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**Femocrats, Gender, and Judicial Selection: The Insider-  
Outsider Interaction Factor and Policy Implementation**

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## **A. Introduction**

Since President Franklin Delano Roosevelt appointed the first woman to the federal bench in 1934, Florence Allen, the number of women judges presidents have appointed has varied considerably. This reality is contrary to a perception of slow and steady progress now that women now make up half of all law school graduates. In fact, President Bush appointed significantly fewer women than did President Clinton (22% versus 28% [Diascro and Spill Solberg 2009, 292]). Judicial scholars have measured the gap between the qualified eligible pool and numbers of women chosen (Cook 1978, 1983, 1984a, 1984b), identified relevant demographic determinants (Cook 1980b, Martin 1982), highlighted the role of judicial appointments in presidential electoral politics (Clark 2002, Harrison 1988, Martin 2004), and documented the importance of political ideology (Allen and Wahl 1987, Martin 1982), all important contributions. But these factors alone do not explain the variation. Policies, whether they are executive orders, bureaucratic regulations, legislation, or constitutional provisions, are not self executing. People implement policies. Documenting how women's judicial appointments came about contributes to our understanding of policy implementation. Identifying the partnerships between feminists inside the administration and interest groups and social movements outside of government responsible for this policy success contributes to our understanding of how social movements engage the state. The case of women's judicial appointments is also instructive for those who want to reverse the dramatic decline and ensure that the Obama Administration makes diverse and representative judicial appointments and that the Senate confirms them.

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Drawing on archival sources, interviews, and secondary sources, I argue that the insider-outsider collaboration during the Carter Administration explains feminist policy success. Carter appointed more women to the bench than all previous administrations combined and put the issue of the race and gender of judges on the public agenda. I identify six critical assets insiders can provide to movements from identifying an impending decision and telling outsiders which lever to pull and when, to proposing strategies, to including movement adherents in decision making, to framing the issues, to bringing movement dissatisfaction to the attention of key decision makers, to advocating internally for movement goals. Using influential feminists in the Carter Administration as a case study of these assets at work, I show that without insiders' strategic knowledge, feminist groups and other social movements cannot be as effective at exerting political pressure at the right points and moments, while in the absence of outsiders' intensive political pressure, insiders cannot obtain the leverage and support they need to implement bold changes. To support my argument, I first consider the literature on feminists engaging the state and on feminist policy implementation. I describe the judicial selection process in general before reviewing the history of Carter's appointments in particular. I show how outside feminist groups put pressure on Carter. I review Carter's relationship with feminists and analyze his policy evolution on appointing women judges. I then briefly comment on the state of that partnership in subsequent administrations and offer some conclusions.

## **B. Femocrats Engaging the State**

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During the 1960s and 1970s, radical feminists developed theories of the state as irretrievably patriarchal, paralleling Marxist theories of the capitalist state.<sup>1</sup> Distinguishing themselves from liberal feminists whom they disdained, radical feminists valorized autonomous feminist organizing and characterized working within government or even political parties as cooptation (Chappell 2002, Kantola 2006, Kantola and Outshoorn 2007, 3-4, Outshoorn 1995, 1997, Roth 2006, Waylen 1998). Although she had used the phrase to criticize racism within the feminist movement, Audre Lorde's feminists repeated her famous quotation, "the master's tools will never dismantle the master's house" (Lorde 1984, 110-114) as a mantra for not engaging in conventional politics (Hartmann, forthcoming). After 1980, however, many radicals joined socialist and liberal feminists in favoring engagement (Allen 1990, Eisenstein 1984, Watson 1990). As feminist policy gains evaporated under President Ronald Reagan, Prime Minister Margaret Thatcher, and others, feminists recognized the dangers the neo-liberal state posed (Banaszak, Beckwith, and Rucht 2003). Feminists seized opportunities for policy change presented by President Bill Clinton's election (Parry 2005, Spalter-Roth and Schreiber 1995), the election of Labour Governments in Australia and the United Kingdom, the election of progressive governors (Gagné 1998), and opportunities within international and supranational organizations such as the Council on Europe, the United Nations, and European Union. In Australia, those who entered governmental administration called themselves femocrats (Chappell 2002, Eisenstein 1991, 1996, Franzway, Court, and Connell 1989, Sawyer 1990, Yeatman 1990). Those who studied the phenomenon applied the term differently, sometimes encompassing advocates within

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<sup>1</sup> Catharine MacKinnon developed this argument in the 1980s when she published her dissertation and other works (1983a, 1983b, 1989). Paradoxically, MacKinnon herself engaged the state in seeking to pass a right of civil action for those harmed by pornography, often in league with far right anti-feminists.

longstanding women's policy machinery such as the U.S. Women's Bureau (Duerst-Lahti 1989, Laughlin 2000, Rai 2003, Stetson 1995), feminists within newly created agencies from the Equal Employment Opportunity Commission to Ministries for Women (Taylor 2005), or feminist advocates within any sphere of the administration of government (political appointees or civil servants, but usually excluding elected officials<sup>2</sup>). Within the European Union and in the field of international economic development more generally, feminists developed the policy tool of gender mainstreaming to use a gender lens to evaluate all policy proposals, from trade to economic development (not just policy areas seen as women's issues, such as social policy) (See 2002 *Feminist Legal Studies*), much as environmentalists advocated environmental impact assessment for building projects. Such projects' objects were to extend feminists' reach outside of the traditional women's policy machinery.

A critical approach to engaging the state may have dominated feminist theory and activist writings in the 1960s and 1970s, but many feminists always rejected such a negative view (Tinker 1983), questioned dichotomies such as radical versus liberal and older versus younger, and theorized the state as an arena (albeit not a gender neutral one) rather than simply a unitary, monolithic tool of patriarchy (Franzway, Court, and Connell 1989, Haney 1996). The path breaking scholarly collection *Feminist Organizations: Harvest of the New Women's Movement* revealed the question in 1995 to be not whether feminists in the U.S. should engage the state, but when, and under what conditions, and to what effect. As Lovenduski put it, "effective feminist intervention in state institutions is necessary, possible, and difficult" (1997, 107). To be effective, feminists needed to

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<sup>2</sup> Santoro and McGuire (1997) see state legislators as one kind of institutional activist. A substantial literature exists on the policy impacts of women legislators, but political scientists have tended to overlook other categories of political actors.

pursue two strategies simultaneously: maintain autonomous organizations and infiltrate the state, rather than choose between them (Randall 1998). Socialist feminist historian Linda Gordon brought women social reformers under the rubric of feminism by labeling them social feminists (1994), whereas early second wavers had rejected the idea that those who favored legal sex differences such as protective legislation were feminists at all (Kenney 1992). Historian Susan Hartmann identified feminists within institutions as preceding the so-called second wave (1998a), and political scientist Mary Katzenstein argued that women working within patriarchal institutions such as the military and the Catholic Church were doing feminist work (1999). By 2008, feminist scholars began to question the periodization reflected in the wave metaphor as concealing the continuities of feminist work in the so-called doldrums (Laughlin et al. 2009), as well as broadened the definition of feminist work and expanded where to look for it. In sum, feminists reconsidered many early second-wave orthodoxies from a rejection of social feminism and engaging the state, to sharp ideological dichotomies about what constituted feminist work, to the very chronological trajectory of feminism itself.

Lee Ann Banaszak joined Katzenstein in urging political scientists to join historians and sociologists in reformulating theories of feminists engaging the state. She criticized social movement scholars following Tilly (1978) who have located social movement as independent actors outside of the State (1995; “Mobilizing In and Out,” 4).<sup>3</sup> She also criticized femocrat scholars such as Outshoorn for conceptualizing feminists inside of government as professionals or allies rather than as social movement participants (1995, 153; Mobilizing In and Out, 6, Inside and Outside the State) and

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<sup>3</sup> Bernstein (2001), for example, labels as inside strategy decisions by outside groups to compromise and work for legislation. But the groups, interest groups or social movements, are clearly outside of the government. Santoro and McGuire (1997) are a welcome exception.

called for scholars to recognize the contributions of feminists outside of the women's policy machinery. As a new institutionalist, she rejected the chronology that social movements mobilize and then enter government to secure their policy objectives. Instead, she showed not only that feminists in government predated second wave feminism (Mobilizing 9), but documented the role of government insiders in creating feminist organizations, such as the National Organization for Women (Duerst-Lahti 1989, Meyer and Rohlinger 2005). She rejected social movement scholars Piven and Cloward's assumption that working within government is necessarily demobilizing (Mobilizing 9).

This paper joins these scholars in sociology, history, and political science in advocating for a new theoretical framework for understanding feminist insiders. If we want to understand feminist policy change and policy implementation, we need to not only take seriously insiders but understand their connections with outsiders. Insiders' power and influence stems directly from the strength of an outside movement and the quality of their connection to it. We should probably abandon the nomenclature of insiders and outsiders altogether since insiders are participants in rather than merely allies of a movement. Activists move between roles over a career, and other insiders often see feminists inside the government as outsiders rather than team players, because of their gender as well as their policy allegiances (Eisenstein 1991, 1996), regardless of how many times they prove their loyalty (Sawer 2008). Because I want to focus on the work feminists do inside government, I shall keep the nomenclature for the time being. Insiders provide the movement several critical assets. First and most important is information. Insiders alert outside groups about upcoming proposed changes in

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regulations and legislation, identify the failure to implement policy, and conduct useful research. Insiders sounded the alarm about the Equal Employment Opportunity Commission's poor record of enforcing the sex discrimination provisions of Title VII and conducted research on the effectiveness of Title IX. Information affects the timing of pressure; it takes more strength for a social movement to reverse a policy than to block its creation. Telling outsiders what is going on when and identifying pressure points are two of the most valuable resources insiders offer. Second, insiders do more than share information, they propose and shape the strategies of outside movements, suggesting protest actions or organizational formations, such as the creation of an NAACP for women, i.e., NOW. Third, they bring the movement's concerns to the attention of their (presumably male) bosses, telling them which prospective decisions will be inflammatory. They can dramatize, even exaggerate, the threat that outside groups pose. Fourth, they frame how their bosses and colleagues think about issues by participating in early and informal discussions and by identifying inconsistencies, myths, and stereotypes. Fifth, they maneuver to include movement players in meetings and key briefings (for example, making sure Betty Friedan attended the EEOC conference where she helped organize NOW when other bureaucrats had intended to exclude her) and even fund feminist projects and consultants (Fraser 2007). Sixth, they insert feminist provisions in regulations and reports and advocate for feminist policy within their units. The femocrat model, with its focus on the bureaucracy, focuses most heavily on this last point, seeing the individual as acting on her policy preferences as a decision maker, documenting the value of feminist office holders. The femocrat, or even representative bureaucracy conceptual frameworks more generally (Dolan 2001a, Dolan 2001b; Krislov 1974),

emphasize the effects of influential individuals. By conceptualizing these insiders as part of (not merely allies of) feminist social movements, however, we should understand successful policy implementation not as the success of individuals, but of social movements. The interaction and combination is what creates policy change.

### **C. Seeing the appointment of women judges as feminist policy implementation**

Presidential appointments of women judges have varied enormously rather than followed a pattern of steady increases reflecting women's greater presence in the legal profession or even the overall strength of the feminist movement. Women insiders pushed for the appointment of women judges with few, yet notable, successes from 1920-1976 (Clark 2004, Cook 1982, Kenney 2010). Only eight women had served on Article III federal courts when President Carter took office in 1976 (Sloviter 2005, 857). President Carter appointed more women than all previous presidents combined; he appointed 40 women: 15.5% of his appointments. Reacting to new evidence of a widening gender gap in support for his presidency, Ronald Reagan outflanked President Carter during the 1980 campaign by promising to appoint a woman to the U.S. Supreme Court, which he did.<sup>4</sup> The fanfare over the appointment of the first woman to the Supreme Court, Sandra Day O'Connor, deflected attention from the fact that only 7.6% of Reagan's judicial appointments were women. (Pacelle reports that Reagan's record improved when "two women were brought into the circle of advisers who screened potential nominees" [1997, 158].) President Bush (41) appointed few women in the first

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<sup>4</sup>Carter was grooming Ninth Circuit judge Shirley Hufstедler, who served as Carter's Secretary of Education, for a Supreme Court appointment. Had Carter not been expected to name a woman to the Supreme Court for the next vacancy, "it is questionable whether Ronald Reagan would have made his pledge to appoint a woman to the Supreme Court during the fall 1980 presidential campaign" (Goldman 2002, 223. Similarly, Gerald Ford nominated his one woman to the federal bench, Mary Anne Reimann Richey, after candidate Jimmy Carter had promised to appoint more women to the bench (Clark 2004, 533).

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two years of his presidency, but following his appointment of Clarence Thomas to the Supreme Court and the backlash surrounding Anita Hill's testimony, Bush appointed nearly half of his 36 women appointees in the year he ran for re-election. Only 19.5% of his appointments were women, but most of those were Reagan appointees he elevated from the district to the circuit appellate courts which did little to change the overall gender composition of the federal bench (Martin 2004, 117). Bush did give women major roles in the judicial selection process (Lee Lieberman, Assistant White House Counsel, and Barbara Drake as Assistant Attorney General in the Department of Justice) (Pacelle 1997, 159). Despite facing a Republican-controlled Senate after 1994, political machinations that disproportionately delayed women and minority men nominees, and eventually impeachment proceedings 28% of President Clinton's appointments to the federal bench were women compared to 22% for President Bush (Diascro and Spill Solberg 2009, 292).

What conclusions can we draw from the analysis of the different administrations' numbers and choices? We must understand this variation by looking at the role of feminist insiders. Like Clark, I argue we should see this variance as an exercise in feminist policy implementation (2002, 244). To understand Presidents Carter and Clinton's distinctive records we need to look beyond their broad statements of endorsement of a gender-diverse bench or, in Clinton's words, a judiciary that looks like America, and examine who made those goals a reality—which groups and individuals exercised leverage on the policy process. Kingdon (1995) or Bardach (1977) would call such strategic insiders in the judicial selection process players or policy entrepreneurs. Adoption of a policy, whether it is a promise in a presidential campaign, an executive

order, an agency regulation, or legislation, is merely the beginning of the story. Moe (1998) demonstrates that the conflicts among interests that emerge during the passage of policy continue on the new terrain of policy implementation. Lipsky (1980) and Wilson (1989) show that policy injunctions from managers at the top do little to change the behavior of street-level bureaucrats unless the new policy helps them accomplish what they believe to be their core task. Amenta documents how the interests of bureaucracies shape which social policies are adopted and implemented (1995). Rochon and Mazmanian demonstrate that the social movements that insinuate themselves into the policy process more generally enjoy greater success than those that merely lobby from outside (1993).

During the second wave of feminism beginning in the late 1960s, the National Women's Political Caucus and the National Organization for Women's Legal Defense and Education Fund championed the cause of integrating more women into public service (Martin 1997, 63). Intermittently, that campaign has included a demand for more women judges, joined at times by the National Association of Women Judges. Public policy scholars have sought to explain when such demands of external constituencies succeed. They have demonstrated that understanding policy change in the positions of elites, public opinion more generally, key constituencies in political campaigns, or the overall strength of feminist social movements or organized interest groups only take us so far toward explaining outcomes and variance state by state or country by country. Mazur (2002) would categorize this endeavor as representational politics, although most studies of such have ignored the judicial branch of government, even in the United States where many state judges are elected and where federal judges have enormous policy power.

Mazur recognizes the importance of strategic partnerships for feminist policy success (2002, 190). Studies under the broad rubric of state feminism (Banaszak, Beckwith, and Rucht 2003, Stetson and Mazur 1995, Lovenduski 2005), too, recognize the importance of partnerships between insiders and outsiders in explaining the success of women's policy agencies. Verloo calls such interactions in Europe "velvet triangles" (2007) while Vargas and Wieringa describe the phenomenon as "the triangle of empowerment" (1998). The insiders I examine, however, are not within a women's policy agency but the White House. They are not civil servants, one category of femocrat, but political appointees.<sup>5</sup> Before I return to the literature on feminist policy implementation, I must first tell the stories of the Carter Administration's judicial appointments.

#### **D. Understanding the judicial selection and confirmation process as policy**

To understand Carter's break with the past, it is necessary to understand the judicial selection process more generally.<sup>6</sup> Appointments to the federal bench have always been party patronage positions, even as senators or presidents occasionally recommended judges from another party. As a formal matter, the president recommends candidates to the U.S. Senate who must confirm them by a simple majority vote. Traditionally, the president deferred to senators of his own party from the home state for district court judges, relied upon them heavily for circuit court appointments, and consulted key senators as a whole on appointments to the Supreme Court. Senators from the state of the vacancy of either party, however, may in effect veto an appointment or

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<sup>5</sup> For Eisenstein, and Australian usage where the term originated, the term femocrat included political appointees, particularly high level women's advisers to Labor Governments (1991, 1996). Unlike the token women appointments Harrison derides as largely insignificant to feminist policy change (1988, 64-65), the feminist insiders I examine see themselves as part of a social movement rather than party loyalists.

<sup>6</sup> Goldman drew heavily upon a memo from Warren Christopher, deputy attorney general in the Johnson Administration entitled "Memorandum to my Successor" for his summary of the process (1997, 9-14).

subject committee hearings to delay by not returning their “blue slip”<sup>7</sup> on the nominee, although more recently, not all Senate Judiciary chairs have deferred.<sup>8</sup> The chair of the Senate Judiciary Committee may delay or refuse to hold hearing and the Senate Majority leader may refuse to schedule a floor vote (usually a voice vote but occasionally a roll call vote). More recently, senators have threatened the filibuster to prevent confirmation. Thus, senators have many ways of delaying or opposing judicial nominees while avoiding the public accountability of a roll call vote (Burbank 2002, Hertzberg 2005, Scherer 2002, Slotnick 2002, Toobin 2007).

From 1953-2000 until President Bush (43) suspended the practice, presidents called upon the American Bar Association’s Standing Committee on the Federal Judiciary to rate nominees before their public nomination as a regular part of the process (ABA 2009, 1). (President Obama reinstated the role of the ABA to prescreen candidates.) The Justice Department referred their files to both the FBI and IRS once the Administration had fully vetted them but before sending their nominations to the Senate. President Bush (43) let the ABA examine the candidates along with every other interest group once the Administration had decided on its nominee and sent the name to the Senate). The Bar Association champions its ideal of merit rather than political loyalty (Slotnick 1988). Feminists have criticized the gender composition of this committee (Elizabeth Brooksley Born was the committee’s first and only woman member in its 25-

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<sup>7</sup> Once the president makes a nomination, the chair of the Senate Judiciary Committee sends out blue slips to the two senators from the nominee’s home state. If either senator returns the slip with the mark “objection,” traditionally no hearing on the nomination is scheduled. If both senators return the slip marked “no objection,” the subcommittee and then full committee proceed to hearings. Senators who object to a choice may simply fail to return the blue slip altogether, delaying the process without having to take responsibility for opposing the nomination.

<sup>8</sup> 1979 Senate Judiciary Committee Chair Edward Kennedy shared Carter’s commitment to a diverse and representative bench and relaxed the policy, announcing that failure to return a blue slip would no longer automatically stall a hearing on a nominee, making it easier for Carter’s nominees to be confirmed (Goldman 1997, 12; Pacelle 1997, 155, Slotnick 1979).

year history, serving from 1977-83 and as its chair from 1980-83 [Love 2006, 50; Ness 1979, 48]<sup>9</sup> and its standards (Clark 2004, Martin 1982). The Committee favored judicial experience and large firm practice over academic work, government lawyering, or public defenders and legal aid. It demanded trial experience (particularly membership in the American College of Trial Lawyers) (Sloviter 2005, 858). And, in Carter's time, it automatically gave judges older than 64 years of age an unqualified rating (Goldman 1997, 261). Feminists criticized the standards, which they argued constituted disparate impact discrimination, but also objected to how they seemed to apply only to women and the Committee made exceptions for men. Conservatives have charged that the committee rates far-right nominees as less qualified because of their judicial temperament, most notably in the committee's split vote over the rating for Robert Bork.

Each president also has his own system for choosing nominees, sharing responsibilities between the Attorney General (overseeing the Department of Justice with the staff to investigate large numbers of candidates) and the White House Counsel's office. While appointments to the Supreme Court have often reflected contentious issues of the day, whether they be federalists versus anti-federalists, supporters or opponents of a national bank, supporters or opponents of slavery, supporters of the New Deal or of liberty of contract, President Nixon was the first president to make ideology rather than party loyalty or personal connections the most important criterion for selecting federal court judges (Scherer 2005).<sup>10</sup> Keeping his campaign promise to appoint strict

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<sup>9</sup> The committee is now chaired by Kim Askew, and has four women members out of fifteen. [www.abanet.org/scfedjud/roster.html](http://www.abanet.org/scfedjud/roster.html) (last accessed 2/5/09).

<sup>10</sup> Although he appointed no women to the federal bench, recent evidence suggests that President Eisenhower may have been more engaged in judicial appointments than previous historians had thought and sought Republican judges in the South who may have been more amenable to racial integration (Mayer 2007).

constructionists (meaning judges who were supportive of the police and not interested in expanding the rights of the accused nor supportive of court-ordered busing to achieve racial integration), President Nixon charged his Attorney General, John Mitchell, to vet judicial candidates to ensure their policy views aligned with his.<sup>11</sup> Until President Carter's Administration, the Justice Department exclusively handled district and circuit court appointments, mostly by deferring to senators.

### **E. Carter Puts Gender on the Agenda**

The voters elected Jimmy Carter president when feminist activism was at its zenith (Costain 1992, 93) when antifeminist forces were only just beginning to organize. Congress had passed the Equal Rights Amendment to the U.S. Constitution and the states were considering ratification. The Supreme Court had declared the right to an abortion part of a constitutionally protected right to privacy in *Roe v. Wade*. Ruth Bader Ginsburg at the American Civil Liberties Union's Women's Rights Project successfully challenged governmental sex-based classifications by urging the Supreme Court to expand its interpretation of the equal protection clause. Congress passed Title IX outlawing sex discrimination in education in 1972 and the EEOC started enforcing the prohibitions against sex discrimination in Title VII. Feminists across the ideological spectrum marched and organized. The far right was only just beginning to organize the countermovement that would defeat the ERA, scale back abortion rights, and sweep Ronald Reagan into the White House.

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<sup>11</sup> President Nixon embraced some versions of affirmative action and brought Barbara Franklin into the White House staff to recruit women. She asked to know, for example, why only three of the first 200 appointments went to women (Martin 2003, 143). Nixon may have been the first president to keep count and to have a direct liaison to the women's movement (Love 2006, 156), but Franklin had few powerful feminist interest groups supporting her proposals. Nixon's example supports my claim that femocrats without connections to a strong movement enjoy little policy success.

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To review, President Roosevelt appointed the first woman to the federal bench in 1934. Sixteen years later, Truman appointed a second, but President Eisenhower appointed no women to the federal bench. Presidents Kennedy, Nixon, and Ford appointed one each; President Johnson appointed three. President Carter's appointment of 40 women to the federal bench was thus a very dramatic policy change. President Carter declared a gender- and racially-integrated bench to be a priority, charged his staff with implementing that policy, and altered the way he chose federal judges. As Meyer and Minkoff have demonstrated, the election of a Democratic President creates opportunities for progressive social movements (2004), and feminists seized the opportunities Carter's election provided.

When President Carter took office, four women served on federal courts, although women made up about 15% of recent law school graduates and 9.2% of all lawyers (Martin 2004, 111). However, the eligible pool of lawyers with 25 years of practice was closer to 3.5%. Carter's absolute number of 40 (increasing the number from 4 to 44) is huge compared to Johnson's three, or the others' appointment of a token one, and his percentage of appointees at 15% is large considering how gatekeepers defined the eligible pool at the time. Clearly, President Carter made appointing women a priority and implemented that policy. Or did he? The record of the first few years of the Carter Administration led feminists to criticize his campaign promise as empty. Recording merely the policy promise and the final results obscures the conflict within the Administration and the insiders that made Carter's promise a reality, and deepened if not created Carter's own commitment to the policy. Recounting the final tally, however, conceals the conflictual process. How did he do that? One can ask who carried out his

policy but as I will show, the question is more accurately who cared enough to persuade him of this policy and then implemented the policy?

#### **F. Carter Dislodges the Patronage Process to Add Gender and Race**

We must understand the political context of President Carter's decisions about judicial selection. Carter's "peanut brigade" ran a grassroots campaign challenging the party machine and did much better than expected in the Iowa Caucuses. Hailing from the state of Georgia in the Deep South, President Carter spoke passionately about how class and race worked to deny equal justice under law to many and was skeptical of the Democratic Party machine and its resulting judicial appointments.<sup>12</sup> President Carter was a firm believer in merit selection. What that meant to him was that party loyalty should not be the most important criterion in choosing judges. President Ford's pardon of President Nixon turned out to be the blow to Ford's candidacy from which he could never recover. After the Watergate debacle, the ethos of the times turned against partisanship, thus President Carter's call for merit selection resonated with an electorate increasingly realigned as independent. But it is not so easy to divorce merit from policy and President Carter's policies on race, economic, and, to a lesser extent, gender inequality differed dramatically from President Nixon's. As we shall see, because of his reliance on the Federation of Women Lawyers' Judicial Screening Panel, his women nominees all had a deep commitment to equal justice under law.

Goldman<sup>13</sup> and others have already provided a detailed analysis of President Carter's judicial appointments. They have documented President Carter's policies, his

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<sup>12</sup> Staff Secretary 4. 1/28/1977.

<sup>13</sup> Although I examined the original documents in the Carter Presidential library that Goldman cited, this entire section is heavily indebted to his research, analysis, and written account (Goldman 1997, 236-283). Unless I cite otherwise, Goldman is my source for the information in this section.

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changes in the judicial selection procedures, and the results. I want to explain those results by spotlighting the acts of one well-placed feminist who made diversifying the judiciary one of her top priorities and strategically acted within a network of feminist organizations—a story of feminist policy implementation. Margaret McKenna was the first woman to hold the position of Deputy White House counsel and was only 32 years old. Having been editor of the Law Review at Southern Methodist University Law School, she tried race discrimination cases as a trial attorney in the Civil Rights Division of the Justice Department,<sup>14</sup> and later coordinated the Rhode Island Carter-Mondale campaign.<sup>15</sup> She served on the transition team for the Justice Department and worked closely with President Carter’s designate for Attorney General, Judge Griffin Bell. Deputy White House Counsel Douglas Huron, and her boss, White House Counsel Robert Lipshutz, shared McKenna’s commitment to a racially and gender diverse federal bench but McKenna made it happen. As she says,

Unless you stay on top of it and it’s a high high priority you just stop pursuing it. You have to be so dogged about it or it slips by. It has to be really important to you. All of us [Lipshutz and Huron] had the same values. This [affirmative action in judicial appointments] was a significant part of my job. And I never let go of it. Doug was close there too, but it might not have been first on their list.<sup>16</sup>

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<sup>14</sup> McKenna recounts that she tried race and not sex discrimination cases because, although Title VII included a prohibition against sex discrimination, no one, including the enforcement agency, the Equal Employment Opportunities Commission, took sex discrimination seriously until well into the 1970s.

<sup>15</sup> In 1980, she became Deputy Under-Secretary of Education. She then became director of the Bunting Institute at Radcliffe College and became the president of Lesley College when she was 39 and nine-months pregnant with her second son. McKenna transformed Lesley and significantly diversified its faculty (Jan 2006).

<sup>16</sup> Telephone interview, Margaret McKenna, June 25, 2007. Babcock reaches a similar conclusion, telling Judge LaDoris Cordell on Thursday March 2, 2006, as part of an oral history: “Leadership is what you really need. Even though Carter himself didn’t know from day to day what was going on. He sent out this order: I want to appoint women, see that it gets done. And it gets done. I saw him last year and reminded him that he had appointed more women than any president previously and he had forgotten about that and was obviously very pleased.”

Barbara Babcock, Assistant Attorney General, who attributes her own appointment to Carter's platform agreement to appoint more women to the government generally<sup>17</sup>

(Clark 2002, 245), agrees that McKenna made it happen:

You are right to focus on folks like Margaret McKenna—she had a huge hidden role...a young feminist without a high level appointment who knew how to manipulate all those who did—and who really got things done.<sup>18</sup>

Babcock emphasized the centrality of McKenna's role in her oral history:

It was wonderful, the way she really threw her weight around. She was [Lipshutz's] deputy and not the President's, but she would say "This is what the White House wants." It was great assurance. She had a lot to do with getting the names through...It was very much a collective effort among women (Wilson 1995, 6).

McKenna, Lipshutz, and Huron had to overcome a number of significant obstacles to meet their goals. First, McKenna had to connect President Carter's commitment to merit selection and racial diversity for judges to his commitment to bringing women in to governmental positions more generally. She helped to shape President Carter's policy on affirmative action. Second, she had to persuade the newly-created circuit nominating commissions, and later senators advocating for federal district court appointments, to include women on their lists of recommendations. Third, she had to wrest control over the decision on judicial nominations from the Justice Department, and particularly from Attorney General Bell and his deputy attorney general, Mike Eagan, and bring the White House Counsel's office into the deliberations. Fourth, the Administration had to overcome the American Bar Association's tendency to rate all the

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<sup>17</sup> Barbara Babcock's famous line when asked by a reporter, "How does it feel to get your job because you're a woman?" was, "Well it feels a lot better than *not* getting it because I'm a woman." *Diversifying the Judiciary. An Oral History of Women Federal Judges.* Federal Judicial Center, Interview with Sarah Wilson, May 19, 1995, p. 5.

<sup>18</sup> Email correspondence, June 30, 2007. Babcock laments that so little of what they did left a paper trail "in the dark ages it was all phone calls and meetings."

women and minority men candidates “not qualified,” destroying their chances at confirmation. McKenna succeeded because she made this issue a priority and because she was the insider working strategically with a network of women’s groups on the outside. McKenna enjoyed enormous success, and the numbers testify to that fact. The Justice Department, however, not the White House, handled the confirmation process and the Senate failed to confirm several women nominees who had not been the Justice Department’s top choices.<sup>19</sup> She may have been able to persuade the President to choose women from a list, but she neither controlled the Justice Department’s lobbying of Congress nor controlled senators, many of whom wanted to choose white men, even if they acquiesced to Carter’s request that they establish district nominating commissions. Before I say more about how McKenna overcame these obstacles, I must first describe what women’s groups did.

### **G. Feminists Working Inside and Out: The Work of Outsiders**

Other scholars have documented well the work feminist groups have done to secure judicial appointments for women, beginning with Beverly Blair Cook’s analysis of efforts to appoint Florence Allen to the U.S. Supreme Court (1982) but including analysis of groups’ activities during the Carter Administration (Clark 2002 , Cook 1981, Fraser 1983, Martin 1987). Feminists inside the Carter Administration formed a Washington Women’s Network that grew to more than 1200 women—women who were networked with each other as well as outside groups (Fraser 1983, 138). Just as well-situated feminist bureaucrats in the Equal Employment Opportunity Commission told Betty Friedan and others about how little the EEOC was doing on sex discrimination and what,

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<sup>19</sup>The ABA’s rating of “unqualified” for Carin Clauss, the Labor Department’s Chief Counsel, caused the Senate to delay hearings on her nomination. She eventually withdrew (Goldman 1997, 266).

exactly, to complain about (precipitating the formation of the National Organization for Women [Kenney 1992]), McKenna's connections with women's groups outside the Administration were critical to her success. According to McKenna, women's groups were "enormously helpful." Neither would have been able to prevail without the other—it was the partnership, the working in tandem that was the key to policy success.

As Clark concluded:

Contemporaneous with Carter's commitment to appointing more women judges was women's rapidly increasing entry into the legal profession, as well as rising activism by women's legal and political advocacy groups around the issue of women's judicial appointments. New organizations specifically focused on promoting women's appointments to the federal judiciary formed at this time, and existing organizations undertook new initiatives to lobby for women's appointments. These organizations were better organized, better connected, and more sophisticated at using the media than had been their predecessors. The pressure brought to bear by women's legal and political advocacy groups was critical in altering the political landscape in which women's judicial candidacies were considered—complementing and indeed spurring Carter's efforts to reform the judicial appointments process to name more women judges (Clark 2002, 246).

Ness agrees:

During this process, women and women's groups have proceeded with determination to mount an effective campaign for more women judges. Besides the efforts of the AAUW's national leaders and members around the country, the National Women's Political Caucus's Judicial Appointments Project, the Judicial Selection Project, the National Organization for Women, the NOW Legal Defense and Education Fund, the American Civil Liberties Union, and many women's bar associations publicized information about the judgeships, recruited and screened candidates, and lobbied for candidates they believed to be well qualified. Would the same 16% of OJA [Omnibus Judges Act] appointments have gone to women without the struggle? We doubt it....It will take political power and organization, plus nonstop effort, to put substantial numbers of women on the bench (Ness 1979, 49).

Once candidate Jimmy Carter promised to increase the representation of women in the federal government, women's groups and the media held him to his promise and counted.

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What, exactly, did they do? First, groups protested the open exclusion of women from consideration. Feminists interrogated the silence around the assumption that judges are men. When Justices Harlan and Black retired in 1971 and Nixon promised to eschew litmus tests and to “appoint the best man for the job,” Liz Carpenter, Lady Bird Johnson’s press secretary who was well connected with women in the Washington Press Corps and on the National Women’s Political Caucus, called Virginia Kerr, a NWPC staff member helping with the set-up of the national office and working on press and legislative testimony. Carpenter said the NWPC should issue a press release in protest. Under Carpenter’s tutelage, Kerr wrote a release and delivered it later that day to a D.C. restaurant where Carpenter was meeting over dinner with Eileen Shanahan (*New York Times*), Helen Thomas (*AP*), and Isabel Shelton (*Washington Star*). Knowing Monday to be a slow news day, Liz Carpenter’s agility in marshaling a response produced stories in the morning papers and the network news. As Kerr recalls, “the NWPC’s public relations campaign was an unqualified success in placing women in the rhetorical field of consideration for future Supreme Court vacancies.... the NWPC turned the taken-for-granted male monopoly into a gaffe.”<sup>20</sup> Women’s groups not only urged President Ford to appoint a woman to replace William O. Douglas but also protested that the President’s advisers on this matter were all men and mostly opponents of the ERA (Kenney 2009; Martin 2003, 186).

Second, they formed specific projects to generate names and work for their nomination. NWPC Chair Mildred Jeffrey oversaw and Susan Ness led the National Women’s Political Caucus’s Legal Support Caucus, formed immediately after Carter’s election to encourage women to apply and to conduct training sessions about how to

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<sup>20</sup> Interview and email correspondence with Virginia Kerr, February 2007, February 2009. Carpenter 1979.

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apply (Clark 2002, 246). They set up a wide network of groups actively pressuring on many fronts. By forming broad coalitions, they ensured a wide audience for their efforts, troops to deploy across a broad spectrum of the women's community, and clout on their letterhead when they wrote to the White House as the Judicial Selection Project.

Moreover, by forming coalitions with progressive and civil rights groups, they broadened their influence beyond the feminist community. Kerr even corralled the Daughters of the American Revolution to join forces: "I was actually the one who thought of contacting the DAR." She says, "I have always felt that Sandra O'Connor owed a big debt to the NWPC for making appointment of women to the court a bipartisan feminist cause."

Third, these groups met with White House staff to press their case and plan a course of action. In November of 1978, White House Counsel Staff met with the Judicial Selection Project, the NAACP, the Women's Legal Defense Fund, the Coalition for Women's Appointments, the National Council of La Raza, and the National Women's Political Caucus. Staff told them to funnel names to McKenna and Huron or Drew Days (Assistant Attorney General) and Barbara Babcock in the Justice Department (Goldman 1997, 253).

Fourth, these groups were whistle blowers who monitored the Administration's performance in meeting its new policy objectives and communicated their dissatisfaction at the results to their constituencies, the media, and the White House through a series of press releases and fact sheets, demanding that the Administration do more (Ness 1978). The National Women's Political Caucus, for example, called for one third of the new seats from the Omnibus Judges Act (which created 35 new judgeships) to go to women (Ness 1979, 10). It released statistics in early January of 1979 that 51 out of the 59

recommendations from Democratic Senators for the new judgeships were white males (Goldman 1997, 258).

Fifth, women's groups lobbied on many fronts. They met with the Administration to suggest names of panelists for the new circuit nominating commissions President Carter mandated, pressured senators to appoint women to their nominating commissions, criticized recommendations of only white men, and pressed for the women who did appear on the list. They testified before the Senate Judiciary Committee about the slow pace of women's judicial appointments and pressured the Committee to require nominees to refrain from membership in discriminatory clubs (Clark 2002, 247). They publicized and protested obvious omissions from lists, such as the Ninth Circuit Panel's failure to suggest Herma Hill Kay or the Second Circuit Panel's failure to suggest Ruth Bader Ginsburg (Ness 1979, 46-47).<sup>21</sup> They advocated for stronger language in the Executive Order implementing the Omnibus Judges Act, challenged the criterion of 12-15 years of legal experience, and wrote questions for nominating commissions—both procedural ones about what they had done to ensure a wide group of potential nominees were considered—and substantive ones, proposing a specific battery of questions for probing candidates' commitment to equal justice under law.<sup>22</sup> One particularly effective letter complaining about Senator Byrd's Commission's nomination of all white men, a "crisis" given that four vacancies would be filled, spelled out how the commissions functioned to exclude women and minority men by not contacting groups which could propose names

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<sup>21</sup> Ginsburg's difficulty getting nominated for a federal judgeship in New York may have stemmed from the fact that Senator Javits's six-member judicial selection panel of 8 years had no woman member and Senator Daniel Patrick Moynihan's new 10-member panel included one woman, a non-lawyer (Ness 1978). Ironically, the difficulties Ginsburg had being nominated in New York led to her appointment to the D.C. Circuit Court of Appeals, positioning her well so that President Clinton could then appoint her to the U.S. Supreme Court.

<sup>22</sup> Letter from Charles Halpern, Judicial Selection Project, to Robert Lipshutz, December 4, 1978. WHCF FG 164 FG 46 1/20/77-1/20/81.

and not interviewing the names they received, and lamented the complete absence of a woman judge on any court of record in the state of Virginia.<sup>23</sup>

Sixth, they set up their own screening panel. Feminists were dissatisfied with both the ABA and Justice Department's definition of merit and their lack of attention to a candidate's commitment to "equal justice under law" (Ness 1979, 48). President Carter sent Attorney General Griffin Bell to hold a meeting with women's organizations to develop ideas about how to increase the number of women's names submitted by screening panels. Mildred Jeffrey asked Bell whether women's groups could set up their own screening panel, and he agreed to submit all names of prospective nominees to what became the Federation of Women Lawyers' Judicial Screening Panel. Phyllis Segal, NOW Legal Defense and Education Fund's first director, organized the effort and recruited Lynn Hecht Schafran to be its national director. They limited their evaluations to questions about the candidates' demonstrated commitment to equal justice under law (Ness 1979, 48) and at least one candidate was forced to withdraw because of what they alone had unearthed. The group insisted the Senate Judiciary follow its policy of requiring nominees to resign their memberships in discriminatory clubs.<sup>24</sup>

Seventh, they formed an organization of women judges. In 1979, the National Association of Women Judges formed and part of its mission included advocating women's appointments at the federal, state, and local levels, as well as training women for election and selection (Clark 2002, 250). One of its first resolutions was to call for the appointment of a woman to the U.S. Supreme Court, and the group lobbied both presidential candidates to commit to this. Ronald Reagan took the pledge but President

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<sup>23</sup> Letter from Charles Halpern, Judicial Selection Project, to Robert Lipshutz, December 7, 1978. WHCF FG 164 FG 46 1/20/77-1/20/81.

<sup>24</sup> Griffin Bell rejoined his clubs once he left office.

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Carter refused, although the NAWJ had issued him a citation honoring him for his efforts to appoint women judges just before the 1980 election. In the presidential debates, President Carter asked voters to compare his record in diversity appointments to Governor Reagan's.

In the end, Clark credits both the multi-pronged approach of the groups as well as their working together in coalition for their success. The insider-outsider connection was determinative. As I shall demonstrate in part J, Carter had a weak policy commitment that his Attorney General initially did little to implement. Without the groups putting pressure on the White House and the Senate and arguing the case before their members and in the media, McKenna would likely not have had the leverage she did to press her advantage. Conversely, without McKenna's insider knowledge, groups would have been less effective at exerting pressure at precisely the right point at precisely the right time. The key to successful policy implementation, then, I argue is the combination of tenacious insiders linked to well-organized strategic outsiders. Commenting on the cumulative influence of the First Lady, McKenna, and Sarah Weddington (special adviser on women's issues), Babcock concluded: "I think that all the women judges would never have been appointed ... without the strong presence of women bosses in the Carter administration. It was very, very striking" (1995, 3). Stark evidence of the importance of this variable, in conjunction with others, is what happened when President Reagan took office. Reagan did appoint Justice O'Connor to the Supreme Court, fulfilling his campaign promise, but his percentage of women appointments fell to half of Carter's. Women were entering law school in even greater numbers in the 1980s, the pipeline was fuller than ever before with qualified women,

women's groups were organized and experienced, the gender gap in voting had emerged and was clearly documented. President Reagan, however, had none of Carter's commitment to merit selection, affirmative action, or a diverse judiciary (for either race or gender, although Carter's commitment to a gender diverse bench developed over the course of his presidency). Nor did he consider women's groups to be a key constituency meriting direct White House access. And he put in place no Margaret McKenna, Sarah Weddington, or Barbara Babcock to press the case. Both the commitment to policy and the feminist policy implementers are the key explanatory variables explaining the differences.

#### **H. Feminists Working Inside: McKenna Overcomes Obstacles**

Before I discuss each obstacle, it is important to have some political context for relations between the Justice Department and the White House Counsel's office. President Carter wanted Attorney General Bell, a highly regarded appellate judge, to choose judges by merit, not party or ideology. To that end, Bell hired Mike Egan, a lifelong Republican,<sup>25</sup> as his Assistant Attorney General in charge of judicial appointments. Moreover, President Carter rejected President Nixon's politicizing of the Justice Department and its criminal investigations, or deploying the FBI or IRS to investigate his political enemies. We should thus recognize that wresting exclusive control of judicial appointments from the Justice Department was even more of an accomplishment for McKenna given the firewall<sup>26</sup> President Carter wanted between the

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<sup>25</sup> Egan had been the minority leader of the Georgia House when Jimmy Carter was Governor (Egan 2006, 5).

<sup>26</sup> Whether Bell would or did indeed create such a firewall is disputed, and was raised during his confirmation hearings.

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White House and the Justice Department on other matters (Kaufman 2006, 290) as well as President Carter's profound commitment to merit selection.<sup>27</sup>

The clash over control of judicial appointments was not the first conflict between the Justice Department and the White House Counsel's office that reflected political differences between liberals and conservatives within the Carter Administration. When the Supreme Court granted certiorari in *Regents of the University of California v. Bakke*, the Justice Department prepared a brief in favor of Bakke. Lipshutz joined the President's Special Assistant for Domestic Affairs, Stuart Eizenstat and Secretary of HEW Joseph Califano in pressuring the Justice Department to rewrite the brief to support affirmative action. Lipshutz's comments lend further support to the contention that, but for someone like McKenna, Attorney General Bell<sup>28</sup> would not have forwarded the names of women and minority men for President Carter to appoint to the bench:

[We] all knew what the president's position was, but we found early on that unless someone really got heavily involved...to do something about affirmative action, it was too easy...[to] end up with all white males again (Kaufman 2006, 291).

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<sup>27</sup> Perhaps the strongest written piece of evidence of McKenna's role is a draft memo she wrote on October 16, 1978, which was never sent and required special permission for the Carter presidential library to release. In this memo, McKenna speaks frankly about their travails with the Justice Department and the credit they deserve for pressing the affirmative action agenda.

<sup>28</sup> Bell had been a friend of Carter's since childhood and was a distant cousin of Rosalynn's. Bell joined the prestigious law firm of King and Spaulding and chaired John F. Kennedy's presidential campaign in Georgia. President Kennedy appointed him a judge on the Fifth Circuit Court of Appeals, where he voted to force the University of Mississippi to admit James Meredith, its first black student, but opposed busing to integrate schools. Like many of his contemporaries, Bell held membership in two segregated social clubs (Kaufman 2006, 41-42). As Patricia Wald, who worked in the Justice Department at the time, commented, Attorney General Griffin Bell would have loyally carried out President Carter's policy injunction to seek out qualified women and minority men, but it would not have been his passion. As a former judge and a moderate, not a liberal, Democrat, Attorney General Bell had a very narrow definition of merit. He frowned on advocacy of any kind, preferred elite law school graduates, and valorized working for a big law firm. The problem was, however, as with the ABA criteria, that the large law firms openly discriminated against the few women, such as Sandra Day O'Connor, Ruth Bader Ginsburg, or Bella Abzug who were in this cohort of law school graduates. When Bell left office, he said "I would suggest that the time is approaching when the affirmative action can be terminated and the selection process returned to the normal method of selecting the best person available without regard to race, creed, or ethnicity" (Ness 1979, 49).

If President Carter was going to institute merit selection, let alone affirmative action, he had to first wrest control from individual senators who had the power to confirm and jealously guarded their prerogatives. President Carter's commitment to reforming judicial selection was part of his campaign,<sup>29</sup> and even before taking office, Carter and Attorney General designate Griffin Bell met with Senate Judiciary Committee Chair James Eastland. Senator Eastland opposed taking district court appointments away from senators, but agreed to set up nominating commissions for circuit court judgeships. President Carter issued Executive Order 11972 four weeks after he took office which created panels to "include members of both sexes, members of minority groups, and approximately equal numbers of lawyers and non-lawyers." The order charged panels to recommend five well qualified persons leaving the President to select one to nominate. The panels succeeded in being diverse—45% women and 24% minority<sup>30</sup>—but the recommendations were not. From the outset, March of 1977, McKenna had met with Eagan and others and proposed urging the nominating commissions of the President's interest in meritorious candidates, particularly minorities and women, and had even drafted a letter for Bell to prospective nominators (senators, Democratic governors, party chairmen) which he decided not to sign saying, "[t]he Justice Department does not want to be involved in this kind of suggestion process" (Goldman 1997, 254).<sup>31</sup> The six panels recommended no women and only one recommended a racial minority. President Carter subsequently revised the Executive Order (12059 in May of 1978) to implore panels "to

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<sup>29</sup> Carter had promised women at the 1976 Democratic National Convention that he would appoint women to the judiciary (Ness 1979, 10).

<sup>30</sup> Ness, however, criticized the fact that only 36% of the women members were attorneys and no panel was chaired by a woman (Ness 1978).

<sup>31</sup> Bell would not write to Senators, but Carter did in February asking them to "redouble their efforts" to find qualified women and minority men (Lipshutz and Huron 1978-79).

make special efforts to seek out and identify well qualified women and minority groups as potential nominees.”

Lipshutz, Huron, and McKenna were unhappy with the results. At the end of the first two years, President Carter had appointed only one woman and two African-Americans (both elevated from lower courts leaving the federal judiciary with no net gain). McKenna traveled to a conference of the nominating commissions in Chicago in July 1977 to personally deliver the message that the panels needed to do better.<sup>32</sup> She learned that they had never been giving the message that identifying women was a policy priority. She delivered that message.

In 1978, the nominating commissions for the Fifth and Sixth Circuits each included a woman on their lists. Bell, however, did not include Ann McManamon in his top two choices for the Sixth, but did include Phyllis Kravitch as his second choice for the Fifth.<sup>33</sup> Lipshutz, Huron, and McKenna intervened. McKenna describes how Bell’s recommendations would come in and they would put theirs on top of his papers before they went to the President. Lipshutz wrote a memo stressing the dissatisfaction of women’s groups that none of the 12 circuit judge nominees so far had been women and recommended that Kravitch was the stronger of the two.<sup>34</sup> The First Lady wrote a hand-

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<sup>32</sup> McKenna recalls that the magnitude of making a lifetime appointment made the panels, even the lay members, more conservative in their choices. Without a strong presidential injunction to include women and minority men on the lists, McKenna feels the panels never would have done so.

<sup>33</sup> Kravitch ran against two men to become the first woman Superior Court judge in Georgia in January of 1977. A graduate of Goucher College and then the University of Pennsylvania law school (one of two women in her graduating class and a member of the law review) Kravitch was dismayed to discover that no large firm would consider hiring her and her gender prevented her from clerking for a Supreme Court Justice. Kravitch went home to Savannah to share a practice with her father, a flamboyant lawyer who had championed the cause of civil rights and was a member of the Legal Aid Society. Lee Giffen’s article about her in the Atlanta Journal and Constitution Magazine reassures readers that Kravitch was NOT the darling of “women’s liberationists” and that she will be the first judge to wear a size four robe (Giffen 1976).

<sup>34</sup> “The most severe criticisms to date of this Administration’s judicial appointments have come from women’s groups, who are distressed that none of the 12 circuit judges nominated to date have been women.

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written note urging the President to choose Kravitch.<sup>35</sup> McKenna recalls Bell opposing Nathaniel Jones, an African-American, for the Sixth, as a “rabble rouser” because for nine years he had been the general counsel of the NAACP, but had listed him as his second choice.<sup>36</sup> The two senators from Ohio, Glenn and Metzenbaum, each supported different white men (McKenna 2007) but said they would go along with anyone on the list (Goldman 1997, 240). McKenna seized a key opportunity when White House visitors came to celebrate the 25<sup>th</sup> anniversary of *Brown v. Board of Education*. As she says, “I was adamant we were going to get Jones and I thought this is the opportunity.” She hand carried her memo to the Oval Office arguing that there had “never been a better time to appoint Jones.” President Carter chose the occasion to announce the appointment of Jones and staff called Bell to tell him the President was announcing the appointment as they spoke. Bell was furious. Later, when he visited Lesley University, Judge Jones said of McKenna: “You made it happen. I wouldn’t have been here but for her.” Although Jones is not a woman, his case shows that McKenna enjoyed both spatial and temporal assets as an insider. Many would regard Bell with his position, credentials, and personal

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In part, this has been caused by the failure of many nominating panels to include women in the list of candidates submitted to us. In this case, however, both the panels have included women among their nominees....We believe that these two appointments should be announced simultaneously and that they can be politically beneficial by emphasizing your commitment to increase the number of well qualified minority and women judges.” Carter checked his approval for Kravitch and Jones and wrote on the memo: “Handle p.r. Senate relations with care. J.” FG 52/#5. Memorandum for the President from Bob Lipshutz, Tim Kraft, and Frank Moore. Appointments to Vacancies on the Courts of Appeals for the 5<sup>th</sup> and 6<sup>th</sup> Circuits (Georgia and Ohio). October 10, 1978.

<sup>35</sup> Box 165 Folder FG 52 #5. On a note to R from m dated 9/21/78 it states: “Carol tells me you plan to do the lobbying for Judge Kravitch yourself, so I’m returning all we have on her nomination. On the bottom is a handwritten note: “Jimmy, I hope you can appoint Phyllis Kravitch.” Clark also reports that Bell said “Phyllis Kravitch was strongly supported by Mrs. Carter” (Clark 2002, 245).

<sup>36</sup>McKenna’s recollection seems to contradict a memorandum from Griffin Bell to the President dated July 14, 1977 he says “Gray is a black. I am aware, of course, of your desire that we make every effort to appoint blacks to the federal courts in the South, but I cannot recommend him for the Court of Appeals. Box 165 Folder FG #5. Goldman reports Carter staffers’ belief that low ABA ratings reflected an assessment not on the merit of the candidates but that they were either too liberal or too activist or both (Goldman 1997, 266-67).

relationship to Carter as more powerful. Yet McKenna's office was physically closer to Carter and she could be the last person to speak to him as he made his decision.<sup>37</sup>

Although Carter had approved both Kravitch and Jones, the Attorney General successfully delayed Kravitch's nomination for three months and Jones's nomination for ten months as he sought to reverse the decision and enlisted others close to the President to lobby for that purpose. Bell was very angry over having to share decision making on judicial appointments with White House staff, considered resigning, and was particularly antagonistic toward McKenna, further evidence McKenna deserves the credit or the blame, depending on your viewpoint. Bell wrote:

*Bob Lipshutz, [emphasis added] as I have noted, is not a combative, overly assertive individual. But he had working on his staff Ms. [emphasis added, remember McKenna had worked closely with Bell on the transition] Margaret McKenna, a lawyer dedicated to protecting and expanding women's rights. [Bell summarizes the record of affirmative action appointments—not the paltry numbers of the first two years, but the numbers AFTER the White House Counsel's office became a player, and indeed after he had resigned as Attorney General]—I thought the need for affirmative action in picking judges had run its course. Enter Ms. McKenna. Some women's organizations took issue with our rate of progress, despite our statistics....the women's groups turned to Margaret McKenna...the new judgeships thus upped the stake in what Ms. McKenna and the women's groups were seeking. Mr. Lipshutz and Ms. McKenna departed from the historical precedent by attempting to assert White House staff control over the judicial nominations. This claim was that they were not trying to take over the process but simply were trying to assure that I did not overlook minorities and women in my recommendations. They set themselves up as the keepers of the morality in the area of discrimination, as if I and others at the Justice Department lacked their degree of concern. [Bell then goes on to describe how he lost his role as exclusive adviser to President Carter on this issue, was often overruled, and had to bring in his friend Charles Kirbo to argue his case to Carter] (Bell 1982, 41-42.)*

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<sup>37</sup> Governor Rudy Perpich appointed the first woman to the Minnesota Supreme Court, Rosalie Wahl, in 1977. Feminists knew that Perpich often made decisions based on whom he had last spoken to and so, when he was considering the Wahl appointment, they loitered at the Governor's mansion late into the evening, determined to be the last people he spoke to "Thank you for being ready: Minnesota's First Supreme Court Justice, Rosalie Wahl," Sally J. Kenney, Professor, Humphrey Institute of Public Affairs, University of Minnesota, [http://www.hhh.umn.edu/centers/wpp/pdf/case\\_studies/rosalie\\_wahl/wahl\\_case.pdf](http://www.hhh.umn.edu/centers/wpp/pdf/case_studies/rosalie_wahl/wahl_case.pdf).

After leaving office, Bell despaired of losing control over the nomination of judges to the White House. The transfer of power to the White House Counsel's Office for judicial appointments has been a permanent change across different presidencies. Lipshutz believes Bell had tried to get McKenna fired. We can only speculate as to whether it was a simple issue of conflicts over who controlled the process or to what extent McKenna's gender or the gender of the judges she championed played a part. Clearly Huron and Lipshutz agreed with the diversity agenda, too. Without the pressure of the three of them, however, President Carter may have deferred to Bell. McKenna reported relations smoothing somewhat after Benjamin Civiletti replaced Bell as Attorney General midway through Carter's term.

President Carter shared Lipshutz, McKenna, and Huron's frustration with the results Bell had achieved. In October of 1978, he asked to see the names of candidates before the FBI checks were run, requesting a written memo from Lipshutz before his initial meeting with Bell. An opportunity arose when Congress passed the new Omnibus Judgeship Act of 1978 creating 35 new circuit court judgeships. With the expanded judicial pie, President Carter could now more easily please senators who expected patronage and satisfy interest groups that wanted a more diverse judiciary.<sup>38</sup> Lipshutz urged the president to seize that opportunity. Carter's Executive Order 12059 explicitly charged the circuit nominating commissions to seek out qualified women and minority groups. Lipshutz also criticized Bell's ad hoc method of selecting judges one-by-one. He called for concentrating on multiple vacancies at both the circuit and district levels, actively soliciting nominations of diverse candidates, and only then submitting

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<sup>38</sup> Ness, however, says that the senators had promised all of the new Omnibus Judges Act positions which were heavily anticipated to white men (Ness 1979, 11).

nominations to Congress. Lipshutz grasped what those studying women in organizations and particularly multi-member electoral systems have long known: selectors are more likely to choose a diverse group if they can select more than one at a time. The Omnibus Judgeship Act gave the administration a unique opportunity to introduce such a selection system, thereby dramatically enhancing the chances of nominating women and minority men.

After several years working with the circuit nominating commissions, moreover, the White House team and McKenna had developed a system and practice for generating the names of women and garnering support for them. But obstacles remained. Only 24% of district court screening panel members were women and one third of these panels included no women lawyers, those most likely to know qualified women (Ness 1979, 12). Ness pointed out that the selection panels may look more like merit selection than patronage at first glance, but they merely institutionalized the old-boys network senators had relied upon to make recommendations.<sup>39</sup> No panel was chaired by a woman (Ness 1978). Panels asked women whether their husbands would be jealous if they were appointed, whether they would be able to sentence criminals to jail, whether they could handle the workload, and who would take care of their children (Ness 1979, 47).<sup>40</sup> Even liberal senators like Alan Cranston, who had many distinguished women lawyers to choose from in the state of California, submitted lists with one or no women (Ness 1979, 10). Robert Byrd's commission recommended only white males; Georgia Senators Nunn

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<sup>39</sup> Democrats in Utah and New Mexico, too, claimed the committees were "rigged" with Republicans. Staff Secretary 4, 1/28/77.

<sup>40</sup> Third Circuit Federal Judge Dolores Sloviter reported being asked discriminatory questions by the district panel. She wrote that the nominating commissions the senators established were very different from the circuit court panels President Carter established (Sloviter 2005, 859).

and Talmadge recommended six males, one black. Illinois Senator Adlai Stevenson recommended three white men (Goldman 1997, 262).

The ABA Standing Committee on the Federal Judiciary proved to be a problem for women and minority men prospective nominees. The ABA Committee rated three women contenders “not qualified” because of lack of trial experience. One of those, Carin Claus, was the solicitor for the Labor Department and supervised the work of hundreds of attorneys (Ness 1979, 48). Joan Krauskopf, a law professor, received unanimous support from the Eighth Circuit nominating panel and the support of Senator Eagleton, as well as the judges of the Eighth Circuit, yet the ABA Committee rated her unqualified because of her lack of trial experience.<sup>41</sup> Bell met with the ABA Committee to see if they would change their rating but when they would not, Carter decided not to nominate her. She commented that it was ironic

that the effects of past sex discrimination in the legal profession, which prevented me from having more extensive trial experience...prevented me from serving on the Eighth Circuit Court of Appeals (Ness 1979, 48).

The ABA rated a female law professor in Puerto Rico under consideration for the First Circuit “not qualified,” and Carter dropped her nomination although she would have been the first woman and the first Hispanic to serve on the First Circuit (Goldman 1997, 268).

The so-called gender neutral standards not only disadvantaged women (disparate impact), but disparate treatment discrimination was also at work in the ABA’s process. The Tenth Circuit panel recommended Stephanie Seymour (the first female partner in a major Oklahoma firm [Goldman 1997, 249]) who had prepared numerous documents and

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<sup>41</sup> Women’s groups noted with dismay the double standard between Krauskopf and J. Harvie Wilkinson III, whom President Reagan nominated straight from the legal academy onto the Fourth Circuit Court of Appeals.

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appeared in court but never tried a case herself. Nancy Stanley,<sup>42</sup> one of the lawyers who had vetted Seymour for the Justice Department, was surprised to learn that the ABA Committee was about to rate Seymour “not qualified” since Seymour had the reputation of being “a lawyer’s lawyer” for the gas and oil industry. Justice called in the ABA Committee chair, Robert Raven, and the Committee member who conducted the investigation of the 10<sup>th</sup> Circuit, demanding to know how they did their inquiry and reached this result. When Justice examined the men the ABA Committee member for the 10<sup>th</sup> Circuit had interviewed, they allegedly discovered that several criticized Seymour because they had a friend whom they thought should have the slot and would receive it if the Committee rated Seymour unqualified. The Justice Department demanded a new investigation with a different circuit representative and Seymour was nominated.<sup>43</sup>

Bell also succeeded in getting the ABA to reconsider its “not qualified” rating for Diana Murphy for the district court in Minnesota (Goldman 1997, 267). President Clinton nominated Judge Murphy to the Eighth Circuit Court of Appeals where she has served with distinction since 1994. Seymour’s case was not the only time Bell intervened in the ABA process, and he apparently told the ABA that they would either reconsider their ratings or the President would stop giving them privileged status in assessing prospective nominees—a threat President Bush (43) carried out. Some accounts emphasize Bell’s interventions with the committee, others also credit Lipshutz.<sup>44</sup> On five

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<sup>42</sup> Stanley was an officer in NOW.

<sup>43</sup> Babcock recalls that she can “take some credit” for Seymour and Ginsburg but struck out with other women nominees. She recalls it not being so much men against women but, with the Democrats having been out of office for so long, it was the case of a “woman versus a specific well-qualified man who had done a huge amount for the Party and having thus far been denied what he had worked most of his career for.”

<sup>44</sup> Lipshutz said, “So, the president had me go to speak with the Standing Committee. And frankly, we just had to be rather blunt and tell them if they did not cooperate with us by modifying these requirements [13 years of practice, extensive trial experience] that we would start ignoring the Standing Committee and the

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occasions, the Administration proceeded to nominate candidates the ABA had rated as “not qualified.” The Senate confirmed two of the white men so rated, David O’Brien and William Matthew Kidd. The Senate confirmed one African-American, U.W. Clemson, but a second, Fred Gray, withdrew. Once Carter had chosen a woman nominee, McKenna could rally women’s groups to put pressure at key points, but securing ABA approval and Senate confirmation was in the hands of the Justice Department.

Feminists involved in the process came to believe that the ABA rating system was deeply flawed, both in the criteria it used and its process more generally. According to Lynn Hecht Schafran, they used to say that if the nominee was male, white, had not tried a case in 20 years, and belonged to three discriminatory clubs, the ABA would consider him a star. Political scientists carefully examined the ratings of all of Carter’s nominees based on the questionnaires they filled out under oath for the Senate Judiciary Committee and found that the non-traditional nominees (women and minority men) were not less qualified as a group than the white male nominees. They were different— younger, less wealthy, less likely to be a Republican, more likely to have been born outside of the jurisdiction for which they were nominated, more likely to have done criminal work, less likely to have been involved in political campaigns (true of the women compared to the white men), less likely to have more than 20 years of legal experience, and more likely to have judicial experience, experience as a public defender, or worked as a legal aid lawyer. Most importantly, however, they were less likely to have received the ABA top two rating, exceptionally well qualified or qualified (Slotnick 1982-83, 294-97).

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American Bar and go directly to the process” (Lipshutz 2006, 9). A document I had to petition for release summarized a meeting with Michael Eagan Robert Lipshutz and the ABA Standing Committee at the White House on November 16, 1978.

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McKenna and her colleagues thus did not just have to persuade the senators and nominating commissions to recommend women but, once they did, they had to fight the Justice Department to get the President to select the women on the list. Then once President Carter chose a woman, they had to fight to ensure that an unwarranted ABA rating of unqualified did not defeat the nomination. The Senate delayed and obstructed some nominees. Right-wing groups, unhappy about President Carter's ability to shape the federal bench with the 150 new positions created by the Omnibus Judgeship Act of 1978, challenged liberals and nominees they considered to be activists. Did it so tar women and minority men with that label? Or were those nominees more likely to have been politically active in liberal causes, particularly advancing the causes of women and minorities? One of the two woman Assistant Attorney Generals in the Justice Department and the Justice Department's liaison to Congress, Patricia Wald, faced fierce opposition over her appointment to be the first woman on the D.C. Circuit Court of Appeals. Canned editorials branded her "anti-family" because of her work on children's rights (although she had been a stay-at-home mother of five for ten years) and Senator Gordon Humphrey called her a "wild and wooly woman" (Wald 2005, 987). Wald's case presages the politicization and gridlock over women and minority men nominees perceived to be left of center and tied to social change causes in later administrations. Before I consider the last obstacle McKenna and her colleagues overcame, gaining President Carter's commitment to the policy itself, I need to first review his relationship with feminism.

### **I. Carter's Stormy Relationships with Feminists Inside and Out**

Just as feminists were ambivalent about engaging the state, participating in mainstream electoral politics, and throwing their support behind one candidate or party (Freeman 2000, Sanbanmatsu 2002, Tobias 1997, Young 2000), they were ambivalent and divided about Carter himself (Hartmann 1998b). Women worked hard to elect him, although many more progressive feminists, disappointed with Carter's record as president, had supported Senator Kennedy's challenge to Carter's renomination in 1980. As a born-again Christian, Carter said he personally opposed abortion. He supported legalization, but not public funding. Carter supported the Equal Rights Amendment (Costain 1992, 93-99), but many feminists claimed he did not use enough of his political capital to ensure ratification (Carabillo et al. 1993, 91). After Iran took Americans hostage in 1979, Carter would not leave the White House to campaign, but Rosalynn Carter did actively campaign for the ERA.<sup>45</sup> Rosalynn was an active participant in the Administration. Although the experiences of his wife and mother sensitized President Carter to women's economic vulnerabilities, his determination to bring women and minority men into government may have stemmed in part from his hostility to the party machine and his commitment to merit over partisan considerations, and was a sharp departure from his predecessors.

President Carter's difficulties with his advisers on women illustrate the stormy relationship. His first political, not policy, adviser was Midge Costanza, who ran his campaign in New York, one of the only non-Georgians in such a position in the White House and the first woman appointed as an assistant to the President (Tenpas 1997, 100).

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<sup>45</sup> When the Illinois legislature voted no in the summer of 1980, the ERA was effectively defeated, despite extending the time period for ratification and heroic efforts in other states, such as North Carolina.

Carter allegedly fired Costanza after she embarrassed him by overstating his support for gay rights.

The United Nations had declared 1976 International Women's Year and later extended that year into a decade. In celebration, President Ford and Congress supported Congresswoman Bella Abzug's bill to fund a national conference made up of delegates each state elected in state conferences (Freeman, Tobias 1997, 109). As twenty thousand women gathered in Houston, it was clear that a backlash against feminist progress on abortion, lesbian rights, and the ERA was organizing and approximately 20% of the women who gathered were antifeminists. The Conference produced a National Plan of Action and President Carter appointed Abzug to chair his national advisory committee on women. The Committee publicly criticized the Administration's slow progress on women's issues and Carter's practice of canceling meetings and she lectured the President at length when he did attend. At the last meeting with Abzug as chair, Carter implored women to help him persuade liberal senators saying "I would love to have half women, but you must help me with the local Senators."<sup>46</sup> Carter eventually fired Abzug, precipitating a crisis within women's groups. Steinem and Abzug pressured members to resign, but half of the forty-member group stayed on (Levine and Thom 2007, 214-228; Martin 2003, 235).<sup>47</sup>

Sarah Weddington, the lawyer who argued *Roe v. Wade* before the U.S. Supreme Court, then became his special adviser on women's issues. Weddington worked to get more women appointed to public office, including judgeships, campaigned with the President for re-election, and helped craft his message on women's issues. Even

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<sup>46</sup> "The President's Remarks to the National Advisory Committee for Women." McKenna Box 136. National Advisory Committee for Women.

<sup>47</sup> See also Rochon and Mazmanian for the hazards of those who engage the state (1993, 87).

Weddington, who, after Abzug and Costanza, presented the more mild-mannered face of feminism (Martin 2003, 225), was not fooled into thinking she was a top adviser. Criticizing the release of candid photographs of Carter working in the oval office, Weddington wrote in a memo: “Mainly through our efforts the outside world would think there are women in the inner circle. For the sake of the President, it would be good to perpetuate that myth” (Martin 2003, 245).<sup>48</sup>

McKenna was not a lone femocrat—the other lawyers in the White House Counsel’s office shared her commitment to a diverse and representative bench, even as she made it a higher priority. Weddington and the First Lady supported her efforts. It may well be, too, that just as radicals make liberal feminists seem more palatable to deal with, in a good cop/bad cop synergy, Abzug and Costanza may have strengthened McKenna’s hand. McKenna and Weddington, the insiders and team players, may have been more effective, not so much because of their strategies alone, but because others pressing the case more critically were more difficult to deal with.

### **J. Insider’s Roles in Shaping Political Commitments: Creating Carter’s Commitment to a Gender-Diverse Bench**

McKenna succeeded in charging the circuit court nominating commissions with putting women on their lists and pressured senators to consider women for district court nominations once Congress passed the Omnibus Judges Act. Along with her colleagues in the White House Counsel’s office, she intervened with President Carter to override

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<sup>48</sup> Martin concludes: “One striking pattern that emerges in this study is the constant emergence and re-emergence, not only from administration to administration, but within the same administration, of various commissions, White House offices, advisory committees, task forces, and talent banks, all devoted to the question of women’s inclusion and participation in government, all coming to the same conclusions, issuing a similar agenda, each administration re-inventing the wheel and claiming credit for it, while real progress proceeds in tiny increments, in fits and starts” (Martin 2003, 258).

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Attorney General Bell's recommendations of white men and succeeded in persuading Carter to nominate women and minority men once their names began to appear on the lists. She worked more indirectly with others to pressure the ABA's Committee not to rate all of the women nominees not qualified. Her efforts and the effects of her efforts are evidenced by the testimony of insiders (such as Babcock), the enmity she aroused from Bell, the statements of successful nominees (like Nathaniel Jones), the paper trail of memos in the presidential papers, and her own statements. So far, the story is one of tenacious policy implementation—McKenna succeeded in getting herself assigned to the task of securing women appointments and, once having done so, pursued the task relentlessly, overcoming barriers within and outside of the Administration. But McKenna's fourth contribution (perhaps not properly characterized as an obstacle) occurred incrementally and steadily over the course of the Administration. She and her colleagues helped President Carter develop and solidify his commitment to appoint women and minority men to the bench.

As part of the campaign, Carter had declared he would consider women for all governmental positions, promising to consider at least one woman for each cabinet position, for example. Those campaign promises included appointing women to the federal judiciary (explicitly in both the Democratic and Republican Party platforms in 1976 [Clark 2002]). President Carter charged Costanza, Abzug, and then Weddington with the task of working with women's groups to gather names and alerting the White House when problems arose.<sup>49</sup> They were the internal bean counters and point persons

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<sup>49</sup> President Carter took his pledge to ensure women at high levels of government departments seriously. For example, he wrote a hand written note to Energy Secretary James Schlesinger saying he had reports of no women in his top fifty appointments, saying this made needless trouble for him, and demanding an immediate accounting of his top positions.

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within the Administration for appointing women across the board. Reading the presidential papers, however, one has the sense that in its early years, the Administration pursued two separate policy tracks: merit selection of judges and appointment of women to governmental office. McKenna and her colleagues in the White House Counsel's office persuaded the president to connect the dots and link those two issues together.

In Carter's speech before the U.S. National Women's Agenda Conference as a presidential candidate, he pledges his support for the agenda in its entirety.<sup>50</sup> The overarching theme is economic inequality. Carter speaks of how his mother worked as a teenager for the post office and then as a nurse until the age of 70 and how Rosalynn had to go to work washing hair in a beauty parlor to help her mother after her father died when she was 13. He talks about discrimination and women's under-representation in the federal government, but he appears to have in mind the bureaucracy. He calls for women to help him identify qualified women, but although he lists justice as a field among seven needing integration, he does not mention the judiciary or the legal profession (except to end with the hope that his daughter could be just as sure of being a lawyer as a secretary). Carter mentions virtually every feminist issue he can think of to support (notably absent, of course, are abortion and lesbian rights), but he does not mention the importance of women serving in the judiciary. From the beginning of his presidency, Carter was committed to integrating women into the federal government in general rather than the judiciary in particular.

As I have shown, Attorney General Bell and Assistant Attorney General Eagan were slow to challenge the conventional standards or procedures of judicial selection that

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<sup>50</sup> Speech Given before the U.S. National Women's Agenda Conference, October 2, 1976, Washington, D.C. by Governor Jimmy Carter. Carter Presidential Library.

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excluded women and minority men and to pursue affirmative action. They were, however, willing to make slightly more token appointments than their predecessors if they could find candidates who met their narrow standards of merit. President Carter was committed to merit selection. He wrote handwritten notes to senators urging them to set up nominating commissions and established circuit nominating commissions. Carter abhorred the idea of political interference with the workings of the Justice Department. In July of 1977, White House Chief of Staff Hamilton Jordan sent him a memo about whom Carter should select for the First Circuit Court of Appeals. Jordan recommended that the seat go to someone from New Hampshire and Carter wrote longhand, “why are we deciding which state gets a judge? This is not merit selection.”<sup>51</sup> The panel recommended five people, including one woman from Rhode Island, Florence Murray, a Superior Court judge. The biographical note states: “Judge Murray was the first woman appointed to the bench in Rhode Island. (The number of women of requisite experience in the profession in R.I., N.H., and P.R. is virtually nil.)”<sup>52</sup> Notably, President Carter does not comment on the fact that Attorney General Bell has followed the recommendations of the two Senators from New Hampshire (especially in light of the recommended nominee, Judge Hugh Bownes’s high reversal rate) rather than his direction to find a woman. Instead, he focuses on the alleged contradiction between geographic preferences and merit selection. Neither gender nor affirmative action seems to factor into his decision.

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<sup>51</sup> Box Staff Secretary 38 7/18/77 [3] Memorandum for the President from Hamilton Hordan re: Judicial Appointment to the First Circuit Court of Appeals, July 14, 1977. Carter Presidential Library.

<sup>52</sup> Other files hold a telegram calling for the appointment of x as the first woman and first Puerto Rican on the First Circuit Court of Appeals.

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McKenna recalls that the issue “wasn’t that high on Carter’s list.” As one who was not a lawyer, initially he did not have that much to do with judicial appointments. He thought they would “take the politics out of it and that the “ABA’s role would be good.” Although Carter instituted the nominating commissions for the circuit courts, during the first two years into the Administration, he had appointed only one woman. It is interesting to speculate what might have been had McKenna not been a lawyer with the active support of the White House Counsel’s office. As a non-lawyer, it is unlikely Costanza would have been effective championing judicial appointments. Both Abzug and Weddington were lawyers, but served more as political liaisons to the women’s community (although Weddington, for example, according to McKenna, was the way to get to Rosalynn and, as McKenna said, “we used everything we had”). Weddington’s files show tangential involvement with judicial selection since people outside clearly identified her as the conduit on women’s issues, but it was McKenna who handled judicial appointments. As she says, “they [Costanza, Abzug, Weddington] were aware of judicial appointments and we involved them but it was not their thing.” Clearly, the others relentlessly pursued the case for women’s integration in all walks of life and softened Carter up on the case for affirmative action more generally, but it was McKenna who pursued the issue on judicial appointments in particular.

Carter may have come to support greater integration for women through his recognition of the need for more black judges, particularly in the South. He said to a black reporter that his goal was “to have black judges in Georgia, Florida, the Carolinas, Mississippi, Alabama, Louisiana, indeed, throughout the country” (Slotnick 1982-83, 277. And later: “If 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 be women, and so fourth (Hanchette, quoted in Slotnick 1982-83, 277). In 1977, Carter had called upon the National Bar Association, a black group, to review the qualifications of judicial candidates. Apparently no one at the White House had thought to ask a women's bar group or a legal panel of women's rights organizations to conduct similar reviews (Ness 1978).<sup>53</sup> As McKenna noted, Carter was not a lawyer and tended to defer to Bell initially, but Carter did want to see "the cabal broken up," that is to say, he wanted to go beyond the top 100 law firms and top 5 law schools in the country for his judges. He met early on with a committee whose purpose was to appoint African-Americans to the Fifth Circuit Court of Appeals. His recognition of the need for a more racially diverse judiciary may well have been his path to embracing a more gender diverse judiciary.

In his speech to the Los Angeles Bar Association celebrating its 100<sup>th</sup> anniversary on May 4, 1978, Carter said:

I grew up in a community in Georgia that often did not provide simple justice for a majority of our citizens because of the divisions of privilege between those who owned land and property, and those who did not, the divisions of power between those who controlled the political system and those who were controlled by it, the wall of discrimination that separated blacks and whites.<sup>54</sup>

Carter talked about many important legal policies and mentions that he appointed judges based on merit alone through the use of a nominating commission and that one of his first acts as president was to create a nominating commission for Federal Circuit Judges. He then goes on to say:

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<sup>53</sup> It was women's groups themselves who proposed that role for themselves to Griffin Bell who agreed but then ignored their work.

<sup>54</sup> Staff Secretary 4. 1/28/1977.

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The passage of the Omnibus Judgeship Act, now pending in a House-Senate Conference committee, will provide a test for the concept of merit selection....The passage of this act...offers a unique opportunity to make our judiciary more fully representative of our population. We have an abominable record to date.

The order of that speech reflects the President's order of priorities and how he came to fiercely advocate for the appointment of women judges: merit, race, and then gender (with thinking about gender bolstered by thinking about women in governmental positions more generally). That speech also marks the moment that a diverse and representative bench was firmly on the agenda (Sloviter 2005, 859).

The signing speech for the Omnibus Judges Act shows the policy of affirmative action to increase the number of women judges firmly in place (Lipshutz and Huron 1978-79). Carter says:

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.

Carter went on to say that he intended to write to the chairman of every Circuit Court nominating commission to remind them of this obligation and that he hoped that, with respect to district court nominees, the Senate would work with him to "achieve a more representative judiciary." Moreover, he emphasized that appointments to each court would be considered as a group rather than individually.<sup>55</sup>

Carter's late arrival to the cause of women on the federal bench, engineered, ironically, by the committed feminists he was determined to include in his administration, follows his pattern of equivocation and then reluctant late support for other feminist issues during his administration, from prohibitions against pregnancy discrimination to

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<sup>55</sup> WHCF FG 164 FG 46.

Title IX (Hartmann 1998b). By the time of the election campaign, Carter was firmly committed to a policy of a gender-diverse bench. Although he refused to commit to appointing a woman to the U.S. Supreme Court should a vacancy occur, unlike his challenger, Ronald Reagan, Carter's debate preparation reveals his deep policy commitment to the issue.<sup>56</sup> Women's issues emerged as an important issue on the campaign, both in trying to keep feminists in the fold after their defection to Kennedy's challenge to his nomination and in trying to capitalize on an emerging gender gap where women were less likely to support Ronald Reagan than men. Whether McKenna and her colleagues, Huron and Lipshutz, deserve the credit for changing Carter's policy position, it clearly evolved over the course of his presidency from one of a firm commitment to merit rather than partisan selection, a commitment to racial diversity, particularly in the South, a commitment to women's participation at all levels of government, and finally a firm commitment to a gender-diverse bench.

### **K. Clinton Confronts a Hostile Senate**

After twelve years, the Democrats retook the White House in 1992 and President Clinton faced a vastly different legal and political environment than Carter. First, unlike Jimmy Carter, Bill Clinton and first lady Hillary were both lawyers.<sup>57</sup> Second, the trickle of women into law schools in the late 1960s had become a torrent; women made up nearly half of all law school graduates and the women who had earned law degrees during the earlier time had made partner, received tenure, developed years of

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<sup>56</sup>His prepared answers for the debate supports my argument about how Carter saw the issue. First, Carter emphasized the importance of an independent judiciary and pointed to the importance in the South of the federal judiciary's enforcement of *Brown*, Cutler memorandum to the president October 20, 1980, Counsel File Cutler, Box 96, Folder Judges 9/11/80.

<sup>57</sup> At least since Eleanor Roosevelt, first ladies have championed the appointment of women to the federal bench, but Hillary Clinton had far greater capacity for influence than any of her predecessors.

trial experience, organized state women's bar associations, and secured positions on state and federal benches. President Clinton had a very different pool to choose from than President Carter. Third, the backlash against affirmative action had crescendoed although, paradoxically, the demand for proportionate representation of women at all levels of government had strengthened. Fourth, the ideological scrutiny Nixon had begun of judicial candidates had gathered steam under Reagan and Bush and the judicial appointment process became more contested and politicized. Conservatives were furious over the failure of the nomination of Robert Bork and that successive appointments to the Supreme Court had not yet resulted in a clear overruling of *Roe v. Wade*. Fifth, the gender gap that emerged in the 1980 presidential race exploded in 1992 to 17 points, catapulting Clinton into the White House with a disproportionately high women's vote.

As a candidate, Clinton had not promised merely to integrate women at all levels of government, but had explicitly promised to have a federal judiciary "that looked like America." Like President Carter, he found feminist groups' scrutiny over the numbers of his appointments "bean counting" and bristled at their criticisms. Unlike Margaret McKenna, who had to fight the Justice Department from inside the White House, the Attorney General was now a woman for the first time ever, Janet Reno, and she appointed Eleanor D. Acheson to be her assistant attorney general and run judicial appointments (Borrelli 2000). Eleanor, the granddaughter of Dean Acheson, had been the college roommate of Hillary Clinton at Wellesley. She later served as the National Gay and Lesbian Taskforce's general counsel (Chibbaro 2005). The challenge for the Clinton administration would be securing confirmation of its nominees, particularly after

the Republicans became the majority party in Congress in 1994.<sup>58</sup> Senate majority leader Robert Dole was not interested in scheduling floor votes on nominees once he became a candidate for president in 1996 and later, the impeachment of the President derailed other policy objectives. The worst of the gridlock in the 105<sup>th</sup> Congress (it took 161 days to confirm compared to 59 days for the 103<sup>rd</sup> [Goldman et al. 2001, 234]) appeared to have abated after Chief Justice Rehnquist and local bar associations criticized the delay and warned of the dire consequences of a high vacancy rate on the federal courts (Goldman and Slotnick 1999, 269). One of Acheson's greatest challenges was to get the Administration to focus on and prioritize judicial appointments when so much else was going on in the White House.

Women nominees' difficulty, then, was securing Senate confirmation. It took women and minority men six weeks longer to clear the confirmation hurdle than white men, despite their higher ABA ratings (Goldman et al. 2001, 234). Many of the so-called non-traditional nominees were the ones the Senate voted down or never acted on.<sup>59</sup> Gender became a proxy for liberal activist in the minds of Republican Senators (Wilson 2003, 43). With Reno and Acheson in charge at the Justice Department, and Hillary watching closely from the White House (she had chaired the ABA Commission on Women in the Profession from 1987-1992 [Tobias 1999, 331]), the Administration would likely not fail to implement the President's policy of nominating women and minority men, but securing their confirmation in this difficult environment was another matter.

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<sup>58</sup> Acheson states that the Justice Department focused more on quality while the White House focused on politics and that the conflicts between the two abated once Judge Mikva joined the White House Counsel's office (Acheson 2006).

<sup>59</sup> Nan Aron, Director of the Alliance for Justice, was especially vocal at identifying and quantifying what she argued was a clear double standard (Goldman et al. 2001, 236). Others argued it was "merely" a case of women having few friends with clout to lobby for them and senators "profiling" women and minority men as more likely to be liberal.

Although some problems remained, the ABA Standing Committee rated 63% of Clinton's nominees well qualified, 10 percentage points higher than the Reagan and Bush (41) Administrations' (Tobias 1999, 321-22) and the highest rankings since the ABA began formally evaluating nominees in 1953 (Tobias 1999, 324). Groups which championed women candidates no longer faced a wall of men—women had joined the Senate and risen to positions within the White House in the Cabinet. During Clinton's first term, 31% of his nominees were women—a rate that was twice that of Carter's and significantly higher than Reagan and Bush (41)'s (Tobias 1999, 324). Clinton appointed the second woman to the U.S. Supreme Court, Ruth Bader Ginsburg.

#### **L. Women's Ways of Working? A Note on Essentialism<sup>60</sup>**

Anyone who focuses on gender identity rather than feminist ideology to explain McKenna, Babcock, and Acheson, is well advised to consider the record of President Bush (43). After nominating John Roberts to fill Justice O'Connor's vacancy, President Bush was determined to appoint a woman when Rehnquist died (Crawford Greenburg 2007, 257). First Lady, Laura Bush, was also pressing the case for a woman. The White House, however, had crossed all the women off its lists when searching for O'Connor's replacement (Crawford Greenburg 2007, 245) and the Senators who broke the deadlock over the filibuster had warned the White House not to elevate conservative appointees Janice Rogers Brown or Priscilla Owen, who the Senate had finally confirmed after a compromise. Bush's nomination of White House Counsel Harriet Miers infuriated conservatives who were determined not to have another Souter (Toobin 184-197). Moreover Miers did not do well meeting with Senators or learning constitutional law in

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<sup>60</sup> I define essentialism as the belief that all men have one set of attributes and all women another. When speaking of women judges, that translates into an argument that a distinctly feminine as opposed to feminist orientation leads women to decide cases dichotomously different from men (see Kenney 2008).

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preparation for her confirmation hearings and ultimately Bush withdrew the nomination in favor of Samuel Alito. A President determined to appoint a woman and a White House Counsel who was a woman, and a woman Assistant White House Counsel, Rachel Brand, were not sufficient for securing the confirmation of a woman. When asked whether the President took gender into account in judicial appointments and valued a gender-diverse bench, Brand said she believed Bush's numbers to be commensurate with his predecessors. (They were not. More than 28% of Clinton's appointments were women compared to only 22% of Bush's [Diascro and Spill Solberg 2009, 292]). The President could overcome neither the objections of his own core constituency nor allay broader concerns about competence. Having a president wanting to appoint a woman and having women insiders was not sufficient given the political context.

The Bush example counters essentialism in another way. McKenna's strategy was neither distinctly gendered nor uniquely feminist, merely clever and effective. However useful both gender and feminist analyses may be, they do not support the existence of a distinctly feminist policy implementation. Conservative groups were furious that their numerous appointments had not secured a majority to overturn *Roe*. They regarded Justices O'Connor, Souter, and Kennedy as traitors because of *Casey*. Both Toobin and Crawford-Greenburg documented how they vetoed first Attorney General Gonzalez and then Harriet Miers as not sufficiently antiabortion. The Senate would not confirm the only women on Bush's short list who would satisfy conservatives. The Senate would have likely confirmed Miers, but the president chose to let conservative groups veto the appointment. Conservative social movements linked strategically to White House insiders (ironically, in this case Miers herself) caused Miers

to withdraw and the President to select Alito. Their success shows the generalizability of the McKenna case: the constraints of Senate confirmation notwithstanding, social movements in connection with insiders implement policy. In Bush's case, however, the policy success was the appointment of conservative judges rather than women and minority men.

**M. Does the Obama Administration Have Feminist Insiders? Are Feminists Still Working Outside?**

During the Reagan and Bush (41) Administrations, feminist groups devoted most of their efforts to blocking particular nominations, most famously Robert Bork. The groups that developed to diversify the bench have now morphed into more classic coalitions of progressive versus conservative groups (Scherer 2003). Legal Momentum focuses on gender bias more broadly and the National Association of Women Judges, too, has taken on a broader agenda, for example, the use of international law in domestic courts. (It has a committee on judicial appointments, but is not highly influential or active.) The National Women's Political Caucus is terminally ill, if not dead. Many state women's bar associations have turned to other issues. No one group or dedicated coalition currently focuses on appointing more women to the bench, although the Alliance for Justice has made priority of publicizing the Senate's disparate treatment of women nominees. What lessons should feminists take from McKenna, Acheson, and Miers as they face the challenge of moving women beyond token representation on appellate courts and their overall numbers as judges from hovering around 25% to closer to 50%?

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Like Presidents Carter and Clinton, President Obama has placed advocates for greater judicial gender diversity such as Preeta Bansal, Cassandra Butts, and Dawn E. Johnson, in key positions (Toobin 2009). President Obama's nomination of Judge Sonia Sotomayor demonstrates the Administration's commitment to a diverse and representative bench. Of the 25 nominations President Obama has made for the federal courts, 11 or 44% have been women.<sup>61</sup> The vitriol conservatives unleashed in response to Judge Sotomayor's nomination,<sup>62</sup> the Senate's failure to cast a floor vote on President Obama's first judicial nominee, David Hamilton, despite a favorable committee report, the slow pace of the President's nominations, and the threat of a filibuster, all suggest that Obama's appointments will meet considerable resistance. President Obama needs no Margaret McKenna to persuade him to nominate women and minority men. Unlike President Carter, President Obama does not have to search for candidates with conventional qualifications of Ivy League educations with distinction, litigation experience, large firm practices, and judicial experience, although the Sotomayor confirmation reveals how both disparate treatment and disparate impact are still at work. Seemingly gender neutral standards may continue to disadvantage women and they still face double standards. Women of color, not white men, are partial, positioned, biased. To mention the significance of social location for judgment is tantamount to racism. Women judges who ask questions from the bench are mean harpies, men who do so merely display their intellectual prowess and demanding standards (Totenberg 2009). Surely President Obama chose both Sotomayor and Hamilton because he thought them to

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<sup>61</sup> [http://en.wikipedia.org/wiki/List\\_of\\_federal\\_judges\\_appointed\\_by\\_Barack\\_Obama](http://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Barack_Obama). Last accessed November 2, 2009.

<sup>62</sup> See Kenney and other essays, "Critical Perspectives on Gender and Judging." *Politics & Gender*, forthcoming 2010.

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be above reproach and certain to sail through the Senate confirmation process. The opposition to these “safe” choices is clearly meant to be a warning should Obama entertain the idea of a less orthodox nominee. Unless feminists organize and mobilize, however, we can expect to see women and minority men take longer to win Senate confirmation and be more likely to fail. Moreover, as with Carter and Clinton nominees, we can expect opponents to demonize legal academics and public interest lawyers as dangerous liberal judicial activists, lacking impartiality and the demeanor to serve as judges.

### **N. Conclusion**

Studying closely the case of Margaret McKenna, a feminist insider in the Carter Administration, affords an opportunity to revamp feminist theory about engaging the state, social movement theories about governmental insiders, and theories of policy implementation. Contrary to a perception that women are making steady inroads into judicial institutions, the evidence shows considerable reversals and the strengthening of old and the development of new, formidable obstacles. Only by understanding the workings of networks of insiders and outsiders can we explain the enormous variation in presidential records on judicial diversity during the last 30 years. The irony is that conservatives, not feminists and progressives, have taken to heart the lessons of the Carter Administration and the Bork nomination. The withdrawal of Miers’ nomination, and the Roberts and Alito appointments are the work of a well-oiled machine. That machine reflects the recognition that policy success requires a network of insiders and outsiders, and a network that enjoys considerable media savvy (Teles 2008, Toobin 2007). Insiders provide six critical assets to movements: identifying exact decision

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points and telling outsiders which lever to pull and when, proposing strategies, including movement adherents in decision making, framing issues, bringing movement dissatisfaction to the attention of key decision makers, and advocating internally for movement goals. If feminists and progressives misunderstand the policy implementation challenge as merely securing the nomination of women and minority men—the huge accomplishment of the Carter Administration—rather than Senate confirmation, they will fail. The lesson feminists and progressives should take from the Carter Administration, and from the subsequent conservative legal movement, is that they must reproduce and strengthen the outside organizations that mobilized with insiders. Feminists have been ambivalent about engaging the state and sustaining that engagement through Republican Administrations. Unless organizations from women’s bar associations, to the National Association of Women Judges, to NOW and Legal Momentum recommit to the actions they took in the 1970s, new organizations such as Emily’s List and the White House Project or others (such as the Infinity Project<sup>63</sup>) replace the vacuum created by the National Women’s Political Caucus, progressive legal organizations such as Justice at Stake, the Alliance for Justice, and People for the American Way place a higher priority on judicial diversity, and mass membership organizations such the League of Women Voters and the American Association of University Women join the activities of the National Women’s Law Center, the National Partnership for Women and Families, and the Women’s Division of the American Jewish Congress, we will continue to see a disproportionate gap between the number of women the President nominates and the

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<sup>63</sup> [www.theinfinityproject.org](http://www.theinfinityproject.org).

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number confirmed; the policy of securing a diverse and representative bench will not be implemented.

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## References

- Acheson, Eleanor. 2006. "Remarks on Judicial Selection." Presented at the Lloyd N. Cutler Conference on White House Counsel, Miller Center, University of Virginia.
- Allen, Judith. 1990. "Does Feminism Need a Theory of the State?" In *Playing the State: Australian State Interventions*, ed. Sophie Watson. Boston: Allen and Unwin, 21-38.
- Amenta, Edwin. 1995. "Political Contexts, Challenger Strategies, and Mobilization: Explaining the Impact of the Townsend Plan." In *Routing the Opposition: Social Movements, Public Policy, and Democracy*, ed. David S. Meyer, Valerie Jenness, and Helen Ingram. Minneapolis: University of Minnesota Press, 29-64.
- American Bar Association. 2009. *Standing Committee on the Federal Judiciary: What it Is and How it Works*. [http://www.abanet.org/scfedjud/federal\\_judiciary09.pdf](http://www.abanet.org/scfedjud/federal_judiciary09.pdf). Last accessed, November 2, 2009.
- Banaszak, Lee Ann. 2005. "Inside and Outside the State: Movement Insider Status, Tactics, and Public Policy Achievements." In *Routing the Opposition: Social Movements, Public Policy, and Democracy*, ed. David S. Meyer, Valerie Jenness, and Helen Ingram. Minneapolis: University of Minnesota Press, 149-76.
- \_\_\_\_\_. 2009. *The Women's Movement Inside and Outside the State*. New York: Cambridge University Press.
- \_\_\_\_\_. "Activism in a Hostile Environment: Changing Presidential Administrations and Feminist Activists in the Federal Government."

- \_\_\_\_\_. "Inside and Outside the State: How Feminist Activists inside the Federal Bureaucracy Changed Policy."
- \_\_\_\_\_. "Mobilizing In and Out of the State: Feminist Bureaucrats and the Creation of Women's Movement Organizations."
- Banaszak, Lee Ann, Karen Beckwith, and Dieter Rucht. 2003. *Women's Movements Facing the Reconfigured State*. Cambridge: Cambridge University Press.
- Bardach, Eugene. 1977. *The Implementation Game: What Happens After a Bill Becomes Law*. Cambridge, MA: MIT Press.
- Bell, Griffin B. 1982. *Taking Care of the Law*. New York: William Morrow.
- Bernstein, Anya. 2001. *The Moderation Dilemma: Legislative Coalitions and the Politics of Family and Medical Leave*. Pittsburgh: University of Pittsburgh Press.
- Borrelli, Mary Anne. 2000. "Gender, Politics, and Change in the United States Cabinet: The Madeleine Korbel Albright and Janet Reno Appointments." In *Gender and American Politics: Women, Men, and the Political Process*, ed. Sue Tolleson-Rinehard and Jyl J. Josephson. New York: M.E. Sharpe, 185-204.
- Burbank, Stephen B. 2002. "Politics, Privilege, and Power: The Senate's Role in the Appointment of Federal Judges." *Judicature* 86(24): 24-27.
- Carabillo, Toni, Judith Meuli, and June Bundy Csida. 1993. *Feminist Chronicles 1953-1993*. Los Angeles: Women's Graphics.
- Carpenter, Liz. 1979. "What's Wrong With This Picture? Isn't It Time to Have a Woman on the Supreme Court?" *Redbook* October, 27.
- Chappell, Louise A. 2002. *Gendering Government: Feminist Engagement with the State in Australia and Canada*. Vancouver: University of British Columbia Press.

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Chibbaro, Lou. 2005. "TaskForce to Expand its Federal Profile." March 4.

[www.expressgaynews.com](http://www.expressgaynews.com). Last accessed June 15, 2007.

Clark, Mary. 2002. "Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda." *Yale Journal of Law Feminism* 14: 243.

\_\_\_\_\_. 2004. "One Man's Token is Another Woman's Breakthrough: The Appointments of the First Women Federal Judges." *Villanova Law Review* 49: 487-550.

Cook, Beverly Blair. 1978. "Women Judges: The End of Tokenism." In *Women in the Courts*, ed. Winifred L. Hepperle and Laura Crites. Williamsburg: National Center for State Courts, 84-105.

\_\_\_\_\_. 1980a. "Florence Allen." In *Notable American Women: The Modern Period—A Biographical Dictionary*, ed. Barbara Sicherman and Carol Hurd Green. Cambridge: Harvard University Press, 11-13.

\_\_\_\_\_. 1980b. "Political Culture and Selection of Women Judges in Trial Courts." In *Women in Local Politics*, ed. Debra W. Stewart. Metuchen, NJ: Scarecrow Press, 42-60.

\_\_\_\_\_. 1982. "Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor." *Judicature* 65(6): 314-326.

\_\_\_\_\_. 1983. "The Path to the Bench: Ambitions and Attitudes of Women in the Law." *Trial* (August): 49-55.

- \_\_\_\_\_. 1984a. "Women Judges: A Preface to their History." *Golden Gate University Law Review* 14(3): 573-607.
- \_\_\_\_\_. 1984b. "Women on the State Bench: Correlates of Access." In *Political Women: Current Roles in State and Local Government*, ed. Janet A. Flammang. Beverly Hills: Sage, 191-218.
- \_\_\_\_\_. [1984] 1987. "Women Judges in the Opportunity Structure." In *Women, The Courts, and Equality*, ed. Laura L. Crites and Winifred L. Hepperle. Newbury Park, CA: Sage, 143-174.
- \_\_\_\_\_. 1988. "Women as Judges." In *Women in the Judicial Process*, ed. Beverly B. Cook, Leslie F. Goldstein, Karen O'Connor, and Susette M. Talarico. Washington, D.C.: American Political Science Association, 9-24.
- Costain, Anne N. 1992. *Inviting Women's Rebellion: A Political Process Interpretation of the Women's Movement*. Baltimore: Johns Hopkins University Press.
- Court Review. 1998. "An Interview with Eleanor Dean Acheson." *Court Review* (Summer): 6-13.
- Dean, John. 2001. *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court*. New York: Free Press.
- Diascro, Jennifer Segal and Rorie Spill Solberg. 2009. "George W. Bush's Legacy on the Federal Bench: Policy in the Face of Diversity." *Judicature*. 92(6): 289-301.
- Dolan, Julie. 2001a. "Political Appointees in the United States: Does Gender Make a Difference?" *PS* (June): 213-16.
- \_\_\_\_\_. 2001b. "Women in the Executive Branch: A Review Essay of Their Political Impact and Career Opportunities." *Women and Politics* 22(4): 89-104.

- Duerst-Lahti, Georgia. 1989. "The Government's Role in Building the Women's Movement." *Political Science Quarterly* 104(2): 249-268.
- Eagan, Michael. 2006. "Remarks on Judicial Selection." Presented at the Lloyd N. Cutler Conference on White House Counsel, Miller Center, University of Virginia.
- Eisenstein, Hester. 1984. *Contemporary Feminist Thought*. London: Unwin.
- \_\_\_\_\_. 1991. *Gender Shock: Practicing Feminism on Two Continents*. Boston: Beacon.
- \_\_\_\_\_. 1996. *Inside Agitators: Australian Femocrats and the State*. Philadelphia: Temple University Press.
- Ferree, Myra Marx and Patricia Yancey Martin, eds. 1995. *Feminist Organizations: Harvest of the New Women=s Movement*. Philadelphia: Temple.
- Franzway, Suzanne, Diane Court, and R.W. Connell. 1989. *Staking a Claim: Feminism, Bureaucracy and the State*. Sydney: Allen and Unwin.
- Fraser, Arvonne. 2007. *She's No Lady: Politics, Family, and International Feminism*. St. Paul: Nodin Press.
- \_\_\_\_\_. 1983. "Insiders and Outsiders: Women in the Political Arena." In *Women in Washington: Advocates for Public Policy*, ed. Irene Tinker. Beverly Hills: Sage, 120-39.
- Freeman, Jo. "The National Women's Conference in Houston, 1977."  
<http://www.jofreeman.com/photos/IWY1977.html>. Last accessed February 23, 2009.
- \_\_\_\_\_. 2000. *A Room at a Time: How Women Entered Party Politics*. New York: Rowman & Littlefield.

- \_\_\_\_\_. 1975. *The Politics of Women's Liberation*. New York: David McKay.
- Gagné, Patricia. 1998. *Battered Women's Justice: The Movement for Clemency and the Politics of Self-Defense*. New York: Twayne.
- Giffen, Lee. 1976. "Her Honor, the Judge." *The Atlanta Journal and Constitution Magazine*, December 12.
- Ginsburg, Ruth Bader and Laura W. Brill. 1995. "Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought." *Fordham Law Review*. 64: 281-290.
- Goldman, Sheldon. 2002. Review of David Alisatir Yalof's *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*. *American Political Science Review* 96(1): 222-223.
- Goldman, Sheldon and Matthew D. Saronson. 1994. "Clinton's Nontraditional Judges: Creating a More Representative Bench." *Judicature* 78: 68-73.
- Goldman, Sheldon. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven: Yale University Press.
- \_\_\_\_\_ and Elliot Slotnick. 1999. "Picking Judges Under Fire." *Judicature* 82(6): 265-84.
- Goldman, Sheldon, Gerard Gryski, and Gary Zuk. 2001. "Clinton's Judges: Summing up the Legacy." *Judicature* 84(5): 228-54.
- Gordon, Linda. 1994. *Pitied but Not Entitled: Single Mothers and the History of Welfare*. New York: Free Press.

- Gottschall, Jon. 1983. "Carter's Judicial Appointments: the Influence of Affirmative Action and Merit Selection on Voting on the U.S. Court of Appeals." *Judicature* 67(4): 165-73.
- Greenburg, Jan Crawford. 2007. *Supreme Conflict: the Inside Story of the Struggle for Control of the United States Supreme Court*. New York: Penguin.
- Hafner-Burton, Emilie and Mark A. Pollack. 2002. "Gender Mainstreaming and Global Governance." *Feminist Legal Studies* 10(3): 285-98.
- Haney, Lynne. 1996. "Homeboys, Babies, Men in Suits." *American Journal of Sociology* 61: 759-78.
- Hartmann, Susan. 1998a. *The Other Feminists: Activists in the Liberal Establishment*. New Haven: Yale University Press.
- \_\_\_\_\_. 1998b. "Feminism, Public Policy, and the Carter Administration." In *The Carter Presidency: Policy Choices in the Post-New Deal Era*, ed. by Gary M. Fink and Hugh Davis Graham. Lawrence: University of Kansas Press, 224-243.
- Hertzberg, Hendrik. 2005. "Filibuster." *New Yorker*. 81(17): 63-64.
- Jan, Tracy. 2006. "Bigger, More Diverse Lesley University: Leader Who Reinvented School Will Step Down." *Boston Globe*, December 28.
- Kantola, Johanna. 2006. *Feminists Theorize the State*. New York: Palgrave MacMillan.
- Kantola, Johanna and Joyce Outshoorn. 2007. "Changing State Feminism." In *Changing State Feminism*, eds. Joyce Outshoorn and Johanna Kantola. New York: Palgrave Macmillan, 1-19.
- Katzenstein, Mary. 1999. *Faithful and Fearless: Moving Feminist Protest Inside the Church and the Military*. Princeton: Princeton University Press.

- Kaufman, Burton I. *Presidential Profiles: The Carter Years*. 2006. New York: Facts on File.
- Kenney, Sally J. 1995. "Women, Gender, Feminism, and Law: Ruminations of a Feminist Academic." *Women and Politics* 15(3): 43-69.
- \_\_\_\_\_. 1996. "New Research on Gendered Political Institutions." *Political Research Quarterly*. 49(2): 445-66.
- \_\_\_\_\_. 2008. "Thinking About Gender and Judging." *International Journal of the Legal Profession* 15(1): 87-110.
- \_\_\_\_\_. 2009. "Nixon Gaffe Sparks Era of Judicial Advance." Women's E-News, May 4. <http://www.womensenews.org/story/our-story/090504/nixon-gaffe-sparks-era-judicial-advance>, Last accessed October 28, 2009.
- \_\_\_\_\_. 2010. "It Would be Stupendous for Us Girls: Campaigning for Women Judges Without Waving." In *Breaking the Waves*, eds. Kathleen Laughlin and . Routledge.
- Kingdon, John W. 1995. *Agendas, Alternatives, and Public Policies*. New York: Harper Collins.
- Krislov, Samuel. 1974. *Representative Bureaucracy*. Englewood Cliffs, NJ: Prentice-Hall.
- Laughlin, Kathleen. 2000. *Women's Work and Public Policy: A History of the Women's Bureau, Department of Labor*. Boston: Northeastern University Press.
- \_\_\_\_\_. 2009. "Is It Time to Jump Ship? Historians Rethink the Waves Metaphor," *National Women's Studies Association Journal*. Forthcoming.
- Levine, Suzanne Braun and Mary Thom. 2007. *Bella Abzug: How One Tough Broad from the Bronx Fought Jim Crow and Joe McCarthy, Pissed Off Jimmy Carter, Battled for the Rights of Women and Workers, Rallied Against War and for the*

- Planet, and Shook Up Politics Along the Way.* New York City: Farrar, Straus and Giroux.
- Lipshutz, Robert J. and Douglas B. Huron. 1978-9. "Achieving a More Representative Federal Judiciary." *Judicature* 62(10): 483-5.
- \_\_\_\_\_. 2006. "Remarks on Judicial Selection." Presented at the Lloyd N. Cutler Conference on White House Counsel, Miller Center, University of Virginia.
- Lipsky, Michael. 1980. *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service.* New York: Russell Sage Foundation.
- Lorde, Audre. 1984. *Sister Outsider.* Berkeley, CA: Crossing Press.
- Love, Barbara J. 2006. *Feminists Who Changed America, 1963-75.* University of Illinois Press.
- Lovenduski, Joni. 1997. "Sex Equality and the Rules of the Game." In *Sex Equality Policy in Western Europe.* Ed. Francis Gardiner. New York: Routledge, , 91-108.
- MacKinnon, Catharine. 1983a. "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence." *Signs* 635: 8.
- \_\_\_\_\_. 1983b. "Feminism, Marxism, Method and the State: An Agenda for Theory." *Signs* 515: 7.
- \_\_\_\_\_. 1989. *Toward a Feminist Theory of the State.* Cambridge: Harvard University Press.
- Martin, Elaine. 1982. "Women on the Federal Bench: a Comparative Profile." *Judicature* 65(6): 306-13.
- \_\_\_\_\_. 1987. "Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations." *Judicature* 71(3): 136-42.

- \_\_\_\_\_. 1989. "Differences in Men and Women Judges: Perspective on Gender." *Journal of Political Science* 17: 74-85.
- \_\_\_\_\_. 1990. "Men and Women on the Bench: Vive La Difference?" *Judicature* 73(4): 204-8.
- \_\_\_\_\_. 1991a. "Judicial Role Models: a Women Judges' Network." Presented at the Meeting of the Midwest Political Science Association, Chicago, April 18-20.
- \_\_\_\_\_. 1991b. "Judicial Gender and Judicial Choices." In *Gender and Policymaking: Studies of Women in Office*, ed. Debra L. Dodson. New Brunswick: Center for the American Woman and Politics, 91-108.
- \_\_\_\_\_. 1993a. "Women on the Bench: A Different Voice?" *Judicature* 77(3): 126-8.
- \_\_\_\_\_. 1993b. "The Representative Role of Women Judges." *Judicature* 77(3): 166-73.
- \_\_\_\_\_. 2004. "Gender and Presidential Judicial Selection." *Women and Politics* 26(3/4): 109-29.
- Martin, Janet M. 1997. "Women Who Govern: The President's Appointments." In *The Other Elites: Women, Politics, and Power in the Executive Branch*, ed. MaryAnne Borrelli and Janet M. Martin. Boulder: Lynne Rienner, 51-72.
- \_\_\_\_\_. 2003. *The Presidency and Women: Promise, Performance, and Illusion*. College Station, TX: Texas A&M University Press.
- Mayer, Michael S. 2007. "Civil Rights and the Politics of Judicial Nomination: The Haynsworth Confirmation Battle (and not the one you think)." Presented at Teacher, Scholar, Citizen: Conference in Honor of Stan Katz, February 23. Princeton, New Jersey. Typescript.
- Mazur, Amy. 2002. *Theorizing Feminist Policy*. Oxford: Oxford University Press.

- Meyer, David S. and Deana A. Rohlinger. 2005. "Ideas, Politics, and Social Change: Big Books and Social Movements." University of California Irvine. Typescript.
- \_\_\_\_\_ and Debra C. Minkoff. 2004. "Conceptualizing Political Opportunity." *Social Forces* 82(4): 1457-92.
- Moe, Terry. 1989. "The Politics of Bureaucratic Structure." In *Can the Government Govern?* Ed. John Chubb and Paul Peterson. Washington, D.C.: Brookings Institutions, 267-329.
- Ness, Susan. 1978. "A Sexist Selection Process Keeps Qualified Women Off the Bench." *Washington Post*. March 26.
- \_\_\_\_\_. 1978. "The Bench: Where Are all the Women?" *Los Angeles Times*, April 4.
- \_\_\_\_\_ and Fredrica Weschsler. 1979. "Women Judges—Why So Few?" *Graduate Woman*. November/December, 10-12, 46-49.
- Outshoorn, Joyce. 1995. "Administrative Accommodation in the Netherlands: The Department for the Coordination of Equality Policy." In *Comparative State Feminism*, ed. Dorothy McBride Stetson and Amy Mazur. Thousand Oaks: Sage, 168-85.
- \_\_\_\_\_. 1997. "Incorporating Feminism: the Women's Policy Network in the Netherlands." In *Sex Equality in Western Europe*, ed. Frances Gardiner. New York: Routledge, 109-126.
- Pacelle, Richard L., Jr. 1997. "A President's Legacy: Gender and Appointment to the Federal Courts." In *The Other Elites: Women, Politics, and Power in the*

- Executive Branch*, ed. MaryAnne Borrelli and Janet M. Martin. Boulder: Lynne Rienner, 147-66.
- Palmer, Barbara. 2001. "Women in the American Judiciary: Their Influence and Impact." *Women and Politics* 23(3): 89-99.
- Parry, Janine. 2005. "Women's Policy Agencies, the Women's Movement and Representation in the USA." In *State Feminism and Political Representation*, ed. Joni Lovenduski. Cambridge, Cambridge University Press, 239-59.
- Rai, Shirin M, ed. 2003. *Mainstreaming Gender, Democratizing the State? Institutional Mechanisms for the Advancement of Women*. Manchester: Manchester University Press.
- Randall, Vicky. 1998. "Gender and Power: Women Engage the State." In *Gender, Politics, and the State*, ed. Vicky Randall and Georgina Waylen. London: Routledge, 185-205..
- Resnik, Judith. 1988. "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges." *Southern California Law Review* 61: 1877-944.
- Rochin, Thomas R. and Daniel A. Mazmanian. 1993. "Social Movements and the Policy Process." *Annals of the American Academy of Political and Social Science*, 528: 75-87.
- Roth, Benita. 2006. "Gender Inequality and Feminist Activism in Institutions: Challenges of Marginalization and Feminist 'Fading.'" In *The Politics of Women's Interests: New Comparative Perspectives*, ed. Louise Chappell and Lisa Hill. New York: Routledge, 157-74.

- Sanbonmatsu, Kira. 2002. *Democrats, Republicans, and the Politics of Women's Place*.  
Ann Arbor: University of Michigan Press.
- Santoro, Wayne A. and Gail M. McGuire. 1997. "Social Movement Insiders: The Impact  
of Institutional Activists on Affirmative Action and Comparable Worth Policies."  
*Social Problems* 44(4): 503-19.
- Sawer, Marian. 1995. "Femocrats in Glass Towers?": The Office of the Status of Women  
in Australia. In *Comparative State Feminism*, ed. Dorothy McBride Stetson and  
Amy Mazur. Thousand Oaks: Sage, 22-39.
- \_\_\_\_\_. 1990. *Sisters in Suits: Women and Public Policy in Australia*. Sydney: Allen and  
Unwin.
- \_\_\_\_\_. 2007. "Australia: the Fall of the Femocrat." In *Changing State Feminism*, ed.  
Joyce Outshoorn and Johanna Kantola. New York: Palgrave Macmillan, 20-40.
- \_\_\_\_\_. 2008. *Making Women Count: A History of the Women's Electoral Lobby*.  
Sydney: University of New South Wales Press.
- Schafran, Lynn Hecht. 2005. "Not from Central Casting: the Amazing Rise of Women in  
the American Judiciary." *University of Toledo Law Review* 36(4): 953-69.
- Scherer, Nancy. 2000. "Are Clinton's Judges 'Old' Democrats or 'New' Democrats?"  
*Judicature* 84(3): 151-4.
- \_\_\_\_\_. 2003. "The Judicial Confirmation Process: Mobilizing Elites, Mobilizing  
Masses." *Judicature* 86(5): 240-50.
- \_\_\_\_\_. 2005. *Scoring Points: Politicians, Activists, and the Lower Federal Court  
Appointment Process*. Stanford: Stanford University Press.

- Slotnick, Elliot E. 2002. "A Historical Perspective on Judicial Selection." *Judicature* 86(13): 13-16.
- \_\_\_\_\_. 1988. "Federal Judicial Recruitment and Selection Research: A Review Essay." *Judicature* 71(6): 317-24.
- \_\_\_\_\_. 1982-83. "Lowering the Bench or Raising it Higher?: Affirmative Action and Judicial Selection During the Carter Administration." *Yale Law and Policy Review* (1): 270-98.
- \_\_\_\_\_. Interview with Eleanor Acheson.
- \_\_\_\_\_. Interview with Sara Wilson.
- \_\_\_\_\_. 1979. "The Changing Role of the Senate Judiciary in Judicial Selection." *Judicature* 62(10): 502-10.
- Sloviter, Dolores Korman. 2005. "Personal Reflections." *University of Toledo Law Review* 36(4): 856-61.
- Spalter-Roth, Roberta and Ronnee Schreiber. 1995. "Outsider Issues and Insider Tactics: Strategic Tensions in the Women's Policy Network during the 1980s." In *Feminist Organizations: Harvest of the New Women's Movement*, ed. Myra Marx Ferree and Patricia Yancey Martin. Philadelphia: Temple University Press, 105-27.
- Spill, Rorie L. and Kathleen Bratton. 2001. "Clinton and Diversification of the Federal Judiciary." *Judicature* 84(5): 256-61.
- Stetson, Dorothy McBride and Amy Mazur. 1995. *Comparative State Feminism*. Thousand Oaks: Sage.

- Taylor, Judith. 2005. "Who Manages Feminist-Inspired Reform? An In-Depth Look at Title IX Coordinators in the U.S." *Gender & Society* 19(3): 358-75.
- Teles, Steven M. 2008. *The Rise of the Conservative Legal Movement*. Princeton: Princeton University Press.
- Tenpas, Kathryn Dunn. 1997. "Women on the White House Staff: A Longitudinal Analysis, 1939-1994." In *The Other Elites: Women, Politics, and Power in the Executive Branch*, ed. MaryAnne Borrelli and Janet M. Martin. Boulder: Lynne Rienner, 91-106.
- Tilly, Charles. 1978. *From Mobilization to Revolution*. Reading, MA: Addison-Wesley.
- Tinker, Irene. 1983. *Women in Washington: Advocates for Public Policy*. Beverly Hills: Sage.
- Tobias, Carl. 1999. "Leaving a Legacy on the Federal Courts." *University of Miami Law Review* 53:315-32.
- Tobias, Sheila. 1997. *Faces of Feminism: An Activist's Reflections on the Women's Movement*. Boulder, CO: Westview Press.
- Toobin, Jeffrey. 2009. "Bench Press: Are Obama's Judges Really Liberals?" *New Yorker*. September 21, 42-49.
- \_\_\_\_\_. 2007. *The Nine: Inside the Secret World of the Supreme Court*. New York: Doubleday.
- \_\_\_\_\_. 2005. "Blowing Up the Senate." *New Yorker*. 81(3): 42-46.
- Totenberg, Nina. 2009. "Is Sonia Sotomayor Mean?" National Public Radio. June 15. <http://www.npr.org/templates/story/story.php?storyId=105343155>. Last accessed July 29, 2009.

- Tuve, Jeanette E. 1984. *First Lady of the Law: Florence Ellinwood Allen*. Boston: University Press of America.
- Vargas, Virginia and Saskia Wieringa. 1998. "The Triangle of Empowerment: Processes and Actors in the Making of Public Policy for Women." In *Women's Movements and Public Policy in Europe, Latin America, and the Caribbean*, ed. Geertje Lycklama a Nijeholt, Virginia Vargas, and Saskia Wieringa. New York: Garland, 3-48.
- Wald, Patricia M. 2005. "Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond." *University of Toledo Law Review* 36(4): 979-93.
- Watson, Sophie, ed. 1990. *Playing the State: Australian State Interventions*. Boston: Allen and Unwin.
- Waylen, Georgina. 1998. "Gender, Feminism, and the State: An Overview." In *Gender, Politics, and the State*, ed. Vicky Randall and Georgina Waylen. London: Routledge, 1-17.
- Wilson, James Q. 1989. *Bureaucracy*. New York: Basic Books.
- Wilson, Sarah. 1995. "Interview with Professor Barbara Babcock." *Diversifying the Judiciary: An Oral History of Women Federal Judges*. Federal Judicial Center, May 19.
- Wilson, Sarah. 2003. "Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective." *Journal of Appellate Practice and Process* 5(1): 29-46.
- Yeatman, Anna. 1990. *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State*. Sydney: Allen and Unwin.

11/5/2009

Young, Lisa. 2000. *Feminists and Party Politics*. Ann Arbor: University of Michigan Press.