter, Remarks at a Reception for Members of the National Women's Political Caucus (Mar. 30, 1977), *reprinted in* PUBLIC PAPERS BOOK I, *supra* note 55, 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. President Jimmy Carter, Remarks on Signing H.J. 638 (Oct. 20, 1978), *reprinted in* PUBLIC PAPERS BOOK II, *supra* note 72, at 1801.

91. See generally LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 278-99 (1999) (discussing Carter's proposal for a universal mandatory draft and the controversy it provoked among members of Congress and political activists).

1152 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

the Soviet invasion of Afghanistan in late December 1979, Carter's proposed draft registration would enable the United States to mobilize quickly should military action prove necessary.⁹²

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,⁹³ where women had enlisted for many years and constituted as many as ten percent of recruits in some services.⁹⁴ 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."⁹⁵ 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."⁹⁶ Carter was careful to add, however, that he had no intention of assigning women to combat duty.⁹⁷

Historian Linda Kerber assesses Carter's impulse toward universal registration as "consistent with his characteristic skepticism regarding the gendered traditions of the military services."⁹⁸ As further evidence of this skepticism, Kerber cites Carter's efforts, in

92. See President Jimmy Carter, State of the Union Address (Jan. 23, 1980), reprinted in PUBLIC PAPERS, BOOK I, *supra* note 55, at 198; see also President Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), reprinted in PUBLIC PAPERS, BOOK I, *supra* note 55, at 289 (declaring that the Soviet invasion of Afghanistan necessitates a "series of firm and measured responses from the United States," including draft registration).

93. President Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), reprinted in PUBLIC PAPERS, BOOK I, *supra* note 55, 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.").

94. See KERBER, *supra* note 91, 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.").

95. President Jimmy Carter, Statement on the Registration of Americans for the Draft (Feb. 8, 1980), reprinted in PUBLIC PAPERS, BOOK I, *supra* note 55, at 290-91.

96. *Id.* at 290

97. See *id.* (explaining that he had no plan to reverse existing policies prohibiting the assignment of women to units involved in close combat).

98. See KERBER, *supra* note 91, at 278.

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1153

conjunction with women's rights groups, "to change what it took to be excessive veterans' preference policies in civil service hiring," which placed women at a severe disadvantage in government employment because of their fewer opportunities for military service.⁹⁹ Kerber acknowledges, however, that "women in the military was a second-order issue for the President . . . who believed in equal obligation but was primarily concerned with responding to the Soviet Union."¹⁰⁰

After animated hearings focused largely on concerns regarding women's military service, Congress amended Carter's registration proposal to include only men.¹⁰¹ Carter did not veto the resulting Military Selective Service Act of 1980, which established a male-only registration system, and, in an irony of history, the Carter administration was called on shortly thereafter to defend the male-only draft in the face of an equal protection challenge pending before the Supreme Court. Originally filed during the Vietnam War and later recaptioned to name Carter's Selective Service Director, Bernard Rostker, *Rostker v. Goldberg*¹⁰² challenged the disparate obligations of men and women 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

99. *Id.* See, e.g., President Jimmy Carter, Remarks to the National Federation of Democratic Women (Apr. 28, 1978), reprinted in PUBLIC PAPERS BOOK I, *supra* note 55, at 798-99 (noting women's disadvantage at hands of current veterans' preference and proposing ten year cap).

100. See KERBER, *supra* note 91, at 280.

101. 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 . . . [a]ny 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, *supra* note 91, at 285. 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. See *infra* note 96 and accompanying text. Representatives of Schlafly's STOP ERA movement vehemently opposed Carter's proposal, invoking stereotypical differences between men and women. 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, *supra* note 91, at 287.

102. 453 U.S. 57 (1981) (holding that men were not "similarly situated" with women for draft purposes thus Congress did not violate the due process clause and acted within its constitutional authority when it authorized registration of men, and not of women, under Military Selective Service Act).

1154 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

enjoined implementation of the male-only registration.¹⁰³

The Carter administration successfully defended the Act on direct appeal to the Supreme 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 and, therefore, that no equal protection interests were harmed by restricting the draft registration to men because women were not similarly situated with men.¹⁰⁴ Writing for the majority, Justice Rehnquist declared, “[T]he 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.¹⁰⁵

While noisily defeated, Carter’s proposal for a universal draft registration system was indicative of his support for women’s equality of opportunity, on both a substantive and symbolic level.

III. OMNIBUS JUDGESHIP ACT OF 1978 AS KEY TO CARTER’S SUCCESS IN APPOINTING WOMEN JUDGES

Despite his principled commitment to women’s equality of opportunity, 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, and only a handful of women were named to the district court.¹⁰⁶ It was not until Congress passed the Omnibus Judgeship Act (“OJA”) in October 1978 that Carter made significant progress in appointing women and minorities to district and appellate court benches.¹⁰⁷ Indeed, thirty-five of

103. *Goldberg v. Rostker*, 509 F. Supp. 586 (E.D. Pa. 1980).

104. See *Rostker*, 453 U.S. at 67, 77-79 (indicating that neither statutory law nor service policy provided women with the right to occupy a combat position).

105. *Id.* at 77-79. In a dissent joined by Justice 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.” *Id.* at 86 (Marshall, J., dissenting). 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 generally JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

106. See *Judge Bill to Test Merit Selection*, *supra* note 50, at 1, 30.

107. See Appointment of Women to the Federal Bench Under President Carter 1 (Oct. 27, 1978) (on file with the Carter Presidential Library). 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,

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1155

Carter's forty women judges were appointed after the OJA's enactment, 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 rather than new judgeships. Nonetheless, the political will and/or capital to appoint women to these positions 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.¹⁰⁸

Carter 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, for example, the NWPC Legal Support Caucus circulated a memorandum to its members seeking names of women to submit to Carter to fill the OJA seats.¹⁰⁹ 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.¹¹⁰

Hispanics, and blacks appointed by Carter. *Id.* The list included the names of the first six women appointed post-OJA—Elsijane Roy, Ellen Burns, Mary Lowe, Patricia Boyle, Norma Shapiro, and Mariana Pfaelzer—all of whom were named to district court benches. *Id.*

108. President's Signing Statement Accompanying Executive Order No. 12,059 (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 & Douglas B. Huron, *Achieving a More Representative Federal Judiciary*, 62 JUDICATURE 483 (May 1979).

109. Memorandum from Susan Ness, Chair of the National Women's Political Caucus Legal Support Caucus, to Legal Support Caucus Coordinators, Friends Working on Judgeships, and Administrative Committee 1 (Nov. 17, 1978) (on file with the Schlesinger Library on the History of Women, Harvard University).

110. 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 1 (Oct. 27, 1978) (thanking Halpern for

1156 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

Central to Carter's post-OJA strategy was his November 1978 executive order, calling upon senators to form merit selection commissions in their home states to name district court candidates of diverse backgrounds.¹¹¹ This was a follow-up to Carter's earlier letter-writing campaign to senators regarding district court judge selection. 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 the citizen commissions.¹¹²

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."¹¹³ Bell reassured the President that the Justice Department would "impress upon the Senators your desire that there be greater representation of women and minorities on the federal judiciary."¹¹⁴ Building upon its experience with the ABA Standing Committee, the Carter administration also encouraged senators to be flexible in terms of years and types of experience so as not to unduly disadvantage women and minorities.¹¹⁵

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 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).

111. Exec. Order No. 12,097, 43 Fed. Reg. 52,455 (Nov. 8, 1978) (concerning "Standards and Guidelines for the Merit Selection of United States District Judges").

112. U.S. DEP'T JUST., SUGGESTED GUIDELINES FOR U.S. DISTRICT JUDGE NOMINATING COMMISSION § 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).

113. Exec. Order No. 12,097, 43 Fed. Reg. 52,455, § 1-1-104 (Nov. 8, 1978).

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

115. U.S. DEP'T JUST., *supra* note 112 § III C (on file with the Carter Presidential Library).

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.

Id.

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1157

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 citizen nominating commissions by individual senators. To encourage senators' reliance on merit selection and affirmative action principles, Carter went so far as to accept recommendations from states with two Republican senators so long as they had used citizen panels. Carter's appointment of Republican judges, including women, was a point of pride because it demonstrated the extent of his commitment to reforming the judicial appointments process. Carter's efforts to persuade senators to form judicial selection commissions were ultimately successful, with thirty states boasting commissions after the OJA's enactment, where only fourteen had operated before.

While women received a substantial number of OJA seats in the end, 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:

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.¹¹⁶

Susan 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.¹¹⁷

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."¹¹⁸

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

117. *Id.*

118. Memorandum from Susan Ness, Chair of the National Women's Political Caucus Legal Support Caucus, to Legal Support Caucus Coordinators and Friends I (Jan. 7, 1979) (on file with the Schlesinger Library on the History of Women, Harvard University).

1158 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

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.”¹¹⁹ 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 thirty percent of the newly created judgeships,” mirroring the percentage of women then in the legal profession, and pressed the President to “nominate at least one women [sic] to each of the eleven circuit courts.”¹²⁰

119. National Women’s Political Caucus, 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).

120. *Id.* 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.

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1159

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 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).¹²¹

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 dire 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."¹²²

Shortly after Weddington and Martin's memo alerting the President to the likely political fallout of failing to name sufficient numbers of 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

121. Judicial Selection Project, Judicial Selection Update 1 (July 6, 1979) (on file with the author).

122. Memorandum from Sarah Weddington and Louis Martin, Special Assistants to the President, to President Jimmy Carter 1 (Jan. 11, 1979) (on file with the Carter Presidential Library).

1160 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

recommend more women and minority candidates. Emphasizing that “[t]here should be no conflict between merit selection and finding qualified women and minorities,”¹²³ Lipshutz advised the President to suggest that the commission chairs “be ‘creative’ in their selection process; not only to look at traditional paper credentials, but also . . . consider the past history of discrimination against minorities and women in the legal profession.”¹²⁴ In essence, Lipshutz advocated the use of affirmative action—of making special efforts to recognize women and minority candidates. 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.¹²⁵

The pre-OJA tension over implementation of Carter’s diversity goals between the White House Counsel’s Office and the Attorney General’s Office 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 Deputy White House Counsel, Margaret McKenna, to Lipshutz, Jordan, and Moore, attaching a chart of the Attorney General’s OJA recommendations, highlighting that, of fifty nine to date, “4 . . . are women; 6 are minorities. Since 2 of the minorities are women, 51 of the 59 recommendations are white men.”¹²⁶ Noting that these figures had gone public in a NWPC press release, and underscoring the negative consequences for Carter’s reelection bid of this lack 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 look at. They will not question why the Senate did not recommend women and minorities; they will just question why the President did not

123. Memorandum from Robert Lipshutz, White House Counsel, to President Jimmy Carter 1 (Feb. 13, 1979) (on file with the Carter Presidential Library).

124. *Id.*

125. Lipshutz & Huron, *supra* note 108, at 485.

126. Memorandum from Margaret McKenna, Deputy White House Counsel, to Robert Lipshutz, Hamilton Jordan, and Frank Moore 1 (Jan. 11, 1979) (on file with the Carter Presidential Library).

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1161

nominate women and minorities.¹²⁷

Bell accused the White House Counsel's Office of undue meddling:

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.¹²⁸

"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."¹²⁹

Ultimately, the judgeships struggle between the Attorney General and the White House Counsel was resolved when both officials resigned in the fall of 1979. Their successors, Attorney General Benjamin Civiletti and White House Counsel Lloyd Cutler, did not do battle in the same way over judicial appointments, which were increasingly overshadowed by Carter's reelection bid and the Iranian hostage crisis.¹³⁰

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

Though Carter's appointment of women judges reflected his commitment to women's equality of opportunity with men, 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 different experiences in the legal profession, at

127. *Id.* at 1-2. 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 1 (Jan. 12, 1979) (on file with the Carter Presidential Library).

128. Oral History Interview with Griffin Bell, *supra* note 24, at 3 (on file with the Federal Judicial Center).

129. *Id.* at 6.

130. *See generally* CARTER, *supra* note 11.

1162 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 11:3

that time when considered in the aggregate. 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 the men, a greater percentage of whom came from private law practices.¹³¹ 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.¹³² 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.

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.¹³³ 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 of demonstrating judicial temperament on a lower court and establishing a track record of opinions for evaluation pre-nomination.

To Carter's credit, this disproportionate judicial service by women may have been an attempt to reassure senators who were skeptical of women's qualifications to serve as federal judges. Martin has hypothesized that this propensity to select women from sitting

131. See Martin, *supra* note 49, at 310.

132. See FEDERAL JUDGES BIOGRAPHICAL DATABASE, *supra* note 16; see also Slotnick, *supra* note 59, at 382-83 (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 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.").

133. See Slotnick, *supra* note 59, at 383-84 (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.").

2003] CARTER'S GROUNDBREAKING APPOINTMENT OF WOMEN 1163

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.¹³⁴

Martin also notes that Carter's women candidates were significantly less politically active prior to federal court nomination than were their male counterparts. Although at that time women overall were less politically active than men, these women were particularly less active because "[a] high degree of judicial experience would naturally be associated with less partisan activity."¹³⁵

CONCLUSION: AN UNMITIGATED SUCCESS?

Carter broke new ground in appointing large numbers of women to the bench, signaling a marked departure from the tokenism characterizing women's judicial appointments before him. Nevertheless, Carter's efforts to diversify the judiciary were not an unmitigated success. Rather, his achievement was limited as compared with the scope of his commitment, the efforts of administration officials, and the pressure exerted by women's and other civil rights advocacy groups. Factors limiting his success included delays in establishing merit selection panels, slowness in communicating Carter's diversity goals to them, struggles with the ABA over the evaluation of female and minority candidates, and the ongoing politicization of the citizen commissions. Still, Carter's appointment of five times as many women judges as all of his predecessors combined stands as one of his administration's groundbreaking human rights achievements and is a testament to his commitment to women's equality and representative governance. While Carter's successors did not share his commitment to these principles, his departure from historic patterns of judicial appointments was so substantial as to prevent Reagan and Bush I from reverting to the tokenism characterizing women's opportunities for judicial service pre-Carter.

134. Martin, *supra* note 49, at 312-13.

135. *Id.* at 308, 310, 312.