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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Draft] [Judicial Selection Process] [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Martha W. Barnett - From: Alberto R. Gonzales	2	03/21/2001	
002	Letter	[Draft] [Judicial Selection Process] [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Patrick J. Leahy et al - From: Alberto R. Gonzales	1	03/21/2001	
003	Letter	[Draft] [Judicial Selection Process] [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Patrick J. Leahy et al - From: Alberto R. Gonzales	2	03/19/2001	

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
ABA (American Bar Association) [1]

FRC ID:
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P1 National Security Classified Information [(a)(1) of the PRA]
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018	Email	Answers to some ABA questions [3 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 05/20/2025 JLS] - To: Alberto R. Gonzales et al - From: Bradford A. Berenson	3	03/18/2001	

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WASHINGTON, March 16 President Bush's legal advisers have told the American Bar Association that they want to end the group's nearly half-century role as a semiofficial screening panel for judicial nominees, lawyers involved in the discussions said today.

NYT 3.17.01

The lawyers said they believed that the proposal reflected the administration's desire to shift the courts in a conservative direction and to satisfy many conservative Republicans who have long complained that the bar association has displayed a liberal bias in evaluating prospective federal judges.

Alberto R. Gonzales, the White House counsel, acknowledged in an interview that the bar association's role was under review. But he would not discuss details pending a meeting he is scheduled to have on Monday with bar association officials.

"I don't think it's appropriate to talk about it publicly without first talking to the A.B.A. about the process," Mr. Gonzales said.

If President Bush goes ahead with the plan, it would end a practice dating to the mid-1950's, when the bar association began reviewing the professional qualifications of judicial candidates in both Republican and Democratic administrations. The last time the issue of eliminating the special role of the association arose was during the administration of his father, President George Bush, when the attorney general, Dick Thornburgh, objected to the bar association's role in judicial selection and threatened to end it. He relented after the bar association agreed to modify its standards for evaluating judges, eliminating questions about a candidate's personal philosophy.

The bar association uses a special committee of 15 lawyers, which has proved highly influential in the judicial selection process. The committee is supposed to weigh the integrity, competence and temperament of prospective judges even before they are formally nominated and sent to the Senate for confirmation.

The resentment of the bar association's special role has festered since 1987, when the association's judicial evaluation committee gave a mixed review to Judge Robert H. Bork, President Ronald Reagan's choice for the Supreme Court. Four members of the committee voted that Judge Bork, then of the federal appeals court, was "not qualified" to sit on the Supreme Court. Judge Bork was rejected by the Senate after a tumultuous confirmation battle.

Republicans said the negative evaluation of Judge Bork stemmed from his strong conservative views and cited the rating as a factor in the Senate's rejection of Judge Bork's nomination a watershed battle that intensified the often harsh partisan warfare between Democrats and Republicans in Congress.

The White House proposal reflects what some Democrats said was the Bush administration's determination to quickly put its ideological imprint on the federal judiciary. The president's aides have started an intensive search to fill judgeships, already interviewing nearly 60 candidates, most of them for the 29

vacancies on the appeals court, the level just below the Supreme Court.

A spokeswoman for the bar association, Gail Alexander, said the organization had not been formally notified of the proposal. But she said that Martha W. Barnett, a lawyer in Tallahassee, Fla., and president of the association, is to meet with Mr. Gonzales on Monday to discuss the group's role in screening judges.

In a letter sent today to Mr. Bush, Senators Charles E. Schumer of New York and Patrick J. Leahy of Vermont, both Democrats, said: "We firmly believe that ending the long- established practice of A.B.A. review would dilute the quality of the federal bench. The process of judicial selection needs more information about the competence and integrity of potential nominees, not less."

In an interview, Mr. Schumer said that the screening committee had succeeded in improving the overall quality of the judiciary because nominees who were thought unlikely to earn a high rating were never submitted for scrutiny. "The effect of the A.B.A. screening process is to raise the bar to an acceptably high level," he said.

Some lawyers have suggested that the White House may seek guidance on prospective judicial nominees from other groups outside the government, like the Federalist Society, a conservative legal organization. That organization is already well represented in the administration. Many of its members have won key legal posts, among them senior jobs in the White House counsel's office under Mr. Gonzales.

The Bush administration's heightened interest in judicial selection is a contrast from that of the Clinton administration, which generally did not make a priority of filling judicial vacancies. Mr. Gonzales heads a team of about 15 lawyers from the White House and Justice Department who have set about reviewing potential candidates.

While Mr. Bush has not directly addressed whether the bar association should be eliminated from judicial selection process, he has signaled he wants to nominate conservatives much as his father and President Reagan did during their terms. During the campaign, Mr. Bush said that he would appoint judges who "do not legislate from the bench" and he identified Justices Antonin Scalia and Clarence Thomas, two of the Supreme Court's more conservative members, as ideal jurists.

The role played by the bar association's Standing Committee on the Federal Judiciary is an unusual one for a non-official group. President Dwight D. Eisenhower first sought recommendations from the association in 1953 to help him resist pressure to use the bench for patronage appointments. Under the informal arrangement, the White House has sent the committee the names of the candidates it intended to nominate and the committee rated the prospective judges as "well-qualified," "qualified" or "not qualified." The committees' recommendations are not binding and in fact, presidents have occasionally nominated people despite negative evaluations.

But since the mid-1980's, Republicans have complained about the practice, criticizing what some Republicans have said was the association's liberal bent. The association, with more than 400,000 members, provides law school accreditation and continuing legal education, and represents lawyers' interests. The group's house of delegates, which is separate from the screening committee, has voted to endorse abortion rights and affirmative action.

Bob Dole, the Republican presidential candidate in 1996, campaigned on a pledge to eliminate the bar association from the judge- screening process. Senator Orrin G. Hatch, the Utah Republican who is chairman of the Judiciary Committee, has regularly demanded that the bar association be expelled from the judicial selection process.

After the Bork rejection, the controversy over the organization's role was reignited in 1991 when the committee divided over the qualifications of Judge Clarence Thomas, former President Bush's choice to succeed Thurgood Marshall on the Supreme Court. A majority of the bar panel rated Judge Thomas "qualified," while two members found him "not qualified." None gave Judge Thomas the highest rating, "well qualified." He was confirmed after a rancorous Senate fight.

Today, Mr. Schumer said that, as the ranking Democrat on the Judiciary Committee's federal courts subcommittee, he would continue to consult the association even if the White House did not. "If the A.B.A. recommended against a candidate we would work hard to not support the nomination and that would further delay the process," he said.

http://www.nytimes.com/2001/03/17/politics/17JUDG.html?ex=985845786&ei=1&en=c8e66e4e8453b9b5

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http://www.nytimes.com?eta

DRAFT – 3/21 @ 8:55 pm

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. ~~We have discussed these issues with the President. He has asked me to inform you that, although the Administration~~ welcomes the ABA's suggestions concerning judicial nominees, it will not notify the ABA of the identity of a nominee before the nomination is submitted to the Senate and announced to the public generally.

There is a long tradition, of course, 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 identity of potential nominees in order to render a formal, pre-nomination opinion 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 an interest 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 ~~interest~~ group.

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

Ms. Martha W. Barnett
President, American Bar Association
c/o Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, FL 32301

DRAFT – 3/21 @ 8:55 pm

March 22, 2001

Dear Senators Leahy and Schumer:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the role of the American Bar Association in the President's judicial selection process. ~~The President has asked me to inform you that the~~ The Administration welcomes the suggestions of the ABA as to judicial nominees. The Administration will not, however, grant the ABA a preferential, quasi-official role by notifying the ABA of proposed judicial nominations before such nominations are submitted to the Senate and announced to the public generally. A copy of my letter to the President of the ABA informing her of this decision is enclosed.

We are highly confident that this procedure, in which the President will welcome and receive input from a variety of interested and diverse parties, will enable the President to nominate candidates of the highest intellect, integrity, and professional qualification. Of course, we appreciate that individual members of the Senate Judiciary Committee may choose to seek the ABA's views on judicial nominees. Based on the ABA's representation to me that it can complete an evaluation in every case in 20 to 30 days, I am confident that any post-nomination ABA evaluation would not delay the Committee's timely consideration of the President's nominees.

Thank you very much for your letter. The Administration looks forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

Senator _____
United States Senate
Washington, DC

COPY

THE WHITE HOUSE

WASHINGTON

March 19, 2001

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES AG/TEF
COUNSEL TO THE PRESIDENT

SUBJECT: AMERICAN BAR ASSOCIATION

Attached is a letter to Senators Leahy and Schumer responding to their letter to the President dated March 16 (also attached) regarding the role of the American Bar Association in the judicial selection process. I have not yet had an opportunity to discuss this with the President this morning, but he approved this course of action in previous conversations.

Please staff this to the appropriate individuals with a deadline for comments to be returned to me by 1:00 pm today.

Thank you.

DRAFT

March 19, 2001

Dear [Senator Leahy][Senator Schumer]:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the appropriate role of the American Bar Association (ABA) in the President's judicial selection process. In particular, the President has asked that I notify you that he has decided not to grant the ABA notice of proposed judicial nominations prior to the time that such nominations are communicated to the Senate and announced to the public generally.

As you know, Article II of the Constitution assigns the appointment of federal judges to the President with the advice and consent of the Senate. In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and interest groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. We welcome such suggestions from all sources, including the ABA.

Your letter, however, raises quite a different question, i.e. whether a single interest group – out of the literally thousands of groups and individuals who have a strong interest in the composition of the federal courts – should be afforded advance access to the identity of potential nominees for the purpose of rendering a formal opinion as to their fitness for judicial service. In our view, granting any single group a quasi-official role in the nomination process today is unfair to the other groups and individuals who have equally strong interests in the judicial selection process. Instead, we believe the sounder approach is to ~~conform Administration practice to that followed by the Senate since 1997, under which the~~ to permit the ABA learns the identity of judicial nominees at the same time and on the same terms as other private groups.

In our view, it would be especially unfair to give a special, quasi-official role to an interest group, such as the ABA, that takes official positions on divisive political, legal, and social issues. Of course, the ABA is entitled to express its collective point of view on such issues. The question is not whether the ABA's voice should be heard in the judicial selection process. ~~It should, and it will be.~~ Rather, the question is whether the ABA should have its voice heard ~~*before* and *above*~~ all others. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to hundreds of other groups, such as the Hispanic National Bar Association, the National Association of Women Judges, the American Trial Lawyers Association, and so forth.

We do not think that treating the ABA equally with other parties will delay the process of Senate confirmation. We are confident it can evaluate the President's nominees just as expeditiously as the other groups that have participated in the process in recent years. Nor do we

believe that such even-handed treatment will have any tendency to produce judicial nominees of lower quality. President Bush is firmly committed to maintaining the highest standards of intellect, integrity, and professional qualification among his judicial nominees.

Your letter also refers to an ABA "gold standard" by which the ABA rates judicial candidates. With respect, we disagree. The assessment of potential judicial candidates is not a mechanical evaluation. As President Kennedy noted when the ABA rated one of his nominees not qualified, "[t]here are a good many judges who have been opposed who have been rather distinguished." President Kennedy's observation has proven especially true in recent decades, as some of the most distinguished and influential judges on the federal appellate courts received a "qualified/not qualified" rating from the ABA.

Finally, we note that the decision to treat the ABA in the same manner as all other interested parties in the nomination process will bring Administration practice into conformity with the Senate confirmation process. In 1997, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. He stated: "Permitting 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."

In sum, the President welcomes the views of all interested parties, including the ABA, regarding potential judicial nominees. He declines, however, to continue a practice by which one interest group is given a unique quasi-official role in selecting federal judges.

Thank you very much for your letter. I look forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

United States Senate

WASHINGTON, DC 20510

March 16, 2001

President George W. Bush
The White House
Washington, DC 20500

Dear President Bush:

We are writing to you as Ranking Member of the Senate Judiciary Committee and Ranking Member of the Courts Subcommittee to express our serious concern that your Administration is considering terminating the policy of soliciting comment from the American Bar Association on prospective nominees for the federal courts. The policy of obtaining ABA review – half a century old and uniformly followed by Republican and Democratic Presidents alike – has served our nation well, and ending it would imperil the process of selecting and confirming federal judges.

Since 1952, the ABA has reviewed the professional qualifications of potential nominees to the federal bench before the person under consideration is formally nominated and submitted to the Senate. The ABA considers only the integrity, professional competence and temperament of persons identified as potential nominees – not their philosophy or ideology.

To ensure complete insulation from politics, members of the ABA committee that evaluates potential nominees refrain from participating in or contributing to political campaigns, or taking part in political activity of any kind. The ABA's views remain confidential until after a judicial candidate is formally nominated.

We firmly believe that ending the long established practice of ABA review would dilute the quality of the federal bench. The process of judicial selection needs *more* information about the competence and integrity of potential nominees, not less. If ABA evaluation did not provide unique, unbiased and essential information, presidents of both parties would not have so heavily relied on it for almost 50 years.

ABA evaluation has been the gold standard by which judicial candidates are judged, which is why presidents have rarely elected to proceed with a nomination after the ABA found the candidate unqualified in the confidential pre-nomination stage. Indeed, for every candidate the ABA finds unqualified, there are undoubtedly scores of others never submitted for ABA review because it is known they cannot meet that body's rightfully exacting scrutiny. Without having to clear the bar of ABA review, nominees will inevitably be of lower quality.

Eliminating ABA review will also further polarize a process that, by now, all Senators agree cries out for less partisanship. The void of information about a candidate's merits that will result from elimination of ABA review will inevitably be filled with politics. And if the Administration chooses not to consult the ABA, we and others of our committee will. Far from saving time, that will delay Senate consideration of nominees, end the Administration's ability to withdraw a nomination in a confidential manner because of a poor ABA rating (which will also publicly embarrass nominees), and drive Senators apart over ideology rather than bring them together.

In sum, we urge you to continue the nearly 50 year old tradition of independent, apolitical ABA evaluation of potential nominees for federal judgeships. Our system of justice can only benefit as a result.

Sincerely,

Charles Schumer

Charles E. Schumer
UNITED STATES SENATOR

Patrick Leahy

Patrick J. Leahy
UNITED STATES SENATOR

Comments to ABA letter from:
- Courtney
- Rachel

THE WHITE HOUSE
WASHINGTON

Facsimile
Cover Sheet

Date: 3-19-01
Time: 11:30 am

To: Libby Camp
Fax:
From: Rachel Brand

Number of Pages: ____

Message: two minor edits to ABA letter

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DRAFT

March 19, 2001

Dear [Senator Leahy][Senator Schumer]:

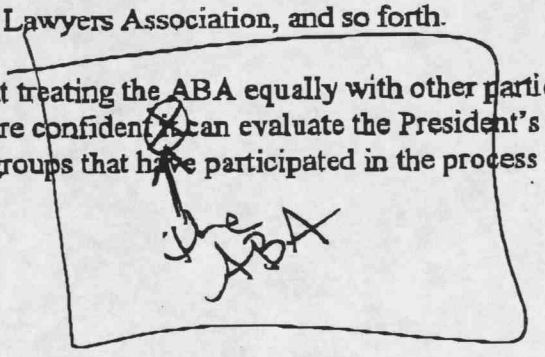
On behalf of the President, I write in response to your letter of March 16, 2001, regarding the appropriate role of the American Bar Association (ABA) in the President's judicial selection process. In particular, the President has asked that I notify you that he has decided not to grant the ABA notice of proposed judicial nominations prior to the time that such nominations are communicated to the Senate and announced to the public generally.

As you know, Article II of the Constitution assigns the appointment of federal judges to the President with the advice and consent of the Senate. In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and interest groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. We welcome such suggestions from all sources, including the ABA.

Your letter, however, raises quite a different question, i.e. whether a single interest group – out of the literally thousands of groups and individuals who have a strong interest in the composition of the federal courts – should be afforded advance access to the identity of potential nominees for the purpose of rendering a formal opinion as to their fitness for judicial service. In our view, granting any single group a quasi-official role in the nomination process today is unfair to the other groups and individuals who have equally strong interests in the judicial selection process. Instead, we believe the sounder approach is to conform Administration practice to that followed by the Senate since 1997, under which the ABA learns the identity of judicial nominees at the same time and on the same terms as other private groups.

In our view, it would be especially unfair to give a special, quasi-official role to an interest group, such as the ABA, that takes official positions on divisive political, legal, and social issues. Of course, the ABA is entitled to express its collective point of view on such issues. The question is not whether the ABA's voice should be heard in the judicial selection process. It should, and it will be. Rather, the question is whether the ABA should have its voice heard *before* and *above* all others. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to hundreds of other groups, such as the Hispanic National Bar Association, the National Association of Women Judges, the American Trial Lawyers Association, and so forth.

We do not think that treating the ABA equally with other parties will delay the process of Senate confirmation. We are confident it can evaluate the President's nominees just as expeditiously as the other groups that have participated in the process in recent years. Nor do we



believe that such even-handed treatment will have any tendency to produce judicial nominees of lower quality. President Bush is firmly committed to maintaining the highest standards of intellect, integrity, and professional qualification among his judicial nominees.

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Finally, we note that the decision to treat the ABA in the same manner as all other interested parties in the nomination process will bring Administration practice into conformity with the Senate confirmation process. In 1997, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. He stated: "Permitting 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."

In sum, the President welcomes the views of all interested parties, including the ABA, regarding potential judicial nominees. He declines, however, to continue a practice by which one interest group is given a unique quasi-official role in selecting federal judges.

Thank you very much for your letter. I look forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

THE WHITE HOUSE

WASHINGTON

OFFICE OF THE COUNSEL TO THE PRESIDENT

FACSIMILE COVER SHEET

Date: 3/22 Time: 1:14

To: Brett

Fax: 6-1647

From: Judge

Phone: (202) 456-2632 Fax: (202) 456-6279

Number of Pages (including cover sheet): 5

Message:

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OFFICE OF THE VICE PRESIDENT

WASHINGTON

March 22, 2001

MEMORANDUM FOR ALBERTO GONZALEZ
COUNSEL TO THE PRESIDENT

FROM: NEIL PATEL NSP
STAFF SECRETARY TO THE VICE PRESIDENT

SUBJECT: PROPOSED LETTERS TO ABA AND SENATORS LEAHY AND SCHUMER

The Office of the Vice President has reviewed the above-referenced draft letters and suggests the changes marked on the attached copy. Specifically, the Deputy Chief of Staff to the Vice President suggests careful consideration of whether we should state anything about what was discussed between the President and counsel.

cc: Harriet Miers
STAFF SECRETARY

Attachment

PRINTED ON RECYCLED PAPER

Probably should not have counsel stating what he discussed with President

DRAFT – 3/21 @ 8:55 pm

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 Assocation involvement in judicial selection. ~~We have discussed these issues with the President. He has asked me to inform you that, although~~ While the Administration welcomes the ABA's suggestions concerning judicial nominees, it will not notify the ABA of the identity of a nominee before the nomination is submitted to the Senate and announced to the public ~~generally~~.

There is a long tradition, ~~of course,~~ 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 identity of potential nominees in order to render a ~~formal~~, pre-nomination opinion 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 an interest 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 interest group.

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

Ms. Martha W. Barnett
President, American Bar Association
c/o Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, FL 32301

DRAFT – 3/21 @ 8:55 pm

March 22, 2001

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Alberto R. Gonzales
Counsel to the President

Senator _____
United States Senate
Washington, DC

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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

Ms. Martha W. Barnett
President, American Bar Association
c/o Holland & Knight, LLP
315 South Calhoun Street, Suite 600
Tallahassee, FL 32301

March 22, 2001

Dear Senators Leahy and Schumer:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the role of the American Bar Association in the President's judicial selection process. 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. A copy of my letter to the President of the ABA informing her of this decision is enclosed.

We are highly confident that this procedure, in which the President will welcome and receive input from a variety of interested and diverse parties, will enable the President to nominate candidates of the highest intellect, integrity, and professional qualification. Of course, we appreciate that individual members of the Senate Judiciary Committee may choose to seek the ABA's views on judicial nominees. Based on the ABA's representation to me that it can complete an evaluation in every case in 20 to 30 days, I am confident that any post-nomination ABA evaluation would not delay the Committee's timely consideration of the President's nominees.

Thank you very much for your letter. The Administration looks forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

Senator _____
United States Senate
Washington, DC

DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON, D. C. 20001

CHAMBERS OF
JUDGE JOHN W. KERN III
SENIOR JUDGE

March 22, 2001

MEMORANDUM

TO: Brett Kavanagh, Esquire, FAX: 202/456-1647

FROM: Senior Judge John W. Kern III, FAX: 202/626-8869

RE: Role of ABA in Federal Judicial Selection

I attach my testimony at the Senate Judiciary Committee Hearing on the above topic some ten years ago, together with the Evaluation Criteria contained in the 1991 version of the ABA's evaluating committee.

Without knowing whether the Evaluation Criteria now used are different, my concern is with the use of elastic words and phrases such as "sensitivity," "freedom from bias," and "commitment to equal justice" when the Committee investigates the candidate's "judicial temperament." This elasticity enables a Committee member who may profess to be non-ideological to determine nevertheless that a candidate lacks judicial temperament because he is not sensitive to the concerns of a particular segment of the community. Judicial temperament is enormously important, as I can attest after 30 years on the bench, but the ABA Committee has so broadened its definition as to render it virtually meaningless.

Obviously, what we seek for the bench are women and men who are fair, honest, efficient and intelligent. Unfortunately, I have found that we do not always succeed in our search. What we do need from the ABA and the other bar groups is a report of how candidates for the bench appear to the lawyers and judges in their community in terms of fairness, honesty, efficiency and intelligence. Bar groups can be helpful provided they focus on the correct criteria.

I wish you luck in your endeavors which are most important to the future of the judiciary.

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Printed March 1991

ISBN 0-89707-621-4

I. APPOINTMENTS TO FEDERAL COURTS OTHER THAN THE SUPREME COURT

Under ordinary circumstances, the Committee is called upon to report on candidates for at least forty vacancies on the federal courts each year. Following the periodic enactment of omnibus judgeship bills creating new judicial positions, this number has often exceeded one hundred.

A. Evaluation Criteria

The Committee's evaluation of prospective nominees to these courts is directed to professional qualifications – integrity, professional competence and judicial temperament.

Integrity is self-defining. The prospective nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence.

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

The Committee believes that ordinarily a prospective nominee to the federal bench should have been admitted to the bar for at least twelve years. 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. Substantial courtroom and trial experience (as a lawyer or a trial judge) is important for prospective nominees to both the appellate and the trial courts. Additional experience which is similar to court trial work – such as appearing before or serving on administrative agencies or arbitration boards, or teaching trial advocacy or other clinical law school courses – is considered in evaluating a prospective nominee's trial experience qualifications. Significant evidence of distinguished accomplishment in the field of law may compensate for a prospective nominee's lack of substantial courtroom experience.

Recognizing that an appellate judge deals primarily with records, briefs, appellate advocates and colleagues (in contrast to witnesses, parties, jurors, live testimony and the theater of the courtroom), the Committee may place somewhat less emphasis

on the importance of trial experience as a qualification for the appellate courts. On the other hand, although scholarly qualities are necessary for the trial courts, the Committee believes that appellate court nominees should possess an especially high degree of scholarship and academic talent and an unusual degree of overall excellence. The abilities to write lucidly and persuasively, to harmonize a body of law and to give guidance to the trial courts for future cases are considered in the evaluation of prospective nominees for the appellate courts.

The Committee considers that civic activities and public service are valuable experiences, but that such activity and service are not a substitute for significant experience in the practice of law, whether that experience be in the private or public sector.

In investigating judicial temperament, the Committee considers the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice.

4 Finally, the prospective nominee's health is considered. The Committee believes that the public is entitled to the appointment to the federal judiciary of persons who are able to render long and vigorous service.

B. The Investigation

After a judicial vacancy occurs and prior to any nomination to fill that vacancy, the Chair of the Committee receives the name of a prospective nominee for evaluation from the office of the Attorney General. The investigation of the prospective nominee is usually assigned to the circuit member of the Committee in the judicial circuit in which the judicial vacancy exists, although it may be conducted by another member or a former member. (The individual making the investigation is hereinafter referred to as the "circuit member.")

The Attorney General's office sends to each prospective nominee a comprehensive ABA-designed questionnaire (called the "Personal Data Questionnaire") that seeks wide-ranging information related to fitness for judicial service. The responses are sent to the U.S. Department of Justice, the ABA Committee Chair and the circuit member. Receipt of the Personal Data Questionnaire is usually the starting point for the investigation. The circuit member makes extensive use of it in the investigation. The prompt, thorough and accurate preparation of a response to the Personal Data Questionnaire by the prospective nominee is extremely important to the investigation.

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Senator SPECTER. Well, at 42, you have a substantial number of years before you and it would be my hope that you would yet become a federal judge. I would say to you, as I have said to you privately and also in the past, that I think you are qualified and you would have my support.

Mr. Chairman, I would like to stay longer, but I am going to have to excuse myself at this point——

The CHAIRMAN. I understand.

Senator SPECTER [continuing]. With my thanks to the Chair, and with my commendation to the Chair for conducting this very important hearing in a very patient and thoughtful and professional way.

The CHAIRMAN. Well, it is an important hearing. And I understand, on a much more personal note, Mr. Schwab's feeling. But, Mr. Schwab, I also can assure you from past experience, being much older than you, 46, we both have time.

Senator Humphrey, unless you would rather hear all the witnesses, however you would like to proceed, Senator.

Senator HUMPHREY. Yes, I think that would be preferable if the Chairman concurs.

The CHAIRMAN. That is fine by me.

Now, let me go, as I always did the few years that I practiced, to the judge first, and then to you, Paul, and we will move in that direction.

STATEMENT OF HON. JOHN W. KERN III, SENIOR JUDGE, DISTRICT OF COLUMBIA COURT OF APPEALS, WASHINGTON, DC

Judge KERN. Mr. Chairman, I will be very brief. I want to make just five points, and I am going to try to do it in three minutes, to supplement my written statement.

The CHAIRMAN. The entire statement will be placed in the record.

Judge KERN. Thank you.

Point one: The issue, I believe, is not whether the ABA or the ABA Standing Committee is too liberal or too conservative, as witnessed by the criticism unleashed by both the Washington Post and the Wall Street Journal, but rather the gut issue which the Committee has zeroed in on today with commendable accuracy, and the Attorney General, also, is whether this committee, which has significant responsibility, is following the rules that have been laid down for it by the board of governors and are contained in the statement governing principles of the Standing Committee on Federal Judiciary.

Those principles say, among other things, that in view of the special nature of the function performed by this committee and the confidence reposed in the committee's evaluations, the integrity and credibility of its processes and the perception of these processes are of vital importance.

I think you, as the primary user, and the Attorney General have performed a very valuable public service by focusing the attention of the committee on to the rules laid down for its conduct.

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HN W. KERN III, SENIOR JUDGE,
JRT OF APPEALS, WASHINGTON, DC

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My letters, to which reference has been made, were efforts, like David with his slingshot, to my ABA to follow the rules, and I think that you have put the committee on the right tack.

Second point: I do not think it helps achieve the overall objective of the committee or this Committee or the Attorney General to use such loose and slipshod language as the committee uses in the factors that it sets forth in investigating temperament when it comes to——

The CHAIRMAN. I beg your pardon. That which committee uses?

Judge KERN. Which the Standing Committee—thank you—which the Standing Committee uses in its factors of evaluating temperament that deal with freedom from bias and commitment to equal justice on the part of candidates for the judiciary.

It has been touched on tangentially by the questions of memberships in the clubs, and unfortunately the present evaluative factor is simply the word "sensitivity." That is the word that is printed in the guidelines.

Chairman Tyler of the committee has written a private letter to me saying that the criterion of judicial temperament is being used to evaluate persons as being extended to say that sensitivity means sensitivity to the concerns of women and minority groups. Well, when you go into such a loose language, the concerns of women and minority groups, you are into a situation where "concerns" has no agreed-on meaning.

I think it would be much better, and I would respectfully suggest to this Judiciary Committee to recommend to the Standing Committee, that the language that the Standing Committee is using should read, "In investigating temperament"—and I am quoting now exactly what the Standing Committee has now—"the Standing Committee considers, among other factors, the prospective nominee's compassion, decisiveness, openmindedness"—skip that word "sensitivity"—"courtesy, patience, freedom from bias."

I would put in "commitment to equal justice," and I would add this phrase, "and sensitivity to the appearance of equal justice." "Sensitivity to the appearance of equal justice"—I think that is what the Standing Committee is trying to do, but by using an awkward—first of all, by using——

The CHAIRMAN. Help me out again, Judge. I apologize. I am trying to follow the exact recommendation.

Judge KERN. All right.

The CHAIRMAN. And you are reading from what paragraph?

Judge KERN. From page 4.

The CHAIRMAN. Page 4.

Judge KERN. And I am reading in the third full paragraph, "In investigating temperament."

The CHAIRMAN. Okay. Now, would you mind re-reading it with your recommendation for me?

Judge KERN. Right. "The committee considers, among other factors, the prospective nominee's compassion, decisiveness, openmindedness"—I would delete the word "sensitivity"—"courtesy, patience, freedom from bias, commitment to equal justice," and I would add this phrase, "and sensitivity to the appearance of equal justice."

Statement of Senior Judge John W. Kern III
District of Columbia Court of Appeals
Before
The Committee on the Judiciary, United States Senate

Concerning the Role of the
American Bar Association in the
Judicial Selection Process
June 2, 1989

Mr. Chairman and Members of the Committee:

Good morning, Mr. Chairman. My name is John W. Kern III and I am a senior judge on the District of Columbia Court of Appeals. President Johnson appointed me to the court in 1968. I took the status of senior judge in 1984 and then served for three years as the Dean of the National Judicial College. In 1987, I resumed judicial service as a senior judge.

I personally am pleased to appear before this Committee of the Senate because my grandfather, Senator John W. Kern of Indiana, was the Senate's Majority Leader for four years during the presidency of Woodrow Wilson.

I speak from the perspective of a judge who has undergone evaluation and I have conferred with many other judges who have been or will be evaluated. Uppermost in our minds is determining how to ensure that the evaluative process is fair both to the person being evaluated and to the community where the person evaluated presently sits or will ultimately sit as a judge.

I submit for your consideration the attached paper prepared on the ABA Standing Committee on Federal Judiciary for publication in a compendium soon to be published by the National Legal Center for the Public Interest. I suggest that the

Standing Committee has in several respe
judicial evaluative practices.

Recently, the ABA Board of Govern
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Accordingly, I respectfully sugge
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Standing Committee has in several respects strayed from sound judicial evaluative practices.

Recently, the ABA Board of Governors directed the President of the ABA to "take any action necessary" to insure the integrity and credibility of the Standing Committee's evaluation processes.

Accordingly, I respectfully suggest that either the current ABA President or his already-chosen successor carry out this express responsibility to insure the integrity and credibility of the Standing Committee's processes in the following ways.

First, eliminate the sentence on page 4 of the Committee's present guidelines that permits the Committee to consider a candidate's political or ideological philosophy as a part of its consideration of her/his judicial temperament. The Guidelines state on their very first page that the Committee "restricts its review to issues bearing on professional qualifications," and leaves to others, such as the Senate or the President, consideration of other aspects of the nominee's qualifications. By refraining from considering political or ideological philosophy the Standing Committee will be adhering to the ABA House of Delegates' admonition that those doing judicial evaluation disregard their personal feelings about the legal philosophies of the person being evaluated. Guidelines for the Evaluation of Judicial Performance, Commentary, p.13 (1985).

Second, the Committee should put an end to its current practice of considering a candidate's "sensitivity to the concerns of women and minority persons." This evaluative

criterion is not defined and has no common understanding which are a prerequisite before use, according to the ABA House of Delegates Evaluation Guidelines. Also, it is unnecessary because the Committee evaluates the candidate already on her/his "freedom from bias and commitment to equal justice."

Third, the Standing Committee should cease its present practice of conducting beyond the legal community confidential investigations of the professional qualifications of the person it is evaluating. As Mr. Robert Raven, former chairman of the Standing Committee explained in 1983, the basis for the favored position of the Committee in the federal judicial selection process is because: "We're a conduit for the perspective of the legal community back to the President and Senate Judiciary Committee on the competency, integrity, and best guess on judicial temperament." (66 Judicature 349, 362 (1983)). Recently, special interest groups have lobbied the Standing Committee with written materials concerning the legal philosophy of the person being evaluated rather than her/his professional qualifications.

Finally, the Standing Committee should eliminate its current practice of announcing, by the numbers, the divided votes of its members in their evaluation of a candidate. The Committee now files its report with the Senate Judiciary Committee and the Attorney General, through its Chairman, and does not permit the members of the Standing Committee to explain their votes. It is inappropriate to announce the division of votes without requiring

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The ABA House of Delegates' Guidelines state: "Under no circumstances should the results of the evaluation process be used to advocate or reflect any particular philosophy." (Guidelines for the Evaluation of Judicial Performance, No. 5-4.1 (1985)). The Washington Post on April 17, 1989 at A18 editorially noted that a divided vote can damage the person being evaluated. Given the impact of such vote it should either be explained in detail or eliminated altogether and only the final evaluation announced.

In sum, the ABA Board of Governors has adopted Principles Governing the Standing Committee's evaluations and directed that such evaluations should be of professional qualifications of persons being considered for appointment to the federal bench "on the basis of predetermined and objective evaluation criteria." I urge this Committee and the Attorney General, as the users of the Standing Committee's evaluations, to insure that the Standing Committee abides by this Governing Principle.

Thank you.

COPY

THE WHITE HOUSE

WASHINGTON

March 19, 2001

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES AG/TEF
COUNSEL TO THE PRESIDENT

SUBJECT: AMERICAN BAR ASSOCIATION

Attached is a letter to Senators Leahy and Schumer responding to their letter to the President dated March 16 (also attached) regarding the role of the American Bar Association in the judicial selection process. I have not yet had an opportunity to discuss this with the President this morning, but he approved this course of action in previous conversations.

Please staff this to the appropriate individuals with a deadline for comments to be returned to me by 1:00 pm today.

Thank you.

Judge/Tim -
My comments -
for what they're worth.
-Courtney

(I preferred the old language):
There is nothing ~~inherently~~ wrong with such political advocacy by the ABA; to the contrary, its voice, along with many others, makes a valuable contribution to public debate. But granting the ABA, (with its defined political & legal viewpoint) a preferential place in the judicial selection process puts both potential nominees and the ABA in an awkward position.

DRAFT

March 19, 2001

In particular, I write to explain why

Dear [Senator Leahy][Senator Schumer]:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the appropriate role of the American Bar Association (ABA) in the President's judicial selection process. ~~In particular,~~ the President has ~~asked that I notify you that he has~~ decided not to ~~grant~~ notify the ABA ~~notice~~ of proposed judicial nominations ~~prior to the time that~~ such nominations are ~~communicated~~ sent to the Senate and announced to the public generally. before

As you know, Article II of the Constitution assigns the appointment of federal judges to the President with the advice and consent of the Senate. In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and interest groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. We welcome such suggestions from all sources, including the ABA.

In the past, the ABA — italicize

~~Your letter, however, raises quite a different question, i.e.~~ whether a single interest group – out of the ~~literally~~ thousands of groups and individuals who have a strong interest in the composition of the federal courts – ~~should be~~ was afforded advance access to the identity of potential nominees for the purpose of rendering a formal opinion as to their fitness for judicial service. In our view, granting any single group a quasi-official role in the nomination process ~~today~~ is unfair to the other groups and individuals who have equally strong interests in the judicial selection process. ~~Instead,~~ we believe the sounder approach is to conform Administration practice to that followed by the Senate since 1997, under which the ABA learns the identity of judicial nominees at the same time and on the same terms as other private groups.

policy ~~problematic~~ troubling? or problematic?

In our view, it would be especially ~~unfair~~ to give a special, quasi-official role to an interest group, such as the ABA, that takes ~~official~~ positions on divisive political, legal, and social issues. ~~Of course, the ABA is entitled to express its collective point of view on such issues.~~ The question is not whether the ABA's voice should be heard in the judicial selection process. It should, and it will be. Rather, the question is whether the ABA should have its voice heard *before* and *above* all others. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to hundreds of other groups, such as the Hispanic National Bar Association, the National Association of Women Judges, the American Trial Lawyers Association, and so forth.

We do not think that treating the ABA equally with other parties will delay the process of Senate confirmation. We are confident ~~it~~ can evaluate the President's nominees just as expeditiously as the other groups that have participated in the process in recent years. Nor do we

that the ABA

-- issues that the prospective judicial candidates, if appointed, may be called upon to decide.

believe that such even-handed treatment will have any tendency to produce judicial nominees of lower quality. President Bush is firmly committed to maintaining the highest standards of intellect, integrity, and professional qualification among his judicial nominees.

Your letter also refers to an ABA "gold standard" by which the ABA rates judicial candidates. With respect, we disagree. The assessment of potential judicial candidates is not a mechanical evaluation. As President Kennedy noted when the ABA rated one of his nominees not qualified, "[t]here are a good many judges who have been opposed who have been rather distinguished." President Kennedy's observation has proven especially true in recent decades, as some of the most distinguished and influential judges on the federal appellate courts received a "qualified/not qualified" rating from the ABA.

Finally, we note that the decision to treat the ABA in the same manner as all other interested parties in the nomination process will bring Administration practice into conformity with the Senate confirmation process. In 1997, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. He stated: "Permitting 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."

In sum, the President welcomes the views of all interested parties, including the ABA, regarding potential judicial nominees. He declines, however, to continue a practice by which one interest group is given a unique quasi-official role in selecting federal judges.

Thank you very much for your letter. I look forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

I might ~~[illegible]~~ omit this ¶. It doesn't add much to your defense of the even-handed approach & it will undoubtedly draw further criticism from Senator Kennedy -- and resulting publicity -- ~~[illegible]~~ as this Administration's second invocation of President Kennedy.

United States Senate

WASHINGTON, DC 20510

March 16, 2001

President George W. Bush
The White House
Washington, DC 20500

Dear President Bush:

We are writing to you as Ranking Member of the Senate Judiciary Committee and Ranking Member of the Courts Subcommittee to express our serious concern that your Administration is considering terminating the policy of soliciting comment from the American Bar Association on prospective nominees for the federal courts. The policy of obtaining ABA review – half a century old and uniformly followed by Republican and Democratic Presidents alike – has served our nation well, and ending it would imperil the process of selecting and confirming federal judges.

Since 1952, the ABA has reviewed the professional qualifications of potential nominees to the federal bench before the person under consideration is formally nominated and submitted to the Senate. The ABA considers only the integrity, professional competence and temperament of persons identified as potential nominees – not their philosophy or ideology.

To ensure complete insulation from politics, members of the ABA committee that evaluates potential nominees refrain from participating in or contributing to political campaigns, or taking part in political activity of any kind. The ABA's views remain confidential until after a judicial candidate is formally nominated.

We firmly believe that ending the long established practice of ABA review would dilute the quality of the federal bench. The process of judicial selection needs *more* information about the competence and integrity of potential nominees, not less. If ABA evaluation did not provide unique, unbiased and essential information, presidents of both parties would not have so heavily relied on it for almost 50 years.

ABA evaluation has been the gold standard by which judicial candidates are judged, which is why presidents have rarely elected to proceed with a nomination after the ABA found the candidate unqualified in the confidential pre-nomination stage. Indeed, for every candidate the ABA finds unqualified, there are undoubtedly scores of others never submitted for ABA review because it is known they cannot meet that body's rightfully exacting scrutiny. Without having to clear the bar of ABA review, nominees will inevitably be of lower quality.

Eliminating ABA review will also further polarize a process that, by now, all Senators agree cries out for less partisanship. The void of information about a candidate's merits that will result from elimination of ABA review will inevitably be filled with politics. And if the Administration chooses not to consult the ABA, we and others of our committee will. Far from saving time, that will delay Senate consideration of nominees, end the Administration's ability to withdraw a nomination in a confidential manner because of a poor ABA rating (which will also publicly embarrass nominees), and drive Senators apart over ideology rather than bring them together.

In sum, we urge you to continue the nearly 50 year old tradition of independent, apolitical ABA evaluation of potential nominees for federal judgeships. Our system of justice can only benefit as a result.

Sincerely,

Charles Schumer

Charles E. Schumer
UNITED STATES SENATOR

Patrick Leahy

Patrick J. Leahy
UNITED STATES SENATOR

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

Date: 3-19-01 ACTION / CONCURRENCE / COMMENT DUE BY: 3-19-01 4:00 PM

Subject: AMERICAN BAR ASSOCIATION

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	IRASTORZA	☐	☐
CARD	☑	☐	JOHNSON	☑	☐
HUGHES	☑	☐	LA MONTAGNE	☑	☐
ROVE	☑	☐	LINDSEY	☐	☐
BOLTEN	☑	☐	MIERS	☑	☐
HAGIN	☐	☐	RICE	☑	☐
DANIELS	☐	☐	_____	☐	☐
BLAKEMAN	☐	☐	_____	☐	☐
CALIO	☑	☐	_____	☐	☐
FLEISCHER	☑	☐	_____	☐	☐
GONZALES	☐	☑	_____	☐	☐
HAWKINS	☑	☐	_____	☐	☐

REMARKS:
PLEASE FORWARD YOUR COMMENTS TO THE STAFF SECRETARY BY 4:00 PM TODAY.
THANK YOU.

RESPONSE:

Harriet E. Miers
Assistant to the President
and Staff Secretary
Ext. 62702

Rec'd 12:17pm
MAR 19 2001

THE WHITE HOUSE

WASHINGTON

01 MAR 19 A10:44

March 19, 2001

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES AG/TEF
COUNSEL TO THE PRESIDENT

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Thank you.

DRAFT

March 19, 2001

Dear [Senator Leahy][Senator Schumer]:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the appropriate role of the American Bar Association (ABA) in the President's judicial selection process. In particular, the President has asked that I notify you that he has decided not to grant the ABA notice of proposed judicial nominations prior to the time that such nominations are communicated to the Senate and announced to the public generally.

As you know, Article II of the Constitution assigns the appointment of federal judges to the President with the advice and consent of the Senate. In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and interest groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. We welcome such suggestions from all sources, including the ABA.

Your letter, however, raises quite a different question, i.e. whether a single interest group – out of the literally ~~thousands~~ dozens of groups and individuals who have a strong interest in the composition of the federal courts – should be afforded advance access to the identity of potential nominees for the purpose of rendering a formal opinion as to their fitness for judicial service. In our view, granting any single group a quasi-official role in the nomination process today is unfair to the other groups and individuals who have equally strong interests in the judicial selection process. Instead, we believe the sounder approach is to conform Administration practice to that followed by the Senate since 1997, under which the ABA learns the identity of judicial nominees at the same time and on the same terms as other private groups.

In our view, it would be especially unfair to give a special, quasi-official role to an interest group, such as the ABA, that takes official positions on divisive political, legal, and social issues. Of course, the ABA is entitled to express its collective point of view on such issues. The question is not whether the ABA's voice should be heard in the judicial selection process. It should, and it will be. Rather, the question is whether the ABA should have its voice heard *before* and *above* all others. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to hundreds of other groups, such as the Hispanic National Bar Association, the National Association of Women Judges, the American Trial Lawyers Association, and so forth.

We do not think that treating the ABA equally with other parties will delay the process of Senate confirmation. We are confident it can evaluate the President's nominees just as expeditiously as the other groups that have participated in the process in recent years. Nor do we

believe that such even-handed treatment will have any tendency to produce judicial nominees of lower quality. President Bush is firmly committed to maintaining the highest standards of intellect, integrity, and professional qualification among his judicial nominees.

Your letter also refers to an ABA "gold standard" by which the ABA rates judicial candidates. With respect, we disagree. The assessment of potential judicial candidates is not a mechanical evaluation. As President Kennedy noted when the ABA rated one of his nominees not qualified, "[t]here are a good many judges who have been opposed who have been rather distinguished." President Kennedy's observation has proven especially true in recent decades, as some of the most distinguished and influential judges on the federal appellate courts received a "qualified/not qualified" rating from the ABA.

Finally, we note that the decision to treat the ABA in the same manner as all other interested parties in the nomination process will bring Administration practice into conformity with the Senate confirmation process. In 1997, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. He stated: "Permitting 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."

In sum, the President welcomes the views of all interested parties, including the ABA, regarding potential judicial nominees. He declines, however, to continue a practice by which one interest group is given a unique quasi-official role in selecting federal judges.

Thank you very much for your letter. I look forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

United States Senate

WASHINGTON, DC 20510

March 16, 2001

President George W. Bush
The White House
Washington, DC 20500

Dear President Bush:

We are writing to you as Ranking Member of the Senate Judiciary Committee and Ranking Member of the Courts Subcommittee to express our serious concern that your Administration is considering terminating the policy of soliciting comment from the American Bar Association on prospective nominees for the federal courts. The policy of obtaining ABA review – half a century old and uniformly followed by Republican and Democratic Presidents alike – has served our nation well, and ending it would imperil the process of selecting and confirming federal judges.

Since 1952, the ABA has reviewed the professional qualifications of potential nominees to the federal bench before the person under consideration is formally nominated and submitted to the Senate. The ABA considers only the integrity, professional competence and temperament of persons identified as potential nominees – not their philosophy or ideology.

To ensure complete insulation from politics, members of the ABA committee that evaluates potential nominees refrain from participating in or contributing to political campaigns, or taking part in political activity of any kind. The ABA's views remain confidential until after a judicial candidate is formally nominated.

We firmly believe that ending the long established practice of ABA review would dilute the quality of the federal bench. The process of judicial selection needs *more* information about the competence and integrity of potential nominees, not less. If ABA evaluation did not provide unique, unbiased and essential information, presidents of both parties would not have so heavily relied on it for almost 50 years.

ABA evaluation has been the gold standard by which judicial candidates are judged, which is why presidents have rarely elected to proceed with a nomination after the ABA found the candidate unqualified in the confidential pre-nomination stage. Indeed, for every candidate the ABA finds unqualified, there are undoubtedly scores of others never submitted for ABA review because it is known they cannot meet that body's rightfully exacting scrutiny. Without having to clear the bar of ABA review, nominees will inevitably be of lower quality.

Eliminating ABA review will also further polarize a process that, by now, all Senators agree cries out for less partisanship. The void of information about a candidate's merits that will result from elimination of ABA review will inevitably be filled with politics. And if the Administration chooses not to consult the ABA, we and others of our committee will. Far from saving time, that will delay Senate consideration of nominees, end the Administration's ability to withdraw a nomination in a confidential manner because of a poor ABA rating (which will also publicly embarrass nominees), and drive Senators apart over ideology rather than bring them together.

In sum, we urge you to continue the nearly 50 year old tradition of independent, apolitical ABA evaluation of potential nominees for federal judgeships. Our system of justice can only benefit as a result.

Sincerely,

Charles Schumer

Charles E. Schumer
UNITED STATES SENATOR

Patrick Leahy

Patrick J. Leahy
UNITED STATES SENATOR

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 ~~greatly~~ 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 ABA involvement in judicial selection. We have discussed these issues with the President. He has asked me to inform you that, although the Administration will continue to welcome the ABA's comments concerning ~~the~~ its judicial nominees, it will not notify the ABA before such nominations are submitted to the Senate and announced to the public generally.

In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. 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 thousands of groups and individuals who have a strong interest in the composition of the federal courts – should receive advance notice of the identity of potential nominees in order to render a formal, pre-nomination opinion on their fitness for judicial service. In our view, granting any single group such a 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 problematic to grant a special, quasi-official role to an interest group, such as the ABA, that takes public positions on divisive political, legal, and social issues and both lobbies actively and files briefs in court on behalf of those positions. This is not to suggest that the ABA cannot or should not adopt policy positions or express its views. But it cannot both espouse such views and be viewed as a neutral arbiter of judicial qualifications.

Our decision to treat the ABA in the same manner as all other interested parties mirrors the approach taken by the Senate Judiciary Committee in 1997 when it ended the ABA's quasi-

WITH RESPECT TO SUPREME COURT NOMINEES BY PRESIDENTS OF BOTH POLITICAL PARTIES IN RECENT DECADES, AS WELL AS THE APPROACH TAKEN

official role in the Senate confirmation process. As Chairman Hatch explained, "[p]ermitting 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 reemphasize that the Administration fully welcomes the suggestions and recommendations of the ABA, along with other interested parties, regarding potential judges. Like other interested individuals and groups, therefore, the ABA is welcome to make ~~recommendations and suggestions~~ present its views to the Administration about appropriate nominees for vacancies in the federal courts. 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. I look 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

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 greatly 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 ABA involvement in judicial selection. We have discussed these issues with the President. He has asked me to inform you that, although the Administration will continue to welcome the ABA's comments concerning the its judicial nominees, it will not notify the ABA before such nominations are submitted to the Senate and announced to the public generally.

In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. 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 thousands of groups and individuals who have a strong interest in the composition of the federal courts – should receive advance notice of the identity of potential nominees in order to render a formal, pre-nomination opinion on their fitness for judicial service. In our view, granting any single group such a 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 problematic to grant a special, quasi-official role to an interest group, such as the ABA, that takes public positions on divisive political, legal, and social issues and both lobbies actively and files briefs in court on behalf of those positions. This is not to suggest that the ABA cannot or should not adopt policy positions or express its views. But it cannot both espouse such views and be viewed as a neutral arbiter of judicial qualifications.

Our decision to treat the ABA in the same manner as all other interested parties mirrors the approach taken by the Senate Judiciary Committee in 1997 when it ended the ABA's quasi-

March __, 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 greatly 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 ABA involvement in judicial selection, ~~and we have now reached a decision on the role of the ABA in this Administration's process. The President~~ has asked me to inform you that the Administration will continue to welcome the ABA's input concerning the Administration's judicial nominees. ~~The Administration~~ will not notify the ABA, ~~however, of proposed judicial nominations~~ before such nominations are submitted to the Senate and announced to the public generally.

In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. 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 thousands of groups and individuals who have a strong interest in the composition of the federal courts – should receive advance notice of the identity of potential nominees in order to render a formal, pre-nomination opinion on their fitness for judicial service. In our view, granting any single group such a 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. ~~In particular, we do not believe that the ABA should receive special and preferential treatment over groups such as the National Bar Association, the Hispanic National Bar Association, the National Association of Women Judges, the American Trial Lawyers Association, and the many other groups that have an abiding interest in the composition of the courts.~~

It would be especially problematic, we believe, to grant a special, quasi-official role to an interest group, such as the ABA, ~~that is not simply a ratings organization, but~~ that takes public positions on divisive political, legal, and social issues and both lobbies actively and files briefs in court on behalf of those positions. This is not to suggest that the ABA cannot or should not adopt policy positions or express its views. But it seems to us quite problematic ~~– both as a matter of fairness and of sound constitutional governance –~~ for the President to give a politically active interest group a special, quasi-official role in the President's judicial selection process.

We also have concern about the very premise underlying the ABA's past practice of rating potential nominees – namely, the notion that a potential judicial candidate can be objectively rated in some mechanical, neutral manner. History has amply demonstrated that this ideal has not been achieved in practice. As President Kennedy explained, "[t]here are a good many judges who have been opposed [by the ABA] who have been rather distinguished." President Kennedy's observation has proven especially true in recent decades, as some of the most distinguished and influential judges on the federal appellate courts received a "qualified/not qualified" rating from the ABA. These include _____.

It bears mention, finally, that our decision to treat the ABA in the same manner as all other interested parties will bring Administration practice into conformity with the Senate confirmation process. In 1997, as you know, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. At the time, he explained: "Permitting 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."

All of that said, let me emphasize that the Administration fully welcomes the suggestions and recommendations of the ABA, along with other interested parties, regarding potential judges. Like other interested individuals and groups, therefore, the ABA is welcome to make recommendations and suggestions to the Administration about appropriate nominees for vacancies in the federal courts. Similarly, once the President submits a nomination to the Senate, the ABA like every other interested party is free to praise or criticize the President's nominee. 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.

Thank you again for your time and your views, as well as for your service to the ABA and the profession. I look 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

March __, 2001

Dear [Senator Leahy][Senator Schumer]:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the role of the American Bar Association in the President's judicial selection process. The President has asked me to inform you that the Administration ~~will continue to invite and~~ welcome the suggestions ~~and input~~ of the ABA as to potential judicial nominees. The Administration will not, however, grant the ABA a special, quasi-official role by notifying the ABA of proposed judicial nominations before such nominations are submitted to the Senate and announced to the public generally. A copy of my letter to the President of the ABA informing her of this decision is enclosed.

We are highly confident that this procedure, in which the President will welcome and receive input from a variety of interested and diverse parties, will ~~ensure that~~ the President nominates candidates of the highest intellect, integrity, and professional qualification. Of course, we appreciate that members of the Senate Judiciary Committee may wish to receive the ABA's views on judicial candidates. Based on my conversations with the ABA, I am confident that relocating the ABA's involvement in this process to the post-nomination period should not delay the Committee's timely consideration of the President's nominees.

Thank you very much for your letter. The Administration looks forward to working closely with you in the months ahead as the President and the Senate labor together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

But considerations of ~~good~~ gov dictate that the ~~government~~ President not grant a ~~private~~ politically active interest group a ~~unique~~ special, quasi-official role in the ~~process.~~ President's judicial selection process.

March 22, 2001

Dear Senators Leahy and Schumer:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the role of the American Bar Association in the President's judicial selection process. The President has asked me to inform you that the Administration welcomes the suggestions of the ABA as to judicial nominees. The Administration will not, however, grant the ABA a special, quasi-official role by notifying the ABA of proposed judicial nominations before such nominations are submitted to the Senate and announced to the public generally. A copy of my letter to the President of the ABA informing her of this decision is enclosed.

We are highly confident that this procedure, in which the President will welcome and receive input from a variety of interested and diverse parties, will enable the President to nominate candidates of the highest intellect, integrity, and professional qualification. Of course, we appreciate that individual members of the Senate Judiciary Committee may choose to seek the ABA's views on judicial candidates. Based on the ABA's representation to me that it can complete its work in every case in 20 to 30 days, however, I am confident that any post-nomination ABA evaluation would not delay the Committee's timely consideration of the President's nominees.

Thank you very much for your letter. The Administration looks forward to working closely with you in the months ahead as the President and the Senate labor together to fill the numerous vacancies on the federal bench.

its evaluation

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

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 ABA involvement in judicial selection. We have discussed these issues with the President. He has asked me to inform you that, although the Administration welcomes the ABA's suggestions concerning judicial nominees, it will not notify the ABA of the identity of a nominee before the nomination is submitted to the Senate and announced to the public generally.

There is a long tradition, of course, by which Members of Congress, ~~the people~~ individual citizens, and groups provide suggestions ~~and input~~ 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 tens of thousands of individuals who have a strong interest in the composition of the federal courts -- should receive advance notice of the identity of potential nominees in order to render a formal, pre-nomination opinion 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 special, quasi-official role to an interest group, such as the ABA, that takes public positions on divisive political, legal, and social issues. This is not to suggest that the ABA cannot or should not adopt policy positions or express its views. But considerations of sound constitutional government suggest that the President not grant a special, quasi-official role in the judicial selection process to a politically active interest group.

Our decision to treat the ABA in the same manner as all other interested parties 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, "[p]ermitting 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 suggestions and recommendations of the ABA, along with other interested parties, regarding potential judges. Like other interested individuals and groups, therefore, the ABA is welcome to present its views to the Administration about appropriate nominees for vacancies in the federal courts. 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

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

Date: 3-19-01 ACTION / CONCURRENCE / COMMENT DUE BY: 3-19-01 4:00 PM

Subject: AMERICAN BAR ASSOCIATION

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	IRASTORZA	☐	☐
CARD	☑	☐	JOHNSON	☑	☐
HUGHES	☑	☐	LA MONTAGNE	☑	☐
ROVE	☑	☐	LINDSEY	☐	☐
BOLTEN	☑	☐	MIERS	☑	☐
HAGIN	☐	☐	RICE	☑	☐
DANIELS	☐	☐	_____	☐	☐
BLAKEMAN	☐	☐	_____	☐	☐
CALIO	☑	☐	_____	☐	☐
FLEISCHER	☑	☐	_____	☐	☐
GONZALES	☐	☑	_____	☐	☐
HAWKINS	☑	☐	_____	☐	☐

REMARKS:
PLEASE FORWARD YOUR COMMENTS TO THE STAFF SECRETARY BY 4:00 PM TODAY.
THANK YOU.

RESPONSE:

Harriet E. Miers
Assistant to the President
and Staff Secretary
Ext. 62702

THE WHITE HOUSE

WASHINGTON

01 MAR 19 A10 : 44

March 19, 2001

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES AG/TEF
COUNSEL TO THE PRESIDENT

SUBJECT: AMERICAN BAR ASSOCIATION

Attached is a letter to Senators Leahy and Schumer responding to their letter to the President dated March 16 (also attached) regarding the role of the American Bar Association in the judicial selection process. I have not yet had an opportunity to discuss this with the President this morning, but he approved this course of action in previous conversations.

Please staff this to the appropriate individuals with a deadline for comments to be returned to me by 1:00 pm today.

Thank you.

DRAFT

March 19, 2001

Dear [Senator Leahy][Senator Schumer]:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the appropriate role of the American Bar Association (ABA) in the President's judicial selection process. In particular, the President has asked that I notify you that he has decided not to grant the ABA notice of proposed judicial nominations prior to the time that such nominations are communicated to the Senate and announced to the public generally.

As you know, Article II of the Constitution assigns the appointment of federal judges to the President with the advice and consent of the Senate. In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and interest groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. We welcome such suggestions from all sources, including the ABA.

Your letter, however, raises quite a different question, i.e. whether a single interest group – out of the literally thousands of groups and individuals who have a strong interest in the composition of the federal courts – should be afforded advance access to the identity of potential nominees for the purpose of rendering a formal opinion as to their fitness for judicial service. In our view, granting any single group a quasi-official role in the nomination process today is unfair to the other groups and individuals who have equally strong interests in the judicial selection process. Instead, we believe the sounder approach is to conform Administration practice to that followed by the Senate since 1997, under which the ABA learns the identity of judicial nominees at the same time and on the same terms as other private groups.

In our view, it would be especially unfair to give a special, quasi-official role to an interest group, such as the ABA, that takes official positions on divisive political, legal, and social issues. Of course, the ABA is entitled to express its collective point of view on such issues. The question is not whether the ABA's voice should be heard in the judicial selection process. It should, and it will be. Rather, the question is whether the ABA should have its voice heard *before* and *above* all others. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to hundreds of other groups, such as the Hispanic National Bar Association, the National Association of Women Judges, the American Trial Lawyers Association, and so forth.

We do not think that treating the ABA equally with other parties will delay the process of Senate confirmation. We are confident it can evaluate the President's nominees just as expeditiously as the other groups that have participated in the process in recent years. ~~Nor do we~~

Nor will this decision make any difference in judicial quality as ~~believe that such even-handed treatment will have any tendency to produce judicial nominees of lower quality~~. President Bush is firmly committed to maintaining the highest standards of intellect, integrity, and professional qualification among his judicial nominees.

— I would delete this - no need to repeat the negative

Your letter also refers to an ABA "gold standard" by which the ABA rates judicial candidates. With respect, we disagree. The assessment of potential judicial candidates is not a mechanical evaluation. As President Kennedy noted when the ABA rated one of his nominees not qualified, "[t]here are a good many judges who have been opposed who have been rather distinguished." President Kennedy's observation has proven especially true in recent decades, as some of the most distinguished and influential judges on the federal appellate courts received a "qualified/not qualified" rating from the ABA.

Finally, we note that the decision to treat the ABA in the same manner as all other interested parties in the nomination process will bring Administration practice into conformity with the Senate confirmation process. In 1997, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. He stated: "Permitting 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."

In sum, the President welcomes the views of all interested parties, including the ABA, regarding potential judicial nominees. He declines, however, to continue a practice by which one interest group is given a unique quasi-official role in selecting federal judges.

Thank you very much for your letter. I look forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

United States Senate

WASHINGTON, DC 20510

March 16, 2001

President George W. Bush
The White House
Washington, DC 20500

Dear President Bush:

We are writing to you as Ranking Member of the Senate Judiciary Committee and Ranking Member of the Courts Subcommittee to express our serious concern that your Administration is considering terminating the policy of soliciting comment from the American Bar Association on prospective nominees for the federal courts. The policy of obtaining ABA review – half a century old and uniformly followed by Republican and Democratic Presidents alike – has served our nation well, and ending it would imperil the process of selecting and confirming federal judges.

Since 1952, the ABA has reviewed the professional qualifications of potential nominees to the federal bench before the person under consideration is formally nominated and submitted to the Senate. The ABA considers only the integrity, professional competence and temperament of persons identified as potential nominees – not their philosophy or ideology.

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Eliminating ABA review will also further polarize a process that, by now, all Senators agree cries out for less partisanship. The void of information about a candidate's merits that will result from elimination of ABA review will inevitably be filled with politics. And if the Administration chooses not to consult the ABA, we and others of our committee will. Far from saving time, that will delay Senate consideration of nominees, end the Administration's ability to withdraw a nomination in a confidential manner because of a poor ABA rating (which will also publicly embarrass nominees), and drive Senators apart over ideology rather than bring them together.

In sum, we urge you to continue the nearly 50 year old tradition of independent, apolitical ABA evaluation of potential nominees for federal judgeships. Our system of justice can only benefit as a result.

Sincerely,

Charles Schumer

Charles E. Schumer
UNITED STATES SENATOR

Patrick Leahy

Patrick J. Leahy
UNITED STATES SENATOR

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

Date: 3-19-01 ACTION / CONCURRENCE / COMMENT DUE BY: 3-19-01 4:00 PM

Subject: AMERICAN BAR ASSOCIATION

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☑	☐	IRASTORZA	☐	☐
CARD	☑	☐	JOHNSON	☑	☐
HUGHES	☑	☐	LA MONTAGNE	☑	☐
ROVE	☑	☐	LINDSEY	☐	☐
BOLTEN	☑	☐	MIERS	☑	☐
HAGIN	☐	☐	RICE	☑	☐
DANIELS	☐	☐	_____	☐	☐
BLAKEMAN	☐	☐	_____	☐	☐
CALIO	☑	☐	_____	☐	☐
FLEISCHER	☑	☐	_____	☐	☐
GONZALES	☐	☑	_____	☐	☐
HAWKINS	☑	☐	_____	☐	☐

REMARKS:
PLEASE FORWARD YOUR COMMENTS TO THE STAFF SECRETARY BY 4:00 PM TODAY.
THANK YOU.

RESPONSE: Good

Harriet E. Miers
Assistant to the President
and Staff Secretary
Ext. 62702

THE WHITE HOUSE

WASHINGTON

01 MAR 19 A10 : 44

March 19, 2001

MEMORANDUM FOR HARRIET MIERS

FROM: ALBERTO R. GONZALES AG/TEF
COUNSEL TO THE PRESIDENT

SUBJECT: AMERICAN BAR ASSOCIATION

Attached is a letter to Senators Leahy and Schumer responding to their letter to the President dated March 16 (also attached) regarding the role of the American Bar Association in the judicial selection process. I have not yet had an opportunity to discuss this with the President this morning, but he approved this course of action in previous conversations.

Please staff this to the appropriate individuals with a deadline for comments to be returned to me by 1:00 pm today.

Thank you.

DRAFT

March 19, 2001

Dear [Senator Leahy][Senator Schumer]:

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the appropriate role of the American Bar Association (ABA) in the President's judicial selection process. In particular, the President has asked that I notify you that he has decided not to grant the ABA notice of proposed judicial nominations prior to the time that such nominations are communicated to the Senate and announced to the public generally.

As you know, Article II of the Constitution assigns the appointment of federal judges to the President with the advice and consent of the Senate. In light of the importance of the federal courts to the Republic, there is a long tradition by which Members of Congress, the people, and interest groups appropriately express their interest in the judicial selection process by providing suggestions and input to the President. We welcome such suggestions from all sources, including the ABA.

Your letter, however, raises quite a different question, i.e. whether a single interest group – out of the literally thousands of groups and individuals who have a strong interest in the composition of the federal courts – should be afforded advance access to the identity of potential nominees for the purpose of rendering a formal opinion as to their fitness for judicial service. In our view, granting any single group a quasi-official role in the nomination process today is unfair to the other groups and individuals who have equally strong interests in the judicial selection process. Instead, we believe the sounder approach is to conform Administration practice to that followed by the Senate since 1997, under which the ABA learns the identity of judicial nominees at the same time and on the same terms as other private groups.

In our view, it would be especially unfair to give a special, quasi-official role to an interest group, such as the ABA, that takes official positions on divisive political, legal, and social issues. Of course, the ABA is entitled to express its collective point of view on such issues. The question is not whether the ABA's voice should be heard in the judicial selection process. It should, and it will be. Rather, the question is whether the ABA should have its voice heard *before* and *above* all others. As Senator Biden asked in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to hundreds of other groups, such as the Hispanic National Bar Association, the National Association of Women Judges, the American Trial Lawyers Association, and so forth.

We do not think that treating the ABA equally with other parties will delay the process of Senate confirmation. We are confident it can evaluate the President's nominees just as expeditiously as the other groups that have participated in the process in recent years. Nor do we

believe that such even-handed treatment will have any tendency to produce judicial nominees of lower quality. President Bush is firmly committed to maintaining the highest standards of intellect, integrity, and professional qualification among his judicial nominees.

Your letter also refers to an ABA "gold standard" by which the ABA rates judicial candidates. With respect, we disagree. The assessment of potential judicial candidates is not a mechanical evaluation. As President Kennedy noted when the ABA rated one of his nominees not qualified, "[t]here are a good many judges who have been opposed who have been rather distinguished." President Kennedy's observation has proven especially true in recent decades, as some of the most distinguished and influential judges on the federal appellate courts received a "qualified/not qualified" rating from the ABA.

Finally, we note that the decision to treat the ABA in the same manner as all other interested parties in the nomination process will bring Administration practice into conformity with the Senate confirmation process. In 1997, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. He stated: "Permitting 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."

In sum, the President welcomes the views of all interested parties, including the ABA, regarding potential judicial nominees. He declines, however, to continue a practice by which one interest group is given a unique quasi-official role in selecting federal judges.

Thank you very much for your letter. I look forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

Sincerely yours,

Alberto R. Gonzales
Counsel to the President

United States Senate

WASHINGTON, DC 20510

March 16, 2001

President George W. Bush
The White House
Washington, DC 20500

Dear President Bush:

We are writing to you as Ranking Member of the Senate Judiciary Committee and Ranking Member of the Courts Subcommittee to express our serious concern that your Administration is considering terminating the policy of soliciting comment from the American Bar Association on prospective nominees for the federal courts. The policy of obtaining ABA review – half a century old and uniformly followed by Republican and Democratic Presidents alike – has served our nation well, and ending it would imperil the process of selecting and confirming federal judges.

Since 1952, the ABA has reviewed the professional qualifications of potential nominees to the federal bench before the person under consideration is formally nominated and submitted to the Senate. The ABA considers only the integrity, professional competence and temperament of persons identified as potential nominees – not their philosophy or ideology.

To ensure complete insulation from politics, members of the ABA committee that evaluates potential nominees refrain from participating in or contributing to political campaigns, or taking part in political activity of any kind. The ABA's views remain confidential until after a judicial candidate is formally nominated.

We firmly believe that ending the long established practice of ABA review would dilute the quality of the federal bench. The process of judicial selection needs *more* information about the competence and integrity of potential nominees, not less. If ABA evaluation did not provide unique, unbiased and essential information, presidents of both parties would not have so heavily relied on it for almost 50 years.

ABA evaluation has been the gold standard by which judicial candidates are judged, which is why presidents have rarely elected to proceed with a nomination after the ABA found the candidate unqualified in the confidential pre-nomination stage. Indeed, for every candidate the ABA finds unqualified, there are undoubtedly scores of others never submitted for ABA review because it is known they cannot meet that body's rightfully exacting scrutiny. Without having to clear the bar of ABA review, nominees will inevitably be of lower quality.

Eliminating ABA review will also further polarize a process that, by now, all Senators agree cries out for less partisanship. The void of information about a candidate's merits that will result from elimination of ABA review will inevitably be filled with politics. And if the Administration chooses not to consult the ABA, we and others of our committee will. Far from saving time, that will delay Senate consideration of nominees, end the Administration's ability to withdraw a nomination in a confidential manner because of a poor ABA rating (which will also publicly embarrass nominees), and drive Senators apart over ideology rather than bring them together.

In sum, we urge you to continue the nearly 50 year old tradition of independent, apolitical ABA evaluation of potential nominees for federal judgeships. Our system of justice can only benefit as a result.

Sincerely,

Charles Schumer

Charles E. Schumer
UNITED STATES SENATOR

Patrick Leahy

Patrick J. Leahy
UNITED STATES SENATOR

On behalf of the President, I write in response to your letter of March 16, 2001, regarding the appropriate role of the American Bar Association (ABA) in the President's judicial selection process.

As you know, the federal courts play a critical role in our constitutional structure in ensuring equal justice and in maintaining the proper balance between order and liberty, between the federal government and the state governments, and among the three branches of the federal government. Article II of the Constitution assigns the appointment of federal judges, including Justices of the Supreme Court, to the President with the advice and consent of the Senate. In light of the importance of the federal courts to the enduring strength of the Republic, there is a long tradition by which Members of Congress, the people, and all manner of interest groups appropriately express their interest in the judicial selection process by providing suggestions and input (both positive and negative) to the President.

The question raised by your letter is whether a single interest group – out of the literally thousands of groups and individuals who have a strong interest in the composition of the courts – should be afforded a special, quasi-official role in the process by which the President selects a nominee. In our view, granting any single group or individual a special, quasi-official role in the President's nomination process would be inequitable and grossly unfair to the large number of other interest groups and individuals who have equally strong interests in the judicial selection process.

The issue here is one of simple equality and fairness. There is no persuasive reason why the ABA or any other group should be afforded special and preferential treatment over every other interested group or individual. In particular, we do not believe that the ABA should receive special and preferential treatment over groups such as the National Bar Association, the Hispanic National Bar Association, the National Association of Women Judges, and the myriad other groups and individuals who have an abiding interest in the composition of the courts. As Senator Biden stated in 1994, "Why the ABA and not the National Bar Association?" The same question could be asked with respect to thousands of other groups.

That said, let me be quite clear that the Administration fully welcomes the suggestions and recommendations of all interested parties, *including the ABA*, regarding potential judges. Like other interested individuals and groups, therefore, the ABA is welcome to make recommendations and suggestions about appropriate nominees for the vacancies in the federal courts. Similarly, once the President submits a nomination to the Senate, the ABA like every other interested party is free to praise or criticize the President's nominee. The question, in sum, is not whether the ABA's voice should be heard in the judicial selection process. We welcome its voice. Rather, the question is whether the ABA should be entitled to have its voice heard *before* and *above* all others who want their voices heard. We think not.



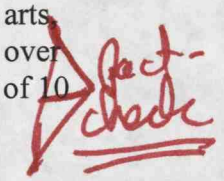
Your letter also refers to an ABA "gold standard" by which the ABA rates judicial candidates. With all respect, we find that description inapt. To begin with, we do not believe that the judicial function – or, therefore, an assessment of potential judicial candidates -- is subject to the kind of mechanical "gold standard" that your letter contemplates. Indeed, as President Kennedy noted when the ABA rated one of his nominees not qualified, "[t]here are a

good many judges who have been opposed who have been rather distinguished." President Kennedy's observation has proved especially true in recent decades, as some of the most distinguished and influential judges on the federal appellate courts received a lowly "qualified/not qualified" rating from the ABA.

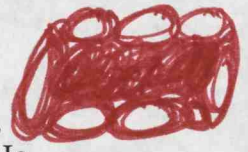
In this regard, it bears mention that criticism of the ABA's special, quasi-official role in the process has been bipartisan. For example, Senator Mosely-Braun stated in 1994 that "in many communities in this country, the judicial evaluation process by the ABA is considered to be nothing short of scandalous."

Of course, even if judicial candidates could be objectively and mechanically evaluated by some kind of "gold standard" process, there still would be no persuasive reason why the ABA, above all other groups, should be afforded a special, quasi-official role as the "ratings organization." The ABA, after all, is not simply a ratings organization. On the contrary, the ABA has taken strong positions on a variety of difficult political issues, including abortion, affirmative action, flag desecration, religious liberty, habeas corpus reform, funding for the arts, welfare reform, and the deportation of criminal aliens. Indeed, the ABA's policy agenda is over 100 pages long and includes over 750 policy positions; the ABA maintains a full-time staff of 10 paid lobbyists to support those views. As such, it is clear that the ABA is far more than a disinterested ratings organization.





That is not suggest that the ABA cannot or should not adopt strong policy positions or express its views. On the contrary, it can and does. But it is unfair and inequitable for the President to give any single group -- but especially a politically active interest group such as the ABA -- a special, quasi-official position in the President's judicial selection process.



The decision to treat the ABA in the same manner as all other interested parties is consistent with the role the ABA now plays in the Senate's confirmation process. In 1997, Chairman Hatch ended the ABA's quasi-official role in the Senate confirmation process. He stated: "Permitting 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."

In sum, the President welcomes the views of all interested parties, including the ABA, regarding potential judicial nominees. But it would be unfair and inequitable to give any group a special, quasi-official role in that process.

Thank you very much for your letter and your interest in the process. I look forward to working closely with you in the months ahead as the President and the Senate work together to fill the numerous vacancies on the federal bench.

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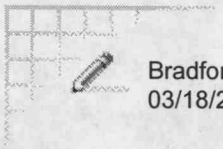
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Sincerely yours,

Alberto R. Gonzales
Counsel to the President

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03/18/2001 03:03:09 PM

Record Type: Record

To: Alberto R. Gonzales/WHO/EOP@EOP, Timothy E. Flanigan/WHO/EOP@EOP, Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: Answers to some ABA questions

Membership

Number of ABA members: approximately 349,000, which represents approximately 51% of the total number of lawyers in the U.S., according to the Bureau of Labor Statistics. Unable to find any ethnic or gender breakdowns.

Makeup of the ABA Standing Committee as of February, 2001: 15 members (10 men, 5 women) (it is impossible to determine race from the materials I reviewed, but there are no Hispanic surnames in the group, and none of the members has listed any affiliation with any of the major African-American political or legal groups)

* The chairman, Patricia Hynes, is a partner at Milberg, Weiss in New York and a past campaign contributor to Sen. Schumer, among others.

As of March, 1997, the following intersections between the ABA Standing Committee and the ABA's policy and political arms were also noted:

* Seven members of the Standing Committee are also members of the ABA's policy arm, the House of Delegates.
* Two of the Standing Committee members who serve in the House of Delegates are members of the House's Nominating Committee, which picks candidates for the ABA presidency and other key Association offices.
* One of the Standing Committee members who serves in the House of Delegates is a member of the House's Rules and Calendar Committee, the House's policy gatekeeper.
* Two of the Standing Committee members serve on the governing Council of the ABA's Litigation Section, which decides what policy proposals the Section will bring to the House floor.
* Since at least 1990, the Standing Committee's Staff Director has been a senior legislative counsel in the ABA's lobbying office.
* The Chairman of the Standing Committee represents the Democratic National Committee in one pending matter.

Forthe period 1994-96, the following was true:

* Ten of the Standing Committee members also served in the House of Delegates. Of these, three served on the House's Nominating Committee.
* Two of the Standing Committee members also served on the Council of the ABA's Individual Rights and Responsibilities Section. During their joint tenure, the Council asked the ABA to submit an amicus brief in the Romer case, which dealt with the constitutionality of Colorado's Amendment 2. The ABA filed the brief. One of the Standing Committee members also served as liason to the ABA's Post-Conviction Death penalty Representation Project, active in efforts dealing with habeas and capital cases.
* Three of the Standing Committee members-including the Chairman-made political contributions while serving on the Standing Committee.

For 1992-94, these were the facts:

* Six of the Standing Committee members also served in the House of Delegates. Of these, one served on the Nominating Committee of the House.
* Two Standing Committee members also served on the governing councils of the Litigation and Tort and Insurance Practice Sections. Both Section Councils submit policy resolutions to the House of Delegates for approval. The two Standing Committee members from the Litigation Section served on that Section's Council when it asked the ABA to submit amicus briefs in Wright and Withrow, two Supreme Court habeas cases. The ABA filed the briefs.

Membership of Hispanic National Bar Ass'n: approximately 25,000 members (no way to tell how much overlap with ABA).

Membership of National Bar Ass'n: approximately 17,000 members (no way to tell how much overlap with ABA).

Not Qualified ratings

Number of "not qualified" ratings given to individuals who were eventually nominated: 26 from 1960 through 1997.

There are a couple important things to note in connection with "not qualified" ratings. First, there is no way to determine how many "not qualified" ratings were given to candidates whom the White House then elected not to nominate. The ABA would probably argue that is where their ratings have the most impact. (A report published by the Standing Committee during the Kennedy adminstration reported that it had rated as "not qualified" 45 out of the 282 candidates that had been presented to it for pre-nomination screening.) Second, this figure reflects only those candidates whom a majority of the ABA Standing Committee voted "not qualified." There are a much larger number of candidates as to whom at least a minority of the committee voted "not qualified." Such votes can often make confirmation far more difficult, by providing cover to ideological opponents of the nominee. Inspection of the nominees receiving minority "not qualified" ratings is even more revealing of the liberal bias of the ABA. Among the judges receiving minority "not qualified" ratings are some of the current leading lights of the federal judiciary, almost all conservative, including: Ralph Winter, Richard Posner, Ken Starr, Frank Easterbrook, Laurence Silberman, Jerry Smith, Alex Kozinsky, Mike Luttig, John Noonan, Robert Bork (for the Supreme Court), Clarence Thomas (for the Supreme Court), and Steve Williams. (Indeed, their liberal counterparts who were appointed to the same courts and who often had less impressive backgrounds, almost uniformly received "well qualified" ratings.)

Senatorial support for candidates rated "not qualified" by the ABA:

[Note that these figures are minimums, but they may not represent actual numbers. Different sources have reported slightly different figures.]

Nine Kennedy nominees received a "not qualified" rating. All but one were eventually confirmed, mostly unanimously.

Six Johnson nominees received a "not qualified" rating. At least two were confirmed, and at least one was not confirmed. I have been unable to determine the fate of the other three.

One Nixon nominee received a "not qualified rating (Tom Meskill). He was confirmed 54-36.

Six Carter nominees received a "not qualified" rating. Three were confirmed; three were not.

One Reagan nominee received a "not qualified" rating. He was not confirmed.

Four Clinton nominees received a "not qualified" rating. Those were Alexander Williams (D. Md.), David Hamilton (IN), David Katz (OH). Three of those were confirmed. Senators Shumer and Leahy voted in favor of all three (as part of unanimous consent votes) .

Quotations from senators and other Democratis regarding the need for speed or criticizing ABA role

Senator Carol Mosely-Braun: "In many communities in this country, the judicial evaluation process by the ABA is considered to be nothing short of scandalous . . . It is in many people's opinion a discredit to the organization . . ." 8/11/94 Senate Judiciary Committee proceedings.

Senator Biden: "Why the ABA and not the National Bar Association?" 8/11/94 Senate Judiciary Committee proceedings. [note that Biden is generally supportive of a continuing ABA role, while noting that he has often disagreed with the ABA's ratings and has indeed disregarded them at times.]

Senator Hatch: "The ABA is an interest group like any other and they are free to take political positions like any other. What I do question and what members of this committee do question is whether a group that expresses such positions should be permitted to play a quasi-governmental role, a role not given to any other private or special interest group. Would it be good public policy to allow the American Medical Association to screen candidates for Surgeon General, the head of HHS, and the head of the FDA prior to their nominations? Would it be good public policy to allow the National Association of Securities Dealers or the stock exchange to to screen the qualifications of members of the Securities and Exchange Commission and exert substantial influence over their nomination? 5/21/96 Senate Judicial Committee Hearing at 3.

Griffin Bell: "Based on my experience over the years, the organized bar should be eliminated from the judicial selection process." 5/21/96 Senate Judiciary Committee Hearing at 10 (prepared letter).

Senator Feingold: "I think it is important that we keep the role of the ABA in its proper context, lest anyone believe that they have a greater influence on this process than they actually do. . . . Neither the President nor any member of this Committee or the full Senate is bound to even consider what the ABA has to say about a given nominee." 5/21/96 Senate Judiciary Committee Hearing at 70.

Senator Levin: complaining about the failure to move Clinton's nominees -- "the Sixth Circuit where there is a severe shortage of judges and an enormous caseload that sits there pending"; "I will be thinking of the vacancies that exist on the Sixth Circuit Court of Appeals that have remained unfilled for years, where there is a **judicial emergency,** an enormous backlog" 146 Cong. Rec. S. 9657

Senator Leahy: "I note for the Senate that there continue to be multiple vacancies on the Third, Fourth, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuits. With 22 current vacancies, our appellate courts have nearly half of the total **judicial emergency** vacancies in the federal court system. I note that the vacancy rate for our Courts of Appeals is more than 11 percent nationwide. If we were to take into account the additional appellate judgeships included in the Hatch-Leahy Federal Judgeship Act of 2000 and requested by the Judicial Conference to handle their increased workloads, the vacancy rate would be 16 percent." 146 Cong. Rec. 8935