

William & Mary Bill of Rights Journal

Volume 10 (2001-2002)
Issue 1 *Symposium: The Judicial Process*

Article 4

December 2001

The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?

Laura E. Little

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), and the [Judges Commons](#)

Repository Citation

Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 Wm. & Mary Bill Rts. J. 37 (2001), <https://scholarship.law.wm.edu/wmborj/vol10/iss1/4>

Copyright c 2001 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

THE ABA'S ROLE IN PRESCREENING FEDERAL JUDICIAL CANDIDATES: ARE WE READY TO GIVE UP ON THE LAWYERS?

Laura E. Little*

In March 2001, George W. Bush's administration eliminated the American Bar Association (ABA) from prescreening judicial candidates before their nominations are made public and forwarded to the Senate. Notifying the ABA of this decision, the administration resolved to treat the ABA like other "interest groups and individual citizens," withholding from the bar association the "advance notice of the identities of potential nominees" necessary for the ABA to render "pre-nomination opinions on their fitness for judicial service."¹ Given that the ABA "takes public positions on divisive political, legal, and social issues that come before the courts," the administration concluded that allowing the ABA a "preferential, quasi-official role" in judicial evaluation was "particularly inappropriate."² Finally, the administration embraced the position that "permitting a political interest group [such as the ABA] to be elevated to an officially sanctioned role in the confirmation process not only debases that process, but . . . ultimately detracts from the moral authority of the courts themselves."³

Subsequent news reports find irony in the strong ideological credentials of those insiders the president *has* designated to vet judicial candidates,⁴ the suggestion

* Professor of Law, Temple University's Beasley School of Law. I am especially grateful for the excellent research assistance of Sarah Westbrook. I also thank my colleagues Theresa Glennon, Amy Boss, and Eleanor Myers for their guidance.

¹ Letter from Alberto R. Gonzales, Counsel to the President, to Martha W. Barnett, President, American Bar Association (Mar. 22, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html> (reproduced in Appendix to this article) [hereinafter Letter from Alberto R. Gonzales].

² *Id.*

³ *Id.* (quoting Sen. Orrin Hatch).

⁴ See, e.g., *ABA Thrown out of Judge-Screening Process*, MONT. LAWYER, Apr. 2001, at 27; Editorial, *Here Come the Judges*, THE NATION, Apr. 16, 2001, at 3 (stating that "Gonzales let the word go forth that in selecting nominees he and John Ashcroft will heed the Federalist Society and kindred far-right legal groups whose acolytes honeycomb this Administration"); Neil A. Lewis, *Bush to Reveal First Judicial Choices Soon*, N.Y. TIMES, Apr. 24, 2001, at A17 (reporting officials as stating that of the 70 judicial candidates interviewed by the Bush Whitehouse, "17 to 20 had been recommended directly by the Federalist Society's Washington headquarters"); Neil A. Lewis, *A Conservative Legal Group Thrives in Bush's Washington*, N.Y. TIMES, Apr. 18, 2001, at A1 (reporting on influence of Federalist Society in Bush White House and that Bush's decision to end the ABA's prescreening role "delighted many Federalist Society members who had yearned for such a move").

Gonzales made clear that . . . the association [was] especially unsuited to evaluate judges because . . . it was a 'politically active group,' but noting that '[m]any of the

being that the ABA is not too political for the job, but just on the wrong side of the political spectrum.⁵ The difference, of course, is that the president's insiders are his fancy: the Constitution allows the president complete discretion to confer with whomever she chooses in nominating candidates for the bench, and the Constitution does not require the president to allow the ABA to evaluate candidates before announcing their names and forwarding them to the Senate.

The question, then, is simply whether ABA participation early in the process is best for the nation. Although I ultimately settle on a qualified yes to this question, I note a number of reasonable objections weighing against such a privileged and powerful role in selecting judges. While no doubt underlying some of the Bush Administration's statements, these objections are not mirrored in the rationales put forth in the March letter to the ABA. Indeed, contrary to the administration's suggestion, potent reasoning suggests that the ABA's role in judicial evaluation should be different from other "political interest group[s]."⁶ In its ability to scrutinize and to evaluate potential judicial nominees, the ABA possesses expertise not likely shared by organizations like the Sierra Club and the National Right to Life Committee.⁷ The ABA's participation early in the appointment process appropriately reinforces the constitutional system for

lawyers who are now in charge of the process of choosing judges in the White House are associated with groups like the Federalist Society, a conservative organization that has taken the lead in trying to eject the bar association from its role in evaluating judges.

ABA Thrown out of Judge-Screening Process, supra note 4.

⁵ See, e.g., Byron York, *Disbarred!: Bush Throws the ABA Out*, NAT'L REV., Apr. 16, 2001 (reporting that the 15 member ABA Committee was composed of 7 members who previously contributed solely to Democrats and 2 members who previously contributed solely to Republicans at the time of the Bush Administration decision); Editorial, *Ousting ABA is Injudicious Move*, DAYTON DAILY NEWS, Mar. 26, 2001, at A6 (asserting that "[i]t's difficult to see how the ABA ouster serves a public as opposed to political purpose"). *But cf.* George Lardner, "Careful" Judicial Vetting Process; White House Shuns Politics, Counsel Says as Nominations Near, WASH. POST, Apr. 19, 2001, at A17 (reporting that White House spokesman announced that the White House counsel's office is not applying "political litmus tests" in making recommendations).

⁶ Letter from Alberto R. Gonzales, *supra* note 1 (quoting Sen. Orrin Hatch).

⁷ See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 7 (1953) (opining that the ABA is not "the same sort of thing as a retail grocers' association"). *Contra The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 14 (1989) (Hon. Orrin G. Hatch, Senator, Senate Comm. on the Judiciary, stating that it is not appropriate to give the ABA a "special status not accorded to any other group on any other nomination"); Bruce Fein, *Praiseworthy Choices for the Bench*, WASH. TIMES, May 15, 2001, at A18 (opining that "[t]he ABA's voice on judicial appointments should be no greater nor less than the AFL-CIO's on Labor Department nominations or the Chamber of Commerce's on Commerce Department selections").

nomination and confirmation and adds a stable voice to the power struggles that our Constitution envisions will occur as presidential administrations come and go.

Perhaps most notable about the Bush Administration's letter is its suggestion that integrating a national bar association's opinions on judicial selection "detracts from the moral authority of courts."⁸ Not only is this statement symptomatic of the declining dignity and prestige of lawyers generally,⁹ but it also illustrates the costs of the ABA's decision to take positions on controversial social issues. While the ABA's decision to speak out prompts concern, the suggestion that the decision should disqualify the organization from its judicial vetting role appears based on oversimplistic thinking. The resolve to express public positions is not only supported by our society's ideal of lawyers as opinion leaders, but is also consistent with nuanced understanding of impartiality in the courts.

The statement's implicit contempt for lawyers and the American Bar Association should not, however, go unheeded. The ABA's explicitly controversial positions have surely contributed to its public relations problems and have magnified suspicions that the ABA uses judicial evaluations to implement policy objectives under the whitewash of "judicial fitness." Whether or not the ABA is guilty of this subterfuge, the broadly held suspicion of the organization's lack of candor is not helpful to the ABA, the federal government, or the public. The solution, however, is not to ax the lawyers from the early judicial evaluation, but to improve their contributions through refined procedures.

I. HISTORY OF THE AMERICAN BAR ASSOCIATION'S ROLE IN FEDERAL JUDICIAL SELECTION

In 1952, the attorney general for President Eisenhower concluded that the administration needed an independent review body to examine the qualifications of potential judicial nominees so that the administration could more ably resist pressure to repay political debts by appointing individuals of questionable talents and abilities to the federal bench.¹⁰ The Eisenhower Administration thereafter

⁸ Letter from Alberto R. Gonzales, *supra* note 1 (quoting Sen. Orrin Hatch).

⁹ The decision is part of a trend within the G.W. Bush administration generally not to rely on lawyers as much as previous administrations. David S. Broder, Editorial, *Good Start by the Bush Team*, WASH. POST, Feb. 18, 2001, at B7 (calling Bush's cabinet a "cabinet of CEOs"); Andrew Sullivan, Editorial, *Bush: Style is Character*, THE STAR-LEDGER (Newark, N.J.), Jan. 7, 2001, available at 2001 WL 9801544 (comparing Bush's staff to Clinton's, the author notes: "We have gone from a Cabinet of yea-saying lawyers to a Cabinet of grown-up CEOs."); Lee Walczak & Richard S. Dunham, Commentary, *Who's In Charge Here, Anyway?*, BUS. WEEK, Apr. 9, 2001, at 78 (referring to Bush's staff, author says Bush "designed his team on a corporate model").

¹⁰ The Miller Center of Public Affairs, *Improving the Process of Appointing Federal Judges: Report of the Miller Center Commission on the Selection of Federal Judges* 10

sought the views of the American Bar Association on potential federal judicial nominees. The ABA's role quickly became institutionalized as an adjunct to the executive's constitutional role of nominating federal judges.

According to public accounts, United States presidents in the modern era have used a judicial selection committee staffed by senior White House and Department of Justice officials to develop a list of federal judicial nominees. As part of this committee, the Justice Department has confidentially provided the names of potential judicial nominees to the ABA Standing Committee on the Federal Judiciary to obtain that Committee's evaluation of judicial candidates.¹¹

The ABA Committee has fifteen members — two from the Ninth Circuit, one from the other twelve judicial circuits, and one member-at-large.¹² The president of the ABA appoints the members for staggered three-year terms, and no member serves more than two terms.¹³ The ABA Committee's "sole function" is to evaluate prospective nominees to the Supreme Court of the United States, United States Circuit Courts of Appeals, United States District Courts, and the Court of International Trade.¹⁴ The Committee only evaluates candidates referred by the attorney general or the White House and formally omits from its evaluation "a prospective nominee's philosophy or ideology."¹⁵ Instead, the Committee seeks to confine its inquiry "to issues bearing on a prospective nominee's professional qualifications."¹⁶

(1996), available at <http://millercenter.virginia.edu/pdf/commissions/commission7.pdf> (explaining that Attorney General Brownell involved the ABA to assure that a senator's political preference was also a competent lawyer); Roberta Cooper Ramo & N. Lee Cooper, *The American Bar Association's Integral Role in the Federal Judicial Selection Process: Excerpted Testimony of Roberta Cooper Ramo and N. Lee Cooper Before the Judiciary Committee of the United States Senate, May 21, 1996*, 12 ST. JOHN'S J. LEGAL COMMENT. 93 (1996) (outlining history of ABA Committee).

¹¹ Brief for the Federal Appellee, 1988 U.S. Briefs 429, at 3, *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 443-45 (1989) (Nos. 88-429 and 88-494) (outlining ABA Committee's role).

¹² American Bar Association, *The ABA Standing Committee on Federal Judiciary: What it is and How it Works* at 1 (1999), available at <http://www.abanet.org/poladv/scfedjud.pdf>. [hereinafter *ABA Standing Committee*].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* The ABA describes its ratings as follows:

To merit Well Qualified, the prospective nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, wide experience, the highest reputation for integrity and either have shown or have exhibited the capacity for, judicial temperament, and have the Committee's strongest affirmative endorsement. The evaluation of Qualified means that the prospective nominee meets the Committee's very high standards with respect to

The procedures for ABA evaluation differed for prospective Supreme Court nominees and nominees to lower courts. Before the Bush Administration eliminated early ABA input, potential lower court nominees commenced the evaluation process by completing an ABA-designed questionnaire and submitting it to White House officials and the ABA Committee.¹⁷ Using the questionnaire answers, an ABA Committee member examined the candidate's legal writings and interviewed a cross-section of lawyers, judges, and legal educators in the candidate's community, as well as members of professional organizations and other groups interested in the nomination process.¹⁸ The candidate also met with the ABA Committee. A committee member then prepared a written report that summarized the interviews, evaluated the candidate's qualifications, and tentatively rated the candidate using three categories: "well qualified," "qualified," and "not qualified."¹⁹ This informal evaluation served as a "prediction as [to] what the ABA's formal inquiry [would] find."²⁰

The ABA Committee then communicated this informal rating of lower court nominees to the Justice Department on a confidential basis.²¹ If the Justice

integrity, professional competence and judicial temperament and that the Committee believes that the prospective nominee will be able to perform satisfactorily all of the responsibilities required by the high office of a federal judge.

When a prospective nominee is found Not Qualified, the Committee's investigation has indicated that the prospective nominee does not meet the Committee's standards with regard to professional competence, judicial temperament, or integrity.

Id. at 9.

¹⁷ *Id.* at 5.

¹⁸ HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 38 (3d ed. 1992) (outlining interview process); JOEL B. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION 94-95 (1965) (explaining that ABA Committee members can exert considerable influence by strategically choosing individuals to interview); Brief for the Federal Appellee, 1988 U.S. Briefs 429, at 3, *Pub. Citizen*, 491 U.S. 440, 443-45 (1989) (Nos. 88-429 and 88-494) (outlining ABA Committee's role); American Bar Association, *supra* note 12, at 13 (outlining interview process).

¹⁹ A fourth category – "exceptionally well qualified" – was discontinued during the first Bush Administration. ABRAHAM, *supra* note 18, at 33 (stating that the category was dropped in 1989); ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 227 (4th ed. 1998) (stating that the qualification was dropped in 1991); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 10 (1997) (stating that the category was dropped at the beginning of George Bush's Administration). Different ratings are used for Supreme Court Justices. ABRAHAM, *supra* note 18, at 34.

²⁰ GOLDMAN, *supra* note 19, at 10 (first alteration in original), (quoting Warren Christopher, *Memorandum to My Successor*, Nov. 26, 1968).

²¹ See ABRAHAM, *supra* note 18, at 38 (noting that the ABA Committee commences its

Department so requested, the ABA Committee then prepared a formal report, which included a rating polled from the entire Committee.²² The chair of the ABA Committee thereafter communicated this rating to the Justice Department, occasionally sharing the reasons behind the rating.²³ The ABA Committee generally did not, however, reveal committee sources or the internal, informal reports of individual Committee members.²⁴ Finally, the attorney general evaluated the rating in light of other information and communicated the rating to the president along with a recommendation whether to nominate the candidate.

The presidents, of course, retained their discretion over whether to nominate, varying in their decisions whether or not to nominate persons rated “unqualified.”²⁵ When the president approved the candidate, the nomination and the complete dossier were sent to the Senate Judiciary Committee, which already should have received its own appraisal report from the ABA Committee directly.²⁶ In the rare event that a president proceeded with the nomination of an individual rated “[n]ot [q]ualified,” the ABA Committee opposed “the nomination in such ways as may be appropriate under the circumstances.”²⁷

For prospective Supreme Court nominees, all Committee members participated in the investigation and teams of law school professors and practicing lawyers examined the legal writings of the nominee.²⁸ While the same factors were considered for lower court nominations, “the Committee’s investigation [was] based on the premise that the Supreme Court requires a person with exceptional professional qualifications.”²⁹ The Committee provided its ratings of prospective nominees confidentially to the attorney general “and, after nomination, reported [the

investigatory work *in camera*); GROSSMAN, *supra* note 18, at 94 (noting that the impact of this informal report depends on timing, with less impact resulting if political commitments are already made at the time the attorney general receives the report); Brief for the Federal Appellee, 1988 U.S. Briefs 429, at 3, *Pub. Citizen*, 491 U.S. 440 (Nos. 88-429 and 88-494) (emphasizing confidential nature of the ABA Committee’s work).

²² GOLDMAN, *supra* note 19, at 11 (explaining that the attorney general requests the formal ABA report concurrently with an FBI check of the judicial candidate); ABRAHAM, *supra* note 18, at 34 (noting that each member of the ABA Committee acts independently and by mail).

²³ *ABA Standing Committee*, *supra* note 12, at 6.

²⁴ Brief for the Federal Appellee, 1988 U.S. Briefs 429, at 3, *Pub. Citizen*, 491 U.S. 440 (Nos. 88-429 and 88-494).

²⁵ GROSSMAN, *supra* note 18, at 78-79, 144-53; Brief for the Federal Appellee, 1988 U.S. Briefs 429, at 3, *Pub. Citizen*, 491 U.S. 440 (Nos. 88-429 and 88-494) (outlining ABA Committee’s role).

²⁶ ABRAHAM, *supra* note 18, at 38.

²⁷ *ABA Standing Committee*, *supra* note 12, at 9.

²⁸ *Id.* at 11.

²⁹ *Id.* at 10.

ratings] to the Senate Judiciary Committee.”³⁰ A Committee representative may explain the reasons for the rating at the Senate’s confirmation hearing, while seeking to preserve source confidentiality.³¹

Although presidents have not consistently followed the same procedures for Supreme Court nominations, they roughly followed the procedures outlined above for lower court nominations from 1952 through the Clinton years.³² Nevertheless, presidents have varied in their esteem for the ABA and the weight they accorded to ABA ratings.³³ A high water mark appeared in 1969 when Deputy Attorney General Richard Kleindienst told the ABA Convention that the Nixon Administration had accorded the ABA’s Federal Judiciary Committee absolute veto power over all federal judicial candidates it considered unqualified.³⁴ Nixon, however, later changed his mind, and a long period of reduced deference has followed.³⁵

Before George W. Bush’s decision to oust the ABA from early participation, another particularly low point of ABA esteem occurred during the Reagan Administration. Reagan, like Carter, kept the ABA Standing Committee on the Federal Judiciary at arm’s length. Yet unlike earlier administrations, the Reagan Administration did not always wait for the ABA’s formal report before the attorney general sent over official nominating documents — and sometimes acted before receiving an informal report from the ABA.³⁶ Although liberals apparently were

³⁰ *Id.* at 12.

³¹ *Id.*

³² ABRAHAM, *supra* note 18, at 32 (reporting up until 1992); GROSSMAN, *supra* note 18, at 69-81 (reporting up until 1965); Brief for the Federal Appellee, 1988 U.S. Briefs 429, at 3, *Pub. Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 443-45 (1989) (Nos. 88-429 and 88-494) (reporting up until 1989); see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 229 (2000) (stating that “the ABA has been formally involved with evaluating prospective judicial nominees since 1952 and with evaluating both prospective and actual judicial nominees since Jimmy Carter’s presidency”).

³³ William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 *VAND. L. REV.* 1, 37 (1990) (reporting that “Presidents have accorded different levels of deference to the ABA’s opinions”).

³⁴ ABRAHAM, *supra* note 18, at 32 (reporting on Kleindienst’s comment); see CARP & STIDHAM, *supra* note 19, at 228 (reporting that Nixon initially declared “that he would appoint no one who did not have the blessing of the ABA”).

³⁵ LAURENCE BAUM, *AMERICAN COURTS* 109 (4th ed. 1998) (stating that Reagan, Bush, and Clinton refused to allow ABA full range of power it enjoyed with previous administrations); CARP & STIDHAM, *supra* note 19, at 228 (reporting that in response to a suggestion that a potential candidate would not fare well under ABA scrutiny, Nixon replied “Fuck the ABA”); Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 *AM. U. L. REV.* 699, 737 (1995) (reporting that the Standing Committee’s influence apparently peaked during the Nixon Administration).

³⁶ GOLDMAN, *supra* note 19, at 323-24 (providing history of Reagan Administration’s judicial selection).

unhappy with the ABA during this time, Republican displeasure was resounding and unanimous — particularly in reaction to the ABA Committee's failure to recommend unanimously Robert Bork as "well qualified" for the Supreme Court (four Committee members apparently found Bork unqualified for lack of a judicial temperament).³⁷

Retribution initially came in the form of scrutiny: first, the Senate convened a hearing devoted to the ABA Committee and its role in the confirmation process; next, suit was filed against the Justice Department and the ABA for violating the federal open meeting law by keeping judicial evaluation records confidential.³⁸ The Supreme Court decided this suit in favor of the ABA.³⁹ The most recent retribution for the Bork nomination, some say, came to reduce the ABA vetting role.⁴⁰ Whatever the precise causal relationship for the "bad blood," one cannot deny that the ABA's most aggressive enemies have, in recent years, been powerful Republicans.⁴¹

³⁷ BAUM, *supra* note 35, at 109 (describing Republican displeasure with the ABA Committee because of perceived liberal bias in evaluation); GOLDMAN, *supra* note 19, at 326-27 (observing that both conservatives and liberals were displeased with the ABA during this time period).

³⁸ See GOLDMAN, *supra* note 19, at 323-24 (suggesting that the Senate hearing and lawsuit were the product of liberal and conservative efforts); see also Henry J. Abraham, *Beneficial Advice or Presumptuous Veto?: The ABA's Committee on Federal Judiciary Revisited*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 70 (Nat'l Legal Ctr. for the Pub. Interest ed., 1990) (stating that the lawsuit was filed by a conservation organization, which alleged that the ABA Committee "relied primarily on liberal interest groups to gather information about judicial candidates and actually released names of . . . nominees to the ultra-liberal Alliance for Justice, a group organized especially to thwart Reagan's promise to shift the direction of the courts").

³⁹ See *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 467 (1989) (holding that the Federal Advisory Committee Act does not apply to the Justice Department's solicitation of the ABA Committee views on prospective judicial nominees). For analysis of the legal issues in this suit, see, for example, R. Townsend Davis, Jr., Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 COLUM. L. REV. 550 (1989).

⁴⁰ See, e.g., Terry Carter, *Squeeze Play*, A.B.A.J., May 2001, at 18, 78 (reporting that many observers attribute ouster to increasing attacks on the ABA by conservative political groups and quoting Professor Sheldon Goldman as stating that Bush's move "essentially gave some fresh meat to his more far-right supporters").

⁴¹ See, e.g., BAUM, *supra* note 35, at 109 (describing Republican displeasure with the ABA Committee). See generally *The Role of the American Bar Association in the Judicial Selection Process: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (Republican Senators critical of ABA track record with judicial nominations); *The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, *supra* note 7 (Republican Senators critical of ABA track record with judicial nominations).

The Bush decision to eliminate the ABA from early participation in the process mirrors an earlier move by Sen. Orrin Hatch to eliminate any special status in the confirmation

II. THE ABA AS AN INTEREST GROUP AND THE APPOINTMENT PROCESS

The George W. Bush Administration and other critics of the ABA suggest that the organization enjoys the status of just another interest group possessing a political or ideological orientation on who should staff the federal judiciary. This view of the bar association ignores the association's unique expertise and suggests that the ABA has squandered any claim to impartiality and clout it had through its forays into controversial social debates. I argue that ABA vetting of possible nominees continues to provide valuable insights, consistent with our constitutional appointment process, even when viewed in light of any mistakes the association may have made.

A. *Lawyers' Expertise*

Bar groups traditionally have dominated the process of evaluating candidates for state and local judgeships.⁴² This tradition may be interpreted as evidence of a national consensus that lawyers are suited to the job of evaluating judicial fitness. Yet the debate over whether lawyers should participate intimately in the appointment of federal judges is not new to our country. In fact, Benjamin Franklin quipped during the constitutional debates that the delegates should consider the method for judicial appointments used in Scotland, "in which the nomination proceeded from the Lawyers."⁴³ Lawyers enjoyed a particular benefit, Franklin wryly suggested, because they were in a position to choose strategically those appointees with law practices the remaining lawyers could lucratively divide among themselves.⁴⁴

Apparent jest aside, Franklin's implication that lawyers may be in a unique position to know the details of nominees' careers and law practices merits attention. In evaluating judicial candidates, lawyers not only have relationships with the right people to answer questions about candidates,⁴⁵ but — knowing the temptations and

process. See BAUM, *supra* note 35, at 109 (describing Hatch's decision); GERHARDT, *supra* note 32, at 230 (describing Hatch's decision as a low point in ABA influence, attributable "in no small measure" to the "divided vote on Robert Bork's qualifications as a Supreme Court nominee").

⁴² See GROSSMAN, *supra* note 18, at 210 (citing the influence of bar groups for state and local judicial selection).

⁴³ I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 120 (Max Farrand ed., 1966).

⁴⁴ *Id.*

⁴⁵ See *The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, *supra* note 7, 281-82 (statement of Sen. Herb Kohl, Member, Senate Comm. on the Judiciary, that the ABA's advice is helpful because it is in a "good

soft spots in legal doctrine and procedure — lawyers are also able to ask the right questions.⁴⁶ This access is aided by the structure of the ABA, with its local and national organization giving ABA interviewers the resources to access individuals with personal knowledge of potential nominees.

Given the range of executive appointments necessary for our federal government to function, our constitutional structure clearly envisions that the president and Senate will look to others to assist in appointments. Indeed, the range of appointments authorized by the Constitution's Appointments Clause is simply too broad to suggest that the politicians are able to make informed judgments themselves about necessary qualifications.⁴⁷ Thus, when the appointment involves officials who will staff the adjudicative process of developing and applying legal principles, those who possess special knowledge of that process — lawyers — are the most natural agents to assist with appointment decisions.⁴⁸ Knowledge of law, legal method, and governmental institutions combine with rhetorical skills to make lawyers particularly well-suited to evaluate who, in the sea of hopeful legal practitioners, should sit as a judge.⁴⁹

Militating against this reasoning is the identity of those whom the lawyers are advising: professional politicians who themselves may be lawyers. Even non-lawyers in the executive branch and Senate are nevertheless in the business of developing laws, an expertise obviously relevant to evaluating the fitness of judicial candidates who will apply those laws. Moreover, as one critic observes, the ABA

position to solicit relevant information from the nominee's peers").

⁴⁶ See *The Role of the American Bar Association in the Judicial Selection Process: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 99 (1996) (statement of Prof. Daniel J. Meador):

One of the things we would lose without a body like the ABA committee would be the investigative resources and information that it does bring to light without any expense to the taxpayers. I think it does get information that the FBI does not get, could not get, that no other governmental entity might get.

Id.

⁴⁷ See GERHARDT, *supra* note 32, at 40-41 (observing that "presidents and senators must rely on others to advise them" about fitness of nominees because "it is unlikely that presidents and senators will be experts themselves in the fields in which these nominees will perform their specialized tasks").

⁴⁸ See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 359 (1993) (describing as reasonable the suggestion that lawyers possess distinctive expertise in the interpretation and understanding of legal rules).

⁴⁹ See A. JAMES CASNER & W. BARON LEACH, *CASE AND TEXT ON PROPERTY* 2 (3d ed. 1984) ("It is an observable fact that through some combination of chromosomes and professional training lawyers tend to come to the top of the barrel in the shaking and jolting of competition for authority."), *quoted in* David J. Hardesty, Jr., *Leading Lawyers: An Essay on Why Lawyers Lead in America*, 10-APR W. VA. LAW. 26, 26 (1997).

is not the only source of lawyers in the country.⁵⁰ Indeed, the president and senators have plenty of lawyers on their staffs to assist them in evaluating judicial candidates. On the other hand, those staff members are likely to have networks duplicative of their bosses and have a primary duty to the senator's or president's public policy agendas.⁵¹ As explored more fully below, the ABA can tap its members' legal expertise in an independent setting, bringing a fresh perspective to the question of judicial fitness and using criteria and procedures that can remain consistent across changing presidential administrations.

B. *Has the ABA Disqualified Itself by Becoming Too Politicized?*

Some say the ABA's historical clout comes in part from its ability to make an impartial judgment about the fitness of judicial candidates free from political or ideological bias.⁵² The Bush Administration and others suggest that the ABA lost credibility in its neutrality claim by taking positions on controversial issues.⁵³ Later in this section, I examine the public relations ramifications of ABA positions on controversial issues, ramifications that indeed may reflect negatively on the ABA's role in judicial evaluation. The public relations question, however, is independent of another point implicit in the administration's March 2001 letter to the ABA: the argument that the ABA's position on public policy issues disqualifies it from prescreening potential nominees. A balanced, well-developed understanding of our constitutional judicial appointments process, impartiality principles, and the social role of lawyers all support a contrary conclusion on the disqualification question.

1. Political Battles are an Inevitable Part of the Appointment Process

⁵⁰ See Paul D. Kamenar, *The Role of the American Bar Association in the Judicial Selection Process*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 93, 100 (Nat'l Legal Ctr. for the Pub. Interest ed., 1990) (arguing that there is nothing "unique" about ABA lawyers and that "[e]qually capable if not more qualified lawyers at the Department of Justice and on [the Senate Judiciary] Committee and its staff could also interview the same sources as the ABA now does, and form their own opinion on the candidate's qualifications") (alteration in original).

⁵¹ This criticism does not disqualify the possibility that an association other than the ABA may provide an alternative. While reference to organizations such as the National Bar Association appears in the literature, there is yet to occur serious evaluation of the merits of this possibility. The other alternative — vetting by an association of judges — is also not discussed in the literature, perhaps because the threat to judicial relationships and impartiality would disincite the judges' association away from the vetting responsibility.

⁵² See, e.g., *The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, *supra* note 7, 285 (1989) (statement of Sen. Joseph R. Biden, Jr., Chairman, Senate Comm. on the Judiciary, that the "ABA has the clout that it has" because the press and the public consider it to be one of the least political organizations).

⁵³ See Letter from Alberto R. Gonzales, *supra* note 1.

The argument that the ABA has disqualified itself through its controversial public policy positions appears not to rest on any suggestion that the Constitution somehow prohibits the executive branch from consulting the ABA before formal judicial nominations. The Constitution leaves the president, the attorney general, and anyone else in the executive branch free to seek advice from whatever sources she desires and to weigh the advice in whatever way she chooses.⁵⁴ The Bush Administration's argument instead seems to derive from concern that the judiciary's independence suffers where a "quasi-official" participant such as the ABA has known public policy preference — particularly on issues that a potential nominee may later encounter as a judge.⁵⁵ Because of these expressed views, the March letter reasons, an agent such as the ABA "debases" the confirmation process and "detracts from the moral authority of courts."⁵⁶

Our Constitution's appointment process is not sufficiently pristine to afford much weight to this reasoning. Whether or not the Framers so intended, the process is already so politicized, and judicial candidates so exposed to influence during nomination and confirmation,⁵⁷ that the ABA's public policy announcements in contexts removed from judicial evaluation are unlikely to change the process's character, much less erode the "moral authority of the courts."⁵⁸

In making these observations, I do not ignore that scholars, politicians, and social critics have almost universally disclaimed the political battles played out during confirmation proceedings, particularly in recent years.⁵⁹ The source of the

⁵⁴ See GROSSMAN, *supra* note 18, at 212 (expressing the view that no constitutional problems dog the relationship between the ABA Committee and the attorney general).

⁵⁵ Letter from Alberto R. Gonzales, *supra* note 1.

⁵⁶ *Id.* (quoting Sen. Orrin Hatch).

⁵⁷ See Little, *supra* note 35, at 730-40 (demonstrating how the confirmation process creates bonds of loyalty and gratitude between judge candidates and those individuals who make possible the confirmation, but concluding that the ABA's role is not such as to cast the organization as "a powerful benefactor for federal judges," *id.* at 737); see also GROSSMAN, *supra* note 18, at 219 (citing evidence of association between prior political affiliation and decisionmaking tendencies).

⁵⁸ Letter from Alberto R. Gonzales, *supra* note 1 (quoting Sen. Orrin Hatch).

⁵⁹ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 348 (1990) (claiming that as the confirmation process becomes more politicized, judicial nominees are treated like political candidates, as evidenced by the nomination of Robert H. Bork); STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 88 (1994) (observing that senators have long struggled to find grounds other than ideology on which to base opposition to a nominee which is really ideological); PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* 209 (1990) (noting that a "judicial war" ensued after the nomination of Judge Bork in which both parties engaged in "guerilla warfare" tactics); Cynthia S. Roper et al., *Sex, Race, and Politics: An Intercultural Communication Approach to the Hill-Thomas Hearings, in THE LYNCHING OF LANGUAGE* 55, (Sandra L. Ragan et al. eds., 1996) (stating that partisanship turned the Hill-Thomas hearings into a "political and ideological battle" rather

rancor, however, so prominently derives from government officials and political parties themselves as to undermine a claim that the ABA itself has poisoned the confirmation process. Some have documented how the ABA has contributed to the political circus atmosphere (the Bork nomination being the most frequent example cited).⁶⁰ Experience suggests, however, that high-pitched political battles will continue without the ABA's contribution.⁶¹ What the Bush Administration has done, therefore, is to omit valuable ABA expertise and resources from the vetting process without showing that political squabbles will measurably diminish as a consequence. I emphasize that the administration is free to omit the ABA from the vetting process. Sound judgment nevertheless suggests that the ABA's contribution should not be dismissed lightly and that the administration wrongly suggests that the ABA's participation clashes with some sort of sanctified process enshrined by our Constitution.

While most thinkers decry the political nature of the confirmation battles, some argue that political battles are a necessary and natural byproduct of the appointment system the Constitution's Framers devised. Disagreement exists over whether the Framers actually intended such a high degree of politicization,⁶² but most scholars agree that the Constitution's Appointments Clause represents the judgment to employ a power struggle — in the form of a separation of powers apparatus — for appointing judicial officers in a manner that ensures balance, accountability, and energetic evaluation of candidates.⁶³

The Framers' debates reflect a struggle between those who feared executive power, with its tendency toward monarchical abuse, and those who feared

than a "quest for truth"); Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent"*, 53 ADMIN. L. REV. 1, 2-3 (2001) (suggesting that as we enter the 21st Century, the "Confirmation Mess" has become even messier in judicial as well as other appointed positions); Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 975-76 (1992) (pointing to the debates over judicial nominees such as Justice Brandeis, Justice Marshall, Judge Haynesworth and Judge Carswell; author says presidents and senators have had "petty political concerns").

⁶⁰ See, e.g., GERHARDT, *supra* note 32, at 230 (discussing the fallout from the ABA's "divided vote on Robert Bork's qualifications as a Supreme Court nominee").

⁶¹ In fact, some Democratic senators suggested that political battles will worsen without ABA early participation in the process.

⁶² See Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577, 1581-82 (1992) (arguing that although the Framers "undoubtedly intended the process of selection and confirmation by the political branches as a check upon potential judicial tyrants, [they] almost certainly did not intend the process to be as heavily politicized and partisan as it has become").

⁶³ See, e.g., GERHARDT, *supra* note 32, at 28 (observing that "balance, accountability, and energy" are apparent in the compromise embodied in the Appointments Clause).

irresponsibility of the legislature.⁶⁴ The Framers resolved the tension with a compromise, seeking balance through the input of actors with varying inclinations, strengths, and interests.⁶⁵ As Hamilton explained, the division of power between the president and the Senate provided “an excellent check upon a spirit of favoritism in the [p]resident, and would tend greatly to prevent the appointment of unfit characters [nominated as a result of] State prejudice, from family connection, from personal attachment, or from a view of popularity.”⁶⁶

The process established by the Framers is by definition sometimes rancorous. After all, the Constitution suggests that the president “may have to pay a price if he ignores the Senate’s advice;” that is, the Senate may withhold its constitutional power of consent over a given nominee.⁶⁷ At least in Hamilton’s estimation, politics would play an important role in ensuring that the president and the Senate experience political ramifications for abuse of their powers during the process.⁶⁸

Some argue that cultural and technological changes have fueled politicization of the appointments process, including a new combative Senate style that has replaced “the clubby, ‘go-along-get-along’ atmosphere” that earlier prevailed.⁶⁹ This lack of cooperation is exacerbated by the dominance of divided government and the concomitant tendency to use confirmation hearings as a venue for power struggles between political parties and for expression of strong sentiments about controversial issues.⁷⁰ To the extent that the ABA adds to the controversy, its participation cannot be said to be contrary to the Framers’ creation.

And the possibility exists that the ABA, although identified with certain policy perspectives, may ultimately reduce furor in the process. From the time of the Constitution’s ratification, most presidents apparently navigated the appointments process by pursuing an informal give and take with the Senate, even before formally nominating candidates.⁷¹ Within the last 40 years, presidents found it expedient to

⁶⁴ See Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 3, 4 (Nat’l Legal Ctr. for the Pub. Interest ed., 1990) (explaining battle lines for constitutional debates).

⁶⁵ *Id.* (explaining that the compromise adopted would bring together the Executive’s strength of responsibility with the security the Senate could provide against inappropriate nominations).

⁶⁶ THE FEDERALIST, NO. 76, at 483 (A. Hamilton) (Benjamin Fletcher Wright ed., 1961).

⁶⁷ GERHARDT, *supra* note 32, at 33.

⁶⁸ Hamilton predicted that the “blame of a bad nomination would fall upon the President singly and absolutely” and that the blame of rejecting a good nomination “would lie entirely at the door of the Senate.” THE FEDERALIST, NO. 77, at 486 (A. Hamilton) (Benjamin Fletcher Wright ed., 1961).

⁶⁹ Denning, *supra* note 59, at 16.

⁷⁰ *Id.* at 12-13.

⁷¹ See GERHARDT, *supra* note 32, at 32 (observing that “virtually every [P]resident has understood that failure to consult” with Senators before nominating candidates “would likely be costly to himself, his nominee, or both”).

consult with the ABA at an early juncture, a practice consistent with the presidential approach of informally evaluating candidates' capabilities and preferences in light of political practicalities. As an expert — albeit outside voice — the ABA is often able to anticipate problems with potential nominations. Its input can assure that controversy is avoided and consensus is achieved, a state of affairs presumably part of what the Bush Administration was concerned about “debas[ing].”⁷²

Moreover, to the extent that the president feels cramped or inhibited by ABA prescreening, such a restriction is consistent with the separation of powers concern animating the appointment structure. As Hamilton explained in response to critics warning that some may use the confirmation power's leverage to influence the president: “[i]f by influencing the President be meant *restraining* him, this is precisely what must have been intended.”⁷³

2. Impartiality and Public Perception of Impartiality in the Courts

Particularly in a time of divided government — which has haunted us in the recent past and may well continue for the foreseeable future⁷⁴ — the work of a third party (even a third party sometimes viewed as allied with one political party or another) can help to avoid stalemates, disingenuous presidential assurances about avoiding litmus tests and inquiries into nominees' ideology, and other possible shams.⁷⁵ Not only is this extra voice consistent with the Constitution's confirmation structure, but it also reinforces public confidence in impartiality in our courts. Balanced, unbiased justice more likely emerges through a checks and balances process, with actors possessing competing perspectives. In such a system, the public more readily believes that good things happen to people (such as receiving a federal judicial nomination) because they have successfully navigated the scrutiny of diverse — and sometimes hostile — actors, rather than simply because some insider wired them for the job.

The ABA can contribute to impartiality and the appearance of impartiality in a number of ways. First, as described above, the ABA can check favoritism, acting

⁷² Letter from Alberto R. Gonzales, *supra* note 1 (quoting Senator Orrin Hatch).

⁷³ THE FEDERALIST, NO. 77, at 486 (A. Hamilton) (Benjamin Fletcher Wright ed., 1961); *see also* CARTER, *supra* note 59, at 32 (arguing that even for confirmation of cabinet officers — who could be viewed as the president's 'own team' — the Founders understood that the confirmation power was an important “check on the President's freedom to staff the government and, hence, on his policies”).

⁷⁴ Denning, *supra* note 59, at 12 (reporting that in the last four decades, the White House has been controlled by a different political party almost 70% of the time).

⁷⁵ Reynolds, *supra* note 62, at 1577-78 (describing “the minuet” between presidents and Senate during periods of divided government as “an exercise in partisanship, politics, and futility”).

as a thorn in the side of the executive, by “saying ‘no’ to the political muscleboys”⁷⁶ and by “taking flak for the Senators.”⁷⁷ Second, and perhaps even more importantly, the ABA contributes to impartiality and public confidence in the confirmation process by simply expressing a separate voice, with incentives independent of those motivating the Executive and the Senate and with an informed opinion on judicial qualification.

In the present era — where dominant legal thought no longer views law as a set of neutral principles existing in a state of nature and awaiting discovery in the hands of competent judges — the concept of impartiality is elusive and complex. While some types of bias, such as personal and financial interest in an outcome, are uniformly condemned as inimical to impartial justice, many gray areas remain. Prevailing thought now allows judges many preconceptions and personal perspectives, not as evidence of bias, but as simply part of an individual decisionmaker’s point of view.⁷⁸

Because true impartiality is now deemed illusory and perhaps not even desirable,⁷⁹ one can argue that the best-designed governmental system allows diffused impartiality to emerge from the confluence of diverse perspectives and opinions. Our nomination and confirmation process is surely such a system. That being the case, the addition of another educated voice — the American Bar Association — at an influential point in the process can only enhance the system. According to this line of thinking (which is frequently offered to promote the American jury system), any bias or preconception on the part of the American Bar Association is not disqualifying, but acts instead to balance other biases or preconceptions already present in the system.⁸⁰

⁷⁶ ABRAHAM, *supra* note 18, at 38 (quoting a December 9, 1971, statement by a representative of the ABA Committee, Robert L. Trescher, Esq.).

⁷⁷ *Id.*

⁷⁸ See Little, *supra* note 35, at 711-15 (reviewing grey areas of a judge’s duty of impartiality and surveying contemporary literature on impartiality); see also Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 374-400 (1996) (discussing how law and the legal process are creatures of multiple competing perspectives).

⁷⁹ See, e.g., *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651 (2d Cir. 1943) (asserting that “[i]f, however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will”); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 149-50 (1991) (exploring the benefits of multiple perspectives and points of view to broader understanding and bridging gaps between members of society).

⁸⁰ *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (stating that the “broad representative character of the jury should be maintained, partly as an assurance of a diffused impartiality”); *California v. Wheeler*, 583 P.2d 748, 755 (1978) (noting the “only practical way to achieve an overall impartiality is to encourage the representation of a variety of such [diverse and overlapping] groups on the jury so that the respective biases of their members, to the extent that they are antagonistic, will tend to cancel each other out”);

Given that the ABA Committee is not burdened with the same political baggage as the president and Senate, and enjoys different skills and resources, its point of view likely stands as a contrast and a complement to the official government agents. This model of a process with diffuse interests competing to arrive at the best results is reflected throughout the constitutional debates, in which delegates repeatedly condemned partiality and favoritism in the appointment process.⁸¹ For example, James Madison argued against the Executive holding the appointment power alone, reasoning that the Senate was “numerous eno[ugh] to be confided in.”⁸² Similarly, Roger Sherman argued that, unlike the Executive, the Senate would bring to “their deliberations a more diffuse knowledge of characters.”⁸³ Sherman added, “[i]t would be less easy for candidates to intrigue with them.”⁸⁴ While the Framers may not have considered whether a non-governmental entity like the ABA should assist the president and the Senate, such assistance is certainly a logical and appropriate complement of the Framers’ design.

3. The Advantage of Consistency and Stability

The appointment system’s integrity, as well as public esteem for its products, are also enhanced by consistent and stable procedures, tested and followed across significant periods of time. Although the ABA vetting process has evolved over the last 40 years, that evolution has created a stable approach that can add consistency

Massachusetts v. Soares, 387 N.E.2d 499, 512 (1979) (noting importance of a representative jury in case where peremptory challenges were exercised to exclude members of a particular racial class); CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 26 (1962) (arguing that a jury verdict is more impartial than a judicial verdict because group deliberation negates bias); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 65 (1994) (reasoning that juries best resolve individual controversies because they consider competing community perspectives and exchange diverse views); Richard Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans*, 48 DEPAUL L. REV. 453, 461 (1998) (expressing preference for jury decisions rather than judicial ones because jurors, deciding as a group, cancel out each other’s attitudes); Jeremy W. Barber, Note, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1228 (1994) (explaining historical rationale for jury trials assumes that an impartial jury is constructed as a result of prosecutors and defense attorneys aggressively seeking partial jurors who will balance each other out); Jim Goodwin, Note, *Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voire Dire*, 38 ARIZ. L. REV. 739, 742 (1996) (asserting that adversarial process induces prosecutors and defense attorneys to select jurors that are favorably biased, under the assumption that the biases will cancel each other out).

⁸¹ See *infra* notes 82-84 and accompanying text.

⁸² 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 120 (Max Farrand ed., 1966).

⁸³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 43 (Max Farrand ed., 1966).

⁸⁴ *Id.*

to judicial evaluations even though the judicial selection process has historically varied widely across administrations. In addition to standardizing qualification guidelines and evaluation procedures themselves, ABA participation at a crucial stage in nomination can bring greater credibility to the process and, thus, greater respect for the appointees.

4. The Role of Lawyers in Society

As noted above, a significant aspect of the Bush Administration decision to eliminate the ABA's prescreening function is the administration's implicit contempt for the legal profession today.⁸⁵ Suggested in the March 2001 letter, as well as in statements of other ABA opponents, is the notion that — because the legal profession has stooped so low as to use its flagship organization to endorse public policy positions — lawyers no longer deserve a special voice in judges' selection.⁸⁶ Legal and academic literature currently maintains that the legal profession has lost its claim to dignity and exclusivity because "lawyers have become less independent and objective."⁸⁷ Thus, the argument goes, the public no longer benefits from preserving influential or special avenues for lawyers to express opinions.⁸⁸

While perhaps appropriately sensitive to the divisive effect of ABA positions on controversial subjects, this reasoning misconceives lawyers' role in society. The consequence is to disqualify improperly the ABA from its valuable insights into judicial selection and to damage the legal profession. The resulting lower prestige for the legal profession may in turn hurt government and citizens themselves.

Gone is the unaccepting embrace of de Tocqueville's view of the legal profession as a major source of social stability that keeps populist forces in check and helps to weave liberal and democratic traditions throughout social strata.⁸⁹ Indeed, the crisis in the legal profession and the decline in public esteem for lawyers is well documented. Much concern exists that lawyers "have lost [their] moral bearings."⁹⁰ The result, some maintain, is a "[l]oss of self restraint and dignity that . . . has transformed all too many lawyers into the kind of hustlers that the bar once strongly condemned."⁹¹

⁸⁵ Letter from Alberto R. Gonzales, *supra* note 1 (quoting Sen. Orrin Hatch).

⁸⁶ *Id.*

⁸⁷ Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861, 870 (1997).

⁸⁸ *Id.* at 863, 870.

⁸⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 123-27 (Richard D. Heffner ed., New Am. Library 1956) (1835) (arguing that American trust in lawyers "is the most powerful existing security against excesses of democracy").

⁹⁰ Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 858 (1998).

⁹¹ *Id.*

But we might not be ready to give up on lawyers' special contributions to judicial selection. We might not be ready to diminish them to the status of other political interest groups with no expertise other than commitment to their members' ideological beliefs. After all, lawyers still remain the group most familiar with judicial processes. Moreover, commitment to social justice and reasoned development of opinions on the issues most troubling society is entirely consistent with the traditional model of lawyering, a model bemoaned as atrophied by those tempted to oust lawyers from influential roles in society. In other words, the paradigmatic lawyer-statesman is valued by society as an opinion leader.⁹² Mere articulation of controversial opinions should not therefore automatically damn lawyers to allegations of unprofessionalism.

Spiteful rejection of lawyers and their guidance can negatively affect the public. For example, lawyers' loss of dignity can "undermine the public's respect for the fairness of the judicial process and eventually its willingness to accept the outcomes of that process."⁹³ Moreover, the quality of the legal profession may further erode, reducing the law school applicant pool⁹⁴ and discouraging individuals with excellent skills and broad intellectual interests from entering the law and thereby protecting the public from unchecked client self-interest.⁹⁵

Minimizing lawyers' position in society likely triggers a similar downward spiral of esteem within the legal profession itself. As explained by Talcott Parsons and others, professional structures are best designed to subordinate the professional's self-interested concerns to higher social values.⁹⁶ Where the

⁹² MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 102-08 (1994) (exalting lawyerly qualities such as sensitivity to issue, feel for common ground, understanding of future possibilities, problem solving abilities, tolerance, and appreciation for the value of deliberate (yet incremental) change); KRONMAN, *supra* note 50, at 14-15 (arguing that the model lawyer-statesman should develop positions through her extraordinary deliberative powers that guide other citizens in public and private life).

⁹³ Selinger, *supra* note 87, at 872 (quoting bar leader as saying that "when people lose confidence in lawyers, they lose confidence in the rule of law" (citation omitted)).

⁹⁴ Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 313 (1998) (commenting on connection between lawyer's sense of professional accomplishment and their view of law as an honorable profession); Selinger, *supra* note 87, at 874 (reviewing reasons why the loss of lawyers' dignity should matter to anyone other than lawyers).

⁹⁵ Selinger, *supra* note 87, at 874 (observing that lawyers can use shame to restrain clients from engaging in questionable activities).

⁹⁶ See, e.g., Talcott Parsons, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 34, 43-46 (rev. ed., 1964) (analyzing relationship among desire for success with a given professional institutional structure, self-interest, and altruism); ROBERT MERTON, *SOME THOUGHTS ON THE PROFESSIONS IN AMERICAN SOCIETY* 11 (1960) (explaining that professional organizations do not require members to "feel altruistic . . . it only requires them to act altruistically"), *quoted in* DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 12 (3d ed. 2001).

professional structure deteriorates, the argument goes, the professional's self-interest starts to dominate. Maintaining dignity for lawyers heightens the profession's incentive to self-police. Finally, any decrease in quality for the legal profession resulting in the profession's lower esteem further affects potential clients' willingness to rely on lawyers when it is in everyone's best interest that they do so.⁹⁷

5. Crisis in the ABA's Public Relations

The Bush decision to eliminate the ABA from its special vetting role is also, of course, symptomatic of a public relations problem for the American Bar Association itself. The precise source of animosity is complex. On one hand, the administration points to ABA public positions on controversial issues as the cause of the ABA ouster.⁹⁸ Underlying this explicit explanation may be more specific complaints about the ABA's votes in the Bork nomination and other ABA interactions with the Ronald Reagan and George H. W. Bush Administrations. In addition, the animosity may derive from more diffuse sources, such as concern with lawyers engaged in power mongering and the generalized impression that lawyers create rules for the primary purpose of benefitting only themselves, whether the rules concern multidisciplinary practice, professional ethics, judicial selection, or other matters.⁹⁹

⁹⁷ Selinger, *supra* note 87, at 877 (suggesting that lowering dignity of lawyers may prompt individual clients to turn to those without legal expertise or to try "to muddle through themselves," *id.* at 877-78).

⁹⁸ Often highlighted is the ABA House of Delegates' decision to support reproductive choice. See GERHARDT, *supra* note 32, at 230 (emphasizing ABA reproductive choice decision as most damaging to public perception of ABA bias). For a list of other ABA positions on issues considered controversial, see *The Role of the American Bar Association in the Judicial Selection Process*, S. Hrg. 104-497, *Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 88 (1996) (statement of Daniel E. Troy, Wiley, Rein and Fielding) (listing house of delegates resolutions representing ABA "liberal positions").

⁹⁹ See, e.g., Susan Bandes, *Erie and the History of the One True Federalism*, 110 YALE L.J. 829, 838 (2001) (articulating the argument that the legal profession is "a powerful special interest group that consistently sought to shape the law for the enhancement of its own prestige and well-being, while wearing the mantle of detached concern for the rule of law and the greater good") (reviewing EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000)). This is not the first time that the ABA's suggestion that it was speaking for the public is a veiled pursuit of narrow interests mongering. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000) (discussing that within the context of diversity jurisdiction, ABA is described as "[s]eriously misstating the law, ignoring evidence and arguments their adversaries presented, and allying with clearly defined corporate interests" while at the same time insisting "that they spoke for no client but the public").

These generalized criticisms are well within the jurisdiction of the ABA, although more appropriately reckoned with on a global level outside the specific context of judicial selection. Nevertheless, the specific concerns flowing from partisanship perceptions and public policy positions deserve close attention by those concerned with the ABA's role in judicial selection.

a. *Perceptions of Partisanship*

The perception of ABA partisanship is difficult to cure because most ABA decisions on judicial nominees are likely to displease one side of the political spectrum or another. Indeed, Republicans have not always been the party that felt undermined by ABA judicial ratings.¹⁰⁰ Moreover, although beliefs in ABA partisanship are deeply held, the allegations are sometimes hyperbolic¹⁰¹ or unsubstantiated.¹⁰²

After the Bush Administration's March 2001 ouster of the ABA, the organization used statistics to rebut the suggestion of partisanship. In particular, the ABA trumpeted that, of the almost 2000 judicial candidates formally nominated by the last nine administrations, the Committee found twenty-six nominees to be unqualified, twenty-three of those individuals being nominees of Democratic

¹⁰⁰ ABRAHAM, *supra* note 38, at 69-77 (discussing disgruntled reactions of Republicans and Democrats to ABA actions); GOLDMAN, *supra* note 19, at 326 (describing ABA positions on conservative judicial candidates, which angered "liberals"). Before the last several decades, the ABA was generally associated with conservative positions. See PURCELL, *supra* note 99 (arguing that ABA's actions in defending diversity jurisdiction "showed the extent to which a partisan ideology controlled their thinking" as they sought to protect conservative interests).

¹⁰¹ One conservative critic, writing under the pseudonym "Publius," characterized the ABA as espousing "leftist" positions. Publius, *From Wall Street to Woodstock: The New Politics of the American Bar Association in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS* 111, 117 (Nat'l Legal Ctr. for the Pub. Interest 1990) (criticizing ABA for advancing an agenda "more commonly associated with the National Lawyers Guild, an organization with identifiably radical origins").

¹⁰² Judge Laurence Silberman argued, for example, that the ABA developed tensions with the Reagan Administration because conservative judicial ideology is against the economic self-interest of lawyers. Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092, 1095 (1991) ("Because the fortunes of lawyers as a class, and particularly litigating lawyers, tend to wax at a time of rising, not declining, judicial power, it is not surprising that there were numerous conflicts between the ABA and the Reagan DOJ."). That assertion does not ring true in principle and does not appear to have born itself in practice, if one evaluates the decisions and other work product of Reagan-selected judges. This is a reaction shared even by a strong critic of the ABA. See Publius, *supra* note 101, at 117 ("[P]rofessional self-interest can only account for some of the policy positions taken by the ABA in recent years . . .").

presidents and three being nominees of Republicans.¹⁰³ From this point, the ABA pressed the inference that recent history does not support a Democratic bias.¹⁰⁴

But this statistic does not tell the whole story. Lacking, for example, are figures on how many potential nominees the ABA tentatively rated as unqualified. For it is this tentative rating, made before the candidate becomes a formal nominee, that President Bush has eliminated from the process. The tentative rating is the one that is so crucial to potential nominees' fates and that the ABA argues so persuasively is key to the organization's ability to help make "the federal judiciary the envy of the world."¹⁰⁵ In official literature, the ABA does not include figures on how many potential candidates have been tentatively rated as unqualified, saying instead that "no one knows" how many "potential candidates were never nominated because of the Committee's evaluation" because "the information is never revealed by the respective administration."¹⁰⁶

Statistics available from non-ABA sources are more ambiguous on the partisanship issue.¹⁰⁷ A recent study of confirmed court of appeals judges found that for the individuals of this group who possessed no prior judicial experience, the ABA granted a "well-qualified" rating to substantially more of President Clinton's nominees than nominees of President George H. W. Bush.¹⁰⁸ Specifically, the study asserts that when the Bush and Clinton court of appeals nominees are viewed together, "being nominated by Bill Clinton was a stronger positive variable than any other credential or than all other credentials put together."¹⁰⁹ Statistics from other sources could also arguably be read as suggesting a Democratic bias,¹¹⁰ but might

¹⁰³ Statement by ABA President Martha Barnett in Response to White House Decision to End ABA's Pre-Nomination Notification of Federal Judicial Candidates, at 1 (Mar. 22, 2001), available at <http://abanet.org/media/statement2.html> (last visited Sept 25, 2001).

¹⁰⁴ Carter, *supra* note 40, at 18 ("Statistics overwhelmingly refute concerns that the ABA committee favors Democrats over Republicans.").

¹⁰⁵ Statement by ABA President Martha Barnett, *supra* note 103, at 2.

¹⁰⁶ *Frequently Asked Questions About the American Bar Association Standing Committee on Federal Judiciary*, at 2 (memorandum on file with the author and available from the American Bar Association), available at <http://abanet.org/media/fedjudfaq.html> (last visited Sept. 25, 2001).

¹⁰⁷ For a rundown of ratings broken down by presidential administration, see GOLDMAN, *supra* note 19, at 348-50; GROSSMAN, *supra* note 18, at 198.

¹⁰⁸ James Lindgren, *Yes, the ABA Ratings on Judicial Nominees Are Biased*, WALL ST. J., Aug. 6, 2001, at A13. A longer version of this study will be published in the *Journal of Law and Politics* and is available at <http://www.law.nwu.edu/lindgren>.

¹⁰⁹ *Id.*

¹¹⁰ Stidham and Carp also point out that President Clinton seems to fair better on "well qualified" ratings than the first term nominations of Carter, Reagan, and Bush, with 64 percent of Clinton's district court and 83 percent of Clinton's appellate court nominees receiving this high ranking. CARP & STIDHAM, *supra* note 19, at 229. Carter apparently follows Clinton as the president with the next highest percentage of exemplary ratings. GERHARDT, *supra* note 32, at 120 (stating that Clinton is the only president to have a higher

be more fairly interpreted as inconclusive on the partisanship issue, or as representing a trivial difference between nominees by the two political parties.¹¹¹ While the criticisms may not be balanced, one alleged practice from recent years has contributed prominently to the partisanship perception. According to critics, the ABA Standing Committee on Federal Judiciary improperly chose to cooperate more with "liberal" groups, both in soliciting information about potential nominees and in selecting with whom to share information.¹¹² The ABA has discontinued the practice of furnishing lists of prospective nominees to organizations, explaining that "[i]n reexamining its operating procedures, the Standing Committee has concluded that a practice of furnishing lists of prospective nominees to organized groups is inconsistent with its concerns for confidentiality and obligations to the President."¹¹³ The negative fallout from this type of partisanship allegation has been exacerbated by criticism that the ABA is not an organization for all lawyers, and that entire segments of the legal profession are insufficiently represented in ABA membership and leadership.¹¹⁴

b. *Public Position on Controversial Issues*

As mentioned earlier, traditional models of lawyers in society value the contributions of lawyers as opinion leaders.¹¹⁵ Articulation of positions on difficult social issues should not be branded as evidence of partiality that disqualifies

percentage of his nominees rated excellent or well qualified by the ABA than Carter); see Fein, *supra* note 7, at A18 (observing that the ABA Committee gave Judge Richard Posner a "lukewarm 'qualified' rating").

¹¹¹ See CARP & STIDHAM, *supra* note 19, at 213 (opining that the "difference in quality between Republican and Democratic appointees is trivial").

¹¹² See, e.g., *The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 36 (Senator Gordon J. Humphrey, reporting on ABA arrangement with "liberal" groups to share information, influence "evaluation of targeted candidates and in some instances derail nominations even before they could be made"); Abraham, *supra* note 38, at 70 (stating that the lawsuit was filed by a conservation organization, which alleged that the ABA Committee "relied primarily on liberal interest groups to gather information about judicial candidates and actually released names of . . . nominees to the ultra-liberal Alliance for Justice, a group organized especially to thwart Reagan's promise to shift the direction of the courts").

¹¹³ Letter from Robert B. Fiske, Jr., Chair of the Standing Committee on Federal Judiciary, to Douglas Johnson, National Right to Life Committee, Inc. (Dec. 2, 1985), reprinted in *The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 324 (1989).

¹¹⁴ See generally JOHN C. SULLIVAN, . . . AND JUSTICE FOR ALL? 21-31 (1989) (criticizing ABA for restrictive membership practices, biased control through canons of ethics, elite control of rank-and-file lawyers, and double standards condemning ambulance chasing yet encouraging corporation chasing).

¹¹⁵ See *supra* notes 87-97 and accompanying text.

lawyers or bar associations from participating in the government processes, such as judicial selection. To so argue would unduly discourage lawyers from sharing with other citizens the deliberative powers developed in legal training and the practice of law.¹¹⁶ Taking stances on controversial issues and developing reasoned positions based on formal legal concepts and competing moral principles is the essence of good lawyering.¹¹⁷

Yet the judgment so valued in lawyers may also counsel against taking positions in such a way and under such circumstances as to cause unnecessary furor and acrimony. The positive contribution of communicating positions on controversial social issues begins to wane if opinions are developed and communicated in a dogmatic, insensitive or overaggressive way.¹¹⁸ Moreover, a fine line exists between lawyers as champions of social justice and lawyers stridently reinforcing existing schisms in society and self-interestedly pursuing their own policy perspectives. The backlash from ABA policy positions suggests that the ABA may not always have navigated this line successfully.

Sometimes problems may have emerged simply as a result of timing. As Professor Michael Gerhardt observed with regard to the ABA's reproductive choice stance, the ABA's reputation for impartiality in the context of judicial selection suffered because the ABA vote on the reproductive choice issue "coincided with the increased intensity with which the Senate Judiciary Committee questioned judicial nominees about their views on abortion rights," thus giving "the appearance that the ABA was taking sides in a public debate."¹¹⁹

The ABA may have also unrealistically believed itself capable of developing a unified position from a membership that is in fact pluralistic and divided. Nonetheless — whether it be a fault of the ABA or an artifact of circumstances

¹¹⁶ See KRONMAN, *supra* note 48, at 14-15 (describing a lawyer-statesman model in which society looks to lawyers to use deliberative powers so as to develop positions that guide other citizens in public and private life). For a review of arguments concerning whether it is inconsistent with the ABA's role to take positions on controversial issues, see, e.g., RHODE & LUBAN, *supra* note 96, at 61-64 (reviewing arguments on both sides); Leslie M. Campbell, *Keeping Watch on the Waterfront: Social Responsibility in Legal and Library Professional Organizations*, 92 LAW LIBR. J. 263, 265 (2000) (summarizing arguments against ABA taking positions on controversial social issues); David M. Leonard, Note, *The American Bar Association: An Appearance of Propriety*, 16 HARV. J.L. & PUB. POL'Y 537, 563-64 (1993) (arguing against taking positions on controversial issues).

¹¹⁷ KRONMAN, *supra* note 48, at 14-16 (describing the model of the lawyer-statesman as opinion leader).

¹¹⁸ *Id.* at 15 (describing the lawyer-statesman as possessing a stock of specialized legal knowledge as well as practical wisdom, and the ability to be "more calm or cautious than most people and better able to sympathize with a wide range of conflicting points of view").

¹¹⁹ GERHARDT, *supra* note 32, at 230. It was apparently in response to this situation that the ABA Committee agreed formally not to take ideology into account in rating judicial nominees. *Id.* (reporting on committee decision).

beyond the organization's control — the ABA's position-taking has created an unfortunate, broadly held conception of the organization as strident, imprudent, and incapable of balanced deliberation. The ABA is advised to evaluate the toll resulting from its policy positions and to inquire whether it can take positions on divisive issues while continuing as an institution meriting respect from official quarters and representing all lawyers, irrespective of ideological or political preferences.

c. *Subterfuge*

Although harm from policy positions can come in the form of divisive relations within and without the organization, an even more damaging consequence is the perception that the ABA uses judicial evaluations as subterfuge. Many believe that the ABA imposes its policy predispositions on the federal judiciary under the guise of rating judicial qualification.¹²⁰ Some have specifically accused the ABA of using negative judicial characteristics such as lack of compassion or sensitivity as cover for negative judgments about conservative political views or concepts of judicial restraint.¹²¹ The insinuation that the ABA suffers from lack of candor, abuse of power, and deceptive techniques makes it even more important that the organization — and its Standing Committee on Federal Judiciary — seek out ways to improve their reputations.¹²² To this end, I sketch below preliminary suggestions for changes in Standing Committee procedure.

III. ANTIDOTES TO PROBLEMS OF PARTIALITY AND PERCEPTION

¹²⁰ GERHARDT, *supra* note 32, at 229-30 (“[The ABA] is best seen as a special conduit through which potentially partisan considerations can be camouflaged as ‘professional qualifications’ concerns, both by its members’ actions in the federal appointments process and by whichever senators find its formal recommendations useful.”).

¹²¹ See, e.g., *The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 36 (1989) (Senator Gordon J. Humphrey, Member, Senate Comm. on the Judiciary, claiming that while the ABA “purports to pass solely on the professional qualifications of nominees, there is strong evidence that the process is tainted by ideological bias,” as evidenced by the Bork nomination); *id.* at 201 (Paul D. Kamenar, Executive Legal Director, Washington Legal Foundation, asserting that temperament criteria is a way to “smuggle in Committee members’ biases against certain candidates”); Silberman, *supra* note 102, at 1095 (suggesting that the ABA used “the codewords ‘compassion’ and ‘sensitivity’” and under “the banner of ‘insensitivity’” rebuffed “those nominees whose political views were identified with the conservative wing of the Republican party or with notions of judicial restraint”).

¹²² For a summary of changes that the ABA can make as a broader organization to avoid the damage resulting from taking positions on divisive issues, see Leonard, *supra* note 116, at 559-63 (analyzing suggestions such as expanding ABA membership, holding referenda, and limiting the ABA's agenda).

A. Existing Protection

The ABA Standing Committee already has in place many protections against abuse of power, subterfuge, and bias. Some are well known; some could be better publicized. Perhaps the biggest restraint on the Standing Committee is its reactive (rather than proactive) orientation. That is, the Committee does not actually generate names of potential nominees, but "evaluates the qualifications of actual and putative nominees" proposed by the president.¹²³ Although the ABA may have originally wished that the Standing Committee take a more proactive role in nominations,¹²⁴ the organization seems ultimately to have concluded that taking on the reputation as "judge-maker" would diminish the prestige and effectiveness of the Committee.¹²⁵

The other major category of protections in place are designed to separate the functions of opinion leader and judicial evaluator within the ABA organization.¹²⁶ Steps already taken to reinforce the integrity of the Committee's work include requirements that the Committee keep its work separate from the remainder of the ABA organization and preventing the ABA's Board of Governors, House of Delegates and Officers from becoming "involved in any way in the evaluations of candidates."¹²⁷ Governing Principles of the Committee provide that each member must agree: (1) while on the Committee and for one year thereafter, not to seek or accept a federal judgeship; and (2) while on the Committee "not to participate in or contribute to any federal election campaign or engage in partisan political activity."¹²⁸ Governing principles also require each member to do her committee work personally and independently.¹²⁹

In service of its desire to maintain impartiality, the ABA has expressly

¹²³ ABRAHAM, *supra* note 18, at 33 (describing ABA evaluative role); Little, *supra* note 35, at 737 (observing that the ABA's role is significant only for its negative effect, a nominee being "likely to view a favorable ABA rating as one of many hurdles in the process, rather than a benefit requiring repayment in some form").

¹²⁴ GROSSMAN, *supra* note 18, at 77 (explaining that promoting the nomination of persons that the Association deems best qualified was one of the major objectives of the ABA).

¹²⁵ *Id.* at 100 (quoting ABA President as concluding that the label "judge-maker" would cause the prestige and influence of the ABA to suffer).

¹²⁶ Ramo & Cooper, *supra* note 10, at 108 ("[T]here is truly a wall of separation between the policies and the politics of the ABA and the workings of the Standing Committee.").

¹²⁷ American Bar Association, *supra* note 12, at 2.

¹²⁸ *Id.* This prohibition means that a member may not host a fund raiser or endorse a candidate for federal office. *Id.*

¹²⁹ *The Role of the American Bar Association in the Judicial Selection Process*, S. Hrg. 104-497, *Hearing Before the Senate Comm. on the Judiciary*, Serial No. J-104-82, 113 (May 21, 1996) (prepared statement of Roberta Cooper Ramo & N. Lee Cooper).

disavowed evaluation of nominees' jurisprudential views.¹³⁰ Critics are quick to point out, however, that this policy was a long time coming, developed only after negative public relations and a series of modifications and negotiations.¹³¹

B. Possible Changes in Procedure

Changes in procedure are of course best designed by the individuals most intimate with the organization of the ABA and its Standing Committee. A number of areas nonetheless present themselves as candidates for innovation, most notably changes in the composition of the Standing Committee, enforcement of Committee rules, and amendment of the confidentiality requirements governing Committee business. I analyze first the composition and enforcement issues, and then turn to the more difficult question of confidentiality.

1. Size and Composition of the Committee

In 1996, a bipartisan group prepared a study released by the University of Virginia's White Burkett Miller Center of Public Affairs.¹³² Commenting on the ABA Standing Committee, the Miller study ultimately concluded that although the ABA Committee "has been criticized, alternatively by liberals and conservatives, the committee is useful in evaluating the professional qualifications of judicial

¹³⁰ Silberman, *supra* note 102, at 1098.

¹³¹ *Id.* (characterizing the ABA's decision to eliminate ideology from its deliberations as one made "grudgingly" after "negotiations" with the Department of Justice); see *The Role of the American Bar Association in the Judicial Selection Process*, S. Hrg. 104-497, *Hearing Before the Senate Comm. on the Judiciary*, Serial No. J-104-82, 8-9 (May 21, 1996) (prepared statement of Dick Thornburgh), available at 1996 WL 276549 (F.D.C.H.), which summarizes the following evolution of the ABA guidelines on the politics and ideology question:

1977 and earlier: The Committee's evaluation is "limited to professional qualifications—competence, integrity and judicial temperament";

1980: "The Committee's evaluation of prospective nominees to these courts is directed primarily to professional qualifications[,] competence, integrity and judicial temperament. . . . The Committee does not investigate the prospective nominee's political or ideological philosophy except to the extent that extreme views on such matters might bear on judicial temperament or integrity.";

1988: The Committee's evaluation criteria were modified, such that "[t]he word 'primarily' was deleted from the language quoted above, and the 'political and ideological' language was broadened so as to read: Political or ideological philosophy are not considered, except to the extent they may bear upon the other factors.";

1989: The Committee's evaluation is confined to "professional qualifications—[i]ntegrity, competence, and judicial temperament." The Standing Committee deleted reference to consideration of "political or ideological philosophy."

¹³² The Miller Center of Public Affairs, *supra* note 10.

nominees.”¹³³ The Miller Center report reported that, although some presidential “administrations have found some of the committee’s investigations duplicative and too time consuming, there has been improvement”¹³⁴ The Miller Center report fashioned suggestions for reducing duplicative inquiries, but focused proposed changes on entities other than the ABA.¹³⁵

The Miller Report did advocate, however, that the ABA expand the size of the Standing Committee.¹³⁶ This suggestion is a sound response to complaints about bias and lack of balanced representation in the Standing Committee. The ABA has been dogged by complaints that its membership is narrow and unrepresentative of the legal profession.¹³⁷ This criticism replicates itself within the context of the Standing Committee, especially where it remains a small, clubby subset of the ABA elite.

It is true that the ABA represents only a portion of the nation’s lawyers,¹³⁸ and its membership is also not precisely representative of the profession as a whole.¹³⁹ This representation problem was exacerbated in the past by the tendency of the Standing Committee on Federal Judiciary to be dominated by white men.¹⁴⁰

¹³³ *Id.* at 5.

¹³⁴ *Id.*

¹³⁵ To the extent that this concern is related to a need to expedite the evaluation process, the ABA has recently turned its attention to the time it takes to complete its work. The ABA has represented in recent correspondence with the White House that it is able and willing to meet tight schedules in evaluating candidates. Letter from Martha W. Barnett, President of the American Bar Association, to Alberto R. Gonzales, Counsel to the President (Apr. 23, 2001) (letter on file with author) (stating that, as matter of routine, the ABA can complete an investigation in non-problem cases in 35 days from receipt of the Personal Data Questionnaire, and that the ABA may be able to complete the investigation in less time in special situations).

¹³⁶ The Miller Center of Public Affairs, *supra* note 10, at 7 (recommending that the ABA “expand the size of its Standing Committee on Federal Judiciary and have more than one representative for each circuit”); *accord* Kamenar, *supra* note 50, at 93, 100 (suggesting that the Committee increase its number of members, particularly in view of Committee members’ other professional obligations).

¹³⁷ *See infra* notes 140–45 and accompanying text.

¹³⁸ The ABA’s own website reports that the ABA now represents approximately half of all lawyers in the United States. American Bar Association, *ABA History*, at <http://www.abanet.org/media/overview/phistory.html> (last visited Sept. 20, 2001). *See also* ABRAHAM, *supra* note 18, at 33 (reporting that “ABA represents fewer than half of the nation’s lawyers”); GROSSMAN, *supra* note 18, at 81 (noting that although the ABA represented fewer than half of the nation’s lawyers in 1965, “the propriety of its assuming the role of ‘voice’ of the American bar is much less questionable”).

¹³⁹ *See, e.g.*, American Bar Association, *Highlights from the 1999 Leadership Survey*, at <http://www.abanet.org/solo/survey99.html> (last visited Sept. 20, 2001) (reporting that solo and small firm practitioners are underrepresented among leadership).

¹⁴⁰ ABRAHAM, *supra* note 18, at 33 (observing that the Committee on the Judiciary once bore the “tag ‘establishmentarian’”).

Traditionally, the ABA Committee is said to have been composed of "largely . . . older, well-to-do, Republican, business-oriented corporation attorneys."¹⁴¹ Consequently, suspicion arose that the Committee viewed "being wealthy and conservative as positive traits and being liberal and outspoken as uncharacteristic of 'a sound judicial temperament.'"¹⁴² Now that the ABA is associated with policy positions deviating from conservative dogma, this perception may be changing.¹⁴³

The ABA has taken significant strides in expanding representation in its general membership and leadership,¹⁴⁴ as well as in the composition of its Standing Committee on Federal Judiciary.¹⁴⁵ Yet to avoid the claim that it has simply replaced a conservative bias on the Standing Committee with a liberal one, the ABA may find that expanding the size of the Committee to include a broader cross-section of the organization would be an easily executed and well-received innovation. Expanding the Committee's size would also respond to those critics who argue that, because the Standing Committee is dominated by trial lawyers, the Committee's recommendations too heavily emphasize trial experience as necessary for judicial qualification.¹⁴⁶

A more complicated question is whether, in expanding the Committee, ABA leadership should pursue an explicit policy of demographic and political diversity

¹⁴¹ CARP & STIDHAM, *supra* note 19, at 227-28.

¹⁴² *Id.* at 228.

¹⁴³ *Id.*

¹⁴⁴ See, e.g., Sandra Torry, *In Speech, Dole Reignites Feud Over Bar Association*, WASH. POST, Apr. 20, 1996, at A10 (quoting ABA President as stating that 24% of ABA members are women, a figure that roughly mirrors the percentage in the legal profession); News Release, American Bar Association, ABA Diversity Commission Gives Association Mixed Reviews in Evaluating Internal Diversity Successes (Feb. 17, 2001), available at <http://www.abanet.org/media/feb01/internaldiversity.html> (last visited Sept. 20, 2001) (reporting that although statistics may not be accurate, they report a slightly higher minority membership than the proportion of the legal profession that is racially or ethnically diverse); News Release, American Bar Association, ABA Membership "Mirrors" Profession in Ethnic Diversity, Commission Reports (Jan. 29, 1999), available at <http://www.abanet.org/media/jan99/g9min299.html> (last visited Sept. 20, 2001) (reporting that minority representation on the ABA mirrors that of the legal profession); American Bar Association, *A Snapshot of Women in the Law in Year 2000*, available at <http://www.abanet.org/women/snapshots.pdf> (last visited Sept. 20, 2001) (demonstrating graphically that percentage of women ABA members is comparable to percentage of women lawyers, although similar parity is not reflected in statistics for ABA leadership positions).

¹⁴⁵ ABRAHAM, *supra* note 18, at 33 (arguing that efforts to diversify membership on the Committee on the Judiciary suggest that it no longer merits "the erstwhile factual tag 'establishmentarian'").

¹⁴⁶ Silberman, *supra* note 102, at 1099 (asserting that "[b]ecause the Standing Committee's membership is monopolized by trial lawyers, it is only human, if not admirable for the 'brotherhood of the brief' to look askance at distinguished lawyers who are engaged in anything other than the classic jury-trial practice").

of its members. In defense of its efforts to ensure the Committee's impartiality, ABA leadership has stated that an aspect of Committee members' backgrounds that remains an unknown during the process of selecting members is political affiliation.¹⁴⁷ One wonders whether, under a theory of diffuse impartiality, the ABA leadership may better serve the country and better rebuff allegations of partisanship and ideological subterfuge if it adopted a policy of selecting members for the Standing Committee drawn from a balanced cross-section of political parties and/or demographic groups.

2. Enforcement of Committee Policies

As noted above, the ABA has worked hard to implement many protections designed to ensure that the Standing Committee's work is independent of the ABA's policy-making efforts. The policies vest the ABA President with power to sanction members who do not comply with these protections. Critics, however, maintain that protective standards are not enforced.¹⁴⁸ Further efforts by the ABA either to enhance its enforcement mechanisms, or at least to improve the public perception that the mechanism works, would serve the Standing Committee's credibility and esteem.¹⁴⁹

3. Confidentiality

The Miller Study's more problematic suggestion would require the Standing Committee to provide the administration and the Senate Judiciary Committee with

¹⁴⁷ Ramo & Cooper, *supra* note 10, at 99 (asserting that the ABA never asks about political affiliation and that members are "forced to leave their politics at the door").

¹⁴⁸ John W. Kern III, *Evaluating the Evaluators: The Standing Committee on Federal Judiciary*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 85, 91 (Nat'l Legal Ctr. for the Pub. Interest 1990) (asserting that ABA Committee's governing principles "would appear to remedy the present deficiencies in the Standing Committee's processes—if only they were to be properly enforced"); Charles E. Grassley, *Reforming the Role of the ABA in Judicial Selection: Triumph of Hope Over Experience?*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 103, 108 (Nat'l Legal Ctr. for the Pub. Interest 1990) (advocating the need for the ABA President to discipline Standing Committee members who breach the Committee's confidentiality requirements).

¹⁴⁹ Another criticism that may require only a quick fix is the concern that the Standing Committee's scope of inquiry into potential nominees is too narrow. *The ABA Role in the Judicial Nomination Process: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 276 (1989) (Sen. Howard M. Metzenbaum, Member, Senate Judiciary Comm., suggesting that the ABA should "contact a wide range of groups before it rates a particular nominee"). That concern, however, must be balanced against contrary concerns with nominees' privacy as well as with the committee completing its work within a quick time frame.

a brief, but official, statement of reasons behind its judicial evaluations.¹⁵⁰ Although many have echoed this recommendation,¹⁵¹ complications arise because of the Standing Committee's unqualified confidentiality policy.

The ABA maintains that it cannot render accurate evaluations without confidentiality¹⁵² — a position possessing both force and common sense. After all, confidentiality not only loosens the tongues of informants, but saves embarrassment of individuals found to lack the requisite qualifications before their names appear in public sources.¹⁵³ Standard social science technique encourages confidentiality as a handservant for accuracy.¹⁵⁴ Within the context of judicial selection, added elements of power and intrigue make confidentiality an even more valuable tool for ensuring that the forces of political favoritism do not motivate nominations. In fact, the United States Supreme Court has even suggested that confidentiality of Justice Department consultations with the ABA Committee may be constitutionally mandated, as necessary to ensure the effectiveness of the president's Article II power to nominate federal judges.¹⁵⁵

¹⁵⁰ The Miller Center of Public Affairs, *supra* note 10, at 7 (explaining recommendation of a "brief statement of the reasons" behind ABA rating).

¹⁵¹ Abraham, *supra* note 38, at 77 ("At a minimum all participants in the Judicial Selection process — left and right, Democrat and Republican — would like to see the ABA explain the reasons for its ratings."); Grassley, *supra* note 148, at 108 (advocating that the ABA should explain ratings of "not qualified" on "objective grounds for that conclusion in a written report to the Attorney General"); Kern, *supra* note 148, at 90 (observing that the ABA Committee does not have to "explain in any way its vote" and that the "evaluation of Judge Bork was contained in a report not even six pages in length"); Ross, *supra* note 33, at 66 ("The reasons for maintaining confidentiality of sources and votes do not extend to the sources of the information that furnished the basis for such votes.").

¹⁵² American Bar Association, *supra* note 12, at 13 ([O]nly by assuring and maintaining . . . confidentiality can sources be persuaded to provide full and candid information."); Carter, *supra* note 40, at 18 (quoting ABA President Barnett as explaining that "'once a nominee's name is out it might be hard to achieve the same level of candor' from local bar members who are interviewed by the vetting committee").

¹⁵³ See, e.g., Ross, *supra* note 33, at 66 (reasoning that because the "web of connections between interviewees and a potential nominee" can be complex, "the potential for future embarrassment or retribution" resulting from lack of confidentiality is "broad and intricate").

¹⁵⁴ See, e.g., HERBERT F. WEISBERG ET AL., AN INTRODUCTION TO SURVEY RESEARCH AND DATA ANALYSIS 91, 303-04 (2d ed. 1989) (noting the importance of confidentiality in convincing individuals to participate in surveys); ELLEN J. WENTLAND & KENT W. SMITH, SURVEY RESPONSES: AN EVALUATION OF THEIR VALIDITY 100 (1993) (designating anonymity/confidentiality as a variable affecting motivation of individuals to respond accurately to surveys); Martin Blumer, *The Impact of Privacy Upon Social Research, in CENSUSES, SURVEYS AND PRIVACY* 3, 4-5 (Martin Blumer ed. 1979) (stating that individuals are less likely to withhold information when given adequate assurances about confidentiality).

¹⁵⁵ *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (noting that lower court made this constitutional holding and stating that requiring disclosure of Justice

Intimately tied to confidentiality is timing. Once a potential candidate has been nominated, the nominee takes on the power of a near-judge, with the potential to affect the fortunes of those whose opinions are most often sought in the evaluation process. Thus, lawyers who may practice in front of the judge are less likely to share negative information, prudently aware that their statements may eventually make their way to the judge's ears.¹⁵⁶ Likewise, judges may be wary of disparaging the character or legal abilities of a near colleague in whom the judge may rely for a vote on an appellate panel, a workplace favor, or camaraderie in a sometimes very isolated job.¹⁵⁷

Perhaps for these reasons, the early history of ABA participation in federal judicial selection (1958-1963) suggests that the Standing Committee's potency and effectiveness in helping to sort through candidates and to identify subtle but important differences among them is diminished considerably if the ABA is relegated to a later point in the process.¹⁵⁸ ABA input before the name gets submitted to the Senate is crucial, in large measure because of the possibility for confidentiality at that stage.¹⁵⁹ The controversy surrounding the ABA prescreening function actually demonstrates this point: the prescreening role must have considerable influence, or those opposed to the ABA would not likely fight so hard to eliminate it.¹⁶⁰

Confidentiality, however, does not mean that the ABA Standing Committee should be absolved of all responsibility for explaining its actions. Moreover, persuasive reasons weigh heavily against confidentiality. As Professor William Ross argues, the ABA's judicial ratings would be far more useful to the Senate

Department consultations with the ABA Committee "would present formidable constitutional difficulties").

¹⁵⁶ Ross, *supra* note 33, at 66 (quoting a member of the Standing Committee as saying that the Committee "might as well quit" if confidentiality is not maintained because "[l]awyers have to appear before judges").

¹⁵⁷ Cf. Silberman, *supra* note 102, at 1097 (expressing discomfort with the "Standing Committee's practice of approaching federal judges in confidence and soliciting their opinions on prospective nominees").

¹⁵⁸ GROSSMAN, *supra* note 18, at 75-76 (reporting that where the ABA was consulted around the same time a name was submitted to the Senate, the organization could not be "a really effective advisor" because political commitments had already been made and the ABA could not assist the attorney general in making delicate choices among candidates with varying qualifications, all of whom were sponsored by prominent politicians).

¹⁵⁹ See, e.g., *id.* at 96 (ABA report sent after decision to submit name to the Senate "must be made in the light of the inevitability of appointment"); American Bar Association, *supra* note 12, at 13 (outlining importance of prenomination, confidential process).

¹⁶⁰ Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 227-28 (1996) ("[The] controversy over ABA judicial recommendations is an indication of the seriousness with which these recommendations are taken by political decisionmakers.").

Judiciary Committee — which enters the picture later in the time line — if detailed reports, with explanations for the ratings, are provided.¹⁶¹ In addition, as the Miller Study explains, the ABA Committee may avoid some charges of partisanship or ideological motivation by providing reasons for its evaluation. The Standing Committee's insistence on confidentiality has contributed to the negative impression that it smugly believes itself above any obligation to explain its decisions.¹⁶² Third, the process of articulating reasons may assist committee members in thoughtful consideration of the qualities that bear on quality judging. An explanation requirement may even help committee members sort ideological or partisan bias unwittingly coloring their evaluation. Finally, explaining its views to the public reinforces the ABA's public service role of educating the public on law and government.

One possible compromise between these competing concerns may come from parsimoniously controlling what is disclosed. For example, the arguments outlined above suggest that confidentiality is particularly important at the early stages of investigation. With this in mind, the ABA may be able to accommodate, at least partially, Senator Grassley's suggestion that the Standing Committee should at least provide a written report on "not qualified" ratings.¹⁶³ At the same time, this suggestion implicates a new set of competing concerns of fairness to potential nominees. As Professor William Ross points out, the ABA needs to be particularly sensitive to claims of unfairness by persons who are not nominated because of a negative rating.¹⁶⁴ Moreover, giving the candidate and executive branch the dignity of explanations behind a negative rating may foster a more informed inquiry as to the accuracy of the ABA's assessment. On the other hand, publication of reports explaining unqualified ratings may embarrass persons under consideration and harm

¹⁶¹ Ross, *supra* note 33, at 66 (arguing for more explanations underlying ratings).

¹⁶² See, e.g., Kern, *supra* note 148, at 90 (observing that the ABA Committee does not have to "explain in any way its vote" and that the "evaluation of Judge Bork was contained in a report not even six pages in length").

¹⁶³ Grassley, *supra* note 148, at 108 (advocating that the ABA should explain ratings of "not qualified" on "objective grounds for that conclusion in a written report to the Attorney General" and that the report should be submitted to the Senate Judiciary Committee if the candidate is subsequently nominated).

¹⁶⁴ Ross, *supra* note 33, at 67 (observing that "an unfavorable rating may be more likely to ruin a candidate's chances for nomination than to preclude confirmation if such a candidate is nominated"). Another argument against breaching confidentiality is that the ABA could become unnecessarily embroiled in controversies with interest groups claiming entitlement to names and details. See THE ABA ROLE IN THE JUDICIAL NOMINATION PROCESS: HEARING BEFORE THE SENATE COMM. ON THE JUDICIARY, 101st Cong. 323 (1989) (letter from the ABA to Legislative Director of National Right to Life Committee, Douglas Johnson, declining to heed requests that ABA provide the names of candidates given to it by the Justice Department).

their professional standing.¹⁶⁵ Moreover, disclosure may have a deleterious effect on the accuracy of the information obtained because of the possibility that sources could be identified even if not named in the report.

Although a close call, the arguments in favor of confidentiality are weightier than those arguing against secrecy. I reach this decision by discounting some of the fairness concerns weighing in favor of disclosing reasons for unfavorable ratings. In this regard, I am persuaded by the observations of Professor Ross that a judgeship is not itself a "right" for all successful lawyers, and that those who have had their hopes for a judgeship dashed are likely to continue with the level of professional success that originally made them eligible for the judgeship.¹⁶⁶ I also note that although making an exception to confidentiality may cause accuracy to suffer considerably, the other side of the balance is not equally weighty: the quality of judgeship candidates is unlikely to diminish if no exception to confidentiality is made and the policy stays as is. In so reasoning, I assume that the pool of qualified judicial candidates will continue to be larger than the amount of available positions. Despite my conclusion that unqualified confidentiality should presently remain the policy, I urge further thought on the issue, recognizing the possibility of a future compromise that more adequately satisfies the competing concerns.

CONCLUSION

For topics of this kind, one is often tempted to point out that battle lines are drawn not according to the merits of the procedures at issue, but according to who is likely to win or lose under the alternatives under scrutiny; the argument here being that Republicans attack ABA prescreening because they believe that the ABA will be tough on their allies and the ABA advocates a prescreening role because it wants to implement its own separate policy objectives and put "friends" on the bench. This "whose ox is being gored" line of argument, however, is usually unsatisfying and almost always unhelpful. In this world of competing perspectives, we can do better at developing the most beneficial system for exercising power in government.

It behooves us to continue to consider innovations, given that the issue is not resolved and is likely to reemerge.¹⁶⁷ At present, I ultimately settle on a continued,

¹⁶⁵ Ross argues that this concern could be addressed by encouraging a practice whereby the ABA prepares only an abbreviated report, "available for inspection and publication only at the behest of the candidate." Ross, *supra* note 33, at 68.

¹⁶⁶ *Id.* (arguing that "[n]o one has a right to become a judge" and that "a candidate's failure to obtain a judgeship is unlikely to create any stigma that seriously affects the candidate's professional standing").

¹⁶⁷ Now enjoying control over the Senate after the spring 2001 party change by Sen. Jeffords, Democratic members of the Senate have expressed a desire to restore the ABA to its prescreening role. See Alissa J. Rubin, *Democrats' Big Edge on Senate Panels; Politics:*

prominent role for the ABA in prescreening judicial candidates with a concomitant change in ABA orientation and attitude. This orientation and attitude change should include frank discussion of past problems and a willingness to consider and to implement further procedural changes, including searching for ways to explain ratings, increasing the size and representation on the Standing Committee, reinforcing the wall of separation between the Committee and the ABA policy-making branches, and taking other actions to facilitate good relations with the public and to eliminate the perception of inappropriate bias and partisanship.

With Leadership Posts, Party to Hold Sway Over Bush's Agenda, L.A. TIMES, May 26, 2001, at A1 ("Leading Democrats want to restore the ABA's role because they say it provides a rounded look at candidates' professional records."). In the meantime, the ABA has continued to evaluate candidates after the administration has announced their names. See Amy Goldstein, *ABA Weighs in on President's Court Nominees*, WASH. POST, June 27, 2001, at A23 (reporting that the ABA gave positive ratings to Bush's seven federal appeals court nominees).

APPENDIX 1¹⁶⁸

March 22, 2001

Dear Ms. Barnett:

Thank you for taking the time to meet with Attorney General Ashcroft and me on March 19. We very much appreciated the opportunity to visit with you and benefited from your perspective on the judicial selection process. In addition to hearing from you, we have carefully studied and considered the history and practice of American Bar Association involvement in judicial selection. Although the President welcomes the ABA's suggestions concerning judicial nominees, the Administration will not notify the ABA of the identity of a nominee before the nomination is submitted to the Senate and announced to the public.

There is a long tradition by which Members of Congress, interest groups, and individual citizens provide suggestions to the President about potential judges. We will continue to welcome such suggestions from all sources, including the ABA. The issue at hand, however, is quite different: whether the ABA alone -- out of the literally dozens of groups and many individuals who have a strong interest in the composition of the federal courts -- should receive advance notice of the identities of potential nominees in order to render pre-nomination opinions on their fitness for judicial service. In our view, granting any single group such a preferential, quasi-official role in the nomination process would be unfair to the other groups that also have strong interests in judicial selection. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to numerous other groups.

The question, in sum, is not whether the ABA's voice should be heard in the judicial selection process. Rather, the question is whether the ABA should play a unique, quasi-official role and thereby have its voice heard before and above all others. We do not think that kind of preferential arrangement is either appropriate or fair.

It would be particularly inappropriate, in our view, to grant a preferential, quasi-official role to a group, such as the ABA, that takes public positions on divisive political, legal, and social issues that come before the courts. This is not to suggest that the ABA should not adopt policy positions or express its views. But considerations of sound constitutional government suggest that the President not grant a preferential, quasi-official role in the judicial selection process to a politically active group.

Our decision to treat the ABA in the same manner as all other interested parties

¹⁶⁸ A copy of this letter is available at <http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html>.

mirrors the approach taken in recent decades by Presidents of both parties with respect to Supreme Court nominees, as well as the approach taken by the Senate Judiciary Committee in 1997 when it ended the ABA's quasi-official role in the Senate confirmation process. As Chairman Hatch explained at that time, “[p]ermitt[ing] a political interest group to be elevated to an officially sanctioned role in the confirmation process not only debases that process, but, in my view, ultimately detracts from the moral authority of the courts themselves.”

Finally, let me reiterate that the Administration fully welcomes the ABA, like other interested parties, to provide suggestions regarding potential judges. Similarly, once the President submits a nomination to the Senate, the ABA like every other interested party is free to evaluate and express its views concerning the President's nominee.

Thank you again for your time and your views, as well as for your service to the ABA and the profession. The Administration looks forward to working with you in the months ahead on issues of concern to the legal profession.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President