

ABA WATCH

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES

AUGUST 2001

EXAMINING THE AMERICAN BAR ASSOCIATION'S RATINGS OF FEDERAL APPELLATE JUDICIAL NOMINEES

With the conclusion of the Clinton administration this past January, *ABA WATCH* decided to review the ABA judicial evaluation ratings received by President Bill Clinton's U.S. Court of Appeals nominees who were confirmed by the Senate, and to compare those ratings to those received by U.S. Court of Appeals judges nominated by President George H.W. Bush and confirmed by the Senate. We asked Northwestern University Law Professor James Lindgren to undertake an analysis of the data we collected.¹ He has authored a preliminary report, and what follows is a summary

setting forth his analysis and findings.² Professor Lindgren expects to release a final report in late summer and publish it in the Fall issue of the *Virginia Journal of Law & Politics*.

The American Bar Association has been rating federal judges since the late 1940s, a task undertaken by the ABA's 15-member Standing Committee on the Federal Judiciary. Presently, the Association rates judges as "Well Qualified," "Qualified," or "Not Qualified." The ABA committees often split their votes on the ratings, so it is possible to get, for example, a majority of the ABA committee voting "Qualified" and a minority voting "Not Qualified." For the most part, this particular split rating is the lowest one that would have given a judge a reasonable chance of getting appointed and the lowest rating Professor Lindgren found in his study of U.S. Court of Appeals judges.

The credentials used by the ABA are set out in numerous public

statements, articles, and booklets. The ABA-published booklet on the ratings process states, "The Committee's evaluation of prospec-

•Controlling for credentials, the odds of getting an ABA "Well Qualified" rating are between 7 and 10 times higher for Clinton appointees than for Bush I appointees.

•A Bush I appointee with the highest measurable credentials would have a slightly lower probability of getting a "Well Qualified" ABA rating than a Clinton appointee who had none of these credentials.

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tive nominees... is directed to professional qualifications—integrity, professional competence and judicial temperament.³

With regard to integrity, the ABA notes, "The prospective nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence."⁴

Professional competence "encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of professional experience."⁵ For appellate

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From the Editors. . .

In its mission statement, the American Bar Association declares that it is the "national representative of the legal profession." And, not surprisingly, as the largest professional legal organization in the world, many policy makers, journalists, and ordinary citizens do in fact look to the ABA as a bellwether of the legal profession on matters involving law and the justice system. This is why debate about the work and activities of the ABA — and the role that it plays in shaping our legal culture — is so very important.

ABA WATCH has a very simple purpose — to provide facts and information on the Association, thereby helping readers to assess independently the value of the organization's activities and to decide for themselves what the proper role of the ABA should be in our legal culture. We believe this project is helping to foster a more robust debate about the legal profession and the ABA's role within it, and we invite you to be a part of this exchange by thinking about and responding to the material contained in this and future issues.

In this issue, we are pleased to report on an analysis that has been conducted of the ABA's ratings of President George H.W. Bush and President William Clinton's appellate court nominees. This article presents empirical data about the qualifications of each president's respective judicial nominees and the relative ABA ratings.

This issue also includes features on the ABA's filing of an *amicus* brief in *Grutter v. University of Michigan Board of Regents*, the role of the ABA in the law school accreditation process, and an interview with incoming Association president Robert E. Hirshon, for which we are most grateful. And, as in the past, we digest and summarize actions before the House of Delegates.

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INTERVIEW WITH ABA PRESIDENT ROBERT HIRSHON

This June, incoming ABA President Robert E. Hirshon graciously agreed to participate in this issue of *ABA WATCH*. We agreed that an interview conducted by email would be most productive and manageable given the enormous time constraints placed upon an incoming Association president. *ABA WATCH* sent off the questions set forth below, and Mr. Hirshon graciously supplied answers to the questions posed. All questions and answers are reprinted in full.

1) What will be your most important goals for your upcoming ABA presidency, and have you mapped out any plans for achieving them?

ANSWER:

I have several goals which I intend to pursue during my presidency. I believe that one of the American Bar Association's highest priorities must be to provide "Main Street Lawyers," the majority of lawyers in this Association, with the wherewithal to make their practices more effective and more efficient. This will in turn allow our members to better serve their clients. At the same time, our Association must remain committed to its core principals and values. We must strive to increase the number of minorities within the ranks of our profession so that our profession more closely mirrors our society. We must insure that within our profession civility and professionalism remain of primary importance. We must provide greater access to our judicial system for low and middle income Americans. Further, we must protect our judiciary so that it remains a vital, independent and adequately compensated institution underscoring our country's commitment to the rule of law. Several Sections and Committees of the American Bar Association are already focused upon these goals.

I will work with these existing entities to make sure they have the resources necessary for them to do their jobs. Among other things, this will include increasing the technological capacity of our association so that we will better serve our membership. Additionally, I will work closely with the two new commissions created at my request by the Board of Governors that will examine the problem of skyrocketing law student debt which has an adverse impact on the delivery of legal services and the corrosive effects of a billable hour regime which is undermining the health of our profession.

2) In your view, what is the role of the ABA in the legal profession, but also, more generally, in our society as a whole?

ANSWER:

The American Bar Association is the largest membership organization within the legal profession. As a membership organization it must be committed to providing our profession with the products lawyers need in order to better represent their clients. In short we must provide value in exchange for our members' dues dollars. Additionally, the American Bar Association as the largest voluntary professional association in this world, has an obligation to act as the national spokesperson for our profession. As such, our Association must continue to work diligently to insure the full faith and confidence of our society in the administration of our system of justice.

3) Lewis Powell, a former Supreme Court justice and ABA president, wrote in 1965 that the ABA "must follow a policy of noninvolvement in political and emotional and controversial issues unless they relate directly to the administration of jus-

stice," and that the ABA's responsibilities could not "be carried out in course if the membership was lost, fractionated, or embittered by involvement in political controversy." Do you agree or disagree with this perspective? In your view, how should we distinguish between issues that the ABA can take a position on and those on which it cannot or should not?

ANSWER:

I believe that the American Bar Association should limit its involvement to issues that relate to the administration of justice. Additionally, we should avoid, if at all possible, fractionalizing or embittering constituencies within our membership.

The American Bar Association continues to be a big tent where various constituencies can meet, discuss and work on projects important to the legal profession. Yet our Association is also like an iceberg. Ninety-five percent of what we do is "below the surface" and causes little, if any, public scrutiny or controversy. Putting on continuing legal education programs, authoring and publishing legal articles and periodicals, assisting in the development of pro bono programs, attending to issues of import to our judiciary, providing a forum for the intellectual discussion of proposed uniform laws and important cases do not fractionalize or embitter. Additionally, the relatively small number of activities embodied by and included in resolutions passed by the House of Delegates for the most part create neither great emotion nor great controversy. I recognize, of course, that every year or so the House of Delegates debates one or two controversial issues, but these issues fall within the rubric

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HOUSE OF DELEGATES PREVIEW: NEW POLICY POSITIONS UNDER CONSIDERATION AT AUGUST ANNUAL MEETING

At its annual meeting this month in Chicago, the American Bar Association's House of Delegates will once again consider resolutions covering a wide variety of topics. A number of the proposed resolutions would expand the range of the ABA's official policy stances, and consequently, would broaden the Association's authority to lobby on Capitol Hill. What follows is a synopsis of some of the resolutions set for deliberation.

The ABA's Role in Reviewing Federal Judicial Nominees

While it has not yet been entered on the House of Delegates calendar for action, the ABA's Law Student Division Assembly is working on a resolution that would urge the Bush administration to reconsider its decision to rescind the ABA's quasi-official role in evaluating putative nominees to the federal bench.

In March, President George W. Bush announced his decision to withdraw the ABA's exclusive pre-nomination role in the judicial selection process. As White House Counsel Alberto Gonzales wrote in his letter to ABA President Martha Barnett announcing President Bush's decision, "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." The Administration emphasized that it was not the history of the American Bar Association's input, but rather the inappropriately exclusive role it occupied, that prompted the change. Judge Gonzales reasoned: "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 selec-

tion... 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."

Supporters of the President's decision have expressed doubt that the Association's assessments of candidates have been based on politically unbiased analysis of their qualifications. Critics of the Association's quasi-official role, such as Senator Orrin Hatch, who withdrew the ABA's favored status in the Senate confirmation process in 1997, have argued that "One cannot assume that a group as politically active as the ABA can at the same time remain altogether neutral, impartial, and apolitical when it comes to evaluating judicial qualifications." Others have also observed that, even if the ABA's evaluations were completely neutral, the mere appearance of political interest undermines the integrity of the ABA's judgments.

The ABA has actively defended its role in the process and countered these arguments. It maintains: "while it is true that the ABA has taken public positions on political and social issues of the day, these positions have never entered the process of reviewing the nominees for the federal judiciary." The Association recounts the longstanding tradition of its role, its usage by both Democrat and Republican Presidents, and its assignment of "Not Qualified" status to only 3 Republican as opposed to 23 Democratic nominees since President Eisenhower began the process. The ABA states that its judgment of professional qualifications, which include integrity, professional competence and judicial temperament, is politically and ideologically unbiased; and that its continued role as favored reviewer of candidates is

essential to ensure that the most qualified individuals are appointed.

Election Law

The House of Delegates will debate two proposals submitted by the Standing Committee on Election Law. Recommendation 112A urges the adoption of *Election Administration Guidelines*, dated August 2001. Largely in response to the difficulties encountered in the 2000 presidential contest, the proposed *Guidelines* cover topics including increased voter education and registration efforts, election day oversight, procedures for challenges and recounts, and more stringent methods for detecting voter fraud (such as more frequent updating of voter records). The ABA also encourages the adoption of modernized voting mechanisms, exploration of alternative voting methods, and striving for uniformity within states with voting machines and local procedures. The following are some highlights from the *Election Administration Guidelines* under consideration:

- Supports registration efforts by civic and political organizations, including allowing these organizations to distribute and return voter registration applications.
- Advocates implementation of same-day voter registration.
- If a voter is unable to produce identification, the voter should be allowed to sign an affidavit of identity.
- Translated ballots and assistance ought to be provided in polling-places where a "significant" portion of the population is non-English speaking.
- States should conduct recounts for the entire jurisdiction affected by the race in question.
- Supports the exploration of alternative voting methods, such as early, mail, internet, and tele-

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POLICY ROUNDUP: ABA MIDYEAR MEETING

Association leaders gathered in San Diego, California, February 15-19, 2001, for the ABA Midyear Meeting. The following is a summary of some of the resolutions considered or adopted by the House of Delegates.

Family Law

Resolution 100B, proposed by the National Conference of Commissioners on Uniform State Law, called for the adoption of the Uniform Parentage Act. Replacing the original Parentage Act of 1973, this act provided a specific procedure for genetic testing, standards for genetic testing, and a paternity registry, to name a few of the reforms. After the National Lesbian Rights Center and several ABA sections raised concerns regarding the "narrow" definition of parenting, the resolution was withdrawn.

Education Law

The House adopted Resolution 103B, recommended by the Section of Family Law, the Standing Committee on Unmet Legal Needs of Children, and the Commission on Mental and Physical Disability Law, among others. The resolution opposes "zero tolerance" policies, which allow schools to "automatically" and "severely" punish students for misbehavior. Although initially created to discourage gun possession by students, zero tolerance policies are now used as a response to a wide-range of infractions — from making death threats to sharing aspirin. The resolution criticizes the "one-size-fits-all" approach, which produces discriminatory effects on students, who can be suspended or expelled, according to the sponsors. Describing the problems with such policies, one Illinois attorney stated that, "Schools are confusing equal treatment with equitable treatment... When they [chil-

dren] see two students whose 'offenses' are vastly different being treated exactly the same, that sense of fairness is obliterated and replaced with fear and alienation." For instance, an eight year old girl who brought her grand-father's gold pocket watch, including its chain and one-inch fingernail knife, to show-and-tell was suspended and transferred to an alternative school under her school's zero-tolerance policy. Instead of mandating expulsion or referring students to juvenile or criminal court, the resolution proposes that schools create individualized and fair responses to student misbehavior with regard to the circumstances and nature of the offense.

International Law

The House approved Resolution 103C, recommended by the Criminal Justice Section, which urges Congress to enact legislation requiring the President to inform Congress, within thirty days of receiving notice, that a U.S. national committed an act within the jurisdiction of the International Criminal Court. Although the United States has not yet ratified the Rome Statute (which seeks to establish the ICC), it plays a participatory role in negotiating the terms of the treaty. The court envisioned by the Statute is supposed to maintain limited jurisdiction and only involve itself in cases pertaining to war crimes, aggression, genocide, or crimes against humanity. The ICC also is only supposed to parallel national jurisdiction, as it is "limited in its ability to exercise jurisdiction without the consent of a sovereign government that could otherwise exercise jurisdiction on its own." A series of procedures in the Rome Statute require deferral by the ICC to the "good faith investigative efforts and prosecutorial discretion of national governments." The prompt reporting requirement of Resolution 103C

allows both the executive and legislative branches to take immediate action in overseeing investigation and prosecution by the United States. The resolution seeks to assure that the president will "take all reasonable steps to exercise its jurisdiction over United States nationals," which will allow the U.S. to execute "a fair prosecution consistent with American notions of justice and due process."

Another proposal endorsed the accession of the United States Government to the Rome Statute of the International Criminal Court through ratification of the ICC Treaty. Resolution 105C, offered by the Criminal Justice Section, the International Law Section, the Individual Rights and Responsibilities Section, and the Association of the Bar of the City of New York, was approved by the House despite efforts to postpone the matter indefinitely. Those opposed to the resolution questioned whether the treaty provides sufficient due process safeguards and whether the ABA should take a position at this time since sensitive negotiations are still taking place to address some of the due process concerns. In particular, objections were raised that American military personnel could technically be prosecuted even without ratification. Supporters maintained that such a situation would not arise because the ICC may not assert jurisdiction until the U.S. has concluded its own investigation and prosecutorial activity, except where the ICC prosecutor is dissatisfied with the American government's efforts to achieve justice.

Immigration Law

The House adopted various resolutions pertaining to immigration law. Resolution 106A, proposed by the Committee on Immigration Law and the Criminal Justice Sec

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ABA FILES *AMICUS* BRIEF IN MICHIGAN RACE PREFERENCES CASE

The American Bar Association filed an *amicus* brief on June 1, 2001 on behalf of the University of Michigan (UM), challenging the recent decision by the U.S. District Court for the Eastern District of Michigan, that the UM Law School's use of race as a factor in its admissions decisions is unconstitutional and a violation of Title VI of the 1964 Civil Rights Act. The district court reasoned that: "The law school's justification for using race—to assemble a racially diverse student population—is not a compelling state interest. Even if it were, the law school has not narrowly tailored its use of race to achieve that interest." The court ruled in favor of the plaintiff, Barbara Grutter, who sued the UM Law School over its admissions policy, which she argued accepted minorities on the basis of race with lower LSAT scores and grade-point averages.

UM's admissions policy involved acceptance of applicants with qualified minority qualities over other applicants with the same qualifications without the minority characteristic. The court noted that the "[d]efendant's own admission record demonstrates that race is an enormous factor in the admissions decision process." The University argued that the use of race as an admissions criteria serves a "compelling interest" in achieving diversity among its student body. Federal district court Judge Bernard A. Friedman noted that a race-conscious admissions program such as Michigan's was incongruous with the Constitution. "Whatever solu-

tion the law school elects to pursue, it must be race neutral."

The district court cited *Bakke* as precedent, arguing that *Bakke* explicitly stated that the University of California Board of Regents special admissions race-based quota system was unconstitutional. The majority of the Supreme Court in *Bakke* agreed that the consideration of race could not be prohibited. In *Grutter*, the court agreed that race could be a factor, but it must be a factor which is weighed equally with others.

In its brief, the ABA begins: "In serving the public and the profession by promoting justice, professional excellence and the respect for the law, the ABA pursues the following important goals, among others: (1) to promote improvements in the American system of justice, (2) to achieve the highest standards of professionalism, competence, and ethical conduct, (3) to advance the rule of law in the world, and (4) to promote full and equal participation in the legal profession by minorities, women, and persons with disabilities." The ABA further notes that "wide diversity of students and faculty provides a superior education for all law students," and that, because of the unfair and unjust judgment made by institutions against minorities, the Association created the ABA Commission on Racial and Ethnic Diversity. The Commission has stated that "[i]f legal employers—and the profession more broadly—are to remain competitive in the twenty-first century, the profession cannot afford to ignore the obstacles to full and equal racial integration."

The ABA contends in its *amicus* that the government has a compelling interest in the consideration of race in law school admission decisions, arguing that "First, diversity of the bar is essential to fulfilling the legal profession's paramount purpose of providing representation to all. Second, diversity is fundamental to fostering the public's perception that our legal system is fair, unbiased, and inclusive, thereby preserving and enhancing the public's trust and confidence in our system and government." The ABA acknowledges its role as the accrediting agency for American law schools and its requirement that these schools provide opportunities for qualified members of racial and ethnic groups.

The ABA implies in its brief that the legitimacy of our courts is tied to reaching decisions in our culture that increase minority participation in the law, and the brief notes that: "[t]he effectiveness of the judicial system as the ultimate arbiter of legal disputes in our society depends upon all ethnic and racial groups acceptance of the system's legitimacy," but minorities have felt humiliation from the lack of their presence in the legal field. This underrepresentation, according to the ABA, has also resulted in a "negative stigma" being attached to minorities. "Since American society is devoted to the equal representation of all its citizens, we must ensure that our legal services are representational of its citizenry as well."

FEDERALIST SOCIETY HOSTS DEBATE ON ABA'S ROLE IN FEDERAL JUDICIAL NOMINATIONS

In a lively debate hosted by the Oklahoma City Federalist Society chapter, approximately 100 members and guests heard competing views regarding President Bush's decision to terminate the American Bar Association's official role of rating federal judicial nominees. William Paul, immediate past president of the ABA, and Patrick McGuigan, Editor of *The Daily Oklahoman* editorial page, participated in the exchange.

McGuigan, who played an active role in the 1980s and 1990s supporting the judicial appointments of former Presidents Reagan and Bush, argued that the ABA has become a left-wing special interest group. According to McGuigan, while the ABA professes to provide independent, non-partisan evaluations of judicial nominees, it has staked out positions promoting abortion on demand, supporting affirmative action, opposing the death penalty, and blocking meaningful tort reform. Although the ABA has the right to maintain such stances, McGuigan said it should not also have the right to a specially sanctioned government veto power over judicial appointments (during the Reagan and Bush administrations, a "not qualified" rating meant the putative nominees would not be moved).

Bill Paul, a senior partner at the Oklahoma City law firm Crowe

& Dunlevy, warned that President Bush would soon regret his decision to "remove the legal profession" from the judicial selection process. He stated that he viewed the ABA's political positions as a complication but not as a reason to remove the ABA from the judicial selection process. The ABA Standing Committee on Federal Judiciary has served ten administrations, five Republican and five Democratic, noted Paul. To rebut charges of partiality, Paul pointed to the fact that the Committee has only rated 26 federal judicial nominees as "unqualified," with 23 of the 26 being Democratic appointments.

Paul further attempted to clarify what he believed were misconceptions about the ABA's role, pointing out that the Committee is independent of the ABA President and House of Delegates and conducts business in confidence. It would be improper for an ABA leader to seek to influence the deliberations of the Standing Committee, Paul said.

Much of the debate centered on what McGuigan asserts is the recent use of leaks of "unqualified" votes from the Committee to undermine conservative judicial nominees because of their political views. When Ronald Reagan nominated Daniel Manion to the Seventh Circuit, the Committee voted him quali-

fied by the narrowest of margins. The Committee's confidential vote was leaked, however, and used by opponents to label Manion as "barely qualified." Yet, a year after his confirmation, Seventh Circuit practitioners rated Judge Manion as the "best prepared" judge on the circuit. Likewise, the ABA Committee's four votes of "not qualified" on the 1987 Supreme Court nomination of Robert Bork appeared in the media the following morning. McGuigan noted that liberal lobbying groups opposed to Bork leaped on the Committee's leak to derail the nomination.

Paul rejected suggestions that anyone knew who had leaked the information. "The preservation of confidentiality is essential to the Committee's investigation of prospective nominees." Paul surmised that someone other than a Committee member may have been responsible for the leaks.

Paul also argued that focusing on 4 negative votes on a 15 member committee was overblown. Referring to his own experiences as a lawyer, Paul stated that getting 15 lawyers to agree on anything was difficult, at best. The fact that some conservative judges did not get "unanimous" approval of the Committee does not mean that the Committee is or has been biased against conservative judges, said Paul.

ABA ACCREDITATION OF LAW SCHOOLS: WHAT ROLE?

The ABA operates the nation's law school accreditation system. Law school accreditation has enormous impact. In many states, a student is not immediately eligible to take the state bar exam unless his or her law school has this accreditation. And, in some instances, those who have passed a state bar exam but attended an unaccredited school in that state may not practice law in any other jurisdiction.

The ABA states that the accreditation process guarantees quality legal education so that qualified lawyers can be trusted with serious legal affairs. Also, it maintains that the accreditation process has elevated the quality of legal education. The ABA cites with approval a statement made by the First Circuit Court of Appeals that "it is widely believed among legal educators and regulatory organizations that compliance with the [ABA] standards enhances the quality of legal education."

Accreditation Criteria

The ABA scrutinizes many areas sensitive to the running of a law school including policies on admission, staff, library facilities, teaching and course content. It also tries to ensure that minority students are not disadvantaged. Standard 210 is explicit in stating that a law school "shall foster equality of opportunity in legal education" adding that a law school "may not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex, or sexual orientation."

Law schools must demonstrate their commitment to providing full opportunities for the study of law and entry into the profession by minorities. This will typically include a special concern for determining the potential of these applicants

through the admission process and special recruitment efforts. Suggested efforts are: the participation of the law school in job fairs designed to bring minority students to the attention of employers; intensifying law school recruitment of minority applicants; promoting programs to identify outstanding minority high school students; developing specific plans to increase the number of minority faculty in tenure and tenure track positions; and developing programs that assist in meeting the financial needs of many minority students. In addition, law schools must provide full opportunities for the study of law and entry into the profession by qualified disabled individuals.

Course content and teaching hours are closely controlled. Standard 304 states that an academic year shall consist of not fewer than 130 days on which classes are regularly scheduled in the law school, extending into no fewer than eight calendar months. Each law school must require the completion of a course of study in residence of not fewer than 56,000 minutes of instruction time, including external study. Students may not engage in employment for more than 20 hours per week in any semester in which the law student is enrolled in more than 12 class hours.

In order to try to ensure high quality teaching, the ABA regulates the student/faculty ratios: a ratio of 20:1 indicates that a law school complies with the standards; a ratio of 30:1 or more indicates that a law school does not comply with the Standards. The ABA has directed that law professors are to be paid no less than the median at other schools on the campus, must not teach more than eight hours per week and receive a sabbatical every seventh year. If a school refuses to adhere to the "minimum standard" guidelines,

then its accreditation can be refused. This places the law school at a significant competitive disadvantage vis-à-vis institutions that remain accredited.

The Impact of Accreditation

According to some, the accreditation process inflates tuition costs. The price of tuition at a law school has increased at a greater rate than comparable professional courses of study. Since 1975, consumer prices have increased by 183% while the median tuition at a private law school accredited by the ABA has risen by 570%. Since 1988 alone, law school tuition has increased by 100% compared to an increase of 62% for medical school tuition. There has been a 74% increase in the average base pay for law professors from 1984 to 1994.

Some have also suggested that a further unintended consequence of these increased costs is the creation of institutional racism within law schools. Higher costs that result from ABA accreditation criteria are more likely to create a financial barrier to the entry of lower income-people, including African-Americans.

In 1996 the Department of Justice sued the ABA, maintaining that the accrediting standards had the effect of artificially raising the salary of law teachers. It further alleged that "rather than setting minimum standards for law school quality... the ABA... acted as a guild that protected the interests of professional law school personnel" and attempted to "limit competition from non-ABA-approved schools." The ABA settled the case. Part of the settlement terms was that the ABA had to refrain from adopting or enforcing any rule for the purpose of imposing requirements as to the base salary, stipends, fringe benefits or other compensation paid to legal educators.

court nominees, the ABA states that “the Committee may place somewhat less emphasis on the importance of trial experience as a qualification⁶,” and that those nominees “should possess an especially high degree of scholarship and academic talent and an unusual degree of overall excellence.⁷”

Regarding judicial temperament, the ABA states that the Committee “considers the prospective nominee’s compassion, decisiveness, openmindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice.⁸”

Some of these qualifications that are reviewed by the ABA can be measured empirically. While obviously not perfect measures, factors such as the existence of practice or judicial experience, judicial clerkship experience, the quality of law school that was attended, and participation in law review are important indicators of the qualities that the ABA seeks in evaluating professional competence and academic talent. Some of the ratings criteria, however, cannot be measured empirically, such as integrity and judicial temperament.

The Federalist Society collected information about the professional qualifications of nominees primarily from publicly available sources such as the Federal Judicial Center’s web site, ABA archives and annual reports, law reviews, and online databases. If necessary, the Society contacted judges directly to fill gaps in publicly available information. Specifically, in addition to the ABA ratings, ABA

WATCH searched for the following information:

- Whether the nominee served as a private practitioner or government lawyer.⁹
- Whether the nominee had already served as a judge.
- Whether the nominee attended a “U.S. News and World Report Top 10 Law School (used 2002 rankings as base year).”
- Whether the nominee served on law review while in law school.
- Whether the nominee had served as a law clerk to a federal judge.

Before beginning to collect the data, the Society chose the above factors because they are the most accurate measurable criteria for profes-

Clinton nominees who were ultimately appointed (hereinafter “appointees”). He analyzed the credentials of the 108 federal appellate appointees rated by the ABA during the last two presidential administrations and compared them to their ABA ratings.

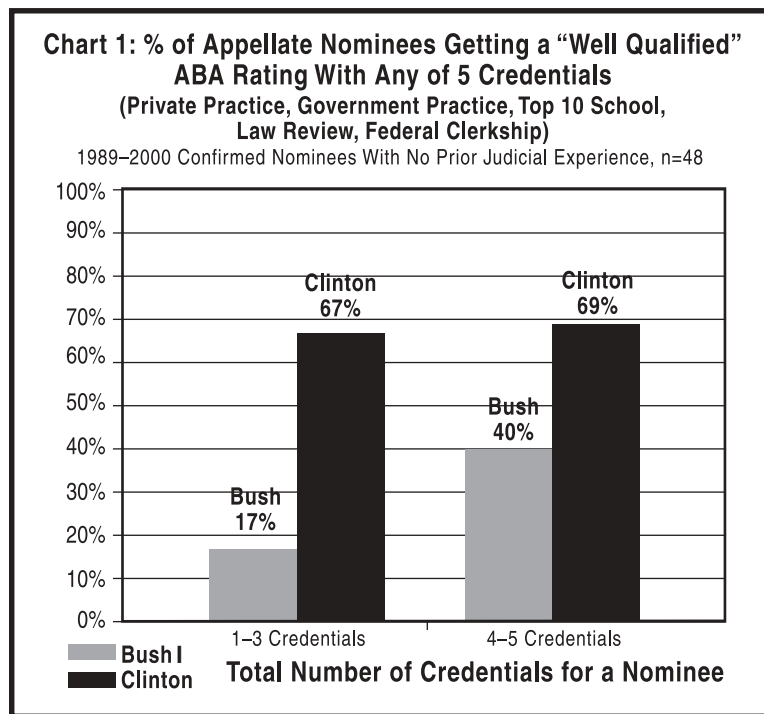
While making simple comparisons between the credentials of Clinton and Bush nominees, Lindgren found only two statistically significant differences: (1) Clinton nominees are more likely to be minorities; and (2) the Bush appointees get lower ABA ratings than Clinton nominees.¹⁰ For example, while 67% of the Clinton confirmed appellate nominees were given the highest ABA rating of unanimously well qualified, 48% of the Bush confirmed nominees were given the same unanimous rating. Among those without prior judicial experience, the differences were greater: 68% for Clinton nominees compared to 24% for Bush nominees.

I.

Bush appellate appointees who were lower court or state court judges do appear to have been assessed similarly to Clinton appointees. But among those without the central qualification – prior judicial experience – the Clinton appointees received

sharply higher ratings than the Bush appointees.

After extensive data analysis, Professor Lindgren found that there were different patterns of evaluating Clinton and Bush appointees. One of the most important credentials for being a judge is already be-



sional qualifications. The data was transmitted to Professor Lindgren for multivariate data analyses.

After examining data on nominees to the U.S. Courts of Appeals over the last two administrations, Professor Lindgren found significant differences in how the ABA Standing Committee evaluated the professional qualifications of Bush and

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ing a judge. Further, it is unlikely that any administration would tend to elevate the worst judges among the many already in the profession. Thus, being a judge was a strong positive credential – both theoretically and in parts (but not all) of the data. The ABA did not post significantly different ratings one way or the other in evaluating candidates who were former judges; Bush lower court judges fared about as well as Clinton lower court judges in ABA ratings for open federal appellate posts.

Among those candidates who were not already judges, the Clinton nominees fared strikingly better than Bush nominees. For example, without judicial experience, 68% of Clinton appointees were unanimously rated well qualified, while 24% of the Bush appointees were so rated.

We collected data on six credentials that are either important in themselves or good indicators of other important credentials: (1) judicial experience, (2) an elite (top 10) law school education, (3) law review, (4) a federal court clerkship, (5) private practice experience, and (6) government practice experience. Chart 1 shows how the ABA rated those nominees without prior judicial experience, but with some of the other credentials.

Chart 1 shows that without judicial experience Clinton nominees with few credentials are rated better (67% of those with 1-3 credentials get the highest rating) than Bush nominees with more credentials (40% of those with 4-5 credentials get the highest rating). Further, as the credentials of Clinton nomi-

nees improved, their chances of getting the highest rating rose only slightly.

To perform more sophisticated analyses controlling for credentials, researchers like to predict the relative odds of a particular outcome.¹¹ Here nearly 7 Clinton appointees are rated well qualified for every 3 who are rated less than well qualified – a 68% to 32% probability translates into nearly 7 to 3 odds of being rated well qualified. For Bush appointees, only 1 appointee is rated well qualified for every 3 rated lower than that (a 24% to 76% probability translates into about 1 to 3 odds of being rated well qualified). Stated another way, the odds of getting a well qualified rating are about 7

highest ABA rating than similarly qualified Bush I appointees.

Controlling for experience as a federal court clerk, attending an elite (top 10) law school, and serving on law review, the difference gets stronger still. Now controlling for all measured credentials, Clinton appointees without judicial experience have 10.9 times greater odds of getting a well qualified rating from the ABA than Bush appointees.

But perhaps there is an explanation. Perhaps minority and female appointees have less traditional credentials.¹³ Since President Clinton appointed more females and minorities than President Bush, Professor Lindgren controlled for being minority or female (even though they are not credentials per se). When one controls for being minority or female and all measured credentials, the Clinton appointees have 10.7 times higher odds of receiving the highest rating from the ABA.

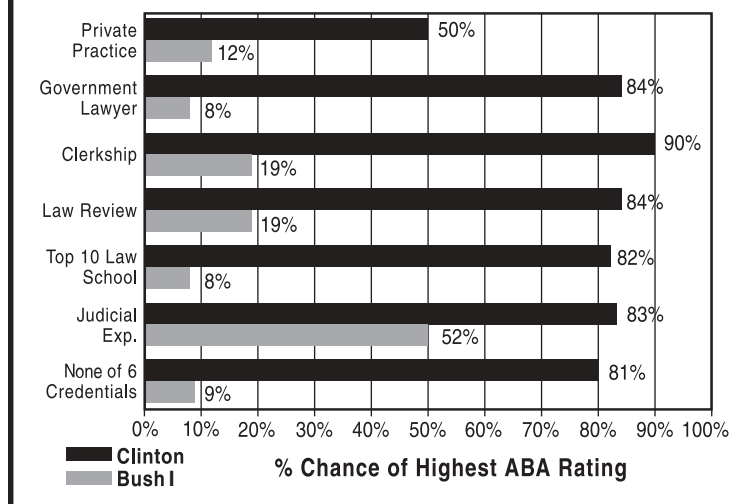
In evaluating those who lack judicial experience, the pattern of higher ratings for Clinton nominees as compared with Bush nominees is extremely strong and consistent for all models with various control variables. When one controls for relevant credentials, such as education and work experience, this pattern of higher ratings gets stronger.

II.

Professor Lindgren then analyzed Clinton and Bush appointees separately. He found that without judicial experience, Bush appointees have little chance of getting a well qualified rating from the ABA. The strength of the relationship is substantial. For Bush appointees, being a judge increases

Chart 2: Chances of Getting a "Well Qualified" ABA Rating by Specific Credentials of Appellate Nominees by Presidential Administration

1989–2000 Confirmed Nominees, n=108



times higher (actually 6.8 times higher) for Clinton appointees than for Bush appointees.¹²

Professor Lindgren then did logistic regression analysis to predict the odds of receiving the highest rating. When one controls for other credentials, the difference gets stronger. If one adds in control variables for practice experience as either a private or government attorney – among those without judicial experience Clinton appointees had 9.3 times greater odds of getting the

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the relative odds of getting the highest rating by over 1,000 percent (11.32 times greater odds). If a Bush appointee does not have prior judicial experience, there is a strong likelihood that the ABA will not rate the candidate well qualified.

Bush appointees without measurable credentials start at a probability of 9% of getting the highest rating. Additional credentials count strongly to move Bush appointees toward obtaining a well qualified rating. For example, being a judge raises the initial probability of receiving the highest ABA rating from 9% to 52%. Having either a federal court clerkship or law review experience would increase the probability of a high rating from the starting point of 9% to 19%.

In other words, for Bush appointees credentials are very important predictors of high ratings. Those without any of the traditional credentials have little hope of getting a top rating from the ABA. As credentials improve, the ratings of Bush appointees rise fairly sharply. Although very harsh for those lacking relevant experience, the ABA process for Bush candidates is based on measurable credentials that the ABA considers important—practice experience, educational background, and especially judicial experience.

For Clinton appointees to the federal appellate bench, the pattern is different. Here Clinton appointees without any measured credentials start off with an 81% probability that they are well qualified. On balance, credentials decrease the odds of getting the highest ABA rating. Private prac-

tice experience is a strong negative influence on the ratings, reducing an 81% initial chance of receiving the highest ABA rating to only a 50% chance of receiving the highest rating. The rest of the credentials increase the odds of getting a high ABA rating, but they are very weak influences. Judicial experience, for example, is instead an insignificant influence on ABA ratings of Clinton nominees.

This pattern is anomalous because measured credentials should increase rather than decrease an ABA rating, unless far more subjective criteria, including judicial temperament (compassion, commitment to equal justice, and so on), are decisive in the ratings. One question that needs to be addressed is whether it is possible that integrity and temperament vary so strongly between the two groups of nominees as to render markers of practice experience and intellectual excellence largely irrelevant.

Professor Lindgren separately examined the influence of particular credentials on the ratings of all Clinton confirmed nominees and all confirmed Bush nominees—determining the best statistical model predicting a high ABA rating for each group. The resulting regression models showed some strong differences in chances.

Chart 2 shows the chances that a nominee with one measured credential would be highly rated. Once again, there were substantial differences between Bush and Clinton nominees.

Consider the hypothetical in Table 1 from Professor Lindgren's study—a Clinton nominee without relevant measurable credentials or a Bush nominee with extensive relevant experience.

A Bush appointee with the highest measurable credentials—judicial experience, a top-10 law school education, a federal court clerkship, and both private and government practice experience—has a slightly lower probability of getting the highest ABA rating than a Clinton appointee who has none of these credentials.

For candidates with no measured credentials the odds of a Clinton appointee getting a well qualified ABA rating are 44 times higher than for a Bush appointee. Converting relative odds to probabilities, if a Clinton appointee with no measured credentials has a 81% chance of getting the highest ABA rating, an identically uncredentialed Bush appointee would have only a 9% chance of getting the top ABA rating.

Of course, neither president is appointing completely unqualified nominees.¹⁴ Thus, this last comparison of seemingly unqualified candidates is more theoretical than actual. What these model effects really reflect is that, for Bush appointees, credentials really matter in raising their chances for a higher rating. For Clinton appointees, on the other hand, ABA ratings do not turn much

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TABLE 1

Clinton Nominee	Bush I Nominee
NO Judicial Experience	Judicial Experience
NO Elite (Top 10) Law School	Elite (Top 10) Law School
NO Federal Court Clerkship	Federal Court Clerkship
NO Private Practice	Private Practice
NO Government Practice	Government Practice
Probability of Highest ABA Rating: 81%	Probability of Highest Rating: 77%

of the administration of justice, although I acknowledge, as did Justice Powell in 1965 that it is sometimes difficult to draw the line.

I understand that some may disagree with my conclusion. It is important to remember, however, that the positions taken by the House of Delegates are based upon the fundamental democratic principle of majority vote. Roberts Rules of Order are scrupulously followed and most tellingly a substantial majority of the House is comprised of representatives from state and local bar associations. Implicit in every adoption of policy by the House is the conclusion that the issue impacts the administration of justice. Lawyers concerned about particular House decisions need to become more involved in their local and state bar association as well as the American Bar Association in order to constructively influence the direction of our organization.

4) In its mission statement, the ABA states that it is the national representative of the legal profession. Can the Association achieve this goal, and at the same time, stake out positions on controversial issues that significantly divide the ranks of the legal profession? Policy resolutions dealing with capital punishment, the right to abortion, racial preferences, and tort reform come to mind most readily here.

ANSWER:

The ABA is the national representative of the legal profession. The members of the ABA are lawyers from large and small states, and include judges, prosecutors, private practitioners, professors, corporate counsel, government attorneys and legal aid attorneys. Our members come from big and small firms, and from cities and rural areas. No other legal organization that I know of has the depth and breadth of membership as does the ABA. It is our mem-

bers who direct the organization, whether by revising a new ethics code to meet the demands and challenges of the 21st century or by presenting seminars and writing articles and books on legal topics of interest. Most of the day-to-day work of the ABA occurs in our 32 sections and divisions and our committees and commissions, where publications and continuing education programs are designed to help lawyers deal with new developments in the law and explore practice issues or problems. Often our members bring legal issues to the House of Delegates for resolution. For example, you mention capital punishment. It is important to understand that the ABA has taken no position for or against the death penalty. After a lengthy debate, our House of Delegates called for states to review the administration of the death penalty to insure that it is being administered fairly and to impose a moratorium on further executions until that has been determined. This issue, just like others brought to our House, saw a debate focused solely on the legal implications for the administration of justice, in this case a desire to ensure fairness and due process. That resolution was supported by some of my most conservative and most liberal friends alike. Insisting that there be due process before the ultimate sanction is imposed by society should not be an issue which splits our ranks.

5) During the annual ABA Day, Counsel to the President Alberto Gonzales reiterated the administration's position that the ABA will continue to play a role in vetting nominees along with other groups but will not receive names prior to nomination, as in the past.

(a) What role is the ABA currently playing in vetting nominees? Has it been able to meet its 20-30 day evaluation timetable?

(b) The Bush administration's move

to end reliance on the ABA to vet judicial nominees has resulted in several Senate leaders, such as Patrick Leahy of Vermont, to say they still will wait for the ABA's input before moving forward on any nominees. He and other politicians are expected to scrutinize nominees more closely because of the administration's revocation of the ABA's quasi-official role. Does it concern you that the ABA's evaluations process might be used by others as a tool for resisting speed and dispatch in the confirmation process?

ANSWER:

The ABA Standing Committee on Federal Judiciary is doing what it has done for more than half a century. It is reaching out to the legal community to get a first hand evaluation of the professional qualifications of candidates nominated to the federal bench. As these evaluations are completed, the Committee is notifying both the Administration and the Senate Judiciary Committee of the rating of each candidate.

In the past the Committee has been able to conduct its examinations within 30 days from receipt of the "Personal Data Questionnaire" filled out by the candidate, except in the unusual cases where significant problems were discovered. The Committee intends to continue to adhere to that timetable. Receipt of the questionnaire in a timely manner and the cooperation of the candidate, however, are essential to the Committee's ability to complete its work in a timely fashion.

The Standing Committee's role, limited as it is to the professional qualifications (integrity, judicial temperament and professional competence) of candidates, will be carried out substantially as it has been for over 50 years. Other con-

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siderations may effect the disposition of nominations by the Senate, but the ABA's role should not be a basis for inappropriate delays.

My real concern about the process as it now stands is that the American public be afforded the same level of comfort it experienced during the past five decades. By providing an evaluation of the professional qualifications to the Administration prior to any public announcement of a candidate, the American public was assured that the professional qualifications of each candidate nominated had been reviewed by those who had worked with him and were in a position to know if he/she was competent, had the utmost integrity and possessed the requisite judicial temperament. This investigation was conducted confidentially, free of partisanship, and before the spin artists engaged in their public relations campaigns, I hope that the new post-nomination process mandated by the White House does not "break" a system that helped Americans feel confident about their judiciary.

6) The ABA's federal judiciary evaluations process has come under attack from time to time, with assertions by some that the process is politicized. In particular, critics maintain that the "judicial temperament" standard is too malleable and can be used as a proxy for expressing disagreement with a nominee's philosophical or jurisprudential outlook. How well has the judicial evaluations process worked in terms of providing objective and impartial evaluations of candidates for the federal bench. Would it be appropriate for the Standing Committee on the Federal Judiciary to take into account a putative nominee's legal philosophy (for example, views on the meaning of the Fourteenth Amendment)? If it is the case that the judicial evaluations process is free from philosophical bias, and does not impose a lit-

mus test regarding legal or judicial philosophy, would you consider eliminating much of the current criticism by tightening the temperament standard so that it is not susceptible to being used as a proxy for ideological disagreements?

ANSWER:

Unfortunately, there has been a great deal of misunderstanding about what the Standing Committee on Federal Judiciary does and what it does not do. It does not look at ideology. It does not examine the political views of candidates. It does not recommend names for selection. What it does do, and has done for the past 50 years, is to go into the legal community to ask the lawyers, judges and professional colleagues who have worked with the nominee and are in the best position to assess the candidates professional qualifications whether the nominee has the professional competence, the integrity and the judicial temperament to make a good judge. As someone who has litigated hundreds of cases I know that judicial temperament, including openness and sensitivity, is important not only to attorneys, but also to clients and witnesses. Also important is what kind of trial experience does a nominee have? What about her legal analytical skills? Does he write clearly? Does she have a good professional demeanor? What about his integrity? This peer review provides a special insight into a candidate's professional qualifications from those who know her best. That is all the committee does and while it is only part of the selection process, I believe it is an important process that helps ensure both a high quality federal judiciary and a high degree of public confidence in those confirmed.

7) How is the ABA seeking to address the apparent decline in public respect for lawyering and the legal

profession?

ANSWER:

Actually I don't think there has been a decline in the public's respect for the legal profession although that seems to be a question that is often asked. In 1986 when I became President of the Maine State Bar Association I remember a reporter approaching me with a similar question. I pointed out then and I restate now that the legal profession has always been the source of lawyer jokes and criticism. Part of the discomfort felt by the public toward our profession is because often what we do results in a winner and a loser. Most individuals don't like to lose. Recent polls, however, suggest an interesting dichotomy. When asked, most Americans stated that they do not like the legal profession because it is too adversarial, too confrontational and has a win at any cost mentality. When those same individuals were asked what they liked about their own lawyer, they responded that what they liked best is that their lawyer left no stone unturned to forcefully advocate their positions and win their cases. Ultimately all any bar association can do is to help educate the public about the workings of the justice system and to stress the good work of its members. The American Bar Association has done much for which it can be proud.

8) Many maintain that there is "a crisis in the legal profession." But how that crisis is defined varies widely. Some say that the crisis is marked by a litigation explosion or liability crisis that is adversely affecting the fair, just and efficient resolution of legal disputes. Others maintain that the crisis is marked by a decline in ethics and professionalism amongst lawyers. Still others suggest that the legal system is not adequately ensuring

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equal justice for all in that minorities remain under represented in the ranks of the profession and that the poor are still badly in need of low-cost and readily available legal services. Do you see a crisis in our profession, and, if so, how would you define it?

ANSWER:

I do not believe that there is a "crisis in the legal profession." The legal profession, however, like almost all segments of society, is entering a new century with new challenges that will have tremendous implications for the way we do business. The technological revolution, developments in communication and the globalization of society are presenting both challenges and opportunities that impact the way we have provided legal services for decades. For example, practicing law across state borders during the age of the internet has forced us to focus on the question of multi-jurisdictional practice. Ethical rules that have guided us on important issues such as confidentiality, working with non-legal practitioners, and how we practice day to day, need to be reexamined in light of the new technologies available to us today. For example, how can we use technological advances to increase access to legal services for those who are now underserved? By mobilizing our diverse membership to examine these issues, we feel working together we can help shape a future that will position the profession to take advantage of new technologies while maintaining its special character and unique role in society.

9) Why is it necessary or important for the ABA to involve itself with public policy issues that already have advocates on all sides in the public square?

ANSWER:

As I said earlier, it is our members

who direct our organization. While a few issues brought by our membership to our House of Delegates might be considered controversial, all issues focus on the administration of justice and the rule of law. To improve the administration of justice is our mission. Lawyers and the ABA not only have a natural interest in doing this, but I believe that as citizens with special legal training we have an obligation to get involved and address critical issues that deal with the fair and orderly administration of justice. As officers of the court, lawyers have a responsibility to our profession and to our calling to make sure "Justice for All" is a reality for all. It is important that we not hesitate to address issues that are relevant to the legal system in this country, even if they may be somewhat controversial. The vigorous enforcement of civil rights laws in the '60s, for example, was controversial in some quarters but should not, therefore, have been avoided by the organized bar.

10) What would you say to disgruntled conservatives and others who might feel that it's a waste of time to join the ABA?

ANSWER:

It is important for lawyers to understand that acting together in a coordinated fashion we can make a difference. A difference in the way we practice law, help our clients, improve the justice system, and design and implement programs and projects that will assist our lawyers to better represent their clients. To help the American Bar Association to carry out this job, to help set our direction, a lawyer must become involved and commit the time necessary to make a difference. There is no other legal organization that is as big a tent as the ABA. It is a place for so many different types of lawyers, diverse viewpoints and

variety of interests. There is no other organization that allows lawyers to focus on what captures their imagination and also provides an opportunity to become involved and have an impact on the profession. Whether we are talking about examining new issues such as multi disciplinary practice or multi jurisdictional practice or whether we are creating better continuing legal education programs, we are only as effective as the lawyers who choose to participate. If lawyers choose to participate, they can help direct this association into a new and challenging century. For those who choose not to get involved, the direction of our Association will be established by others. But make no mistake, it will be established.

phone voting, provided that "issues of technology and funding can be adequately addressed."

Ballots should be designed to minimize the possibility of voter confusion. Punchcard ballots ought to be discouraged, and all candidates running for the same office should be listed on the same page.

As with many of the current debates relating to election reform, the key question for the House will be whether the *Guidelines* strike an appropriate balance between increasing voter access and preventing fraud and error.

In proposed resolution 112B, the Standing Committee recommends that Congress authorize the Department of Defense to set up polling places for federal, state, and local elections at military installations where "suitable alternative facilities do not exist."

Health Care and Abortion

The Special Committee on Medical Professional Liability, the Commission on Legal Problems of the Elderly, and the Senior Lawyers Division Steering Committee on Unmet Legal Needs of Children wish to enact Resolution 103 which encourages Congress to pass legislation requiring employer-sponsored health plans to reveal to their enrollees any financial incentive programs they provide to health care providers with whom they contract. This ABA resolution comes in response to the Supreme Court's ruling in *Pegram v. Herdrich* (2000) in which the Court elected to defer to Congress' judgment on whether or not granting year-end bonuses to physicians (without disclosing the incentive program to enrollees) constitutes a breach of fiduciary responsibility under the Employer Retirement Income Security Act of 1974. Those favoring the resolution argue that Congress ought to ensure that consumers "have the ability to be fully

informed that their respective physicians offer treatment through programs with health plans that allow for financial incentives... "

Two proposals touch on the abortion issue. Proposed Constitutional Amendment 11-1, which has been offered by member Edward Jacobs, would add the following to the ABA's statement of purposes: "to defend the right to life of all innocent human beings, including all those conceived but not yet born." Resolution 118 opposes any federal law that would bar foreign private organizations that receive U.S. aid from using non-U.S. funds to provide "lawful health or medical services that are legal in the country receiving the United States' assistance." The resolution is a response to President Bush's reinstatement of the "Mexico City Policy" on March 28, 2001 through a Presidential Memorandum. (President Clinton had rescinded the policy in 1993). The Mexico City Policy restricts organizations receiving USAID family-planning assistance monies from using any of their non-U.S. monies to provide, advocate the use of, or refer individuals to abortion services.

The Section on Individual Rights and Responsibilities, which has proposed Resolution 118, contends that the Bush policy "imposes government censorship on health care professionals in overseas family planning clinics, depriving them of the ability to provide basic information and health care services to their patients." In its report on the matter, the Section maintains that the policy detracts from the promotion of civil society abroad and is inconsistent with the right to free speech. The sponsors also maintain that the Mexico City Policy undermines U.S. foreign-policy goals such as promoting women's rights. In this regard, the report accompanying the resolution endorses abortion rights. The report states: "In their effort to advance women's reproductive health,

these groups [organizations receiving USAID family-planning assistance monies] see firsthand the effects of illegal, unsafe abortion and often are called upon to participate in their societies' debates over the liberalization of abortion laws. If the United States is committed to improving women's equality, it should eliminate the global gag rule, which not only undermines the rights of women in other nations to reproductive self-determination, but also hampers their ability to question abortion laws that often result in the incarceration of women and doctors and heightened rates of maternal deaths." Adoption of the resolution would allow the ABA to lobby in favor of the reversal of the Mexico City Policy.

Poverty Issues

The Commission on Homelessness and Poverty has proposed resolutions 105A and 105B. The first urges the Bush Administration and Congress to enact legislation intended to "bridge the digital divide" and increase the presence of technology for minorities, the disabled, and low-income communities. The ABA's report mentions actions such as better student and teacher education in technology, creating community technology centers, and providing incentives for private companies to increase technological access. Although 105A does not support any specific legislation, sponsors of this resolution anticipate the introduction of several bills regarding these issues in the second session of the 107th Congress. Adoption of the resolution will empower the Association to "participate in the ongoing and subsequent debates on the digital divide in Congress and the administration."

With the exception of a brief mention of tax incentives, the "Digital Divide" resolution is silent re-

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specting how it expects the federal government to pay for increased internet access and a greater availability of computers. In particular, one key question is whether the resolution would authorize the ABA to support Congressional initiatives that impose tariffs to achieve universal service in the technology realm. Another important question is whether the ABA would be authorized to support legislation or regulation that requires internet service providers and website hosts to retool in ways that assist the blind, hearing impaired, and otherwise disabled.

The other resolution, 105B, requests the passage or amendment of welfare legislation to mandate additional procedural protections in the administration of welfare programs, with attention specifically addressed to giving recipients notice and an opportunity to be heard before withdrawing funds or imposing sanctions for noncompliance with program regulations. The Supreme Court previously ruled on this matter in *Goldberg v. Kelly* (1970). The Court's opinion, delivered by Justice Brennan, stated that the requirements of due process must be followed (notice and an opportunity to be heard) before recipients' welfare benefits can be eliminated or reduced. The ABA Commission on Homelessness and Poverty contends that "Since the comprehensive overhaul of welfare in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, opportunities for termination or reduction are more numerous, as work requirements and eligibility conditions have increased dramatically. Although the principles of *Goldberg* were not undermined by federal welfare reform, federal law currently contains virtually no safeguards or procedural protections when states impose penalties for alleged violations of program rules."

The Commission wishes to enact additional "statutory safe-

guards" to protect the due process rights of welfare recipients before the Temporary Assistance to Needy Families federal welfare program comes up for reauthorization in 2002. Although they bring up no quarrel with the *Goldberg* standard, and do not allege that the ruling has been undermined by the states, advocates of Resolution 105B are likely to call for states to require heightened procedures that allow beneficiaries to correct problems that are the cause of benefit terminations, "good cause" exceptions to sanctions, provision of clear notice before sanctions are imposed, and prompt reinstatement of benefits once compliance is established. Opponents likely will debate whether these additional procedures ought to be imposed uniformly upon the states and whether such additional procedures could be improperly used as vehicles for blocking implementation of welfare reform.

Other Issues

Proposed Resolution 117 supports an expansion in the role of "problem-solving courts," which the resolution describes as "specialized courts such as drug courts, community courts, domestic violence courts and mental health courts." The Coalition for Justice and the Committee on State Justice Initiatives, which have sponsored the resolution, also request that the "principles of these courts be incorporated into the daily administration of justice" and that education about these types of courts be encouraged.

The House of Delegates will also consider whether to adopt Resolution 119, which supports the creation of additional judgeships in the five district courts along the Mexican-American border in order to "dispense justice promptly, efficiently, and fairly." Courts in these districts have had increasing difficulty handling their caseloads since Congress and the Administration announced a new national enforcement strategy to combat narcotics

trafficking and alien smuggling in 1995. According to the Standing Committee on Federal Judicial Improvements, these districts experienced a 161% increase in their caseloads between 1994 and 2000. During this same time, the number of judgeships increased by only 12%. And, according to the report, "While funding has been appropriated for the deployment of thousands of additional law enforcement personnel along the U.S./Mexican border, there has been no corresponding increase in funding for additional court personnel or authorization of additional judgeships for the affected border courts." The Standing Committee on Federal Judicial Improvements urges the adoption of this resolution so that the ABA can request immediate action by Congress for the authorization of an increased number of judgeships in these districts.

Resolution 116A, if adopted, would express the Association's opposition to any law that could be interpreted to allow a genetically engineered human being to be considered property. In addition, proposed Resolution 116C urges the United States to adhere to the Madrid Agreement for the International Registration of Trademarks. In order to effect compliance with the Agreement, Resolution 116C also requests the amendment of the Lanham Act (USC Section 1051 et. seq.) to the "minimum extent required for U.S. adherence."

The ABA will consider a host of other resolutions as well. The Environment, Energy and Resources Section of the Standing Committee on Environmental Law has proposed Resolution 108, which advocates that all government agencies responsible for environmental protection implement policies that give incentives to businesses, government agencies, and other regulated bodies to implement voluntary "Environmental Management Systems."

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These voluntary measures would “combine appropriate incentives for developing proactive environmental strategies via EMS with traditional monitoring and enforcement techniques.” Although the sponsors note that while this matter is not “urgent,” the Standing Committee on Environmental Law states that “There is no reason to delay addressing this matter...” and “the earlier the organized bar calls on agencies to encourage EMS by the regulated community... the sooner the country may see improved environmental performance and hence cleaner water, air and soil.”

Resolution 113, proposed by the Standing Committee on Ethics and Professional Responsibility, suggests an amendment to the comment on Model Rule 1.7 in order to recognize the possible conflicts of interest that might arise when attorneys engage in strategic alliances with non-lawyers. This is the latest chapter in the long debate the ABA has had regarding alliances with non-lawyers and the conflicts that can arise under multi-disciplinary partnerships. The resolution here proposed is “cautionary rather than prohibitory,” and focuses on potential conflicts of interest that could arise in these arrangements. The Committee’s report recommends that “lawyers’ participation in strategic alliances, with the proper consideration given by the participating lawyer to the ethics rules and to the lawyers’ primary obligations to their clients, should not be discouraged; instead, such alliances should be recognized and brought within the rubric of the Model Rules.” Accordingly, the proposed amendment of Model Rule 7.2 recognizes the permissibility of reciprocal referral arrangements among lawyers and non-lawyers, but cautions that such agreements should never compromise the lawyer’s primary obligation to a client.

Finally, in Amendment 11-

5, the ABA will be considering a change in the Rules of Procedure for the House of Delegates to clarify the accreditation process for the approval of law schools. The proposed revision of Section 45.9 of the Rules of Procedure of the House of Delegates clarifies the role of the House in the accreditation process. The revision makes clear that a denial of approval by the Council of the Section of Legal Education and Admissions to the Bar to a law school will be reported to the House of Delegates for informational purposes only, unless the school appeals the Council’s decision. Also on the accreditation front, Resolution 200, if adopted, will express the Association’s concurrence with the Section of Legal Education and Admission to the Bar in denying provisional approval to the Barry University School of Law in Orlando.

Policy Roundup Continued from page 5

tion, among others, requires appointment of counsel to unaccompanied children during all stages of the immigration process at government expense. Unaccompanied children, who are non-citizens under 18 and face INS custody and/or immigration proceedings alone, may encounter challenges in finding legal assistance. The resolution provides services to these children who may be unaware of their rights under U.S. law or who are unable to speak English. The resolution further recommends that an independent office providing child welfare expertise be established in the Department of Justice to ensure that children’s interests are being met throughout the immigration process. The House also approved Resolution 106B, which opposes “the involuntary transfer of detained immigrants and asylum seekers to facilities that impede an existing attorney-client relationship,” and Resolution 106C, which

opposes the use of “secret evidence” in immigration proceedings.

Election Law

In an effort to review the causes of problems in the 2000 presidential election, Robert L. Weinburg, a District of Columbia Bar Delegate, proposed Resolution 104. The House approved the resolution, which supports review of the 2000 presidential election in relation to the casting, counting, and challenging of votes for presidential electors, and calls for examination of administrative or constitutional changes.

Abortion

Resolution 108, proposed by Darrell J. Stutes, who is an ABA member but not a delegate in the House, suggested that the government enact laws that would guarantee every human being, without exception, “the unalienable life and liberty right to live until natural death.” The resolution also stated that no human life may be “terminated by the intentional act of any human being.” On behalf of the Committee of Delegates-at-Large, Margaret Kuroda Masunga did not endorse the resolution, but agreed that it fell within the ABA’s purposes, and therefore was germane for consideration. The House did not adopt the resolution.

on their measured professional credentials.

What about more common sets of credentials? Chart 3 presents the four most common sets of actual credentials that nominated judges

pointees receive much higher ratings than their measured credentials would predict when compared with Bush appointees. Here the odds of a Clinton appointee getting the ABA's highest rating of

highest ABA rating than a Clinton appointee (81%) who has none of these six credentials.

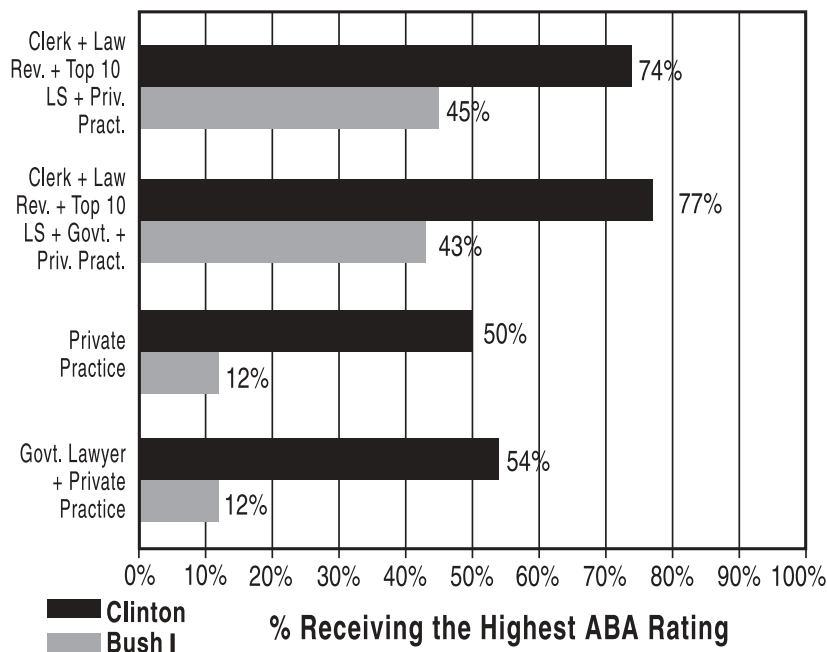
Statistical models fit to the actual practice of ABA raters predict that a Clinton nominee with none of the five criteria would have an 81% chance of getting a well qualified rating from the ABA, while a Bush nominee with identical credentials would have only a 9% chance of getting the same rating. For Bush nominees, measurable credentials matter.

Bush nominees can work their way up the ratings spectrum with actual concrete credentials, especially lower court experience. Clinton nominees, on the other hand, start near the top; their measured credentials have much less influence on whether they will be viewed as well qualified by the ABA.

If Clinton nominees were scrutinized under the same credentials-driven standards that Professor Lindgren's statistical analysis found were applied by the ABA to evaluate Bush nominees, only 48% of Clinton's nominees would have been rated as unanimously well qualified, rather than the 67% that actually received that top rating from the ABA. This 48% is exactly the percentage of well qualified ratings that George H.W. Bush's nominees actually received from the ABA. In other words, using the standards for weighting measured credentials revealed in the data that are set forth here and in Professor Lindgren's study, the Bush and Clinton nominees had on average identically strong qualifications but received different ratings by the American Bar Association.¹⁵

Chart 3: Chances of Getting a "Well Qualified" ABA Rating by Specific Credentials of U.S. Court of Appeals Nominees by Presidential Administration

Most Common Sets of Credentials (excluding Judicial Experience)
1989-2000 Confirmed Nominees, model Ns=66+42



presented for ABA evaluation (4 to 9 nominees presented each set of credentials). Computing the probabilities of several sets of credentials using logistic regression equations, Professor Lindgren found that for those without judicial experience, Clinton nominees had much better chances of getting the highest ABA rating of unanimously well qualified.

III. Summary and Conclusion

Among those nominees with the most relevant experience—that of being a lower court judge—there are no meaningful differences in the ratings for Bush and Clinton appointees. For those without judicial experience, however, Clinton ap-

pointees are 6.8-10.9 times higher than for Bush appointees, depending on how many different credentials are controlled for in the analysis.

Trying to determine why this might be, Professor Lindgren explored whether the basic credentials—(1) judicial experience, (2) a top-10 law school education, (3) law review, (4) a federal court clerkship, (5) private practice experience, and (6) government practice experience—were evaluated similarly when considering Bush and Clinton appointees. A Bush appointee with top credentials on five of the six criteria (excluding only law review or federal clerkship) has a slightly lower chance (77%) of getting the

Federal Appellate Judicial Nominees Footnotes

¹ James Lindgren is a Professor of Law, Director of the Demography of Diversity Project, and Director of Faculty Research at Northwestern University School of Law. He is Chair-Elect of the AALS Section on Social Science.

² The Federalist Society was responsible for collection of data, not Professor Lindgren. Despite careful checking of the data, any remaining errors are those of the Society and not of Professor Lindgren, who performed data analysis.

³ American Bar Association, *Standing Committee on Federal Judiciary: What It Is and How It Works* 3 (March 1991).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *Id.*

⁸ *Id.*

⁹ To be sure, some practices do more than others to prepare one for the appellate bench. However, it seems unlikely that the distribution in types and quality of practices would vary sharply between administrations or from year to year. Moreover, we did collect data on the number of years that nominees had practiced, and we understand that Professor Lindgren's formal study may include analysis of that data as well.

¹⁰ The Clinton nominees did not fare better because of any supposed affirmative action, because the data did not suggest that any existed. Minority Clinton nominees got slightly lower ABA ratings than their credentials would predict. Minority Bush nominees got much lower ratings than their credentials would predict.

¹¹ Odds-ratios (and log odds-ratios) are the staple of categorical data analysis in the social sciences — being the heart of both logistic regression analysis and loglinear analysis. Although less

intuitive than percentages for all but frequent gamblers, odds-ratios and log odds-ratios have more powerful statistical properties for modeling ratios.

¹² Here is a more precise version of the computations for appointees without judicial experience. Comparing a 67.74% rate of highest ABA ratings for Clinton appointees with a 23.53% rate for Bush appointees, the precise relative odds are computed as: $(.6774/(1-.6774))/(.2353/(1-.2353))=6.8$ to 1. Thus the odds of a Clinton appointee without judicial experience getting a well qualified rating are 6.8 times higher than the odds of a Bush appointee without judicial experience getting the same rating.

¹³ The ABA pamphlet on the evaluations process states: "In evaluating experience, the Committee recognizes that women and members of certain minority groups have entered the profession in large numbers only in recent years and that their opportunities for advancement in the profession may have been limited." American Bar Association, *Standing Committee on the Federal Judiciary: What It Is and How It Works* 3 (March 1991).

¹⁴ Two of the three Clinton nominees with only one of the six credentials got the highest "well qualified" rating (67%); one of the five Bush nominees with a single credential was rated "well qualified" (20%).

¹⁵ Multiple linear regression analysis can provide some insight into the differences between Bush and Clinton judicial ratings by the ABA. Consider the following 4-point scale of ABA ratings:

0 — Not Qualified/Qualified (split)

1 — Qualified (unanimous)

2 — Qualified/Well Qualified (split)

3 — Well Qualified (unanimous)

For those candidates without judicial experience, controlling for all measured credentials, the mean differential is .8 rating point (rounded to the nearest tenth of a point). In other words, Bush nominees are rated nearly one point lower than Clinton nominees with the same level of measured credentials (suggesting the amount that any rating would need to be adjusted to eliminate the measured effect).

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