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# Women Judges Unite: A Report from the Founding Convention of the National Association of Women Judges

## **Erratum**

Corrected spelling of title

## *SPECIAL FEATURES*

### WOMEN JUDGES UNITE: A REPORT FROM THE FOUNDING CONVENTION OF THE NATIONAL ASSOCIATION OF WOMEN JUDGES

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LYNN C. ROSSMAN\*

On October 25, 1979, an organization was born—the National Association of Women Judges (NAWJ). The founding conference was partially a celebration: “[This] is certainly an event that could not have happened a few years ago—there weren’t enough women on the bench then to hold a committee meeting, let alone form a national association. Happily for all of us, that day has changed.”<sup>1</sup> But more than a celebration, it was a dedication to work for major change in the judiciary—to assure both the appointment of a woman to the United States Supreme Court and the integration of women into the entire American judiciary, to speak out as women jurists against sex discrimination and for the Equal Rights Amendment, and to support each other “with a sense of sisterhood” in the fight to end discrimination against women on the bench.<sup>2</sup>

Two committed women jurists had the original idea of starting a nationwide judicial “old girls network” to effect change; Justice Joan Dempsey Klein of the California Court of Appeal and Judge Vaino Spencer of the Los Angeles Superior Court, were long-time allies and friends who found themselves facing

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1. Transcript of address by ABA President Leonard Janofsky, American Bar Ass’n (ABA) President, Founding Conference of the National Association of Women Judges (NAWJ) at 1 (Oct. 26, 1979) (on file at Golden Gate University Law Review Office) [hereinafter cited as Janofsky Address]. Chief Justice Rose Bird similarly noted, “Even a few short years ago, this conference would not have been possible . . . .” Transcript of address by Chief Justice Rose Elizabeth Bird, California Supreme Court, Founding Conference of NAWJ (Oct. 26, 1979) [hereinafter cited as Chief Justice Bird Address].

2. “Statement of Goals for 1980,” address by Justice Joan Dempsey Klein, NAWJ President, Founding Conference of NAWJ (Oct. 28, 1979) [hereinafter cited as Statement of Goals].

similar problems as judges.<sup>3</sup> Some forty women breathed life into their idea, planning and publicizing, seeking support and ideas from political allies, experts on the judiciary, colleagues and clerks, and contacting every woman judge they could locate.<sup>4</sup>

Support for the conference was forthcoming from such notables as California's Chief Justice Rose E. Bird, Governor Jerry Brown, Deputy Counsel to President Carter, Margaret McKenna, American Bar Association (ABA) President Leonard Janofsky, California Judges Association President David Eagleson, Los Angeles Mayor Tom Bradley, and Los Angeles Supervisor Yvonne Braithwaite Burke, each of whom addressed the founders' meeting.

The conference was attended by judges of all races, ranging in age from their early thirties to early seventies, from courts throughout the country. Founding members include members of state supreme courts, U.S. Circuit Courts of Appeals, and state appellate courts.<sup>5</sup> The overwhelming majority of NAWJ members sit on trial courts, which reflects the fact that most women in the judiciary are trial judges.<sup>6</sup>

The three-day convention is noteworthy both because of its significance to all women seeking an end to sex discrimination and because of its special importance to women in law. For observers, this conference was a first-hand lesson that women *can* be judges, similar to the experience of visiting a women doctor

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3. Interview with Judge Vaino Spencer, NAWJ President-elect, Founding Conference of NAWJ, Los Angeles, California (Oct. 27, 1979) [hereinafter cited as Judge Spencer Interview].

4. *Id.*

5. Founding members number 166 and come from a total of 28 different states, Washington, D.C., and the Virgin Islands. They represent 114 different courts, the majority of which are state trial courts. The federal bench was represented at the Founding Conference by Justices Cornelia Kennedy and Patricia Wald of the Sixth Circuit and D.C. Circuit, respectively; other Circuit and District Court judges are founding members. Chief Justice Rose Bird, who addressed the Conference, is one of three founding members who sit on state courts of last resort.

Since the conference, several male judges have joined and eventually NAWJ intends to actively recruit sympathetic male jurists.

6. Cook, *Women Judges: The End of Tokenism*, in *WOMEN IN THE COURTS* 84, 87-88 (W. Hepperle & L. Crites eds. 1978) [hereinafter cited as *WOMEN IN THE COURTS*]. See note 24 *infra* for California statistics.

for the first time or meeting a woman pilot, steelworker or mechanic. Conference participants were impressive for their enthusiastic and active support of women's rights,<sup>7</sup> and for their determination to have an impact on the predominantly male judiciary. This report briefly examines the background and extent of male domination of the judiciary, and discusses the major areas of NAWJ concern—sex discrimination generally, the specific discrimination facing women judges, and the critical issue of discrimination in judicial selection.

## I. BIRTH OF THE NAWJ

The founding of NAWJ is an historic event, with roots in the decades of sex discrimination throughout the legal field. In the past, women judges have sat on the bench in numbers substantially proportionate to the number of women attorneys from the prior decade; however, until recently, women's severely limited access to a legal education kept this percentage low.<sup>8</sup> The need for an organization of women who have advanced to the bench can best be understood with an historical overview. NAWJ's concern with sexual equality can then be viewed in its proper context.

### A. HISTORY OF WOMEN ON THE BENCH

In the infamous case of *Bradwell v. Illinois*,<sup>9</sup> Justice Bradley concurred in denying a fully qualified woman admittance to the bar, stating:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent

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7. Bennett, *New Women Judges Group Ends Parley*, L.A. Times, Oct. 29, 1979, at 1, col. 8 (Metro) (quoting Judge Mattie Belle Davis, a 20-year veteran of the Dade County Court).

8. Cook, *supra* note 6, at 84, 91-92.

9. 83 U.S. (16 Wall.) 130 (1872).

career from that of her husband.<sup>10</sup>

Over one hundred years later, a glance at the personnel sitting on the federal courts would convince even a skeptic that Justice Bradley's view still prevailed. No woman has ever served on the United States Supreme Court. Only forty-four (or 6.6%) of 667 federal judges are presently women,<sup>11</sup> and of those, all but four have been appointed within the last two years. Only nine women sit on the United States Circuit Courts of Appeals, with four circuits still exclusively male.

Not until Franklin Delano Roosevelt appointed Florence Allen to the Sixth Circuit in 1934 could the federal bench boast of its first woman.<sup>12</sup> Fifteen years later, the second woman was appointed to the federal trial court.<sup>13</sup> After Justice Allen retired in 1959, the circuits resumed their all-male status until Lyndon Baines Johnson appointed Shirley Hufstedler to the Ninth Circuit in 1968.<sup>14</sup> Justice Hufstedler remained the only woman on the federal appellate court until 1979.

State courts were integrated earlier, some by appointment

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10. *Id.* at 141 (Bradley, J. concurring) (only Chief Justice Chase dissented and he declined to write an opinion). He added, "[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator." *Id.*

11. Address of Susan Ness, Chairperson of the Legal Support Caucus of the National Women's Political Caucus, Founding Conference of NAWJ (Oct. 26, 1979) [hereinafter cited as Ness Address]. National Women's Political Caucus, Women In the Federal Judiciary, A Status Report—October 1, 1980 (on file at the Golden Gate University Law Review office). Due to the 151 vacancies created by the Omnibus Judgeship Act, 28 U.S.C. §§ 44, 45, 133 (Supp. 1978), these statistics are changing rapidly as women nominated by President Carter are confirmed. President Carter has taken this opportunity to appoint 40 women to the federal bench.

12. J. SCHMIDHAUSER, JUDGES AND JUSTICES 60 (1979); Cook, *supra* note 6, at 85. Eventually Florence Allen became Chief Judge of the Sixth Circuit, the highest position any woman has attained in the federal courts. Professor Schmidhauser notes that as early as 1930, the Christian Science Monitor unsuccessfully recommended several qualified women, including Justice Allen (then sitting on the Ohio Supreme Court), for appointment to a vacant seat on the United States Supreme Court. J. SCHMIDHAUSER, *supra* at 60. Professor Cook documents the unsuccessful 14-year letter-writing campaign to elevate Justice Allen to the Supreme Court. Cook, *supra* note 6, at 85.

13. Justice Burnita Shelton Matthews was appointed to the District Court of the District of Columbia, where she still sits as a Senior Judge.

14. Shirley Hufstedler recently resigned from the Ninth Circuit to become President Carter's Secretary of Education, amid widespread rumors that she is likely to take Justice William Brennan's seat on the United States Supreme Court should he resign at the end of the 1979 Term. See, e.g., Work, *1st Schoolmarm to Nation Got High Marks as Judge*, Nat'l L.J., Nov. 12, 1979, at 6, col. 1 "[She is] generally regarded to be a leading candidate to fill the next U. S. Supreme Court opening."

and some by election.<sup>15</sup> Even before women's suffrage, the first woman attorney in Nebraska, Ada Bittenbender, ran for the state supreme court and received "5 percent of the male vote."<sup>16</sup> In 1922, Florence Allen was elected to the Ohio Supreme Court. Women now sit as chief justice on two state supreme courts and as associate justices of high courts in eleven states and the District of Columbia.<sup>17</sup> Intermediate appellate courts in twenty-one states are sexually integrated for a total of approximately four percent of state appellate seats. On state trial level courts, women comprise three percent of major trial positions, four percent of limited jurisdiction judgeships and seven percent of specialized family, probate, and city courts.<sup>18</sup> However, eighteen states continue their all-male tradition in their courts of general jurisdiction.

Historically, the dearth of woman jurists bore a close relationship to the number of women lawyers.<sup>20</sup> However, with over 45,000 women presently practicing law,<sup>21</sup> the old cry of "I should like very much to appoint a woman to a distinguished position if I could find a distinguished woman to appoint,"<sup>22</sup> (even assum-

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15. Cook, *supra* note 6, at 85-86. In most states, women were not eligible for elected judgeships until after the passage of the nineteenth amendment. *Id.* at 85.

16. *Id.* at 86.

17. Present Chief Justices are Susie Marshall Sharp (elected Chief Justice of the North Carolina Supreme Court on Nov. 4, 1974) and Rose Elizabeth Bird (appointed Chief Justice of the California Supreme Court on March 28, 1977). Lorna Lockwood was Chief Justice of the Arizona Supreme Court until her retirement in 1975. Other states which presently have women on their highest court are: Alabama, Colorado, Connecticut, Kansas, Massachusetts, Maryland, Michigan, Minnesota and Wisconsin.

18. Transcript of address by Professor Beverly Blair Cook, Founding Conference of NAWJ at 3 (Oct. 26, 1979) (on file at Golden Gate University Law Review office) [hereinafter cited as Cook Address]. Courts of general jurisdiction are those courts which are not limited to specific subject matter, i.e. family or probate courts, not to minimum amounts in controversy.

19. States which have no female jurists on their *general jurisdiction courts* are: Alaska, Arkansas, Delaware, Idaho, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Nevada, North Carolina, North Dakota, South Carolina, Vermont, Virginia and Wyoming. All but one state have women sitting on limited jurisdiction courts. These statistics were compiled by Professor Cook for NAWJ from THE AMERICAN BENCH, 1978 (M. Reincke ed. 1978). The author updated the list using THE AMERICAN BENCH, 1979 (M. Reincke ed. 1979) and the NAWJ registration list. These statistics change continually due to new appointment or election, retirement and elevation. The statistics on state judiciaries are presently being updated by the American Judicature Society in collaboration with the NAWJ. The expected publication date of these new figures is December, 1980.

20. Cook, *supra* note 6, at 84, 91-92.

21. Ness Address, *supra* note 11. See also Bennett, *supra* note 7.

22. Letter from Attorney General William Mitchell to President Herbert Hoover

ing its truth in 1929) is today an outmoded rationalization.

Recently inroads have been made into the stereotype of judge as white, male corporate lawyer.<sup>23</sup> The most outstanding example has been California's state courts, where Governor Brown has appointed and/or elevated sixty women since he was elected, bringing the total number of women in the state judiciary to eighty-four.<sup>24</sup> Still, women judges in California comprise only 7% of the 1192 authorized judgeships.

On the federal bench, some of the 151 new openings, created by the 1978 Omnibus Judgeship Act,<sup>25</sup> have been filled with women. The Carter administration is attempting to improve the quality of the judiciary by making it more reflective of our population. The President's merit selection panels for the circuit courts<sup>26</sup> have aided in the appointment of eleven women to the

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(Aug. 5, 1929), in HOOVER JUDICIAL SELECTION CORRESPONDENCE, *quoted in* J. SCHMIDHAUSER, *supra* note 12, at 59.

23. Taped address by Margaret McKenna, Deputy Counsel to President Jimmy Carter, Founding Conference of NAWJ (Oct. 29, 1979) (tape on file at Golden Gate University Law Review Office) [hereinafter cited as McKenna Address]. Ms. McKenna, in discussing the "image of a federal judge" described the stereotype: "white, male in his fifties, a Harvard, Yale or Stanford graduate who came from a big law firm, was active in the ABA, a corporate practitioner . . ." *Id.* Another commentator agreed:

If the backgrounds of federal judges were patched into a human facsimile, . . . the result would be a fifty-eight-year-old white male Protestant, a son of the middle-to-upper-middle class who graduated from a good . . . law school, worked as a prosecutor, joined a prominent firm, and contributed regularly to the church and party of his choice.

D. JACKSON, JUDGES 252-53 (1974). *See also* J. SCHMIDHAUSER, *supra* note 12, at 59.

24. Women in California Judiciary: A Status Report, Oct. 23, 1979 (statistics provided to NAWJ by Governor Edmund G. Brown, Jr.) (on file at Golden Gate University Law Review Office). The number of women jurists on California courts reveals that the overwhelming majority sit on trial courts: supreme court (1); courts of appeal (6); superior courts (26); municipal courts (47); justice courts (4). *Id.*

Several members of NAWJ, including Judge Spencer and Judge Florence Bernstein of the Los Angeles Superior Court, decried the "hysterical" reaction of male colleagues, including the misconception that to become a judge in California you have to be "black, brown or broad." This racist/sexist notion is clearly exposed as fiction by the fact that only 7% of California's judges are women.

25. 28 U.S.C. §§ 44, 45, 133 (Supp. 1978). For legislative history of the Act, *see* S. REP. NO. 95-117, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U. S. CODE CONG. & AD. NEWS 3569-619.

26. These panels were established by Exec. Order No. 11,972, 42 Fed. Reg. 9,659 (1977). Exec. Order No. 11,992, 42 Fed. Reg. 27,195 (1977) extends merit selection to all federal judgeships other than circuit and district courts. *See also* Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (1978); Exec. Order No. 12,096, 43 Fed. Reg. 52,455 (1978) regarding



circuit courts. However, some well-qualified women have run into difficulty with ABA approval and have failed to be nominated.<sup>27</sup>

Even with these recent efforts in the federal courts, in California and other state court systems, most courts have, at best, a token woman; and eighteen states still have no women on the trial bench. Outside of major urban areas, "the large majority of women judges are working in a courthouse with no other woman judge."<sup>28</sup> Simultaneously, attacks on newly-appointed women and minorities have been "almost hysterical."<sup>29</sup> While Governor Brown optimistically said, "resistance to participation of women and minorities is a very temporary state of affairs,"<sup>30</sup> Mayor Bradley wisely cautioned NAWJ founders, "You have a long way to go and much resistance to face which will not be easily overcome."<sup>31</sup> This opposition can be answered most effectively by a unified group, in a systematic way; thus, NAWJ has an important role to play in this period of judicial controversy.<sup>32</sup>

## B. NAWJ SUPPORT FOR SEXUAL EQUALITY

Justice Klein explained the need for a specialized group of women judges in terms of women's rights:

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merit selection. See notes 79, 80, 87-89 *infra* and accompanying text. The executive orders on merit selection were drafted for President Carter by Margaret McKenna, Deputy Counsel to the President, who addressed the conference at length and is quoted extensively throughout this report.

27. For example, the address by Margaret McKenna, *supra* note 23, mentions two well-known women whose nominations were thwarted by ABA review—one, an unnamed chairperson of a major federal agency and the other, Joan M. Krauskopf, a professor of law since 1963 at University of Missouri-Columbia School of Law. Neither woman met the "substantial trial experience" qualification of the ABA. See notes 118 & 121 *infra* and accompanying text.

28. Cook Address, *supra* note 18, at 3 (reporting on her study of women judges in state court systems). This finding holds true for trial as well as appellate judges.

29. Statement of Judge Vaino Spencer at concluding press conference, Founding Conference of NAWJ (Oct. 28, 1979) [hereinafter cited as Judge Spencer Press Statement].

30. Taped address by California Governor Edmund Brown, Jr., Founding Conference of NAWJ (Oct. 26, 1979) (tape on file at Golden Gate University Law Review Office) [hereinafter cited as Gov. Brown Address].

31. Taped address by Los Angeles Mayor Tom Bradley, Founding Conference of NAWJ (Oct. 26, 1979) (tape on file at Golden Gate University Law Review office).

32. Chief Justice Bird Address, *supra* note 1, at 8. The Chief Justice noted, "With the formation of this organization [NAWJ], women judges have gained a collective voice, and I urge that that voice be used to help bring about a clearer understanding of the role of our judicial system during a time of change and transition." *Id.*

We must address problems that are close to our hearts, like sex discrimination. Women have to get their share of the pie. An objective study of the case law shows that male judges do not view sex discrimination as they view race discrimination. Somehow sex discrimination seems to be more acceptable. Only as a group can we begin to change those attitudes.<sup>33</sup>

Judge Vaino Spencer added that the "mere presence and interrelating with male colleagues" will help sensitize male judges to the societal problems women face. "As direct victims of discrimination, we are bound to be more concerned and conscious of the need to relate to all people."<sup>34</sup> She recounted a story of a visit to Ghana, explaining how apprehensive whites were about going into an all black situation. "That's how women feel going into court with all men."<sup>35</sup>

The themes of how women judges can better the lot of all women and more effectively project women's rights were reiterated throughout the founding conference. Three specific issues were addressed: passage of the Equal Rights Amendment, membership in private clubs that discriminate, and supporting women's rights generally.

### *Discrimination Against Women Generally*

1. *Equal Rights Amendment.* The NAWJ resolution supporting ratification of the ERA<sup>36</sup> passed unanimously.<sup>37</sup> Such a

33. Statement of Justice Klein at the concluding press conference, Founding Conference of NAWJ (Oct. 29, 1979) [hereinafter cited as Justice Klein Press Statement].

34. Judge Spencer Press Statement, *supra* note 29. Chief Justice Rose Bird similarly noted "most women at some time have experienced unequal treatment based on the fact that they are women. And I believe that such personal experience brings with it a greater sensitivity to the tragic personal costs that discrimination exacts." Chief Justice Bird Address, *supra* note 1, at 7.

35. Judge Spencer Press Statement, *supra* note 29.

36. The proposed ERA reads in part:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. proposed amend. XXVII, § 1 (S.J. Res. 8 & 9, H.R.J. Res. 208, 92nd Cong., 2d Sess. (86 Stat. 1523 (1972))).

37. The NAWJ resolution states:

WHEREAS the NAWJ is committed to the principle of equal justice under the law for all persons, regardless of sex, and

WHEREAS the membership of NAWJ believes that pas-

stance by an organization of judges is proper because "ERA is not a political issue. It is an issue of basic human rights."<sup>38</sup> The conference heard a status report which indicated that at present thirty-five states have ratified the amendment, with three states attempting to rescind prior ratification.<sup>39</sup> Thus, ratification of three additional states is needed before the June 30, 1982 deadline.<sup>40</sup>

The passage of ERA is extremely important to women because only a constitutional amendment will place sex discrimination on a par with race discrimination with regard to court review. Presently, the United States Supreme Court applies "middle-tier scrutiny" in sex discrimination cases,<sup>41</sup> as opposed to the more stringent strict scrutiny applied in cases of race discrimination. The difference is largely supported by the fact that the fourteenth amendment drafters did not have "women's emancipation on the agenda."<sup>42</sup> ERA is equally important because it will require amendment of approximately 800 state statutes presently containing gender-based provisions.<sup>43</sup> NAWJ

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sage and ratification of the Equal Rights Amendment to the U.S. Constitution will contribute to the achievement of such equality of treatment under the law, now therefore be it

RESOLVED that the NAWJ supports ratification by the States of the Equal Rights Amendment.

Resolution of NAWJ, passed Oct. 29, 1979.

38. Justice Klein Press Statement, *supra* note 33. While the membership of NAWJ agreed with Justice Klein, various members of the U.S. Senate may not agree. When Columbia University law professor Ruth Bader Ginsburg was reported to be a prospective nominee for the D.C. Circuit Court of Appeals, conservative Senators on the Judiciary Committee expressed "concern" with her active support for feminism. Lavine, *Court Prospect's Feminism Irks Senate Conservatives*, Nat'l L.J., Dec. 31, 1979, at 3, col. 1. "Ms. Ginsburg is regarded as the intellectual architect of the attack on sex discrimination and has strongly supported the Equal Rights Amendment." *Id.* at col. 2. See, e.g., Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L.J. 19 (1978); Ginsburg, *Women, Men and the Constitution: Key Supreme Court Rulings*, in WOMEN IN THE COURTS, *supra* note 6.

39. The three states are Nebraska, Tennessee and Idaho. For a thorough discussion of these rescission attempts, see Fasteau & Fasteau, *May A State Legislature Rescind Its Ratification of a Pending Constitutional Amendment?*, 1 HARV. WOMEN'S L.J. 27 (1978).

40. Taped address by Elizabeth Snyder, Community Leader, Founding Conference of NAWJ (Oct. 26, 1979) [hereinafter cited as Snyder Address]. She noted that in the last five years, only North Dakota and Indiana have ratified. *Id.*

41. See *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

42. Ginsburg, *The Equal Rights Amendment is the Way*, *supra* note 38, at 25.

43. *Id.* at 22-23.

members were encouraged to actively support only pro-ERA candidates running for state legislative office and to make clear to politicians that they must fulfill their commitment to ERA's passage.<sup>44</sup>

2. *Discrimination in Private Clubs.* Recently judicial membership in private clubs which discriminate on the basis of race and/or sex has been criticized.<sup>45</sup> The conference addressed the complex problem posed by the membership of women judges in service clubs which discriminate on the basis of sex. After some debate over whether traditional women's service organizations fall into that category, NAWJ took a stand against all judicial membership in discriminatory clubs.<sup>46</sup> The organization passed a resolution urging its members, over the next year, to "endeavor to influence the eradication of such discrimination" in their clubs and in the event that an organization refuses to change, the judge will "forthwith resign."<sup>47</sup>

3. *Supporting Women's Rights.* Most women holding public office not only support ERA<sup>48</sup> but also agree that more should be done to further women's rights.<sup>49</sup> Studies have shown that women judges are generally more liberal than their male counterparts.<sup>50</sup> Professor Cook concluded, based on her study, that "[i]t seems very unlikely that individual men on the benches or organizations they dominate will take much interest or initiative in improving the condition of women."<sup>51</sup> NAWJ members, on

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44. Snyder Address, *supra* note 40.

45. The Senate Judiciary Committee's questionnaire to judicial nominees includes a query about private club memberships; the Federation of Women judges ask a similar question. Ness Address, *supra* note 11.

46. Bennett, *supra* note 7.

47. Resolution of NAWJ, passed Oct. 29, 1979 (on file at Golden Gate University Law Review office).

48. CENTER FOR AMERICAN WOMEN AND POLITICS, WOMEN IN PUBLIC OFFICE 33A (1978) [hereinafter cited as WOMEN IN PUBLIC OFFICE]. Seventy-seven percent of women in the judiciary agreed that ERA should be ratified.

49. *Id.* at 32A, 37A.

50. A higher proportion of women than men professes liberal political philosophies, while a higher proportion of men describe themselves as conservative. *Id.* at 35A; Cook Address, *supra* note 18, at 9.

51. Professor Cook's survey responses came from about two-thirds of women trial judges on state courts and a matching sample of men in those jurisdictions. Cook Address, *supra* note 18, at 2.

Twice as many men judges as women think that most women are happiest as housewives. Some men judges still think a

the other hand, expressed serious concern over ways in which women judges can improve the lot of women. NAWJ will seek to effect change by attempting to educate and sensitize male judges to women's issues, by educating women in the legal field as to potential judicial careers, by setting up a foundation to further educate women judges and to research particular women's issues, by attempting to educate and influence the organized bar, and by fighting for equality in the judiciary.

### *Discrimination Against Women Judges*

In the comparatively short time that women have been judges, several outstanding problems have confronted them relative to their gender. Many female jurists have suffered through unwarranted attacks on their integrity and competence, both from political figures and from male colleagues. Women are infrequently elevated to higher courts and are often tracked into specialized areas of the judiciary, like family law, despite their interest and expertise in other areas; and because women judges are often working in a courthouse with no other women judges, they rarely have sufficient power to influence the work assignment process. At the same time, women report that they must be "Super-judge" to command respect equal to their average male counterpart. Because their performance may affect the appointment of other women, the pressure to fulfill this double standard is extreme. The NAWJ is determined to respond to these attacks with a unified voice and to eliminate the double standard and stereotyping to which women judges are presently subjected.

1. *Sexist Attitudes From the Public and the Bench.* One NAWJ member recounted a minor but typical incident: I approached a table in the courthouse cafeteria with one of the at-

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boy's education is more important than a girl's. A third of the men but only 6% of the women judges think that women with children in school should not hold jobs. More men think that a wife should give priority to her husband's career over her own. Although symbols are important in any major social movement for equality, almost half the men judges oppose the practice of women using their own names. The attitudes revealed by the men are significantly more conservative than those of the women judges.

*Id.* at 9. And see Cook, *The Burger Court and Women's Rights, 1971-1977*, in *WOMEN IN THE COURTS*, *supra* note 6.

torneys involved in a case that was about to be tried in my courtroom. We walked up to a table where two other male attorneys on the case were sitting. As we approached, the fellow I walked in with asked the two lawyers if they knew Judge X (meaning me), whereupon they both immediately stood and shook each other's hand. Of course, they were both surprised and embarrassed to find that I was their judge.

Similar accounts were commonplace for the founders of NAWJ. Women judges told stories of their treatment by some male judges, including being called obscene names, being referred to as Mrs. X rather than Judge X, and being snubbed or entirely ignored.<sup>52</sup> While these were minor incidents, they reflect the sexist attitudes of members of the bench who "are not yet willing to share power" with women.<sup>53</sup>

While NAWJ members were annoyed and angered by these indignities they were far more concerned with what was termed the "obviously unfair and unwarranted attacks"<sup>54</sup> on women judges. The most vicious example referred to at the conference was the statewide political campaign to unseat California Chief Justice Rose Bird.<sup>55</sup> The excuse of "lack of judicial experience"

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52. Goffa, *Her Minority Opinion*, Van Nuys News, Oct., 1979, at 1, col. 1. This article was based on an interview with Justice Joan Dempsey Klein, in which she explained that one of her male colleagues on the bench referred to her as a "splittail" when she was first a candidate for the Los Angeles Superior Court in 1974. *Id.* She also referred to an article by Judge Sarah Hughes, one of the first women to sit on the federal district court bench, in which Judge Hughes said that at least one of her brethren "refused to acknowledge her existence." *Id.* "There are many women judges who have complained about male judges who refuse to call them judge. . . . Some of the male judges have even made downright obscene remarks!" *Id.*

53. Judge Spencer Press Statement, *supra* note 29. Justices Klein and Spencer and other NAWJ members acknowledged the support they have received from some men on the bench. However, Professor Cook reported that her study showed only 37% of women judges reported that they were "fully accepted as equals by their male colleagues." Cook Address, *supra* note 18, at 10.

54. Cook Address, *supra* note 18, at 10.

55. A vigorous campaign was launched by the Law and Order Campaign Committee, headed by State Senator H. L. Richardson (R-Arcadia), to prevent the confirmation of Chief Justice Bird. *Rose Bird Foes Establishing A War Fund*, S.F. Chronicle, Aug. 25, 1979, at 6, col. 1. On election day, the media ran front page articles alleging that certain cases had been "held up" in order to aid the Chief's confirmation. *E.g.*, S. F. Chronicle, Nov. 7, 1978, at 4, col. 4. After extensive public hearings by the California Commission On Judicial Performance (CJP), the judges were cleared of all charges of misconduct. Bartlett, *State's Top Judges Won't Face Charges*, S. F. Chronicle, Nov. 6, 1979, at 1, col. 5. Nonetheless, it was noted by CJP Special Investigator Seth Hufstедler that the results

did not conceal the essentially sexist nature of the assault on the Chief Justice.<sup>56</sup> A male member of the same court, appointed at approximately the same time had neither judicial nor trial experience, yet he was not publicly attacked as she was and continues to be. Both Governors Brown of California and Lamm of Colorado, each of whom has appointed a woman to their respective state supreme courts, have suffered rebukes for their female appointments.<sup>57</sup>

Chief Justice Rose Bird explained these attacks against women judges:

The anger felt toward minorities and women in our society in general can be seized upon at election time and turned against judges who happen to be minorities or women. In an age of uncertainty, the critical focus resulting from emotional responses of this sort and their manipulation can indeed be intense. And those who are breaking ground in any given area—as women and minorities so often do when they enter the judiciary—are subject to particularly close scrutiny and allowed little or no margin for error.<sup>58</sup>

Judge Spencer pointed out that where many judges have remained silent through such attacks “because of a sense of propriety” NAWJ will now give women judges a “unified voice” with which to respond to similarly unwarranted charges.<sup>59</sup>

2. *Problems of Elevation and Tracking.* Women judges have experienced problems with advancement and job assignments. The difficulties encountered in elevation to higher courts

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of the hearings were far less publicized than the original accusations. TV Interview, Channel 9, in San Francisco (Apr. 6, 1979).

56. “Some of us [women judges] felt that not all the venom of the attack was as a result of her ‘lack of . . . judicial experience.’ Some of us felt that indeed, it was directed at her *because* she was a female.” Goffa, *supra* note 52 (emphasis added).

57. *E.g.*, Mellinkoff, *Just His Luck*, S. F. Chronicle, Nov. 8, 1979, at 66, col. 2 (criticizing Governor Brown). See Nat’l L.J., Jan. 14, 1980, at 3, col. 1 (explaining the exoneration of Governor Lamm from charges of improperly influencing the judicial nominating commission to include Justice Jean Duboffky who now sits on the Colorado Supreme Court).

58. Chief Justice Bird Address, *supra* note 1, at 6-7. See also, Blake, *Rose Bird Outlines Judiciary Problem*, L. A. Times, Oct. 27, 1979, at 1, col. 1 (Metro).

59. Judge Spencer Press Statement, *supra* note 29.

closely parallel the problems with judicial selection.<sup>60</sup> Additionally, because "domestic relations and trusts and estates are 'sex-typed' as women's specialties,"<sup>61</sup> women judges often find themselves being assigned to hear primarily family disputes and probate cases. Women judges sit on specialty courts in higher proportion than they sit on other courts.<sup>62</sup> This tracking is another expression of sexual stereotyping which affects chances for advancement to higher courts of general jurisdiction and appellate judgeships. Since it is rare to find a woman sitting as presiding or administrative judge, case assignments are also largely controlled by men.

3. *Super-judge*. The double standard which requires that women judges perform more competently than men was amply demonstrated by Professor Cook:

A woman lawyer from Massachusetts warned . . . [in 1887] that 'women who are pioneers in any public movement are narrowly watched and keenly criticized, and the slightest misstep of one brings suspicion on all.' Women judges today agree that they must watch their step carefully to protect their status and gain the recognition which would open doors to more prestigious office for themselves and others. Over half of the women but only thirteen percent of the men judges think that women's mistakes are noted and criticized more than men's. The difference in perception of reality is striking and important. Just under half of the women trial judges believe that they must be *twice* as good to get equal recognition for competence. Under ten percent of the men recognize that women have to be superior to receive ordinary assignments.<sup>63</sup>

This "superstar" concept was criticized throughout the conference, both as it affects sitting judges and as it affects the chances of women seeking judicial office.<sup>64</sup> The conference's feel-

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60. See notes 88-127 *infra* and accompanying text.

61. Sassower, *Women in the Law: The Second Hundred Years*, 57 A.B.A.J. 329, 331 (1971).

62. Cook, *supra* note 6, at 88-90.

63. Cook Address, *supra* note 18, at 10-11 (citation omitted, emphasis added). And see text accompanying note 58 *supra*.

64. "I think we're all tired of the 'superstar.' At this point women have to be super-



ings in this regard were aptly summed up: "We work for a time when no one will notice that you are a woman, a black or of hispanic origin, but rather that you are a fine jurist, so that we can get on with the business of making this a safer, healthier and more peaceful world."<sup>65</sup>

The historical discrimination against women provided the backdrop for the founding of this association of women judges. Having suffered discrimination themselves, NAWJ members logically addressed issues of women's rights, supporting ERA and denouncing judicial membership in discriminatory clubs. They identified common gender-based problems on the bench. While they did not find simple solutions to these difficult problems, they did find support, encouragement and a vehicle for unified action.

## II. PROBLEMS OF WOMEN IN THE JUDICIAL SELECTION PROCESS

Of overriding importance to NAWJ is the issue of sexism in judicial selection. It was repeatedly stressed at the conference that the solution to most other NAWJ concerns will be accomplished only when women become full partners in the judicial arena. Because extensive female representation on the bench will most effectively eradicate sexist attitudes of both the public and of male members of the judiciary, NAWJ focused on how to surmount the myriad obstacles to sexual integration of the courts.

### A. FEDERAL JUDGESHIPS

The selection of federal judges has long been based on political patronage, with the President and Senate working hand in hand to reward those who were politically faithful at election time.<sup>66</sup> With the recent advent of merit selection<sup>67</sup> panels for the

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stars to make the bench. They still have to have a flawless character; and it's better not to have small children. They have to have other things that men don't have to have." McKenna Address, *supra* note 23.

Professor Cook also found that 79% of the women judges in her study "assume that their behavior will strongly affect the chances of women now entering the legal profession to move into public office." Cook Address, *supra* note 18, at 11.

65. Ness Address, *supra* note 11.

66. D. JACKSON, *supra* note 23, at 249 (chapter XII entitled *Federal Roulette, The Road to the Federal Bench is Paved With Good Connections*) ("[Becoming a federal

circuit courts of appeal, some of the political factors have yielded to considerations of both the quality of judicial candidates and the need to appoint qualified minority people and women. Presently, district court vacancies are not subject to the merit selection panels, although in response to presidential pressure, many senators have created commissions of various types to recommend federal trial court nominees.<sup>68</sup> The process of selection of federal judges is still one which encourages the maintenance of a white male-dominated judiciary: from the merit selection panels to the individual senators to the ABA to the chief executive, women continue to have an uphill struggle toward the federal bench.<sup>69</sup>

The most critical problem identified by members was changing the United States Supreme Court's males-only status.<sup>70</sup>

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judge] is a beguiling dream, but any aspirant soon awakens to the realization that it is politics—not his talent, not his wisdom, not even his record, but old-fashioned back-scratching politics—that ultimately defines his chances.”); Williams, *Federal Merit Selection Takes Root*, 61 JUDICATURE 104 (1977) (“we cannot ignore the long period in which political rather than professional considerations have been primary in staffing the federal bench.”). Tydings, *Merit Selection for District Judges*, 61 JUDICATURE 113 (1977) (“Patronage, the saying goes, is the lifeblood of politics; For United States senators, patronage consists in large part of federal judgeships.”).

67. For general background on the concept of merit selection, see A. ASHMAN & J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* (1974); SELECTED READINGS: JUDICIAL SELECTION AND TENURE (Winters ed. 1967); Alfini, *The Trend Toward Judicial Merit Selection*, TRIAL, Nov. 1977, at 40; Kaminsky, *Judicial Selection: Alternatives to the Status Quo in the Selection of State Court Judges*, 48 ST. JOHN'S L. REV. 496 (1974).

68. Tydings, *supra* note 66, at 113. Senator Tydings discusses the 13 states in which Senators have voluntarily set up merit panels for selection of federal district court judges.

69. Not a lack of qualified women, but the method of judicial selection, has preserved the federal bench as a male domain. That process, complex and decentralized, is encumbered with many of the same barriers which blocked women during Carter's search for cabinet and sub-cabinet appointees:
- Selection criteria tend to favor men.
  - A double standard prevails in applying the selection criteria.
  - Primarily men—the “old boy network”—make the selections.

Ness, *A Sexist Selection Process Keeps Qualified Women Off the Bench*, Washington Post, Mar. 26, 1978 (reprint on file at Golden Gate University Law Review office).

70. For discussion on the need for a woman justice on the Supreme Court, see Sas-sower, *Women and the Judiciary*, 57 JUDICATURE 282, 285-86 (1974). Merit selection has been suggested as one way to find those best qualified for Supreme Court appointments. Voorhees, *It's Time For Merit Selection of Supreme Court Justices*, 61 A.B.A.J. 705

The conference unanimously adopted a resolution urging the next president faced with a vacancy on the high court to appoint a woman.<sup>71</sup> In her opening address, Justice Klein pointed out that there are many within the ranks of NAWJ who are well qualified for this position and that "it is high time for a woman to take her rightful seat" on the Court.<sup>72</sup> Margaret McKenna, Deputy Counsel to President Carter, reiterated the president's commitment to consider a woman should a vacancy arise in the near future.<sup>73</sup> Second only to the appointment of a woman to the Supreme Court was the need to pressure for female appointments to the rest of the federal bench.

While our Constitution grants the President the power to appoint federal judges with the advice and consent of the Sen-

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(1975) (also discussing anticipated opposition to this suggestion from several sources including the ABA Standing Committee on the Federal Judiciary).

71. The text of the resolution reads:

WHEREAS no woman has served on the United States Supreme Court,

WHEREAS over a century has passed since women were admitted to the practice of law,

WHEREAS since that time, there has been a steady but difficult growth in the number of women on the bench,

WHEREAS there has been a concurrent increase in the number of women participating in the professional, social, political and economic life of this country,

WHEREAS the next decade promises an even greater expansion of the scope and breadth of women's participation and representation in all aspects of our democratic society,

WHEREAS the questions presented to our courts for decision increasingly reflect and bear upon the role of women in the United States,

WHEREAS the complex and unique dynamics of the judicial decision-making process, and the interaction of those who participate in it, are such that at this time in the history of our country, it is significant both in practice and symbolically that women be represented in that process at all levels including its highest level,

WHEREAS there are women well qualified to serve on the United States Supreme Court,

THEREFORE BE IT RESOLVED that the National Association of Women Judges strongly recommends that one of the number of qualified women be appointed to fill the next vacancy on the United States Supreme Court.

72. Taped opening address by Justice Joan Dempsey Klein, Founding Conference of NAWJ (Oct. 26, 1979) (tape on file at Golden Gate University Law Review office).

73. McKenna said that the next appointment is dependent upon which member of the Court resigns. She recognized that if Justice Marshall resigns, great pressure will be brought to replace him with another Black person. McKenna Address, *supra* note 23.

ate,<sup>74</sup> it has been noted that the process most often works in reverse—that is, the Senate nominates and the president confirms.<sup>75</sup> Based on the system of senatorial courtesy, a practice developed whereby senators would recommend nominees from their local areas for the federal judgeships in their home states.<sup>76</sup> This practice continues with slight modification in the appointment of federal district court judges.<sup>77</sup> However, in the selection of circuit judges, the long years of pressure for merit selection were recently successful.

On February 14, 1977, President Carter signed Executive Order No. 11,972 which established the United States Circuit Court Nominating Commission.<sup>78</sup> The Commission is comprised of thirteen panels roughly corresponding to the circuits, each of which is convened upon presidential request.<sup>79</sup> The panels, whose members are appointed by the president, should include “members of both sexes, members of minority groups and approximately equal numbers of lawyers and nonlawyers,”<sup>80</sup>

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74. U.S. CONST., art. II, § 2, cl. 2 reads in part: “and [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States . . .” This appointment power has been extended to include *all* federal judges. 28 U.S.C. §§ 44, 133 (1970).

75. D. JACKSON, *supra* note 23, at 249. “Although the Constitution gives the president the power to appoint federal judges . . . the political reality of the appointments process, as Attorney General Griffin Bell recently acknowledged, is that ‘the Senate nominates and the president confirms.’” Ness, *supra* note 69.

76. H. CHASE, *FEDERAL JUDGES, THE APPOINTING PROCESS* 6-13 (1972); J. SCHMIDHAUSER, *supra* note 12, at 29.

77. Some senators have chosen to modify what has been considered their sole province, by establishing merit commissions which make recommendations to the Senator. See notes 66 & 68 *supra*.

78. See note 26 *supra*.

79. Judge Dorothy Nelson, recently appointed to the Ninth Circuit, has observed that “[t]he first and perhaps most critical departure from traditional forms of merit selection is that membership on the President’s nominating panels will be on an ad hoc basis as vacancies arise rather than for a specific term.” Nelson, *Carter’s Merit Plan: A Good First Step*, 61 JUDICATURE 105, 106 (1977). She points out that an ongoing commission would have the advantage of “pursu[ing] ongoing recruitment and screening. Rather than merely ‘reacting’ . . . , commissioners should continually seek out those who are best qualified . . . .” *Id.* at 106.

80. Exec. Order No. 11,972, § 2(c), 42 Fed. Reg. 9,659 (1977). The importance of representation of both sexes and minority group members cannot be overemphasized. In a study of state merit selection panels, Ashman and Alfini found “the typical commissioner was 48 years of age or older, white, male and either a lawyer, a judge or a businessman.” A. ASHMAN & J. ALFINI, *supra* note 67, at 228. See also *id.* at 38-40.

Judge Nelson points out that of President Carter’s first 88 appointments to commissions, 38 were women. NELSON, *supra* note 79, at 107. However, while 50% of commis-

recommends five persons deemed best qualified for the position. The Executive Order also includes standards for selection.<sup>81</sup>

Once the panels submit recommendations, the President selects a potential nominee, generally in consultation with the Attorney General.<sup>82</sup> Generally during the course of presidential decision-making, the Department of Justice requests an "informal" report from the ABA Standing Committee on the Federal Judiciary and a report from the FBI.<sup>83</sup> Once the President chooses a nominee, that person's name goes to the Senate for confirmation.<sup>84</sup> The Senate then requests a formal report from the ABA Standing Committee and generally invites ABA testimony at the confirmation hearing.<sup>85</sup> Once confirmed, the new judge is sworn in and assumes a position on the bench.

Only the first step in this process differs for federal district court appointments. In states in which Senators have voluntarily created merit selection panels, the panels vary widely in composition, standards and goals.<sup>86</sup> With or without a panel,<sup>87</sup> the Senator submits his recommendations for district court to the President and the rest of the selection process remains the same.

From this brief sketch of the process, it becomes apparent that for a woman to become a federal judge she must overcome several major hurdles: first, she must be recommended by a commission panel or senator; second, she must be chosen by the President; third, she must pass the scrutiny of the ABA; and

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sion members are *male lawyers*, only 8% are *women lawyers*. Ness Address, *supra* note 11. Over one-third of the panels have *no women lawyers*. *Id.* Significantly, the lay members will have far less familiarity with outstanding women lawyers than women members of the bar.

81. Exec. Order No. 11,972, § 4, 42 Fed. Reg. 9,659 (1977). For the language of § 4, see text accompanying note 95 *infra*.

82. Nothing in the executive order requires that the President select from a panels list of five recommendees.

83. H. CHASE, *supra* note 76, at 20. The President has recently begun to request evaluations from the National Bar Association, a Black lawyers group, and the Federation of Women Lawyers. Ness Address, *supra* note 11.

84. H. CHASE, *supra* note 76, at 20-23.

85. The ABA Committee is committed to publicly testifying in opposition at confirmation hearings of any nominee it finds "not qualified." Janofsky Address, *supra* note 1, at 14-15.

86. Tydings, *supra* note 33, at 114-16.

87. Approximately half of the new district court vacancies were filled with merit selection panel recommendees. McKenna Address, *supra* note 23.

fourth, she must gain the support of the United States Senate. While none of these steps is easy to take, several substantial stumbling blocks were readily identifiable to the members of NAWJ and, therefore, received more of their attention—the problem of gaining enough recognition and political support to be considered, and, possibly more difficult for women, securing ABA approval.

### *Recommendation By Merit Selection Panel or Senator*

Being recommended for a federal judgeship is an exceedingly difficult task for anyone who does not fit the traditional image of white male corporate lawyer, over fifty and active in the ABA. Whether by merit panel or by senator selection, the barriers to recommendation of women include: the criteria applied, the male-controlled recommendation process, and the concept of tokenism—that one woman on a given bench is sufficient.<sup>88</sup>

The criteria for becoming a federal judge have been the strongest barrier to women becoming jurists. Although the President's executive order standards are noticeably silent on how many years in practice are required,<sup>89</sup> a Department of Justice guideline requires fifteen years in practice with substantial trial experience<sup>90</sup> and the ABA similarly requires twelve to fifteen years in practice with substantial trial and appellate experience.<sup>91</sup>

These criteria notably favor white men. Because it is only within the last decade that women have been admitted to law schools on more than a token basis, few women can meet even

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88. "The mere existence of panels doesn't ensure recommendations of qualified women." Ness Address, *supra* note 11. Additionally, Ms. McKenna noted that although the purpose of the commissions is to "open up the process, to put a wide net out, to find people who had never had the opportunity to get on the federal bench," the commissioners often "don't want to take chances" and therefore perpetuate the old image. McKenna Address, *supra* note 23.

89. "In selecting persons whose names will be transmitted to the President, a panel shall consider whether the training, experience, or expertise of certain of the well-qualified individuals would help to meet a perceived need of the court of appeals on which the vacancy exists." Exec. Order 11,972, § 4(b), 42 Fed. Reg. 9,659 (1977).

90. Ness Address, *supra* note 11.

91. Janofsky Address, *supra* note 1, at 9.

the twelve year requirement.<sup>92</sup> The trial experience factor is equally difficult because it is only recently that large litigation firms have begun hiring women; and many firms still exhibit strong resistance to sending women into trials.<sup>93</sup> Additionally, women often face a double standard in the evaluation process: they have to have better credentials than do their white male counterparts.<sup>94</sup> If these selection criteria remain unchanged, they alone could keep the federal bench white male-dominated for decades to come.

The standards to be used by panels in recommending circuit judges are explained in the President's executive order:

Before transmitting to the President the names of the five persons it deems best qualified to fill an existing vacancy, a panel shall have determined:

- (1) That those persons are members in good standing of at least one state bar, or the District of Columbia bar, and members in good standing of any other bars of which they may be members;
- (2) That they possess, and have reputations for, integrity and good character;
- (3) That they are of sound health;
- (4) That they possess, and have demonstrated, outstanding legal ability *and commitment to equal justice under law*;
- (5) That their demeanor, character, and

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92. President Carter consciously rejected as requirements both the minimum number of years of bar membership and trial experience. In a meeting with the ABA Committee, the President suggested that they revise their standards because "it is clear that minorities and women do not have the same amount of experience that white males do." McKenna Address, *supra* note 23. The ABA Committee declined to change its standards.

93. Ness Address, *supra* note 11. For a discussion of problems of women in getting other positions which lead to the bench, see Cook, *supra* note 7, at 93-94. For a discussion on women seeking jobs in large prestigious law firms, see Sassower, *Women in the Law: The Second Hundred Years*, 57 A.B.A.J. 329 (1971).

94. For example, Ms. Ness wrote:

A double standard in the application of selection criteria is another major obstacle in the path of would-be women jurists. For example, all seven of the women and minority members who have been nominated to federal judgeships by the Carter administration have had previous judicial experience. But only 35 percent of the white male district court nominees and 28 percent of the circuit court appointees had such experience.

Ness, *supra* note 69.

personality indicate that they would exhibit judicial temperament if appointed to the position of United States Circuit Judge.<sup>95</sup>

While these criteria are similar to the ABA's evaluation of "competence, integrity and judicial temperament,"<sup>96</sup> they differ in one significant factor: requiring a "demonstrated commitment to equal justice under law." The purpose of this provision was to encourage the commissions to seek out qualified women and minorities for appointment in order to "give people confidence in the judicial system."<sup>97</sup> However, since even those selected by the President via panels must get ABA-rated, nominees are still subject to old, more demanding standards including the twelve to fifteen years in practice and trial experience prerequisites of the ABA.

Those in a position to make recommendations for judicial selection are overwhelmingly male lawyers. Ninety-nine out of one hundred members of the U.S. Senate are men and most of the merit panel lawyer-members are men.<sup>98</sup> While the panels each have women representatives, most of them are nonlawyer members with only eight percent of the panels being women lawyers.<sup>99</sup> Bar association nominations to panels have been exclusively male and panel members often seem to be unaware of qualified women in their area.<sup>100</sup>

While recent selection panels' recommendations have resulted in a much higher proportion of women becoming circuit judges,<sup>101</sup> the rate of female appointments to the district court is disappointingly low despite merit panels being used in fifty percent of the district court appointments.<sup>102</sup> Some panels them-

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95. Exec. Order No. 11,972, § 4(a), 42 Fed. Reg. 9,659 (1977) (emphasis added).

96. Janofsky Address, *supra* note 1, at 6.

97. McKenna Address, *supra* note 23.

98. Ness Address, *supra* note 11. See note 80 *supra*.

99. Ness Address, *supra* note 11.

100. *Id.*

101. Eleven of the 35 new circuit positions have been filled with women. McKenna Address, *supra* note 23.

102. Based on the present rate of women recommended, the projected percentage of total Omnibus Judgeship Act vacancies filled by women is 16%. Ness Address, *supra* note 11. Because the percentage of new circuit court women appointees is 28%, the figure for district court falls substantially below the 16% figure.



selves have subjected women to biased interviews.<sup>103</sup> The senators who submit recommendations often do not see women as wielding political clout in their constituency, and therefore do not refer women.<sup>104</sup> In addition, the "old boys" network is extremely successful in promoting brothers to the bench; commentators have noted the important role federal judges have in selecting new brethren.<sup>105</sup>

Lastly, there is the problem of tokenism.<sup>106</sup> As Susan Ness aptly put it, "It is unthinkable for a senator or the President to select two women for just two seats. However, no one blinks an eyelash when two white males are appointed to those seats."<sup>107</sup> There is ample evidence that when minorities and women are considered for judgeships, the attempt is to get one for each area.<sup>108</sup> Thus, qualified women are forced to compete against

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103. Women interviewed by panels have been asked how their husbands feel about their becoming judges, how many small children they have, how they would handle their workload and if they could sentence someone to prison. Ness Address, *supra* note 11.

104. Women alone without a coalition of other groups are often not successful. Look at what we've produced if you want to see if women have political clout in this country. We did not have senators come up with women's names. They came up with Blacks and Hispanics but not women. The President wrote a personal note to every senator about how important it was to find qualified women. . . . Most senators did not think that women were a viable political force in their own state. Nationally, yes, but not locally . . . . For that reason, a lot of senators, even the most liberal, never put forth a woman's name.

McKenna Address, *supra* note 23.

Susan Ness confirmed the presence of this factor: "Research by Susan Tolchin, Director of the Washington Institute for Women in Politics, indicates that some senators have considered it politically necessary to recommend a black or a member of a particular ethnic or religious group for a judgeship, but until very recently, no one has perceived a similar political need to satisfy women's groups. Ness, *supra* note 69.

105. H. CHASE, *supra* note 76, at 34-35; see B. WOODWARD & S. ARMSTRONG, *THE BRETHREN* 159-60 (1979); Abraham & Murphy, *The Influence of Sitting and Retired Justices on Presidential Supreme Court Nominations*, 3 HASTINGS CONST. L.Q. 37 (1976). Ms. McKenna acknowledged the role of federal judges in the selection of their colleagues as "quite important and very quiet;" while they may not write it down, they "call the A[ttorney] G[eneral]," or make contact in other ways. McKenna Address, *supra* note 23.

106. Cook, *supra* note 7.

107. Ness Address, *supra* note 11.

108. Ms. McKenna suggested that one of the principal problems with commissions is their handling of multiple vacancies, because there tends to be trading of votes to meet the various requirements of the commission members. The nominee, therefore, needs at least one advocate on the commission "who will die for you." McKenna Address, *supra* note 23. This trading results in seeking the right balance—i.e., "I'll trade you two women for one labor candidate." *Id.* Individual senators' recommendations conform to this

each other for the one recommendation that has been set aside for a woman, despite the vast underrepresentation of women in the judiciary.

### *The ABA Hurdle*

Although the ABA emphatically denies it,<sup>109</sup> many knowledgeable commentators have termed ABA involvement in judicial selection a virtual veto power.<sup>110</sup> The nominations of several notable women have been thwarted by ABA "not qualified" ratings.<sup>111</sup> Because of concern with the ABA's "profound impact"<sup>112</sup> on judicial selection, the NAWJ invited both Leonard Janofsky, President of the ABA, and Jane Barrett, President-elect of the Young Lawyers Division of the ABA, to address the conference. Ms. Barrett spoke to the need for NAWJ members to become active participants in the ABA in order to effect change.<sup>113</sup> President Janofsky addressed the critical question of the ABA's judicial evaluation.

### The ABA's Standing Committee on the Federal Judiciary

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model as well. *Id.*

109. Janofsky Address, *supra* note 1, at 5 ("The ABA Committee neither searches for, recommends nominees, nor attempts to exercise any so-called 'veto power.'").

110. J. SCHMIDHAUSER, *supra* note 12, at 30 ("Deputy Attorney General Kleindeinst announced to the 92d Annual Convention of the ABA that the Nixon Administration had granted the ABA veto power over all federal judgeships except those for the Supreme Court."); McKenna Address, *supra* note 23 ("They [the ABA] say they are involved in selection of judges but, in essence, they are a veto power over who goes on the bench."); Ness Address, *supra* note 11 ("ABA Committee has veto power over judicial appointment. Since 1977, only one person found unqualified by the ABA was appointed."). For history and background of the ABA Committee, see H. CHASE, *supra* note 76, at 20, 23, 120-64.

111. See note 27 *supra*.

112. H. CHASE, *supra* note 76, at 20.

113. Ms. Barrett discussed the importance of women to get involved in the ABA. She agreed that the ABA has been an "old boys network" and suggested that only a large, vocal group of ABA women could change it into an "old person's network." She urged NAWJ not to just criticize because "the ABA is not going to go away, it is not going to lose its power." She urged NAWJ members to join, get appointed to committees and run for ABA office. (No woman has ever served on the ABA Board of Governors or been an officer of the ABA.) Her address was warmly received and very persuasive. Taped address by Jane Barrett, President-elect, Young Lawyers Division/ABA, Founding Conference of NAWJ (Oct. 26, 1979).

President Janofsky also noted that he "appointed or reappointed at least one woman to every committee" for an 80% increase over the previous year of women serving on ABA committees. He added: "I look forward to women serving on our Board of Governors and as officers of the Association." Janofsky Address, *supra* note 1, at 3.

### Women's Law Forum

was created to "investigate and report on the qualifications of persons considered" for federal bench appointment.<sup>114</sup> This committee has reviewed over 1,000 nominees and been consulted by every president since 1952. The committee, consisting of fourteen members,<sup>115</sup> evaluates potential jurists' qualifications as to "competence, integrity and judicial temperament."<sup>116</sup>

The Standing Committee uses ratings of "exceptionally well-qualified", "well qualified", "qualified", "not qualified" and, infrequently, "not qualified by reason of age".<sup>117</sup> Additionally, the committee requires minimum bar admission of twelve to fifteen years, and finds "substantial experience in both the district court and the court of appeals . . . desirable."<sup>118</sup> In "exceptional cases" the committee may find qualified a person with limited trial experience "because of other significant evidence of distinguished accomplishment in the law."<sup>119</sup> For appellate positions, the committee also looks for writing ability and scholarship.<sup>120</sup>

There are several stumbling blocks for women who are potential nominees. The ABA's stress on trial experience as a prerequisite to serving on the bench has been the major factor barring women and minorities from the bench.<sup>121</sup> Additionally, the process of investigation does not, in all cases, afford a prospective nominee an opportunity to rebut negative information ob-

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114. Janofsky Address, *supra* note 1, at 4. Mr. Janofsky stated that the procedures and standards for United States Supreme Court candidates were different and went beyond the scope of his remarks. *Id.*

115. The first and only woman member—Brooksley Landau—was appointed to the committee in 1977 and is still a committee person. *WHO'S WHO IN AMERICAN LAW* (2d ed. 1979).

116. Janofsky Address, *supra* note 1, at 6.

117. To be classified as "exceptionally well qualified", a nominee "must stand at the top of the legal profession . . . , have outstanding legal ability, extensive legal experience and the highest reputation for integrity and temperament." *Id.* at 7. A "well qualified" recommendation indicates "the committee's strong affirmative endorsement." *Id.* A "qualified rating" is applied to those who the committee believes are "able to perform satisfactorily and about whom an investigation has disclosed no significant adverse information." *Id.* at 8. A "not qualified" rating shows that the committee's investigation showed the person "not adequate from the standpoint of competence, integrity or temperament." *Id.*

118. *Id.* at 9.

119. *Id.*

120. *Id.* at 10.

121. See notes 27 and 92 *supra*.

tained by the Standing Committee.<sup>122</sup> Moreover, the statistics of the Standing Committee do not bear out President Janofsky's assertion that the "ABA has been and will continue to be dedicated to the advancement of women in the judiciary."<sup>123</sup> He told the conference that of the twenty-three women *nominated* since January 1, 1979, seventeen were found qualified and six were well-qualified.<sup>124</sup> However, Margaret McKenna, Deputy Counsel to President Carter, asserted that of the twelve nominees found unqualified since mid-1978, nine were women or minority candidates.<sup>125</sup> Additionally, she noted that when the ABA informally finds a potential nominee not qualified, even when the president is willing to go forward with the nomination, few will agree to stand for confirmation knowing that the ABA is committed to testifying against them in the public Senate Judiciary Committee Hearings.<sup>126</sup> It has also been noted that the "proportion of women and minorities who receive "well-qualified" ratings is inverse to white males. In other words, most women . . . receive qualified ratings, while most white males receive well-qualified ratings."<sup>127</sup>

## B. STATE COURTS

The judicial selection systems of state courts vary widely. Most states have a combination of appointed and elected judgeships. The problems women face differ greatly regarding being appointed and being elected. In most states, the appointed positions create problems similar to those in federal appointment: a

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122. President Janofsky stated "If adverse information is received that *jeopardizes a candidacy*, the prospective nominee is interviewed and given an opportunity to explain the evidence." Janofsky Address, *supra* note 1, at 11-12 (emphasis added). But some NAWJ members knew of cases where mere "rumors" were enough to take a woman out of the running. Susan Ness asserted that "a person can be found unqualified on the say-so of one person . . . without an opportunity to rebut the evidence." Ness Address, *supra* note 11.

123. Janofsky Address, *supra* note 1, at 16-17.

124. *Id.* at 16.

125. McKenna Address, *supra* note 23.

126. Ms. McKenna said that few are willing to go through the "public drawing and quartering" since they have to "put their career on the line." *Id.* When asked why the President has to consult the ABA, Ms. McKenna stated that even if the President didn't, the Senate would. Realistically, the "President can't ignore the ABA." At least knowing the ABA's position will go at the informal investigation stage saves some nominees from public humiliation. The President has on occasion sent an ABA evaluation back for a second review. *Id.*

127. *Id.*

lack of political power and input,<sup>128</sup> vast underrepresentation on existing state merit selection panels,<sup>129</sup> and difficulties with state bar associations' trial experience requirement.<sup>130</sup> The problems women face in running for elective positions are similar to those faced by women in politics generally—sexual stereotyping, political party endorsements, and campaign financing.<sup>131</sup>

Although women increasingly have been successful in running for the bench,<sup>132</sup> there are still eighteen states with no female trial judge.<sup>133</sup> NAWJ intends to make these states targets for activity aimed at integrating state judiciaries. By working with the National Women's Political Caucus, NAWJ intends to actively seek out women to run for seats and to press state executives to appoint women to judicial positions.<sup>134</sup>

### C. NAWJ SOLUTIONS

The first steps towards sex integration of the judiciary have been taken. Not only are there approximately 700 women judges,<sup>135</sup> but they now have an organization through which to

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128. See note 104 *supra* and accompanying text.

129. Selection panels may not look like patronage, but almost all the 15 panels established to date have merely institutionalized the old-boy network which senators previously relied upon to make judicial nominations. Even though women are a majority of the population, and the panels purport to reflect a state's diversity, 78.3 percent of these panels' members are male. Of the attorneys on the panel, 92.4 percent are men. No panel is chaired by a woman. No bar association recommended a woman attorney to fill a slot on any of the panels.

With so few women, and even fewer female attorneys represented, it is no wonder that hardly any panels have recommended women for judicial appointments.

For example, Sen. Jacob Javits' six-member judicial selection panel, set up 8 years ago, has no women. Sen. Daniel Patrick Moynihan's recently established 10-member panel includes only one woman—a non-lawyer. Not surprisingly, the first five out of six vacancies of the district court in New York were filled by men. This despite the fact that New York has one of the highest concentrations of women attorneys in the country as well as a very active women's bar.

Ness, *supra* note 69. See A. ASHMAN & J. ALFINI, *supra* note 67, at 22-69, 227-28.

130. See notes 27, 88 & 92 *supra* and accompanying text.

131. Women in Public Office, *supra* note 48, at 38A-40A, 56A.

132. *Id.* at xvii-xix. See Cook, *supra* note 7, at 87-88; note 24 *supra*.

133. See note 19 *supra*.

134. Statement of Goals, *supra* note 2.

135. Cook Address, *supra* note 18, at 1. This number is an estimate based on availa-

make their collective voice heard. NAWJ plans to approach this problem from several fronts. With strong and vocal leadership, this organization will begin to exert political pressure on those who make appointments and on the merit selection panels and to urge qualified women to run for elected judgeships.

The Association and its individual members plan to become more active in the American Bar Association to push for change in its discriminatory standards and for more female representation on its Standing Committee.<sup>136</sup> The conference was strongly urged to become active in the ABA to help elect a first woman officer and a first woman member of the ABA Board of Governors.<sup>137</sup> The importance of working from within to change the ABA was repeatedly stressed. A change in the ABA's standards would be a major step towards women acquiring an equal portion of judicial power.

NAWJ has another important contribution to make towards putting women on the bench:

This group can educate women as to what is necessary to make it to the bench: the kinds of activities they should be involved in, the kind of contacts they should make, the kinds of experience they should have. If a person decides early on to become a judge, she can do it. She has to develop and have a number of experiences. If she's a good lawyer she *can* become a federal judge. It just so happens she has to take certain steps and have certain kinds of jobs in order to achieve that goal.<sup>138</sup>

With the tremendous increase in the numbers of women in law schools, an active educational campaign to encourage women to

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ble data. New appointments and elevations have changed significantly even since this conference took place in October 1979. Also, there is the problem of who to include in such a count: are administrative law judges included, should referees and certain specialty judges be counted. This estimate includes all categories of judges.

136. Statement of Judge Gladys Kessler, Vice President of NAWJ, at concluding press conference of Founding Conference of NAWJ (Oct. 28, 1979).

137. See note 113 *supra*.

138. McKenna Address, *supra* note 23. Judge Vaino Spencer opined "Trial experience is a key because lack of it is being used increasingly against women. I would also urge women in law schools to be involved in state bar and especially women's bar groups." Judge Spencer Interview, *supra* note 3.

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pursue judicial careers could result in women taking the steps necessary to meet even the stringent requirements of the ABA.

The Association intends to "establish a network as effective as the 'old boys network.'"<sup>139</sup> Such a network would promote women nominees and candidates just as does its male counterpart. By getting to know each other, these judges form a national chain of advocates for the integration of the judiciary. By ending the isolation of the sole woman in her courthouse, the efforts, knowledge and contacts of these few hundred women can be organized to exert far more power than each could exercise alone.<sup>140</sup> Especially considering the "sense of excitement, exhilaration, warmth and sisterhood"<sup>141</sup> that characterized the conference, such a woman judges' network can have major impact on the face of the American judiciary.

### III. CONCLUSION

The founding of the National Association of Women Judges is an exciting and historic step towards sexual integration of the judiciary. As the collective voice of women on the bench, NAWJ forcefully can address the dual problems of underrepresentation and discrimination. The goals of this organization include placement of a woman on the United States Supreme Court; increased representation generally of women on the bench, with special emphasis on those states which have no women judges; elimination of sexual discrimination in the law, especially the ratification of ERA; and organizational response to unwarranted attacks on women in the judiciary and to sexual stereotyping and harassment that make being a judge more difficult for women.

Justice Klein appropriately suggested that a sunset clause be included in the by-laws of NAWJ, "because we hope that very soon an organization like this one will no longer be needed." The creation of NAWJ is a much needed and welcomed event that will advance the cause of women's equality and have great impact on a predominantly male judiciary.

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139. Justice Klein Press Statement, *supra* note 33.

140. Governor Brown Address, *supra* note 30.

141. Justice Klein Press Statement, *supra* note 33. Justice Klein remarked "We may be neophytes, but we learn fast." *Id.*

