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Gender, Affirmative Action, and Recruitment to the Federal Bench

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ARTICLES

GENDER, AFFIRMATIVE ACTION, AND RECRUITMENT TO THE FEDERAL BENCH*

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With the appointment of Sandra Day O'Connor to the position of Associate Justice of the U.S. Supreme Court by President Reagan in 1981, a major victory was won by advocates of a more representative American judiciary. While O'Connor was not the first woman nominee considered for the Supreme Court, she was the first to emerge successfully from the appointment process to the highest level of the federal bench—perhaps the greatest remaining bastion of white male dominance in the American political system save for the Presidency itself.[1] O'Connor's appointment is an historical event of great magnitude and an important symbolic victory for women and advocates of judicial "representation" in general, and perhaps sets a precedent for a "woman's seat" on the Court analogous to the "seats" sometimes attributed to regional, ethnic, religious and, more recently, racial interests. Nevertheless, O'Connor's appointment represents, in some respects, a pyrrhic victory for feminism and representational breadth on the American bench for a number of reasons.

First, O'Connor's substantive policy preferences and her political agenda on many pressing issues of the day are more closely aligned, as one might expect, with the appointing authority Ronald Reagan than with the dominant positions held within the feminist movement. As one commentator has observed:

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1. For a fascinating and detailed account of the first serious consideration given to a woman's candidacy for the Supreme Court, *see* Cook, *The First Woman Candidate for the Supreme Court*, YEARBOOK 1981 SUPREME COURT HISTORICAL SOCIETY; *see also* Cook, *Women As Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314 (1982).

> Her political and professional credentials had been established by careful screening; she belonged in the administration by token of her personal policy preferences on the death penalty, the exclusionary rule, busing and abortion. The [P]resident could assume a close if not perfect match between her personal values and her legal conclusions.[2]

Further, O'Connor herself is an individual likely to downplay the significance of her gender, unlike earlier women Supreme Court candidates such as Florence Allen, a potential nominee during FDR's presidency. In fact:

> Florence Allen wished to represent on the Court the legitimacy of women's claim to a full share in public life; and women worked vigorously for more than a decade after 1934 for her elevation . . . . . Allen was part of a network of women's groups. Women . . . saw her as a representative of women . . . . Her duty was to demonstrate the ability of women to hold the same offices as men, if they only had the opportunity. She wrote, "I have tried with all that is in me to justify the presence of women on the courts . . . ."[3]

Such a characterization clearly does not apply to O'Connor and her rise to the Supreme Court. In contrast to Allen, it has been noted:

> [M]ale politicians picked Sandra O'Connor for the new woman's seat. While she accepts the inevitability of her representative role with grace, she looks ahead to the time when sex identity will lose its significance in the selection of public officials. She has an ideal of the sex neutrality of political roles which is in advance of the culture, just as Allen's goal of a female role in politics was not realistic for her times.[4]

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2. Cook, *Women As Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314, 326 (1982).

3. *Id.*

4. *Id.*

On a broader and fundamentally more important level, the O'Connor appointment may have tended to obscure the dismal historical record of presidential appointment of women to the federal judiciary, and indeed, the emerging record of even the incumbent President in his selections for the federal district and appeals courts. The implications of the furor and euphoria surrounding the O'Connor nomination were not lost on all analysts. One journalist commented, "[w]ith none of the fanfare that surrounds a Supreme Court appointment, President Reagan is nominating his kind of guy—conservative, white, and male—to federal district and circuit courts.[5] Commenting on the relatively few women appointed by the President to the federal bench, Jonathan Rose, head of the Office of Legal Policy in the Reagan Justice Department stated, "I suppose for some people there will never be an adequate commitment. But I think Sandra Day O'Connor stands out as the most major example of the President's commitment to appoint qualified women to the highest courts in the country."[6]

Focusing on the Reagan administration and its judicial recruitment behavior regarding women may lead one to a somewhat unfair indictment. For what is most notable is not necessarily the Reagan record per se but rather its historical consistency with the record of all presidents who came before him except for the flurry of concern with representativeness on the federal bench associated with the Carter presidency. Indeed, more women (and non-whites) were appointed to the federal courts by Jimmy Carter in the pursuit of an avowed and controversial affirmative action program than had been seated on the bench in the nation's entire history.

In the analysis which follows, an effort will be made to assess the historical record of the appointment of women to the federal bench. Extended consideration will be given to the Carter administration's judicial recruitment behavior in an effort to assess the thrust and implications of the President's affirmative action concerns. How successful was Carter in appointing women to the federal judiciary and how did the women appoin-

5. Washington Post, Aug. 19, 1981, at A2, col. 4.

6. Cohodas, *Reagan Judicial Nominations Go Primarily To White Men*, 41 CONG. Q. WEEK 2533, 2534 (1983).

tees differ, if at all, from their male colleagues? Do women appointees follow a different "path" to the bench than males? Did affirmative action "dilute" the quality of the federal bench as many administration critics claimed or, alternatively, did criteria exist for women appointees which remained at a higher threshold than those employed for male candidates? Examination of these and other questions relies on a uniquely rich and penetrating data source.[7] Finally, attention will be directed to President Reagan's judicial selection behavior as manifested in his recruitment of women jurists during the first three years of his administration.

I. WOMEN AND THE BENCH: AN HISTORICAL PERSPECTIVE

Focusing on the relatively few women who have served in the American judiciary and, most particularly, on the federal bench is an exercise that tends to place the cart before the horse. From an historical perspective one can argue that the dearth of women judges has been, at least in part, a reflection of the small number of women attorneys and, consequently, the shallow pool from which female judgeship candidates might emerge.

Belle Mansfield, the first American woman attorney, was admitted to the Iowa bar in 1869 following only approximately two-thirds of a century of an exclusively male profession.[8] While the number and relative percentage of female attorneys has in-

7. The data base for this analysis consists primarily of the responses to a Senate Judiciary Committee questionnaire administered to all judicial nominees during the 96th Congress. Completion of the questionnaire was required before a nomination hearing would be held on a candidate and, therefore, before any appointment could be finalized on the Senate floor. The detailed questionnaires contain a wealth of comparable data on nominees of a kind previously difficult if not impossible to obtain. Questionnaire responses are likely to result in an unusually valid data source on nominees since they constituted a record, submitted under oath, on which members of the Judiciary Committee, the Senate, the press, other interested parties, and the general public could scrutinize a candidate. Questionnaire data were supplemented by information concerning nominee race, political party affiliation, religion, and ABA rating graciously provided by Professor Sheldon Goldman.

8. D. Fossum, *Women in the Legal Profession*, 67 A.B.A.J. 580 (1981).

creased throughout the 20th century, dramatic increases did not occur until the 1970's. In 1910 there were 558 women attorneys in America accounting for 1.1% of the legal profession.[9] By 1920, the number of women attorneys had more than tripled, yet due to the growth in the size of the legal profession, women still accounted for only 1.4% of those admitted to the bar.[10] In the next decade the number of women attorneys virtually doubled (to 3385) and women constituted 2.1% of all attorneys.[11] Despite such a low percentage of women attorneys, by 1930, most law schools did not *absolutely* bar women from attendance, although Harvard did not admit women until 1950, Notre Dame until 1969, and Washington and Lee became the final ABA approved school to admit women in 1972.[12]

Succeeding decades saw continued growth in both the number and the percentage of women attorneys. In 1940, 4447 women attorneys constituted 2.4% of the American bar.[13] In 1950, 6348 women attorneys increased female representation in the legal profession to 3.5%.[14] Increases in the number of women attorneys slowed down during the next decade and women constituted 3.3% of the legal profession in 1960.[15]

The volatile decade of the 1960's saw the number of women attorneys increase by over 70% (to 13,000) and in 1970 women accounted for 4.7% of all American lawyers.[16] The changes that were taking place in the legal profession in the late 60's and early 70's were well foreshadowed by events occurring in legal education. In 1963, the percentage of women in attendance at American law schools was 3.8% and by 1967 the figure was only 4.5%.[17] Between 1969 and 1972, however, while the total number of students in law schools tripled, the number of women enrolled increased by a factor of fourteen. By 1970, 13.3% of those taking the LSAT exam were women and by 1975 women made up at least 10% of the student body at nearly all law schools and at

9. C. EPSTEIN, WOMEN IN LAW 4 (1983).
10. *Id.*
11. *Id.*
12. *Id.* at 50.
13. *Id.* at 4.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 53.

least 20% of the student body at two-thirds of American law schools.[18] Trends such as these resulted in the percentage of women law students reaching 8.5% in 1970, 15.8% in 1973, 22.9% in 1975, 27.5% in 1977, 30.3% in 1978, and a full third of all law students in 1980.[19]

Enrollment figures in the law schools have been swiftly transformed into demographic changes in the profession in the last decade and a half. Between 1970 and 1976 the number of women attorneys increased by nearly 200% (to 38,000) and women constituted 9.2% of all attorneys.[20] By 1980, the 62,000 women attorneys constituted 12.0% of the American bar.[21] As one analyst has noted, "if current trends continue, women will constitute one-third of all lawyers by the year 2000."[22]

While the entry of women in significant numbers into the legal profession has been a slow process, the ascension of women to the American bench has been an even more difficult accomplishment and has occurred at a relative snail's pace. The first American woman to serve in a judicial capacity was Esther Morris, who was not an attorney but did serve as a Justice of the Peace in Wyoming territory in 1870.[23] By 1930, twelve American states could claim that a woman had served as a judge at some level in their judicial system. By 1940, twenty-one states could make such a claim and by 1950 the number had grown to twenty-nine.[24] It was not until 1979, however, that a woman judge had served at some level in the judicial system of all fifty American states.[25] In short, recruitment of women to the bench has lagged far behind the growth in their numbers in the legal profession per se. Indeed, in 1970 women accounted for only 1% of all American judges and by 1979 their strength had risen to only 4%.[26]

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18. Fossum, *supra* note 8, at 580.
19. EPSTEIN, *supra* note 9, at 53.
20. *Id.* at 4.
21. *Id.*
22. Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 286, 291 (1982).
23. Carbon, *Women in the Judiciary: An Introduction*, 65 JUDICATURE 285 (1982).
24. Berkson, *supra* note 22, at 292.
25. Carbon, *supra* note 23, at 285.
26. Fossum, *supra* note 8, at 582.

Representation of women on the federal bench has been even more problematic than the preceding state data might suggest. While a few women had served on special jurisdiction federal courts and on ostensibly "federal" courts servicing the District of Columbia, it was not until Florence Allen's 1934 appointment that a woman served on the U.S. Court of Appeals, in this instance the 6th Circuit. Not until the appointment of Burnita Matthews to the D.C. District Court in 1949 was a woman appointed to a federal district court. It was not until 1968 and Shirley Hufstedler's appointment that a second woman received a federal circuit court appointment. Indeed, prior to the Carter administration a scant eight women had served in the federal judiciary at the District or Appeals Court level in the nation's entire history![27]

It is in this context, and for the reasons set out below, that the Carter administration's legacy of appointing forty women to the lower federal judiciary, (twenty-nine to district and eleven to appeals court seats) representing nearly 20% of all his appointments to these tribunals, attains some of its significance. Clearly, the Carter administration's commitment to appointing greater numbers of women (and non-whites) to the federal judiciary represented a conscious choice. It is to an exploration of the Carter effort that we now turn.

II. JUDICIAL RECRUITMENT, AFFIRMATIVE ACTION, AND THE CARTER ADMINISTRATION

A. Background

1. *Affirmative Action: "Merit" or "Quota" Selection*

Affirmative action programs in the public and private sector, that is, positive attempts to recruit members of underrepresented groups in American society to positions long closed to them, have long been surrounded by great controversy. Advocates of such programs have asserted that they are ameliorative and benign in nature while opponents label them "reverse discrimination" and ascribe to such efforts a quota mentality which

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

is viewed as objectionable and unconstitutional.[28]

Most debate over affirmative action programs has been polemical in tone, with a dominant focus on the compatibility (or lack thereof) between such programs and the concern with "merit" as the basis for individual advancement in American society. For many reasons, the federal judiciary has been an especially prominent subject of the debate in recent years. For one, as we have seen, the federal bench has historically been a stronghold of white male dominance in American society. A second reason for widespread focus on the federal bench was the passage of the Omnibus Judgeship Act of 1978 which created 152 new federal judgeships (117 district and thirty-five appeals court positions) and alerted many groups to the possibility that these vacancies could be part of an effort to redress past discrimination and move towards a more representative judicial branch. Finally, and perhaps most importantly, the focus on the judiciary corresponded to an announced pursuit of affirmative action by the Carter Administration in filling federal judgeships and the utilization of nominating panels to help pursue representative nomination outcomes.

The primary justification proffered for affirmative action in judicial selection is the need for amelioration of long standing underrepresentation of several elements of American society on the federal bench. As has been asserted, "[it] does not seem unreasonable to make special efforts to recruit from these groupings of Americans for federal judgeships" as long as race and sex are not utilized in an invidious fashion.[29] In the eyes of the Carter Administration, the reasons which lay behind the contemporary imbalance of the federal bench were irrelevant. Rather, that Administration was simply concerned with the real-

28. For formulations by critics of affirmative action *see* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975), and B. GROSS, DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY? (1978). For other efforts to illuminate the complex issues implicated by the affirmative action debate *see* B. BITTKER, THE CASE FOR BLACK REPARATIONS (1973), and R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION (1975).

29. Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488, 489 (1979).

ity of an underrepresentative judicial branch. Thus, according to two Carter advisors, "[i]t accomplishes little to speculate whether these figures reflected a pattern of discrimination in the selection process or general societal factors which had in the past limited the pool of minority and female candidates. Instead, the President . . . simply recognized the existence of a problem which needed to be addressed."[30]

While redress of past and continuing representational wrongs can serve as a primary justification for affirmative action policies, it is important to note that its advocates anticipate that positive benefits will accrue to the American system of justice from increased diversity on the bench. A more pluralistic judiciary, for example, would be "more likely to win the confidence of the diverse groupings in a pluralistic society."[31] In a similar vein, one Washington Post journalist editorialized, "[t]he strength of the judiciary rests in the way it is perceived by those over whom it sits in judgment. That perception will be infinitely better if the bench is populated with well-qualified men and women of all races . . . than if it is populated only by the 'best' qualified lawyers, particularly if most of them turn out to be white males."[32]

Such justifications for affirmative action rely heavily on the likely impact of a more representative bench on public perceptions and confidence. It can also be argued, however, that increased representation of minorities and women would sharpen the judiciary's sensitivity to the complex substantive issues and controversial social issues facing it.[33] Indeed, the presence and perspective of non-traditional judges would likely increase the sensitivities of already seated white male colleagues in ways which could have a considerably greater impact on the judicial

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30. Lipshutz & Huron, *Achieving A More Representative Federal Judiciary*, 62 JUDICATURE 483 (1979).

31. Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246, 253 (1978).

32. Washington Post, Jan. 4, 1979, at A24, col. 1.

33. A judge who is a member of a racial minority or a woman cannot help but bring to the bench a certain sensitivity—indeed, certain qualities of the heart and mind—that may be particularly helpful in dealing with these issues . . . . [T]he presence on the bench in visible numbers of well qualified judges drawn from the minorities and women cannot help but add a new dimension of justice to our courts . . . .

Goldman, *supra* note 29, at 494.

process than the direct contribution of the new judges.

Thus, justifications offered for affirmative action in judicial recruitment go well beyond the recognition of past discrimination and a current representational imbalance. Rather, affirmative action efforts are seen as instrumental in assuring a bench which fosters greater public confidence and which is sensitive to the diverse perspectives necessary for a "just" judiciary. Ultimately, advocates of affirmative action would contend that such a policy is not inconsistent with "merit" recruitment but, rather, actually helps foster a more meritorious bench. From this perspective, perhaps, the debate over affirmative action may be reduced to a debate over the questions of how merit is to be defined and whose definition of merit is to prevail.

In direct opposition to the advocates' position, critics of affirmative action programs (including those focusing on the implications of such programs in the judicial selection arena) contend that there is a basic and inherent contradiction between affirmative action and appointment of the most qualified individuals.

> The precepts of merit selection dictate that only those possessing the most illlustrious credentials will be recommended, without regard to political considerations. However, it is claimed, affirmative action is, by its nature, a political goal, and one which directly contravenes the very thrust of merit selection. It submerges quality in order to redress past race and sex discrimination.[34]

Critics of affirmative action ignore the usefulness of outreach efforts and expanded search processes as a means of locating qualified individuals that traditional search procedures miss. They contend that such programs amount to the granting of absolute preference to individual members of underrepresented groups—even when other considerations are not in any sense equal. Research indicates instances in the operation of President

34. L. BERKSON & S. CARBON, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES, AND CANDIDATES 4 (1980).

Carter's advisory U.S. Circuit Judge Nominating Commission when it appears that panel members did bend over backwards to advance the candidacies of individuals they themselves did not feel were sufficiently qualified on the record presented. "Some women and minorities were interviewed by at least one panel whose members did not believe they were sufficiently qualified to warrant an interview."[35]

Clearly, such an approach did not sit well with some Senators.

> We're happy to see affirmative action in the commission's reaching out to solicit applications and, hopefully, [sic] they will turn out to be well qualified. If, however, there is any hint of using balance in an attempt to preserve ratios and dilute the strength of the bench, this would be opposed. Outreach is great, but don't put people in spots where they don't belong. This is the standard conservative view on affirmative action.[36]

The central focus for criticism of affirmative action programs has been placed on the "problem of quotas." Clearly, quota mentalities are inconsistent with the American ethic and the mere suggestion of their usage can serve as a rallying cry for the development of an emotional and active opposition. As Virginia Senator Harry Byrd asserted during a protracted battle over a potential black nominee for the U.S. District Court, "I can't imagine anything worse for the American people than to have a quota system for federal judges."[37] Similar senatorial perspectives on the utilization of quotas emerged in recent research. As one Democratic Senator noted, "It is not our responsibility to guarantee any fixed percentage of different classes of people. You try to get the best qualified people, not some elusive balance."[38] Similarly, an aide to a conservative southern Republican added, "race or sex has nothing to do with it. Carter has gone too far in trying to impose quotas. The whole approach is off base . . . . We like the principle of merit selection. We applaud

35. *Id.* at 80.

36. Slotnick, *Reforms in Judicial Selection: Will They Affect the Senate's Role?*, 64 JUDICATURE 114, 117 (1980).

37. Washington Post, Apr. 10, 1980, at A1, col. 2.

38. Slotnick, *supra* note 36, at 117.

that . . . . Yet are they doing that?"[39]

Thus, the tensions between merit and affirmative action are present in the assertions of both supporters and critics of efforts to increase representativeness on the federal bench. At times, however, it appears that the debaters did not even agree on what the nature of the Carter Administration's affirmative action effort was and how that effort could be defined. In part, this may be because of mixed signals from the Administration itself.

2. *The Carter Administration's Commitment to Affirmative Action in Judicial Selection*

The basic premises which guided the Carter Administration's activities to increase the representativeness of the federal bench were rooted in the belief that in a pluralist democracy the diversity among the ruled should be reflected in similar diversity among the rulers. In effect, the Administration's goals were:

> based on the belief that the governing institutions of a democracy should reflect the spectrum of interests of the governed and that this is done by dispersing the power to govern among representatives of diverse groups. In short, it is assumed that a national judiciary should resemble its national demographic constituency. Therefore, large groups which have been denied extensive representation in government should now be given a greater degree of representation. These values cannot be tested and confirmed or refuted. One can only accept or reject them.[40]

The official thrust of the President's affirmative action program was revealed in two executive orders, one issued on May 10, 1978 in which the President issued a mandate to his new U.S. Circuit Judge Nominating Commission and the other issued on November 8, 1978 establishing "standards and guidelines" for

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39. *Id.*

40. A. NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSION: THEIR MEMBERS, PROCEDURES, AND CANDIDATES 150 (1981).

the appointment of district judges under the Omnibus Judgeship Act. In the initial executive order the President underlined the need for the advisory circuit panels to cast a wide net in seeking candidates, and they were encouraged "to make special efforts to . . . identify well qualified women and members of minority groups as potential nominees."[41] The later order instructed the Attorney General, before recommending candidates to the President, to consider whether "an affirmative effort has been made, in the case of each vacancy, to identify candidates, including women and members of minority groups."[42]

Although the wording of the executive orders emphasized expanding outreach efforts, the commitment being articulated may also have extended to representative outcomes from the judicial selection process. Indeed, outside the confines of the executive orders, the President and his representatives left little doubt where they stood. As early as July, 1977, Margaret McKenna, the Deputy Assistant for the White House Office of Legal Counsel, told the Federal Judicial Nominating Commission Workshop of the President's "firm commitment to affirmative action in the judicial selection process and his concern that the panels . . . find and recruit minority groups and nontraditional candidates for the federal bench."[43] Similarly, on August 5, 1978, Associate Attorney General Michael Egan, the key Justice Department official dealing with judicial nominations, told the American Bar Association Symposium on Merit Selection of Federal Judges that the Administration "is determined to broaden the bench and add a significant number of women and minorities."[44] On signing the Omnibus Judgeship Act on October 20, 1978, the President himself asserted, "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 . . . . I am committed to these appointments, and pleased that this act recognizes that we need more than token representation on the Federal bench."[45]

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41. Exec. Order No. 12,059, 3C.F.R. § 180 (1979), *reprinted in* 28 U.S.C. § 44 at 6 (Supp. 1981).

42. Exec. Order No. 12,097, 3C.F.R. 254 (1979), *reprinted in* 28 U.S.C. § 133 at 17 (Supp. 1981).

43. BERKSON & CARBON, *supra* note 34, at 34.

44. *Id.*

45. NEFF, *supra* note 40, at 190.

Ranging quite afar from the simple outreach effort suggested by the words in the President's official executive orders, Attorney General Bell's posture before the Senate Judiciary Committee on January 25, 1979, revealed the Administration's commitment to representative outcomes from selection processes.

> I perceive my role as that of being an honest broker . . . . I think I have a duty to seek out and find qualified people of all types and give the names to the senators . . . . And I think I have a duty, and this is a painful one, to say to a senator I wish you would reconsider your list . . . . We are pledged to make the judicial system more representative and I wish you would reconsider.[46]

At the hearing the Attorney General also made it clear that "qualified" was the bottom line requirement for the appointment of women and minorities to the bench—even if there were more highly qualified white male candidates under consideration as well. At bottom, Bell "believed . . . that choices of that sort had to be made to alter the composition of the bench in meaningful quantities."[47]

Needless to say, the asserted policy was quite controversial and fanned the debate over the implications of affirmative action for competent "merit" appointments. Making matters worse, the feared quota mentality seemed to make its way into the White House itself. Thus, President Carter told one black reporter of his goal "to have black judges in Georgia, Florida, the Carolinas, Mississippi, Alabama, Louisiana, indeed throughout the country."[48] And in what was perhaps a more ill-considered statement, the President asserted "[i]f I didn't have to get Senate confirmation of appointees, I could just tell you flatly that 12 percent of all my judicial appointments would be black and 3 percent would be Spanish-speaking and 40 percent would

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46. Slotnick, *The Changing Role of The Senate Judiciary Committee in Judicial Selection*, 62 JUDICATURE 502, 503 (1979).

47. NEFF, *supra* note 40, at 102.

48. BERKSON & CARBON, *supra* note 34, at 34.

be women, and so forth."[49]

3. *The Carter Administration's Affirmative Action Program*

Thus far, we have considered justifications for affirmative action in judicial recruitment as well as several criticisms aimed at such programs. An effort has also been made to define the scope and meaning of the Carter Administration's affirmative action policies. It is notable, however, that all of the perspectives herein considered, whether supportive or critical of affirmative action, begin from the premise that an affirmative action program did exist and was implemented in the judicial selection arena during the Carter presidency. It is important to underline that this premise was not shared by all the prospective beneficiaries of the Carter effort—judgeship candidates who were women and/or non-white. Rather, some women and minority group members argued that far from lowering the standards to be met by non-traditional nominees, the operation of the judicial selection process during the Carter years continued to establish barriers and substantially higher threshold requirements to be met by potential female and/or non-white candidates before they would be given serious consideration.

Perhaps the most controversial requirements which were imposed on nominees, and often criticized because of their alleged discriminatory impact, were those which mandated that except under unusual circumstances, candidates with less than twelve to fifteen years of legal experience or over sixty years of age would not be nominated. The chief objections to these criteria were that non-traditional candidates have relatively less legal experience and that the nature of their experience tends to differ substantially from what is generally considered appropriate for judgeship candidacies. As noted by Assistant Attorney General Barbara Babcock, a key figure in the Carter effort to search for qualified non-traditional candidates, "[w]omen lawyers do not have the same kind of resumes men do. They've been kept from being president of the local bar association. They don't

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49. Hanchette, *Few Minorities Sit on Federal Bench*, in GANNETT NEWS SERVICE SPECIAL REPORT: JUSTICE ON TRIAL, at 5, Col. 2 (May be obtained from Gannett News Service Dept. 1-800-368-3553).

make partner in the firm so fast, either."[50]

Elaine Jones of the NAACP Legal Defense and Educational Fund argued before the Senate Judiciary Committee that a mechanically imposed experience requirement would bar from the bench many who had a range of experience which would make them ideal candidates. Ultimately, implementing the Carter criteria:

> would serve to perpetuate in the judicial selection process the prior exclusion of minorities from the profession as a whole. The rule would thus serve to eliminate from our already too few numbers many who are in every respect qualified—12 to 15 years is no magic number . . . wherein, magically, one becomes experienced. One lawyer may practice . . . with shining mediocrity for years too numerous to count, while another can demonstrate superb skill and ability in a mere few years.[51]

At the same committee hearing, David Cohen of Common Cause underlined that it was the nature of one's legal experience and not its duration which was of importance. Further, Cohen suggested that the reputed differences in the legal experience of candidates who were not white males were virtues and not liabilities.

> There is no . . . one type of service that prepares a person to be a good judge. The varied experience of public defenders, legal services attorneys, and civil rights lawyers would strengthen our Federal judiciary. The issues before the Federal courts span the breadth of our society. The legal experience of our judges should stretch as far.[52]

It was also feared that the absence of substantial numbers of women and minority attorneys with prior judicial experience would lead to a continued underrepresentation of non-tradi-

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50. L.A. Times, Feb. 20, 1979, at I5, col. 1.

51. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270, 278 (1983).

52. *Id.* at 279.

tional candidates on the federal bench. As one author noted "[o]ur numbers are already small; and to heap an additional requirement such as judicial experience on those numbers virtually assures the non-participation of minorities in any significant way in the selection process. The impact on minorities of such a requirement . . . is exclusion."[53] Indeed, it was even suggested by Susan Ness of the National Women's Political Caucus that, at least in the early days of the Carter Administration, a double-standard was utilized to gauge the importance of judicial experience in potential nominees. That is, such experience appeared to be a threshold requirement for non-traditional nominees but not for white males.[54]

Our examination of affirmative action and judicial recruitment during the Carter Administration reveals a policy program which was the subject of much debate, controversy, and disagreement. Supporters, opponents, and analysts of the Carter effort failed to agree on the impact and implications of this effort. One thing, however, does remain clear. Recruitment outcomes during the Carter Administration resulted in a more "representative" bench than had ever existed if the concept of representation is assessed by the sheer number and percentage of appointees who were not white males. Of Carter's 258 district and appeals court appointees forty were women, thirty-eight were black, and sixteen were Hispanics (seven of the black and one of the Hispanic nominees were women).[55] This constituted a greater number of non-traditional appointees than had been designated over the course of the nation's entire history and, clearly, was an obvious departure from the selection behavior of recent presidents. "By the end of the Carter Administration the proportion of women judges on the federal bench had risen from one per cent to close to seven per cent and, for blacks, from four per cent to close to nine per cent."[56]

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53. *Id.* at 280.

54. Ness, *The Bench: Where Are All the Women*, L.A. Times, Apr. 4, 1978, pt. II, at 5, col. 3.

55. Compiled from Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344 (1981).

56. *Id.* at 349.

B. Male and Female Judicial Nominees Contrasted

The preceding figures tell only part of the story. Clearly, the debate over affirmative action has never focused solely on the actual possibility of substantially increasing the numbers of individuals from underrepresented groups in important positions in American society. Rather, controversy generally has surrounded the issue of what the implications of greater representativeness were for the quality of American institutions—with the judicial branch being simply one example.

As we have seen, many assertions and much rhetoric have characterized the debate over affirmative action. Little, if any, empirical research, however, has explored the consequences of recruitment outreach for the quality of the American bench. Clearly, "quality" is an elusive concept—particularly when society remains ambivalent about what constitutes a "good" judge. Nevertheless, it is possible to compare and contrast categories of non-traditional nominees with their white male counterparts in terms of certain background characteristics, some of which are thought to be related to judicial performance. How do women nominees differ from the male candidates nominated at the same time? Can the judgment reasonably be made that women nominees were "inferior" candidates? How did the path to the federal bench differ for female and male nominees?

The next section of this article focuses on answering these questions by using data collected on all judicial nominees whose names were sent to the Senate Judiciary Committee for confirmation hearings during the 96th Congress. Our analysis will compare male and female nominees on several dimensions including their demographic profiles, educational achievements, levels of politicization, legal career patterns, and litigation records.

1. *Demographic Variables*

The demographic variables considered include measures of the nominees' age, birthplace, and religion. Male and female

candidates were found to differ most dramatically on the age and birthplace measures. As Table 1* clearly reveals, women nominees were significantly younger than male candidates and more likely to have been born outside the state or circuit of their appointments.[57] Thus, over two-thirds (72.7%) of all women nominees (and *all* of the non-white women) were under the age of fifty when they were appointed and *none* were over the age of 60. This contrasts sharply with the male nominees, a clear majority of whom were over the age of fifty when they received their appointment. These data are strongly suggestive of the underlying differences in the size of the candidate pools for male and female nominees. With fewer women attorneys to choose from, particularly with long years of professional service behind them, the Carter Administration had to seek out younger women candidates for the bench.

* *See Table 1, next page.*

57. For this and all future relationships discussed, unless otherwise indicated, a relationship significant at $p=.05$ will be treated as statistically significant. Contingency coefficients are utilized in the few instances where variables were measured at the nominal level. For ordinally measured variables, Tau B was utilized for "square" tables with equal numbers of rows and columns. Tau C was used for "rectangular" tables with unequal numbers of rows and columns and ordinal data.

TABLE 1 - Age and Place of Birth By Nominee Gender

		Age[a]				Place of Birth[b]	
		30-39	40-49	50-59	60-69	In Jurisdiction of Appointment	Not In Jurisdiction of Appointment
Nominee Gender	Male	16 (9.0%)	59 (33.1%)	88 (49.4%)	15 (8.4%)	131 (74.9%)	44 (25.1%)
	Female	6 (18.2%)	18 (54.5%)	9 (27.3%)	0 (0.0%)	14 (48.3%)	15 (51.7%)

(a) Tau C = -0.18, S = 0.00

(b) Tau B = 0.20, S = 0.00

In a similar vein, the localism that generally characterizes appointments to the lower federal bench, and which was reflected by the fact that nearly three-fourths of the male nominees were born in the jurisdiction of their appointment, was not evidenced among women appointees. Indeed, more than half (51.7%) of the women nominees including five out of six of the non-white women candidates were not locally born. The gender variance suggests that the legal careers of the successful women nominees manifested greater geographic mobility than those of the males since the women's careers may have been more closely linked to the geographic mobility of their spouses. Presumably, the males could more easily pursue career opportunities closer to home unencumbered and, therefore, would have access to the more traditional path to a judgeship.

The relationship between gender and income does not quite reach an acceptable level of statistical significance, although male candidates do appear to have somewhat higher incomes than females in the aggregate. When *white* males are compared to *all other* non-traditional candidates (i.e., all women and non-white male candidates) the relationship is quite graphic and the white male nominees are seen to enjoy substantially higher incomes. (TAU C=0.21, S=0.00) Thus, over one-third (35.5%) of the white male nominees earned upwards of $80,000 per year prior to their nomination while the corresponding figure for women candidates was only 17.2%.

In toto, our socioeconomic and demographic data revealed that the differences among male and female judgeship nominees went well beyond the obvious gender differences. The size of the candidate pools differed significantly for these groups and so, presumably, did the career paths through which men and women nominees reached the federal bench. These data do support the assertions of the advocates of affirmative action that it would lead to the creation of a more representative judiciary on many scores.

2. *Education*

A second set of variables included in our analysis focused on the educational backgrounds and achievements of the nominees. Included were measures of what kind of colleges and law schools

they attended (public, private, or Ivy), where they went to law school (in or out of the state or circuit of their appointment), whether or not they attended an "elite" law school, and whether or not the nominee received law school honors during his or her professional training.[58] While gender differences among these variables did not tend to be dramatic, some interesting findings did emerge.

Women, for example, were more likely to attend private or Ivy colleges (Contingency Coefficient = 0.18, S = 0.03) and law schools (Contingency Coefficient = 0.16, S = 0.07) than their male colleagues appointed at the same time with 60.6% of the women attending such colleges and 69.7% attending such law schools. The corresponding lesser figures for male nominees were 47.2% and 48.4% respectively. The results are somewhat more graphic when the race of the judgeship nominees is considered as well. For example, Table 2 reveals that white women were the *most* and the few black women appointees the *least*, likely candidates to graduate from "elite" law schools.

These findings appear consistent with what conventional wisdom about educational opportunity would lead one to expect. That is, it could be argued that the historical pattern of disadvantagedness and institutionalized discrimination against non-whites in American educational institutions (and even more so, non-white women) would be most evident in fewer graduates of elite institutions being found among non-white judgeship candidates. One researcher has observed that "[o]nly in the mid-to-late 1960's did legal training at a predominantly white institu-

58. Law school honors were operationalized as attaining membership on the school's law review or law journal, earning Order of the Coif distinction, graduating at the top of one's class, competing in national moot court competition, etc. Law schools were characterized as "elite" or "not elite." A school was considered to be "elite" if it was included on three of the following measures:

1. The Gourman Report (14 "Distinguished" law schools)
2. Barron's Guide "Group 1" law schools (14 "high resource" law schools)
3. Blau-Margulies Report (top 9 law schools)
4. Cartter Report (top 15 law schools)
5. Ladd-Lipset Report (top 8 law schools)
6. Juris Doctor (top 13 law schools)

tion become a realistic possibility for American blacks."[59]

TABLE 2 - Type of Law School Attended and Nominee Gender[(a)]

		Type of Law School	
		Elite	Not Elite
Nominee Gender	White Male	59 (43.1%)	78 (56.9%)
	Non-White Male	12 (29.3%)	29 (70.7%)
	White Female	14 (53.8%)	12 (46.2%)
	Non-White Female	2 (28.6%)	5 (71.4%)

(a) Contingency Coefficient = 0.15, S = 0.02

The elite educational background associated with white women nominees in the aggregate may also be understood from the perspective of educational opportunities. While American educational institutions have predominantly been training grounds for white males, females generally have not been barred absolutely from attendance as often or as recently as was the case for non-whites. Traditionally, however, it was the truly exceptional woman whose education proceeded beyond the level of a college degree.[60] In the absence of an absolute bar to attendance, one would expect that among the relatively few "successful" women who did attend law school there would be a representative rate of enrollment in elite law programs. Further, attendance at such an institution could be a means by which a woman attorney attained a degree of professional prominence—particularly if her law degree did not necessarily open the door to the kinds of career opportunities traditionally en-

59. Uhlman, *Race, Recruitment and Representation: Background Differences Between Black and White Trial Court Judges*, 30 WESTERN POL. Q. 457, 462 (1977).

60. For an overview of admissions and attendance patterns of women in American law schools *see generally*, C. EPSTEIN, *supra* note 9, Fossum, *supra* note 8, R. Ginsburg, *Women at the Bar: A Generation of Change*, 2 U. PUGET SOUND L. REV. 1 (1978), and D. Sassower, *Women in the Law: The Second Hundred Years*, 57 A.B.A.J. 329 (1971).

joyed by successful white male attorneys. Indeed, perhaps attendance at an elite law school has been a "threshold" criterion for serious consideration of non-minority women for federal judgeship candidacies to a greater degree than is the case for other potential nominees. In a similar vein, one would expect that excellence in law school performance could be a means by which a woman attorney gains some degree of professional prominence in a way that might positively affect her potential judgeship candidacy, whereas nominating authorities might seek other career relevant attributes in recruiting others to judgeships. Indeed, Table 3 reveals that the greatest differences among our nominees on educational variables emerged on our measure of law school honors where women, in the aggregate, excelled.

In addition, it should perhaps be noted that women nominees were somewhat more likely than men to attend law schools outside the state or circuit of their appointment. (TAU B=0.08, S=0.11) This finding reflects both the greater geographic mobility already noted in the career patterns of female judgeship candidates as well as the much greater likelihood that non-white

TABLE 3 - Law School Honors and Nominee Gender[a]

		Law School Honors	
		YES	NO
Nominee Gender	Male	53 (29.8%)	125 (70.2%)
	Female	16 (48.5%)	17 (51.5%)

(a) Tau B = -0.14, S = 0.02

women nominees attended out of state law schools. Thus, five out of seven (71.4%) of the non-white women nominees (as compared to only 32.3% of all other candidates) attended out of state law schools suggesting the possibility of discriminatory admissions practices within their home state.

WOMEN'S LAW FORUM

3. *Politicization*

A third set of variables examined focused on gender associated differences in the degree of politicization of judgeship candidates during the 96th Congress. Research on the federal judicial selection process has generally drawn much attention to the role that patronage plays in the emergence of candidacies. At times it has even been suggested that federal judges are simply attorneys who "knew" a senator and, indeed, it has traditionally been true that judgeships are, in part, a reward for political services rendered.[61] Thus, partisan political activism has always been considered to be a great boon to a judgeship candidacy. Thus, the question arises of whether this traditional path to the bench corresponds to the road taken by non-traditional judgeship candidates—particularly women.

Data on gender differences in politicization, while abundant, tend to point the analyst in different and, at times, mutually exclusive directions. Clearly, existing findings are not definitive. The dominant thrust of the literature, however, suggests that politics is predominantly a game played by white male participants. Perhaps the classic analysis specifically focusing on gender differences in politicization was authored years ago by Robert Lane.

> A major feature of our culture's typing of two sexes is the assignment of the ascendant, power, possessing role to the man and the dependent, receptive role to the woman . . . . Politics is precisely such an area of power, and a woman enters politics only at the risk of tarnishing, to some extent, her femininity. Although voting and talking politics are only at the threshold of this . . . area of life, the woman who seems too active in these areas seems, to some people, to have moved from the properly dependent role of her sex and to seek the masterful and dominant role of men.[62]

To the extent that the simple voting act was sometimes pictured

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61. For a classic account of the traditional operation of the federal judicial recruitment process and the role of patronage *see generally*, H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS (1972). For a more recent view of senatorial prerogatives in judicial selection, *see* Slotnick, *supra* note 36.

62. R. LANE, POLITICAL LIFE: WHY PEOPLE GET INVOLVED IN POLITICS 213 (1959).

outside the realm of women's political activities, it is clear that more highly developed forms of politicization were quite outside the mainstream.

More recent analyses, however, have greatly questioned Lane's findings as researchers have been faulted with trying to place new data into outdated conceptual containers.[63] Explanations of lower politicization patterns among women grounded in differential political socialization along gender lines simply will not wash. "In sum, the more we look at women's actual political behavior, the less it seems possible to explain their underrepresentation in high political offices as the consequences of their own sex role socialization."[64] It has been asserted that "[i]n recent years students of female participation have shown increasing interest in this body of theory that suggests women are blocked from achieving office not merely by socialization but also by situational and structural restraints."[65] Similarly, other data suggest that:

> [T]he stereotype of the politically passive woman simply is untrue. Women as a whole participate as much as men once structural and situational factors are considered . . . . Women participate in the aggregate less than men not because of some belief that they hold about the role of women in politics, but largely because they are less likely to be found in those categories of people who participate in politics.[66]

In some respects, the relative degree of politicization of women, in the aggregate, is not critical to this analysis. Our concern is a somewhat more narrow one and seeks simply to assess the relative degree of politicization evidenced by female and male candidates for federal judgeships.[67] Our measures of politi-

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63. Carroll, *American Politics and Political Behavior*, 5 SIGNS; J. OF WOMEN IN CULTURE AND SOCIETY 292, 293 (1979).

64. *Id.* at 298.

65. WOMEN IN LOCAL POLITICS 7 (D. Stewart ed. 1980).

66. Welch, *Women as Political Animals? A Test of Some Explanations for Male-Female Political Participation Differences*, 21 AM. J. POL. SCI. 711, 726 (1977).

67. Survey data collected on female state judges suggest, however, that political ac-

cal involvement are somewhat imperfect and clearly not inclusive. They should, however, collectively create a portrait of the level of political activity of the judicial nominees. The variables utilized include measures of whether the candidate had made any speeches during the past five years (of unspecified subject matter, and possibly, non-political content) that they characterized as "significant," whether they had ever held (through appointment or election) a public office, whether they had ever played a significant role in a political campaign, and whether they had ever been a candidate for a non-judicial, elective office.

The data, as presented in Table 4, clearly demonstrate that systematic differences in politicization fell strongly along gender lines, with females generally displaying lower levels of political activity than males. The one exception emerged on our measure of significant speechmaking where women were considerably more active than men. (TAU C=0.12, S=0.01). Over three-quarters of the women nominees (78.1%) admitted to such speechmaking, with the corresponding figure for male candidates a considerably lower 59.7%. Fully 80.8% of the white females had engaged in significant speechmaking. Since women appear to be less politicized than men on all of our other measures, it is quite possible that a large portion of the significant speechmaking done by women is civicly oriented yet non-political in a partisan sense. If that is the case, it suggests that such activity could substitute for more blatant politicization as a means by which female candidates demonstrate their suitability for the federal bench. While such a linkage cannot be drawn with certainty given the nature of our variables, it is clearly a construc-

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tivism among women judges occurs at the same relatively low level as activism among women in general. According to research:

> Less than one-quarter . . . had participated in any election campaign . . . . Only 10 percent had held office in a political party, and relatively few had held a public office prior to assuming the bench . . . . Only seven percent had held locally elected positions, such as members of city or county councils or school boards.

Carbon, Houlden, & Berkson, *Women on the State Bench: Their Characteristics and Attitudes About Judicial Selection*, 65 JUDICATURE 294, 298 (1982).

TABLE 4 - Politicization by Nominee Gender

		Politicization Measures								
		Significant Speeches[a]			Public Office Holder[b]		Significant Campaign Role in Campaign Other Than One's Own[c]		Candidate for Non-Judicial Elective Office[d]	
		None	1-10	More than 10	NO	YES	NO	YES	NO	YES
Nominee Gender	Male	71 (40.3%)	89 (50.6%)	16 (9.1%)	25 (14.0%)	153 (86.0%)	99 (55.9%)	78 (44.1%)	100 (56.2%)	78 (43.8%)
	Female	7 (21.9%)	19 (59.4%)	6 (18.8%)	12 (36.4%)	21 (63.6%)	25 (75.8%)	8 (24.2%)	29 (87.9%)	4 (12.1%)

(a) Tau C = 0.12, S = 0.01
(b) Tau B = -0.21, S = 0.00
(c) Tau B = -0.15, S = 0.02
(d) Tau B = -0.24, S = 0.00

tion of the data which appears to make much sense. As has been noted:

> [W]omen have greater experience with non-partisan political groups such as citizens' committees, community action groups . . . or the League of Women Voters. It is possible that for women civic activism is . . . a key factor in political recruitment. Through volunteer activities women become knowledgeable about issues and acquainted with problem solving strategies; they sharpen their verbal and interpersonal skills; and they become known in the community, making connections with influentials and "proving themselves" as competent and serious both to their potential constituents and to themselves.[68]

In effect, as the preceding suggests, different "feeder" mechanisms may exist for advancing candidacies of women for public office than is the case for men. On that score:

> Findings . . . inevitably raise questions about alternative organizational settings for launching female public office holding careers. Perhaps organizations where women lay strong claim to experience, like the PTA, or where they constitute nearly the entire membership, like the League of Women Voters, provide more effective launching pads than do political parties . . . . [E]xperience outside the conventional male feeder organizations may be a prerequisite for some women who ultimately gain public office.[69]

Our other measures of politicization, also portrayed in Table 4, clearly reveal that male judgeship candidates predominantly enjoyed political backgrounds. Male candidates were considerably more likely to have served in a public office prior to their judgeship candidacy, to have played a significant role in a political campaign of a candidacy other than their own, and to have sought election to non-judicial offices than their female counterparts.

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68. Merritt, *Winners and Losers: Sex Differences in Municipal Elections*, 21 AM. J. POL. SCI. 731, 736 (1977).

69. WOMEN IN LOCAL POLITICS, *supra* note 65, at 219.

In sum, the data clearly demonstrate that significant records of partisan political activity—generally considered prime paths to a federal judgeship—were predominantly associated with the more traditional male judgeship candidates. Political campaign activity, perhaps the greatest contribution which an individual could make to her/his party, was most associated with white male nominees. Gender differences existed on all of our politicization measures, and partisan political backgrounds did not appear to be a means by which female candidates were located for judgeship vacancies. There is some suggestion in our data, however, that significant speechmaking (possibly of a civic nature), was a route by which the potential candidacies of some women attorneys could become visible.

Our findings comport well with one researcher's assertion that while Carter's nominees were generally more active partisans than those appointed by Presidents Ford, Nixon, and Johnson, "women appointees were the major exception to this rule."[70] This same researcher noted of Carter's circuit appointments, "[in his] quest to appoint well qualified women and blacks . . . Carter . . . departed from the political criteria that have traditionally played such an important role in the selection process (and still play a role for white males)."[71] While recognizing that the female appointees were not generally partisan activists this is not necessarily to say that they were, in any sense, apolitical. Here, our data is suggestive of the following conclusion:

> If we redefine political activism from the traditional emphasis on holding party or public office and take into account the different patterns of political participation for women we see that our women judges are not politically passive . . . . Almost all have served on appointed blue ribbon citizen committees of some sort; most have served on several. Thus, they demonstrate an interest in and commitment to public service. Almost 90 per cent show a commitment to feminism, ranging

70. Goldman, *supra* note 55, at 351.
71. *Id.* at 352.

> from giving speeches to taking sex discrimination cases to being delegates to the International Women's Year Conference . . . . Thus, it appears that our women judges are political, but do not follow the same participation pattern as their male peers.[72]

4. *Career Patterns*

The final area of our focus—the career patterns and litigation records our nominees developed prior to their judicial appointments—is the area in which one would expect to find the greatest differences between the nominees. If, indeed, establishment values prevailed in the appointment processes which resulted in the creation of a virtually exclusive white male bench in the past, it would be expected that women (and other "non-traditional" candidates—a classification including all women and non-white males) would evidence alternate career paths to their judicial appointments. That this is the case is clearly suggested by the ABA Committee ratings earned by male and female nominees as portrayed in Table 5. Male candidates were

TABLE 5 - ABA Rating By Nominee Gender[(a)]

		ABA Rating			
		Extremely Well Qualified	Well Qualified	Qualified	Not Qualified
Nominee Gender	Male	14 (7.8%)	91 (50.8%)	71 (39.7%)	3 (1.7%)
	Female	1 (2.9%)	6 (17.6%)	27 (79.4%)	0 (0.0%)

(a) Tau C = 0.20, S = 0.00

nearly three times as likely as females to receive one of the ABA's two highest candidate designations, while women candidates were nearly twice as likely as males to receive one of the ABA's two lowest designations.

The differential in ABA ratings was even more graphic when *all* non-traditional candidates (i.e., women *and* non-white males) were compared to white males in our analysis. (TAU

72. Martin, *supra* note 27, at 313.

C=0.41, S=0.00) Nearly four times as many white males (9.6%) were designated "exceptionally well qualified" when compared to non-whites and females (2.6%), with 86.7% of the ABA's highest designations going to white male candidates. Under one quarter (24.7%) of the non-traditional candidates received the two highest ABA designations, while a substantial majority of white males (68.4%) enjoyed this distinction. Women candidates, and particularly non-white women, received the relatively least favorable ratings from the ABA Committee. If, as it is contended, the ABA ratings are a reflection of the nature of a candidate's professional credentials (as measured, perhaps, by "mainstream" criteria valued by the most successful elements in the bar) we should expect to find great differences in the career paths and litigation records between the categories of judicial nominees under analysis. Our data included numerous indicators of the nature of the legal careers from which judgeship nominees emerged. Among them were measures of the following:

1. Years at bar
2. Highest court before which a nominee has been admitted to practice (state court, U.S. district court, court of appeals, U.S. Supreme Court)
3. Prior judicial experience
4. Prior prosecutorial experience
5. Clerking experience with state supreme court justice, U.S. district or appeals court judge, U.S. Supreme Court Justice
6. Legal aid or public defender experience
7. Last job prior to nomination

The data on years of legal experience and court admissions (presented in Tables 6 and 7) comported quite well with the thrust of the ABA ratings. Clearly male judges enjoyed greater years of professional experience prior to their appointment than did women candidates. (TAU C=0.20, S=0.0) Indeed, a full third (33.3%) of the women nominees had under fifteen years of professional experience while more than half (57.5%) had under twenty years. The comparable figures for male candidates were substantially lower—8.5% and 23.1% respectively. On the other end of the experiential scale less than one-fourth (24.2%) of the women candidates had been in the legal profession for over

TABLE 6 - Years at Bar By Nominee Gender[(a)]

		Years At Bar					
		6-10	11-15	16-20	21-25	26-30	31+
Nominee Gender	Male	1 (0.6%)	14 (7.9%)	26 (14.6%)	46 (25.8%)	46 (25.8%)	45 (25.3%)
	Female	1 (3.0%)	10 (30.3%)	8 (24.2%)	6 (18.2%)	4 (12.1%)	4 (12.1%)

(a) Tau C = -0.21, S = 0.00

TABLE 7 - Highest Court Admission By Nominee Gender[a]

		Highest Court Admission			
		State Courts	U.S. District Courts	U.S. Court of Appeals	U.S. Supreme Court
Nominee Gender	Male	3 (1.7%)	33 (18.8%)	42 (23.9%)	98 (55.7%)
	Female	5 (15.2%)	7 (21.2%)	7 (21.2%)	14 (42.4%)

(a) Tau C = -0.11, S = 0.02

twenty-five years as compared to a majority (51.5%) of the male nominees.

These data are even more dramatic when white male candidates are juxtaposed with *all* non-traditional nominees. (TAU C=0.36, S=0.00) Indeed, only 19% of the white male nominees had under twenty years to their credit in the legal profession, while 57.6% of the white males had more than twenty-five years in legal experience.

Similarly, on another measure which could be related, albeit cautiously, to professional prestige, Table 7 demonstrates that male candidates tend to have been admitted to practice before a "higher" level court than women. (TAU C=0.11, S=0.02) It should be noted, however, that admission to practice before prestigious courts, such as the U.S. Supreme Court, is often largely honorific— requiring only a sponsor and the payment of a fee. Perhaps the data do reflect, however, the tendency of women and other non-traditional nominees not to share equally in the accoutrements of status as defined by the established white male bar. Indeed, we would expect differences among our categories of nominees to be quite pronounced as we consider, in greater detail, specific facets of the nature of their professional experience.

One career variable of considerable interest in distinguishing among the paths to judgeships taken by different types of nominees focuses on the candidates' last job prior to their pend-

ing judicial appointment. The modal job from which white male candidates moved to the federal bench was the private practice of law with nearly half (49.6%) following that route. Substantially fewer women (27.3%) (and non-traditional nominees in general (25.7%)) 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 are not widely staffed by women and non-white attorneys. Indeed, even when engaged in private practices in prominent firms, women are unlikely to enjoy partnerships which could lend visibility to a judgeship candidacy. "Of the 1520 partners distributed among the large New York firms in 1977, twenty-nine were women. This represented almost a tenfold increase since 1971."[73] By 1980, "of the 3987 partners in the top fifty law firms in the country, eighty-five were women. This is . . . only about 2 percent . . . . As of 1980 . . . more than a quarter of the large firms . . . have no women partners."[74]

The modal job held by women candidates (and non-traditional nominees in the aggregate) prior to their current appointment was another judgeship—with 51.5% of the women (and 59.5% of all non-traditional nominees) so employed. In a similar vein, more than twice as many women (12.1%) than men (5.6%) held law school professorships at the time of their judicial appointment. Indeed, 15.4% of the white women were so employed as compared to only 5.1% of the white males.

These figures demonstrate that for the non-traditional nominee the prominence necessary to become a viable candidate for a federal judgeship often was not readily available through successful private law practices. Lower court judgeships could have relatively greater appeal to non-traditional attorneys, including women, than to white males since "highly qualified men find it difficult to take the kind of salary cut the bench entails at their level of professional development."[75]

Also of significance is the relatively large number of practicing academicians found among the white women gaining entry to the federal bench—over two times as great a proportion than

73. EPSTEIN, *supra* note 9, at 179.
74. *Id.*
75. *Id.* at 129.

evidenced by white males, non-white males, and non-white women. Apparently, with few women creating a pool for judgeship candidacies in private practices or on the bench, the search for females turned to the academy. The relatively large proportion of female academicians appointed to the bench suggests "that what the women lacked in political credentials, they compensated for by their professional scholarship."[76] Further, "[w]omen judges have continued their intellectual interests, each publishing an average of 11 articles or books."[77] Our data, too, revealed a more prolific, though not statistically significant, publication record among women nominees.

These differences among our nominees in the jobs they held immediately prior to their federal judgeship appointments are suggestive of broader differences in their career backgrounds. In Table 8 several of these differences are examined including whether the nominees had ever had judicial experience, prosecutorial experience, clerking experience with a state supreme court justice or federal judge, and legal aid or public defender experience.

The data in Table 8 are difficult to characterize. There appears to be no relationship whatsoever between gender, in the aggregate, and the likelihood of a judicial candidate enjoying some measure of prior judicial experience. Women were somewhat more likely than men to display legal aid/public defender experience and prestigious law clerking experiences in their background—though the relationships were far from dramatic and did not approach conventional criteria of statistical significance. On the other hand, women nominees were only half as likely to have gained prosecutorial experience during their legal careers as the male candidates. White female nominees in particular did not have prosecutorial experience in their backgrounds, with only 15.4% having been employed in that fashion. The comparable figure for all other nominees was a substantially more robust 48.6%, more than three times the level associated

76. Martin, *supra* note 27, at 312.
77. *Id.*

TABLE 8 - Career Experiences and Nominee Gender

		Career Experience							
		Judicial Experience[a]		Prosecutorial Experience[b]		Legal Aid Experience[c]		Clerking Experience[d]	
		Yes	No	Yes	No	Yes	No	Yes	No
Nominee Gender	Male	97 (54.5%)	81 (45.5%)	86 (48.3%)	92 (51.7%)	54 (30.7%)	122 (69.3%)	35 (19.7%)	143 (80.3%)
	Female	19 (57.6%)	14 (42.4%)	8 (24.2%)	25 (75.8%)	14 (42.4%)	19 (57.6%)	9 (27.3%)	24 (72.7%)

(a) Tau B = -0.02, S = 0.37
(b) Tau B = 0.18, S = 0.01
(c) Tau B = -0.09, S = 0.09
(d) Tau B = -0.07, S = 0.16

with white females. Clearly, a prosecutorial career experience was not a prime path by which women, particularly white women, gained prominence for their judicial candidacies. Since the prosecutorial ranks have always been a traditional "pool" from which judicial candidates are drawn, our findings are suggestive of the broader search efforts necessary to promote the judicial candidacies of women.

Some of the patterns in our data are more clearly revealed when the scope of our analysis is expanded to compare the professional experiences of white male nominees to *all* non-traditional candidates or when the data is disaggregated to examine all categories of judicial nominees on race and gender lines. Thus, for example, while there was no pronounced relationship between the gender of a nominee and prior judicial experience, this occurs because the substantial level of judicial experience among non-white male nominees renders male and female candidates indistinguishable in the aggregate. Non-traditional candidates were, however, considerably more likely to have served as a judge at some time during their careers than was the case for white males. (TAU B=-0.17, S=0.01) Indeed, less than half of the white male nominees (48.9%) as compared to approximately two-thirds (66.2%) of the non-traditional candidates (and 73.2% of non-white male candidates!) had so served.

No significant differences existed in the law clerking experience of white male and non-traditional candidates, yet disaggregating the data reveals that white female nominees were relatively the most likely to have served in a prestigious judicial clerkship. Indeed, 30.8% of the white females had served in such a capacity as contrasted to only 19.5% of all other candidates. As was the case regarding measures of their educational backgrounds and scholarly achievements, prominent clerkships may have been another means of bringing women's candidacies to the fore.

Finally, focusing on the legal aid and public defender experience of our nominees reveals that such past employment, while associated somewhat more with women than men, was even more strongly associated with non-traditional candidates in gen-

eral (TAU B=0.25, S=0.00) and non-whites in particular. (TAU B=0.25, S=0.00) Indeed, more than twice as many non-white nominees (48.6% of all non-whites and 53.7% of the non-white males) had served in this capacity than was the case among the white males (23.7%). It is not surprising to learn that non-traditional attorneys whose legal careers had included what might be characterized as a "social work" component were identified as judgeship candidates. For example, as pertains to women attorneys:

> [A] 1970 study . . . suggested that law school gatekeepers held pervasive beliefs that women were motivated by desires . . . to help the poor and oppressed . . . . Representing the poor and disadvantaged is one of the major areas of 'women's work' in the law. It is a realm in which women have found work in the past and in which they still tend to cluster.[78]

Indeed, other data demonstrate that women disproportionately take "legal services" positions and, presumably, assertions such as those made above are equally applicable to all non-traditional attorneys.[79]

Our data also included several measures focusing on the litigating experience of the nominees. These included estimates of the frequency of their court appearances, the percentage of their litigation which occurred in federal, state, or other courts, and the percentage of their litigation which involved civil versus criminal matters. Each candidate's Judiciary Committee questionnaire responses also provided detailed case studies of what were, in the candidate's view, the ten most significant legal matters they had personally handled during their careers. Assuming that these case studies offered important evidence of how nominees perceived and characterized their own careers, each case was coded on a number of variables for each nominee. Summary variables were also created for each nominee based on aggregating the data obtained from the ten case studies. Included were measures of the percentage of the case studies arising in the federal judiciary, involving civil law, and involving appellate courts. Finally, each case study was also coded according to its subject

78. EPSTEIN, *supra* note 9, at 38 & 120.
79. *Id.* at 99.

matter and an attempt was made to operationalize the concept of a "non-traditional" legal practice based on the summary aggregation of the subject matter of the case studies for each nominee.[80]

Gender differences in the litigation patterns of the nominees were not pronounced, although some were statistically significant. The greatest litigation differences emerged in the location of litigation with women nominees relatively more likely to litigate in federal courts than men (TAU C=0.11, S=0.01) and considerably less likely to litigate in state courts. (TAU C=0.09, S=0.04) Indeed, 68.4% of the male nominees litigated the majority of their cases in state courts, with the corresponding figure only 42.9% for women. Further examination of the volunteered case studies outlining the most important cases the nominees had personally handled reveals that women designated at least 70% federal cases 47.6% of the time and *all* federal cases 19.0% of the time. Male nominees, on the other hand, elected at least 70% federal cases as among their most important only 20.6% of the time and all federal cases just 4.5% of the time. Thus, while our data may suggest that women, particularly white women, are relatively more likely to be recruited for judgeships from outside of legal practices, there is significantly greater tendency for women nominees to have litigated predominantly in federal courts.

It should also be pointed out that, while not statistically significant (TAU C=0.05, S=0.08), our data suggest that the female judgeship candidates were not quite as heavily involved in

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80. The subject matter codes used to categorize the case studies were as follows: Business Organization and Management, Contracts, Real Property, Torts, Personal Finances, Family and Estate, Criminal, and several Public Law categories (Governmental Regulatory Powers, Prisoner and Defendant Rights, Equal Protection and Abuse of Governmental Authority). The effort to characterize a "non-traditional legal practice" proceeded from conventional wisdom concerning what types of individuals were generally considered to be "mainstream" attorneys and likely candidates for federal judgeships. Non-traditional legal practice was conceptualized as work in the areas of criminal defense, public law plaintiff (or defendant against governmental regulatory activity), tort plaintiff, personal finances, or family law. When a nominee acted in these capacities in at least four of the ten case studies developed in the questionnaire he or she was considered to enjoy a non-traditional legal practice.

litigation as were the males. Thus, 75.0% of the women nominees claimed to appear in court "frequently" while 85.2% of the male candidates opted for this response. The relatively lower litigation rate among women candidates was not unexpected. There is a common perception that:

> [W]omen lawyers [do] not go to court. Like law students or summer [interns], women [do] research and brief writing . . . . *Time* magazine made it all clear in a March 6, 1964 article that described the legal profession's view of women lawyers as "unfitted for trial work, suited only for matrimonial cases or such backroom fields as estates and trusts."[81]

While such perspectives have changed and undoubtedly continue to do so, their residual effect may be evident in the litigation records of female attorneys with sufficient legal experience to be judgeship candidates.

Of greater interest than the extent and location of one's litigating experience, is its substantive nature. Such a focus helps to distinguish among the various classes of nominees—particularly when the analysis extends beyond a simple gender classification. In the aggregate, the data reveal that non-traditional nominees were more heavily involved in criminal litigation than their white male counterparts—although this finding is primarily a consequence of substantial criminal law practices being associated with non-white nominees. White females, on the other hand, emerge as most likely to have engaged in a primarily civil law practice with 71.4% asserting that over 90% of their cases were civil in nature. Only 48.6% of all nominees claimed to have practices so disproportionately civil in nature. Returning to the nominees' case studies for further elaboration of this finding, 94.2% of the white women designated at least 70% civil cases as among their most important as compared to only 74.8% of all other nominees.

Finally, it should be noted, non-traditional nominees were more likely than white males to have been recruited from what we have operationalized as a non-traditional legal practice on the basis of coding the subject matter of the ten volunteered

81. EPSTEIN, *supra* note 9, at 103-04.

case studies. (TAU B=0.14, S=0.03) Thus, a solid majority (55.7%) of the non-traditional nominees (57.9% of the non-whites, 60.6% of the non-white males and 47.8% of all women) were classified in this fashion as compared to 40.2% of the white males (and 41.5% of all whites).

In sum, the data clearly demonstrate that white male candidates and what we have labelled "non-traditional" nominees travel different routes to the federal bench. As importantly, significant differences existed among the career patterns evidenced by different categories of non-traditional nominees.

That stark career differences would appear among our categories of nominees was suggested by their widely divergent aggregate ABA ratings. White male candidates were found for judgeships generally after travelling a well worn path established by a time honored selection process. They enjoyed long years of legal experience, prestigious courtroom admissions and, for the most part, highly successful private practices.

Such prominent and successful private practices were not likely to be fertile grounds for locating viable non-traditional judgeship candidates. Non-whites, however, were recruited from sitting judgeships, or, more generally, from among those who had gained some public prominence in their legal careers through their judicial experience. Non-whites, particularly males, were relatively most likely to have legal aid backgrounds and to have served in predominantly criminal practices.

While women nominees appeared less likely to be among the heaviest litigators, their litigation tended to occur disproportionately in civil law cases found in the federal court system. In seeking women for the bench, recruitment authorities turned disproportionately to the law schools where several women attorneys had gained prominence as academicians. Their scholarly achievements were also evidenced in their greater likelihood to have served in prominent law clerkships than other candidates. These findings are of much interest, suggesting that "exceptional" women attorneys became prominent candidates for judgeships by escaping their stereotyped legal roles and, perhaps, by

being at the forefront of professional developments which were altering those very roles during the decade of the 1970's. Indeed, the following characterization of women attorneys during the 1950's only partially captures the professional world of women federal judgeship candidates during the late 1970's.

> Surely there was a chill wind for women in the law schools of the 1950's . . . . Although women were long accepted as criminal defenders at legal aid, where salaries were low, United States Attorney offices would not assign women to the criminal division. Pace setting law firms wanted no women lawyers, prestigious judicial clerkships were off limits to females. With only a handful of exceptions, women did not teach in law schools.[82]

Yet much change has been occurring. For example, while only three women had served as Supreme Court clerks in the history of the Court prior to 1971, between 1971 and 1976 fourteen additional women had so served.[83] Our data indicate that while women have made less substantial inroads in lucrative private practices, the doors to several other arenas of professional status and success have begun to open. At bottom, however, it should be stressed that non-traditional candidates tended to emerge disproportionately from what we have identified as non-traditional legal practices.

C. The Carter Record—Concluding Thoughts

Our research has revealed that the non-traditional judgeship candidates who emerged in large numbers as a consequence of the Carter Administration's affirmative action efforts differed greatly from the traditionally recruited white males in ways that went well beyond the obvious racial and gender lines. The road to the bench predominantly exhibited by white male nominees—with its inclusion of many traditional measures of personal and professional success—was not widely travelled by women and non-white nominees and, clearly, affirmative action did not lead to the appointment of individuals who were the mirror images of those they would join and sit beside on the bench. Rather, along with great diversity within their ranks, en-

82. Ginsburg, *supra* note 60, at 4.
83. *Id.* at 7.

hanced gender and racial representation on the bench added substantially to pluralism in the federal judiciary with increased representation of, among others, the young, the relatively less affluent, the less "politically" active, attorneys with non-traditional and, especially, criminal law practices, and attorneys with public defender/legal aid backgrounds.

It is not an easy task to measure "quality" among judicial nominees, and indeed, it is highly unlikely that a consensus could ever be fashioned around the question of what goes into the making of a "good" judge. We have, however, examined white males and all other Carter nominees on a host of variables, some of which are bound to be an integral part of any analyst's measure of quality and all of which would undoubtedly find their way into some analyst's metric. On some such measures, white male nominees appeared to come out "ahead" of their non-traditional counterparts. Often, these variables were related to general societal norms attached to professional prestige, stature, and success. Thus, white male nominees were significantly older, wealthier, more experienced, more likely to practice before higher level courts, and more likely to have gained a higher ABA rating than non-traditional designates. On most of our measures, however, non-traditional nominees appeared equally qualified or, indeed, fared somewhat "better" than the white males. Most prominent among these, perhaps, was the greater propensity for the non-traditional candidate to have gained judicial experience prior to his or her current federal appointment. It has been argued that:

> [T]he credentials of the black, women, and Hispanic Carter appointees and nominees have been impressive . . . . Indeed, it is my distinct impression based on over 16 years of research on the backgrounds of federal judges that the credentials of the women and minorities chosen by the Carter Administration on the whole may even be more distinguished than the over-all credentials of the white males chosen by Carter and previous administrations.[84]

84. Goldman, *supra* note 29, at 492-93.

While it is not our intention in any sense to argue that the non-traditional nominees of the Carter Administration were objectively "better" than their white male counterparts, given the data we have presented it is certainly difficult, if not impossible, to argue convincingly that the quality of the federal bench has been diluted by affirmative action. Indeed, on measures ranging from educational training to several aspects of legal backgrounds, litigating behavior, and publication records of the nominees it is impossible to draw meaningful distinctions between white male and non-traditional nominees that could lead to assessments of differential quality. Furthermore, there is some evidence which supports the threshold theory alluded to earlier in the analysis. That is, perhaps some criteria for the advancement of women and non-whites were placed at a relatively higher level of attainment before such individuals were given serious consideration. This appeared to be the case when the questions of prior judicial experience and the most recent employment of judgeship nominees were considered. Indeed, the data viewed, including in particular the ABA ratings of judicial nominees, suggest that the primary issue implicated by the judicial selection process during the Carter years was not necessarily merit versus affirmative action. Rather, it appears the central issue may have been the question of whose definition of merit would prevail? That is, would selection outcomes reflect the traditional standards of the established legal (and governmental) community or, alternatively, would new interests active in the selection process be successful in imposing their standards of merit to a greater extent than ever before on recruitment outcomes?

The major differences exhibited in the paths to the federal bench in this analysis were directly related to the different socio, economic, and political roles played, in the aggregate, by the groups to which non-traditional candidates belong in American society and to the opportunities available to members of these groups. Perhaps of equal importance, non-traditional candidates differed substantially from each other as well. Thus, recruitment strategies aimed at increasing the representativeness of the federal judiciary must begin with the recognition that different avenues to prominence may predominate in the life experiences of white males, non-white males, white women, and non-white women. Representativeness in the judicial branch is difficult to come by. Therefore, if an administration chooses to pursue it, as

the Carter Administration clearly did, such representativeness can only be realized through a broad search commitment to locating qualified candidates in non-traditional settings and overcoming the bias inherent in longstanding judicial selection norms and traditions.

The data we have examined regarding the alternative career paths to the federal bench travelled by the representatives of divergent groups in American society must be considered in a temporal context. That is, while women and other "non-traditional" candidates travelled different paths to the bench than did white males, this does not suggest that the differences observed must of necessity continue unabated in the future. Several possibilities emerge for the structure of opportunities available for future patterns of judicial recruitment. It is possible that as the number of non-traditional attorneys continues to increase on the bench and in the legal profession writ large, barriers will be broken down and distinctive non-traditional legal career patterns will begin to disappear as the former "outsiders" take their place in the established legal order. A second scenario would suggest that if non-traditional paths to the federal bench continue to be accepted, and to some degree rewarded, white male candidates may begin to emerge from these recruitment patterns in significant numbers as well and a reassessment of what constitutes a "traditional" path to the bench would be called for. Finally, the possibility exists that the distinctive career paths leading to the bench exhibited by the different groups among our candidates will continue to distinguish among their recruitment patterns. What mix of scenarios is controlling must await the judgment of future recruitment patterns and scholarly analysis.[85]

III. CODA: GENDER, AFFIRMATIVE ACTION, AND RECRUITMENT TO THE FEDERAL BENCH—THE REAGAN RECORD

The record developed by the Reagan Administration during

85. I am indebted to Beverly Blair Cook for initially raising the concerns addressed in this section of the analysis.

its first three years regarding the representativeness of judicial selection outcomes clearly does not approach that of the Carter Administration but, at least where women are concerned, still surpasses that of all other presidents. The appointment record regarding blacks, however, has been considerably more problematic as has been the overall record of non-traditional nominations to the U.S. Courts of Appeals where the Administration has placed its dominant control.

Of his first 121 appointments to the district and appeals courts, Reagan has nominated only fifteen candidates (12.4%) who were not white males.[86] Nine women have been placed on the district courts and to date, *none* have been appointed to the U.S. Courts of Appeals.[87] Only one black federal jurist was selected by the end of Reagan's third year in office—and his appointment did not bring any greater representativeness to the bench since the appointee was already a sitting district court judge.[88]

The realities of the Reagan record, particularly during his first two years in office and in the wake of President Carter's infusion of non-traditional nominees into the federal judiciary, have resulted in strident criticism from the advocates of a more representative judiciary. As stated by Susan Ness, an attorney who has served as a spokesperson for the National Women's Political Caucus on judicial selection matters and who continues to consult in this area, "[h]is record is absolutely deplorable . . . and it is not as though he hasn't had ample opportunity."[89] Lynn H. Schafran of the Federation of Women Lawyers adds:

> I'm not surprised that there are almost no women and minorities being nominated . . . . As one can see from the administration's failure to appoint women and minorities to administration posts, there is a lack of appreciation, if not disdain, for the fact that women and minorities are as capable of executing

86. Compiled from Cohodas, *supra* note 6, at 2533.

87. *Id.*

88. *Id.*

89. Cohodas, *Reagan Slow in Appointing Women, Blacks, Hispanics To Federal Judiciary Seats*, 39 CONG. Q. WEEK 2559 (1981).

> the tasks of government and the judiciary as are the more privileged members of society.[90]

It is also important to note of the Reagan record that most women and minority group members who have been appointed to the federal courts have been seated on district courts where Republican senators have been given the upper hand in appointment decisions. On the circuit courts, where the Administration has exercised more direct control, the record of non-traditional appointees has been considerably weaker. The distinction between the Administration's posture at the district and appeals court levels has even been attested to by Bruce Fein, an associate deputy attorney general active in the judicial selection process. "Fein said the Administration for the most part is deferring to Republican senators in selecting U.S. district court judges from their states, while at the appeals court level the administration looks for its own candidate."[91] Such an admission has further fueled criticism of the Administration inasmuch as the district court appointment outcomes have been considerably more representative than those on the circuit bench. The Administration, however, continues to place blame on senators for not coming up with the names of potential women and minority nominees. "The administration continually blames senators for failing to come up with women's names . . . but Reagan's record on the circuit courts basically makes clear what the commitment is."[92]

That substantially different recruitment outcomes from a representational standpoint have emerged from the Carter and Reagan Administrations is quite understandable and attests to the prominence of the concept of "representativeness" and the status of affirmative action in the two presidencies. "The Reagan Administration set[s] a different public posture with regard to affirmative action than did the Carter Administration. Where the Carter Administration aggressively sought to recruit women, blacks, and other minorities for judgeships, the Reagan Admin-

90. *Id.* at 2560.
91. Washington Post, Aug. 19, 1981, at A2, col. 6.
92. Cohodas, *supra* note 6, at 2534.

istration has appeared passive if not indifferent—with one conspicuous exception."[93] Indeed, it is easy to find statements associated with each of the Reagan lieutenants in the judicial recruitment arena asserting that "merit" and conservative philosophies were the paramount concerns in appointment processes which would be completely "color blind" and "gender blind." For example, early on in the Administration's tenure prior to consummation of any appointments, Attorney General William French Smith was asked "[w]ill efforts be made to continue the previous administration's policy of increasing the number of women and minorities on the federal bench?"[94] Eschewing a more noncommittal statement, Smith replied, "[a]s I have said, the principal qualification will be the merit and quality of the candidate and selection will be made without regard to race, creed, color, sex, and so on."[95]

Others in the Administration have echoed Smith's stance at every opportunity. Thus, according to Bruce Fein, "[o]ur view is that the law is, and should be color blind, and we look at merit."[96] As stated by Counsel to the President and judicial selection functionary Fred Fielding during the first year of the Administration:

> I don't think that it is accurate that we have not sought out and have not considered women and minorities . . . . But there are some people who think that courts should be staffed, if you will, on a basis of representativeness, and really, we think they should be staffed on the basis of qualifications.[97]

In a similar vein, Deputy Attorney General Edward Schmults, a coordinator of judicial selection activity in the Justice Department added, "[w]e certainly are interested in reaching out and into the applicant pool for well qualified minorities and women, but I think once people are in that pool, we are looking for the best judges we can find."[98]

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93. Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 344 (1983).

94. *Interview With William French Smith*, 13 The Third Branch 1 at 4 (1981).

95. *Id.*

96. Washington Post, Aug. 19, 1981, at A2, col. 5.

97. Cohodas, *supra* note 89, at 2560.

98. *Id.*

In effect, such statements represent a disavowal of affirmative action as defined by the Carter Administration where "qualified" was deemed the bottom line requirement for the non-traditional nominee. In the eyes of Jonathan Rose, Reagan's Assistant Attorney General for Legal Policy, the Carter approach "stretched it from the standpoint of qualifications."[99] According to Rose, "[w]e approach this from a different philosophy than the Carter administration. We did not adopt a view that we should strive for a quota or a goal of a particular number of women or minorities to be put on the federal bench."[100]

With such a philosophy in hand, it appears that the Administration makes no special effort to facilitate the appointment of non-traditional candidates even in those rare instances when women and minorities emerge as prime contenders for judgeship seats as a consequence of "traditional" recruitment processes. In fact, this appears to be the case even though non-traditional candidates may undergo more intensive public scrutiny and ideological litmus tests than do white male nominees. A case in point was the Administration's political decision *not* to nominate Judith Whittaker as its first female appeals court judge in late 1981. Ms. Whittaker, a corporate attorney with Hallmark Cards, graduated first in her law school class, is a trustee of Brown University, was deemed "qualified" for a circuit judgeship by the ABA's Standing Committee on Federal Judiciary, and received support for her appointment from Donald Lay, Chief Judge of the circuit on which she would serve.[101] Opposition to her candidacy emerged from the conservative right and focused on allegations and innuendos regarding Ms. Whittaker's position on many substantive issues—particularly ERA and abortion. Whittaker was never nominated and, as the candidate stated it, "[i]t really is aggravating. This has been a campaign of misinformation instigated by a very few people. My feeling is that the very conservative opposition tends to zero in on women. I don't think they make such irreponsible charges that men are

99. USA Today, Nov. 19, 1982, at 8A, col. 5.

100. Cohodas, *Reagan's Judicial Selections Draw Differing Assessments*, 41 CONG. Q. WEEK 83, 84 (1983).

101. Washington Post, Dec. 23, 1981, at A1, col. 6. *See also* Washington Post, Jan. 13, 1982, at C1, col. 1.

pro-abortion."[102] According to Susan Ness, "[w]omen are being singled out."[103] In the wake of the Whittaker non-appointment, presidential counsel Fred Fielding admitted that "[t]he abortion issue most often comes up in regard to potential women candidates . . . . I can't comment on why it does. I don't know the answer."[104]

Despite the problematic nature of the opposition to Whittaker the Administration dropped her appointment without any signs of a struggle. According to one report:

> [T]he decision to look at other candidates was a "consensus" decision among White House and Justice officials. "What happened here is no different than anything that happens with a whole variety of people who are candidates for appointment. When opposition develops, you look and see what the support is," [Deputy Attorney General Schmults] said. In this case, he indicated, officials decided there was not enough.[105]

Reacting to the Whittaker scenario, one columnist opined:

> Judith Whittaker is, by all informed accounts, an outstandingly qualified person to be nominated . . . . She was, in fact, outstanding enough . . . until she became the target of a New Right smear campaign. Then, in a real show of principle, the administration dropped her like a hot potato. Instead of telling them to buzz off, the White House listened and the next thing you know you have . . . Schmults acknowledging that Whittaker has been dropped . . . because there was not enough "broad based support for her." This brings to mind a picture of Schmults placing his hand over the heads of three judicial nominees to see which one gets the highest rating on the audience applause meter. That may be the way we pick television game show winners, but it is not the way we are supposed to pick judges for the federal bench.[106]

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102. Washington Post, Dec. 23, 1981 at A1, col. 6, & A5, col. 1.
103. *Id.* at A5, col. 1.
104. *Id.* at A5, col. 2.
105. *Id.* at A5, col. 6.
106. Washington Post, Jan. 13, 1982, at C1, col. 1.

Incidents such as these have left the advocates of a representative judiciary frustrated and, for the most part, resigned to a no-win situation. Recruitment processes are seen as closed political transactions, lacking the fluidity and outreach of the Carter years. Groups that were intimately involved in selection processes under Carter and which were in direct contact with the Justice Department now must attempt, at best, to have some influence on external ABA candidate evaluation processes.

> "It's so dreary—it's just all white males," says Ann Macrory, who worked for the now defunct Judicial Selection Project while Carter was in office . . . . "As Mr. Reagan said, judicial appointments are his business," says Arnette R. Hubbard, who chairs the judicial selection committee of the National Bar Association, an organization of black lawyers . . . . "Everyone's out of it," says Nan Aron, director of the Alliance for Justice, an association of public interest lawyers. "I think the sense is, we wouldn't have much impact." Even Brooksley Born, chairman of the ABA rating committee, says "I don't see the kind of grassroots participation . . . that we saw during the Carter administration."[107]

At bottom, the selection process is now seen as a game reserved for long standing traditional players. To sum up, "[t]he nature of the judicial selection process is so closed at this point and the likelihood of getting first quality women or blacks through the process is so remote, that people have [basically] given up."[108]

IV. CONCLUSION

Juxtaposing federal judicial selection activity during the Carter and Reagan years amply demonstrates that an administration's ideological and political goals, its judicial selection procedures, and its judicial recruitment outcomes are intimately linked. A representative bench can be recruited and, our data suggests, without any decline in judicial "quality." Such an out-

107. USA Today, Nov. 19, 1982, at 8A, col. 5 & 6.
108. Cohodas, *supra* note 100, at 84.

come, however, would follow only in the wake of a positive commitment to non-traditional, broad based outreach efforts. "An administration's goals and . . . recommendation procedures are interrelated. An administration determines its procedures based on the goals that it wishes to accomplish. The Carter emphasis on 'affirmative action' led it to create the panels, while Reagan has sought conservative jurists through a more traditional, non-panel system."[109] For numerous reasons, the Reagan Administration has been less successful than its predecessor in recruiting women (and other non-traditional candidates) to the bench. Thus, focusing on traditional selection criteria, searching for philosophically conservative candidates, and refusing to mandate broadened search procedures have all limited the likelihood that candidates would emerge who were *not* white males. Judged on its own terms and by those of its prime constituencies, the Reagan Administration has been quite successful in its judicial selection behavior. Through the eyeglasses of advocates of a more representative American bench, "success" has been sorely lacking.

109. Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection Under Reagan and Carter*, 1 YALE L. & POL'Y REV. 299, 331 (1983).