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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Letter] [3 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/15/2025 JLS] - To: Martha Barnett - From: Orrin Hatch	3	08/28/2001	
002	Draft	Role of American Bar Association... [5 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/15/2025 JLS] - From: Brett Kavanaugh	5	02/13/2001	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Judges - ABA (American Bar Association) Ongoing Issues - Cassell

FRC ID:

9631

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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SUPERSEDED

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MEMORANDUM

TO: Alberto R. Gonzales
CC: All Attorneys in Counsel's Office
FROM: Brett M. Kavanaugh
DATE: May 12, 2001
RE: ABA Questionnaire

Please copy +
circulate to
all attorneys

✓ Thanks,
Brett

Attached is the ABA questionnaire that was sent to nominees on Friday, May 11.

Note the
privacy waivers
BK



AMERICAN BAR ASSOCIATION

Standing Committee on
Federal Judiciary

11th Floor
740 Fifteenth Street, N.W.
Washington, DC 20005-1022
(202) 662-1765

May 10, 2001

Miguel Estrada, Esq.
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Dear Mr. Estrada:

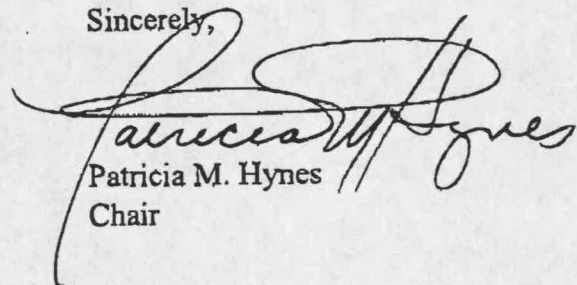
Congratulations on your nomination to the United States Court of Appeals for the District of Columbia Circuit. We look forward to receiving a copy of your responses to the enclosed Personal Data Questionnaire so that we may proceed promptly with our investigation. The completed Questionnaire should be forwarded to me and to Fred F. Fielding, who will be conducting the investigation on behalf of the Committee.

I have enclosed a copy of the Committee's brochure, "Standing Committee on Federal Judiciary -- What It Is and How It Works," which describes the Committee's procedures.

If you have any questions, please feel free to call me at 212-594-5300 or Mr. Fielding at 202-719-7320.

We look forward to receipt of your responses.

Sincerely,


Patricia M. Hynes
Chair

sl
encs.

cc: Fred F. Fielding, Esq.
Wiley, Rein & Fielding
1776 K Street, NW - Ste. 900
Washington, DC 20006

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P.02 202467 0539

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GIBSON DUNN CRUTCHER

MAY-10-2001 11:41

LAWYER

PERSONAL DATA QUESTIONNAIRE

In answering these questions, please use letter size paper. Repeat each question and place your answer immediately beneath it. To expedite matters, send in your completed Questionnaire as soon as possible, since it is a prerequisite for the usual process of investigation.

1. Full name and social security number.
2. Office and home addresses, zip codes, telephone numbers and area codes. (Name of law firm, if associated.)
3. Date and place of birth.
4. Are you a naturalized citizen? If so, give date and place of naturalization.
5. Family status:
 - a. Are you married? If so, state the date of marriage and spouse's full name including maiden name if applicable.
 - b. Have you been divorced? If so, give particulars, including the date, the name of the moving party, the number of the case, the court, and the grounds.
 - c. Names of your children, with age, address and present occupation of each.
6. Have you had any military service? If so, give dates, branch of service, rank or rate, serial number, present status, and type of discharge, if applicable.
7. List each college and law school you attended, including dates of attendance, the degrees awarded and, if you left any institution without receiving a degree, the reason for leaving.
8. List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

9. Describe chronologically your law practice and experience after your graduation from law school, including:
- a. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk.
 - b. whether you practiced alone, and if so, the addresses and the dates.
 - c. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, the nature of your connection with each, and the names, addresses and current telephone numbers for individuals who have direct personal knowledge about your work at such law firm, company or government agency.
 - d. any other relevant particulars.
10. a. What has been the general character of your practice, dividing it into periods with dates, if its character has changed over the years?
- b. Describe your typical clients, and mention the areas, if any, in which you have specialized.
11. With respect to the last five years:
- a. Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court has varied during this period, describe each such variance, giving the dates thereof.
 - b. What percentage of these appearances was in
 - 1) Federal courts.
 - 2) State courts of record.
 - 3) Other courts.
 - c. What percentage of your litigation was
 - 1) Civil.
 - 2) Criminal.
 - d. State the number of cases you tried to verdict or judgment (rather than settled) in courts of record, indicating whether you were sole counsel, chief counsel, or associate counsel.
 - e. What percentage of these trials was

- 1) Jury.
 - 2) Non-jury.
12. Summarize your experience in court prior to the last five years, indicating as to that period.
- a. whether your appearances in court were more or less frequent.
 - b. any significant changes in the percentages stated in your answers to question 11 (b), (c) and (e).
 - c. any significant changes in the number of cases per year you tried to verdict or judgment (rather than settled) in courts of record as sole counsel, chief counsel, or associate counsel.
13. Describe ten of the most significant litigated matters which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case, and a succinct statement of what you believe to be the particular significance of the case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case, (a) the dates of the trial period or periods, (b) the name of the court and the judge before whom the case was tried, (c) the individual name, address and telephone numbers of co-counsel and of counsel for each of the other parties.
14. a. Have you ever held judicial office? If so, give dates and details including the courts involved, whether elected or appointed, periods of service, and a description of the jurisdiction of each of such courts with any limitations upon the jurisdiction of each court.
- b. Have you ever held public office other than judicial office? If so, give details, including the office involved, whether elected or appointed, and the length of your service, giving dates.
15. Have you ever been an unsuccessful candidate for elective, judicial, or other public office? If so, give details, including dates.
16. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office? If so, give details, including dates.

17. Are you now an officer or director or otherwise engaged in the management of any business enterprise?
- a. If so, give details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.
- b. Is it your intention to resign such positions and withdraw from any participation in the management of any such enterprises if you are nominated and confirmed? If not, give reasons.
18. Have you ever been arrested, charged, or held by federal, state, or other law enforcement authorities for violation of any federal law or regulation, state law or regulation, county or municipal law, regulation or ordinance? If so, give details. Do not include traffic violations for which a fine of \$50.00 or less was imposed.
19. Have you, to your knowledge, ever been under federal, state or local investigation for possible violation of a criminal statute? If so, give particulars.
20. Has a tax lien or other collection procedure ever been instituted against you by federal, state or local authorities? If so, give particulars.
21. Have you ever been sued by a client? If so, give particulars.
22. Have you ever been a party or otherwise involved in any other legal proceedings? If so, give the particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Include all legal proceedings in which you were a party in interest, a material witness, were named as co-conspirator or a co-respondent, and any grand jury investigation in which you figured as a subject, or in which you appeared as a witness.
23. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, give the particulars.
24. a. What is the present state of your health?
- b. Have you in the past ten years (i) been hospitalized due to injury or illness or (ii) been

prevented from working due to injury or illness or otherwise incapacitated for a period in excess of ten days? If so, give the particulars, including the causes, the dates, the places of confinement, and the present status of the conditions which caused the confinement or incapacitation.

- c. Do you suffer from any impairment of eyesight or hearing or any other physical handicap? If so, give details.
 - d. When did you have your most recent general physical examination, and who was the supervising physician?
 - e. Are you currently under treatment for an illness or physical condition? If so, give details.
 - f. Have you ever been treated for or had any problem with alcoholism or any related condition associated with consumption of alcoholic beverages or any other form of drug addiction or dependency? If so, give details.
 - g. Have you ever been treated for or suffered from any form of mental illness? If so, give details.
25. Furnish at least five examples of legal articles, books, briefs, or other legal writings which reflect your personal work. If briefs are submitted, indicate the degree to which they represent your personal work.
26. List all bar associations and professional societies of which you are a member and give the titles and dates of any offices which you have held in such groups. List also chairmanships of any committees in bar associations and professional societies, and memberships on any committees which you believe to be of particular significance (e.g., judicial selection committee, committee of censors, grievance committee).
27. List all organizations other than bar associations or professional associations or professional societies of which you are or have been a member, including civic, charitable, educational, social and fraternal organizations.
28. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinctions in college or law school) other than those mentioned in answers to the foregoing questions.

29. Describe any pro bono or community service activities in which you have engaged.
30. State any other information which may reflect positively or adversely on you, or which you believe should be disclosed in connection with consideration of you for nomination for the Federal Judiciary.

Signature

Date

11/14/89

- 6 -

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON FEDERAL JUDICIARY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with or in the possession of any governmental, judicial, disciplinary, investigative or other official agency, _____, * or any educational institution, or employer, and I hereby authorize a representative of the American Bar Association Standing Committee on Federal Judiciary to request and to receive any such information.

** _____

Date

* Please insert the name of the appropriate state or federal authority, e.g. Board of Bar Overseers, Commission on Judicial Conduct, etc.

** Please type or print name under signature line.

EDWARD M. KENNEDY, MASSACHUSETTS
JOSEPH R. BIDEN, JR., DELAWARE
HERBERT KOHL, WISCONSIN
DIANNE FEINSTEIN, CALIFORNIA
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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

September 6, 2001

Martha W. Barnett, President
American Bar Association
740 15th Street, N.W.
Washington, DC 20005-1019

Dear Ms. Barnett:

I write to express my concern about the recent reports questioning the impartiality of the ABA's ratings of Federal judicial nominees. As you may be aware, Professor James Lindgren of Northwestern University has conducted a study comparing the ABA ratings of President Clinton's confirmed Federal circuit court nominees with the ratings of President George H.W. Bush's confirmed circuit court nominees. Professor Lindgren reported some of his study's findings in an August 6 op-ed in the *Wall Street Journal*. The reported findings are disturbing and raise questions about the ABA's evaluation process.

First, Professor Lindgren's study found that among nominees with no judicial experience, Clinton nominees received much higher ratings than their credentials would predict when compared with Bush nominees. For example, the odds of a Clinton nominee receiving the ABA's highest rating of "unanimously well qualified" were between 6.8 and 10.9 times higher than for Bush nominees with similar credentials. Moreover, a Bush nominee with top credentials – such as prior judicial experience, a top-ten law school education, private practice experience, government practice experience, and law review or a Federal clerkship – had a lower chance (77%) of getting the highest ABA rating than a Clinton nominee who had *none* of these credentials (81%). A Bush nominee with none of these credentials, on the other hand, had only a 9% chance of receiving a unanimous "well qualified" rating. Moreover, the reported study finds that, had the ABA applied the same credential-driven scrutiny to Clinton nominees as it did to Bush nominees, only 48% of Clinton nominees would have been rated "unanimously well qualified," as opposed to the 67% that actually received that top rating.

Second, another disturbing implication of the study is the disparate impact of ABA ratings on minority nominees of different political parties. Although the study found no appreciable difference between ratings assigned to Bush and Clinton nominees with judicial experience, the study did find that minority Clinton nominees received slightly lower ABA

September 6, 2001

Page 2

ratings than their credentials would predict, while minority Bush nominees received *much* lower ratings than their credentials would predict.

The study concluded, "In other words . . . the Bush and Clinton nominees had on average identically strong qualifications but received different ratings by the American Bar Association." This study raises serious questions about the neutrality and fairness of the ABA evaluation process, and whether it can evaluate judicial candidates without bias toward the President who nominated them.

Third, I must note that compounding the questions raised by the study is the ABA's failure to live up to its promised pace of evaluating President George W. Bush's judicial nominees. When we met earlier this year, ABA representatives pledged to submit ratings within thirty days of a candidate's nomination. However, the nomination of Timothy Tymkovich has been pending more than fourteen weeks without an ABA rating. The nomination of Lavenki Smith was pending more than eleven weeks without an ABA rating. The nominations of Sharon Prost, Carolyn Kuhl, and Richard Clifton were pending for nine or more weeks without an ABA rating. It took the ABA six weeks or more to submit ratings for John Roberts, Jr., Priscilla Owen, Terry Wooten, and James Gritzner; more than seven weeks for Michael Melloy, Laurie Smith Camp, and Michael Mills; and eight weeks or more for Miguel Estrada, Terrence Boyle, Michael McConnell, Charles Pickering, Sr., Harris Hartz, Paul Cassell, John Bates, and Reggie Walton. Of the 44 judicial nominations by President Bush thus far, more than half - 27 - have not received ABA ratings within 30 days of their nomination as promised. Given the scheduling constraints on the Senate confirmation process and Chairman Leahy's stated practice that he will not schedule hearings for President Bush's nominees prior to the ABA's evaluation, any undue delays seriously impact our system of justice for American citizens.

To conclude, the combination of Professor Lindgren's study and the significant delay in ABA ratings inevitably begs the question of what exactly the ABA rating process entails. To date, the ABA rating letters simply state the ratings - they provide no basis for the ABA's decision or information about the process by which nominees are evaluated. Given the role the current Senate Judiciary Committee has given the ABA, the Senate and the citizens each Senator represents deserve to know how the ABA arrives at its final ratings of nominees. I am therefore requesting a detailed explanation of the process by which the ABA evaluates judicial nominees, including the objective and subjective factors the ABA considers and the weight given to each; how the ABA measures nominees' qualifications; the persons with whom the ABA consults on nominees' qualifications; and how those persons are identified. I would like to know how the voting is conducted and how any reports or written materials are maintained. In addition, I would appreciate hearing your view of what accounts for the differences illuminated in Professor Lindgren's study between the ABA's ratings of President Clinton's judicial nominees and the ratings it assigned to the nominees of the first President Bush, and what the ABA does to ensure political neutrality. Finally, I am requesting that the ABA reaffirm its commitment to its original pledge of submitting ratings of judicial candidates within 30 days of their nomination.

September 6, 2001
Page 3

Thank you in advance for your response.

Sincerely,



Orrin G. Hatch
Ranking Republican Member

OGH:rmj

cc: ABA Standing Committee on the Federal Judiciary

*I appreciate our
good relationship &
count on you to
make sure the
ABA processes fair*



CONFIDENTIAL

*Copy to all
attorneys*

ROPES & GRAY
ONE INTERNATIONAL PLACE
BOSTON, MA 02110-2624
PHONE: (617) 951-7000
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FAX TRANSMITTAL LETTER

Total Number of pages including this transmittal letter: 4

<u>Name</u>	<u>Firm/Company</u>	<u>FAX No.</u>	<u>Phone Number</u>
Hon. Alberto R. Gonzales	Counsel to the President	202-456-6279	202-456-2632

FROM: Roscoe Trimmier, Jr.

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL IMMEDIATELY AT:

(617) 951-7521

IMPORTANT: PLEASE DELIVER THIS DOCUMENT IMMEDIATELY!

COMPLETE WHEN SUBMITTING TO FAX DEPARTMENT

Date: October 9, 2001

File Symbol: ABAM-223

Submitted By: Rosemary D. Resnick

Phone: (617) 854-2248

Comments:

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AMERICAN BAR ASSOCIATION

**Standing Committee on
Federal Judiciary**
740 15th Street, N.W.
Washington, D.C. 20005-1022
(202) 662-1760

Please respond to:
One International Place
Floor 42
Boston, MA 02110
617-951-7521

October 9, 2001

VIA FACSIMILE AND FIRST CLASS MAIL

Hon. Viet D. Dinh
Assistant Attorney General
U.S. Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue, NW
Room 4640
Washington, D.C. 20530

Dear Mr. Dinh:

I wish to address several of the issues raised in your September 26, 2001 letter. It seems that we are getting closer to a mutual understanding of the Committee's procedures and the basis upon which members evaluate nominees. I must begin with the caveat that I am not at liberty to discuss specifics regarding the investigation of a particular nominee, and nothing in this letter should be construed to be a reference to any specific investigation. I should also say that I intend by this letter to characterize, but not modify, the descriptions of the evaluation process contained in the pamphlet "Standing Committee on Federal Judiciary: What It Is and How It Works" (July 1999).

The members of the Standing Committee are appointed for no more than two staggered three-year terms by the ABA President at the time vacancies occur. Although I have not been party to the appointment process, for the almost six years I have been a member of the Committee I have worked with, and have first-hand knowledge of, those appointed to this Committee. They are distinguished practitioners of the highest integrity and professional accomplishment. They take seriously the solemn responsibility of their office to fairly and impartially assess the qualifications of nominees to federal judicial office. The members bring to their work their collective professional experience, and the individual perspectives of their diverse

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professional experience, and the individual perspectives of their diverse backgrounds and professional careers. There are lawyers from large firms and small firms, big city practices and not-so-big city practices; there are specialists in a number of legal disciplines; several are fellows of the American College of Trial Lawyers, others have distinguished themselves with similar honors. But they are united in the firm belief that peer review of federal judicial nominees ensures the preservation of the quality of the federal judiciary. It is for this reason that they labor many hours in near anonymity in the discharge of their responsibilities.

The exercise undertaken is not merely an objective assessment of a checklist of minimum professional benchmarks. In addition, it is a qualitative investigation, based on views of sitting judges, fellow practitioners and others who are in a position to comment meaningfully on a nominee's qualifications for a lifetime appointment as a federal judge. The members of the Committee are, in effect, jurors who weigh the evidence bearing on the nominee's qualifications.

The Committee's three evaluation criteria are directed solely to professional qualifications - integrity, professional competence and judicial temperament. The Committee's task is to determine on the basis of the nominee's record, whether or not the nominee meets or exceeds the Committee's very high standards and will be able adequately to perform the duties of a federal judge. Each of these criteria could be disqualifying; where that line is drawn, depends to some degree on the review of the record by individual members of the Committee. While it is unlikely that two Committee members would review the evidence relevant to one of the criteria, and reach diametrically opposite views, it is entirely plausible that members could reach different conclusions on two different criteria, resulting in votes that span the range. For example, if one member places relatively little weight on actual trial experience and another considers such experience critical for appointment to a trial court, their votes will reflect that. Some members might view intellectual ability, as reflected by scholarly writing, as being indicative of the ability to learn those skills that might not be obvious in a nominee's background; others might not.

Thus, the evaluations are not, and cannot be, based solely on objective facts. They are based upon the facts, opinion and judgment of colleagues, judges and others who know the nominee and then the assessments and judgment of Committee members reviewing the reports and recommendations

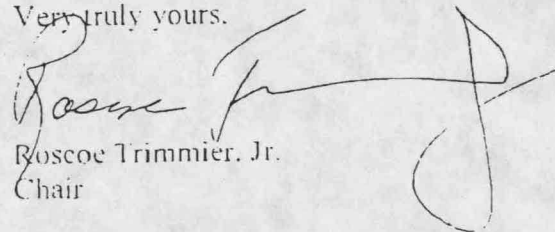
Hon. Viet D. Dinh
Page 3 of 3
October 9, 2001

of investigators. Most investigations result in unanimous or near unanimous ratings - a remarkable circumstance given the complexity of the considerations upon which the ratings are based. Indeed, historically, most nominees are at least qualified and a clear pattern of their qualifications emerges fairly early in the investigation.

Where there are conflicting evaluations, or where a clear pattern regarding qualifications is not present, there might be room for legitimate disagreement. In circumstances where reasonable people might reach different conclusions on the same record, split votes of the Committee are likely. The procedures of the Committee do not provide unbridled discretion to members or allow votes based solely on personal predilections. The criteria are circumscribed but are sufficiently flexible to permit a range of views to be expressed before a majority view emerges. For this reason, I do not concur with the view that those procedures require improvement. However, I would be pleased to discuss with you ways in which the nomination process might be improved and less burdensome or intrusive for the nominees.

I hope this responds to your concerns. I look forward to our continuing cooperation in assisting the Administration and the Senate in the confirmation of judicial nominees.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Roscoe Trimmier, Jr.", with a long, sweeping horizontal stroke extending to the right.

Roscoe Trimmier, Jr.
Chair

RT/rdr

cc: The Honorable Patrick J. Leahy
The Honorable Orrin G. Hatch
The Honorable Alberto R. Gonzales
ABA Standing Committee on Federal Judiciary

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e-mail Alex on Pens

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

DRAFT

August 28, 2001

late '80's

Martha W. Barnett, President
American Bar Association
740 15th Street, N.W.
Washington, DC 20005-1019

Dear Ms. Barnett:

I write to express my concern about the recent reports questioning the impartiality of the ABA's ratings of Federal judicial nominees. As you may be aware, Professor James Lindgren of Northwestern University has conducted a study comparing the ABA ratings of President Clinton's confirmed Federal circuit court nominees with the ratings of President George H.W. Bush's confirmed circuit court nominees. Professor Lindgren reported some of his study's findings in an August 6 op-ed in the *Wall Street Journal*. The reported findings are disturbing and raise questions about the ABA's evaluation process.

Professor Lindgren's study found that among nominees with no judicial experience, Clinton nominees received much higher ratings than their credentials would predict when compared with Bush nominees. For example, the odds of a Clinton nominee receiving the ABA's highest rating of "unanimously well qualified" were between 6.8 and 10.9 times higher than for Bush nominees with similar credentials. Moreover, a Bush nominee with top credentials – such as prior judicial experience, a top-ten law school education, private practice experience, government practice experience, and law review or a Federal clerkship – had a lower chance (77%) of getting the highest ABA rating than a Clinton nominee who had *none* of these credentials (81%). A Bush nominee with none of these credentials, on the other hand, had only a 9% chance of receiving a unanimous "well qualified" rating.

Moreover, the reported study finds that, had the ABA applied the same credential-driven scrutiny to Clinton nominees as it did to Bush nominees, only 48% of Clinton nominees would have been rated "unanimously well qualified," as opposed to the 67% that actually received that top rating. Although the study found no appreciable difference between ratings assigned to Bush and Clinton nominees with judicial experience, the study did find that minority Clinton nominees received slightly lower ABA ratings than their credentials would predict, while minority Bush nominees received *much* lower ratings than their credentials would predict. The study

DRAFT

concluded, "In other words . . . the Bush and Clinton nominees had on average identically strong qualifications but received different ratings by the American Bar Association." This study raises serious questions about the neutrality and fairness of the ABA evaluation process, and whether it can evaluate judicial candidates without bias toward the President who nominated them.

I further note that compounding the questions raised by the study is the ABA's failure to live up to its promised pace of evaluating President Bush's judicial nominees. When we met earlier this year, ABA representatives pledged to submit ratings within thirty days of a candidate's nomination. However, the nomination of Timothy Tymkovich has been pending for more than thirteen weeks without an ABA rating. The nomination of Lavenski Smith was pending more than eleven weeks without an ABA rating. The nominations of Sharon Prost and Carolyn Kuhl were pending for nine or more weeks without an ABA rating. The nominations of Harris Hartz and Richard Clifton have been pending more than nine weeks, still without a rating. The evaluations of Miguel Estrada, Terrence Boyle, Michael McConnell, and Charles Pickering, Sr., took more than eight weeks after their nominations. It took the ABA six weeks or more to submit ratings for John Roberts, Jr., Priscilla Owen, Terry Wooten, and James Gritzner; more than seven weeks for Laurie Smith Camp; and more than eight weeks for Paul Cassell, John Bates, and Reggie Walton. The nominations of Michael Melloy and Michael Mills have been pending more than six weeks without a rating. Given the scheduling constraints on the Senate confirmation process and Chairman Leahy's stated practice that he will not schedule hearings for President Bush's nominees prior to the ABA's evaluation, any undue delays seriously impact our system of justice for American citizens.

The combination of Professor Lindgren's study and the significant delay in ABA ratings inevitably begs the question of what exactly the ABA rating process entails. To date, the ABA rating letters simply state the ratings – they provide no basis for the ABA's decision or information about the process by which nominees are evaluated. Given the role the current Senate Judiciary Committee has given the ABA, the Senate and the citizens each Senator represents deserve to know how the ABA arrives at its final ratings of nominees. I am therefore requesting a detailed explanation of the process by which the ABA evaluates judicial nominees, including the objective and subjective factors the ABA considers and the weight given to each; how the ABA measures nominees' qualifications; the persons with whom the ABA consults on nominees' qualifications; and how those persons are identified. I would like to know how the voting is conducted and how any reports or written materials are maintained. In addition, I would appreciate hearing your view of what accounts for the differences illuminated in Professor Lindgren's study between the ABA's ratings of President Clinton's judicial nominees and the ratings it assigned to the nominees of the first President Bush, and what the ABA does to ensure political neutrality.

Kyle Sessions cc: re Cassell

Pauls

DRAFT

August 28, 2001
Page 3

Thank you in advance for your response.

Sincerely,

Orrin G. Hatch
Ranking Republican Member

OGH:rmj

cc: ABA Standing Committee on the Federal Judiciary

~~CONFIDENTIAL~~

Brett

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FAX TRANSMITTAL LETTER

Total Number of pages including this transmittal letter: 4

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Hon. Alberto R. Gonzales	Counsel to the President	202-456-6279	202-456-2632

FROM: Roscoe Trimmier, Jr.

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Please respond to:
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September 19, 2001

VIA FACSIMILE AND FEDERAL EXPRESS

Hon. Viet D. Dinh
Assistant Attorney General
U.S. Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue
Washington, D.C. 20530

Dear Mr. Dinh:

This is in response to your September 6, 2001 letter regarding the Standing Committee's evaluation of Paul G. Cassell. I apologize for not responding sooner, but I am sure you understand, given the tragic events last week and the delay in my return from Washington. Although, the differences in our respective views on these matters seem relatively unimportant now, I think it is appropriate for you to have my response.

Let me first state that the rating given to Mr. Cassell, as reflected in my letters dated August 20, 2001, to the members of the Senate Committee on the Judiciary and the Counsel to the President, was "Well Qualified." The rating was based on a substantial majority vote of the Committee; that a minority of the Committee found him less than "Well Qualified" in no way alters the Committee's official rating.

The procedures you describe in the third through sixth paragraphs of your letter are procedures governing the investigation process before the preparation and circulation of a Formal Report and ensuing vote. Those procedures are employed when an investigation reveals facts about the nominee which might require his or her response for clarification.

Under Committee procedures, a nominee is entitled to refute adverse

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Hon. Viet D. Dinh
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information, if the information can be disclosed without breaching the promise of confidentiality. If not, the Committee does not consider those facts in its evaluation unless there is a waiver of the confidentiality or the information is otherwise known to, and is discussed with, the nominee. Thereafter, the nominee is entitled to a rating that is determined by at least a majority of the Committee. Nominees are not entitled to a unanimous rating.

As you know, I cannot discuss the details of a specific investigation; however, I can assure you that this investigation was properly conducted in accordance with Committee procedures. After reviewing the Formal Report and recommendation, a substantial majority of the Committee voted to rate him "Well Qualified;" a minority held different opinions.

Under the circumstances, there is nothing for Mr. Cassell to address or to which a response can be directed. This is simply a matter where, on the record of the Formal Report, Committee members, having different perspectives and, perhaps, different views on the minimum qualifications for a lifetime appointment as a United States District Court judge, reached different conclusions.

A split vote is not that rare. One of the reasons that the Committee rating is determined by majority vote is to mitigate the significance of minority votes. It is a procedure no different from that giving rise to dissenting opinions in appellate cases or majority votes in Congress. In each case the majority prevails, but the minority is entitled to express its views.

The only circumstances under which the Committee has disclosed the basis of ratings are for Supreme Court nominees or where the rating was "Not Qualified" and the Committee was asked to testify at the confirmation hearing. Even under these circumstances, we do not breach the promise of confidentiality.

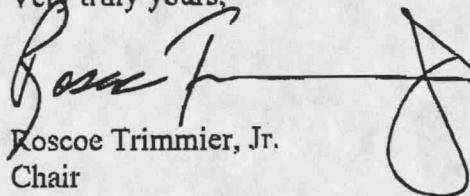
I do not see the wisdom of disclosing the basis for Committee votes, unless the majority vote is "Not Qualified." Unnecessary and inappropriate focus on the basis for minority votes would not be fair to the nominee because, that information would be part of the public record and might be considered out of context with the other aspects of the investigation. With the undue focus on the basis for minority votes, the confidentiality of the process would also be threatened. Early last week, I discussed these concerns with Judge Gonzales, Counsel to the President.

Hon. Viet D. Dinh
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With respect to future votes, the Standing Committee will adhere to its established procedures and disclose any adverse information to the nominee before it considers that information in its vote. That is the notice and opportunity to address concerns provided by our procedures. Accordingly, I cannot represent that there will be notice of, and an opportunity to address, any "Not Qualified" votes where those votes are a minority. If the "Not Qualified" votes are the majority view, the notice and opportunity to be heard is before the Senate Committee on the Judiciary.

I hope this addresses your concerns. Please call me if you wish to discuss this further, or if you have any additional questions concerning the Committee's procedures.

Very truly yours,



Roscoe Trimmier, Jr.
Chair

RT/rdr

cc: The Honorable Patrick J. Leahy
The Honorable Orrin G. Hatch
The Honorable Alberto R. Gonzales
ABA Standing Committee on Federal Judiciary

To: Brett

DRAFT 1

MEMORANDUM

TO: White House Judicial Selection Committee
FROM: Brett M. Kavanaugh
DATE: February 13, 2001
RE: Role of American Bar Association in President's Judicial Selection

I agree
with your
recommendation,
but we
need to
have some
Judge
opponents

This memorandum summarizes options and makes recommendations regarding the role of the American Bar Association (ABA) in the President's judicial selection process.

Background

On and off since 1952, the ABA's Standing Committee on Federal Judiciary has played a quasi-official role in the selection of federal judges -- advising the President as to potential nominees (*before* he submits a nomination to the Senate) and the Senate as to the actual nominees. (The full ABA House of Delegates elects the ABA President, and the ABA President in turn appoints the members of the Standing Committee.)

in the view of some → The ABA's "special" role in the judicial selection process has generated controversy since the outset, but especially in the last 15 years as the ABA has become increasingly politicized. In that time, the ABA has adopted the "liberal," Democratic position on issues as varied (and unrelated to the legal profession) as abortion, affirmative action, flag desecration, religious liberty, habeas corpus reform, tort reform, funding for the arts, welfare reform, and deportation of criminal aliens. 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. In short, the ABA has long since given up any pretense of being an apolitical organization devoted solely to the well-being of the profession.

Given the strong ideological views of the ABA and its members -- as reflected in its increasingly predictable stances on divisive social and policy issues -- it is no surprise that the ABA has continually made its views known on controversial political matters. In 1994, ABA President George Bushnell characterized the House Republicans as "Reptilian bastards." In 1992, the ABA gave Anita Hill an award for her "key testimony" against Justice Clarence Thomas. In 1999, the ABA invited President Clinton to give its annual keynote address shortly after he was held in civil contempt by Judge Susan Webber Wright. The ABA's decision to invite President Clinton sparked criticism from the *Washington Post* editorial page, which argued that the ABA's choice was "odd": "Of all the lawyers in the United States, the ABA decided to

hear from President Bill Clinton. . . . [I]nviting a perjurer to speak to a professional association of attorneys is a move that could not be better calculated to entrench the larger public's contempt for lawyers as people who twist the truth for selfish ends."

The ABA also has revealed its partisan bent in its ratings of judges, particularly the appointees of President Reagan and President Bush. For example, the following judges – some of whom are among the best appeals court judges ever appointed – received a lowly "qualified/not qualified" rating from the ABA: Richard Posner, Frank Easterbrook, Alex Kozinski, Laurence Silberman, Jerry Smith, and Michael Luttig. In September 1987, a substantial minority of the ABA Committee rated Judge Bork "not qualified" to sit on the Supreme Court notwithstanding that he had served as Solicitor General, D.C. Circuit Judge, Yale Law School professor, and partner at a leading national law firm.

All of this is not to suggest that the ABA cannot adopt strong policy positions or express its views. On the contrary, it obviously can. The narrow question here, however, is whether such an overtly ideological group should play a quasi-official role in the judicial selection process.

In light of the ABA's ideological views, Senator Hatch ended the ABA's quasi-official role in the Senate confirmation process in 1997. He stated that "[o]ne cannot seriously dispute that the ABA has become a political interest group." Although Senator Hatch explained that the ABA was of course free to adopt such views, it was "inappropriate," he said, "for such a group to play any formal, officially sanctioned role in evaluating judges. One cannot assume that a group as politically active as the ABA can at the same time remain altogether neutral." Senator Hatch continued: "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."

The Republicans have not been alone in their criticism of the ABA's preferred position in the process. 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." What is more, past Presidents in both parties have occasionally criticized the ABA or evaded the ABA process.

At his last press conference, in response to the ABA rating one of his nominees "not qualified," President Kennedy stated that the ABA was "not infallible" and that "[t]here are a good many judges who have been opposed who have been rather distinguished."

President Johnson avoided the ABA on isolated occasions, for example by nominating Homer Thornberry to the Fifth Circuit without seeking an ABA rating beforehand.

President Nixon refused to submit Supreme Court nominees to the ABA in advance.

President Carter established regional circuit judge nominating commissions that essentially circumvented the ABA process.

President Reagan did not seek ABA ratings except for those nominees the President intended to nominate, thus eliminating the ABA from any earlier role in the process.

At the conclusion of the Bush Administration, Attorney General Barr stated his intent to downgrade the ABA's role in the judicial selection process.

Options

President Bush faces two fundamental options regarding the role of the ABA in the President's judicial selection process.

First, the President could follow the lead of Senator Hatch and treat the ABA the same as any other group. Under this approach, the President would receive recommendations and input from the ABA, just as he receives recommendations and input from numerous other groups and individuals. But the President would not give the ABA a quasi-official, pre-nomination role.

The advantages of this approach are as follows:

- (i) This approach would ensure that all persons and groups participate on an equal basis in the process. A single group would no longer receive an unfair preference (a group that, in this instance, happens to be ~~overly hostile~~ *disagree with* to many of President Bush's policy positions);
- (ii) This approach may better inoculate the President's important nominees from the harm (perhaps fatal) of the negative ABA ratings some that important Bush nominees ~~will inevitably receive~~ *may*;
- (iii) This approach would serve the cause of sound constitutional government, as this President would not continue the past practice of "farming out" to a private group the President's constitutional duty to study, assess, and nominate judges; ~~and~~
- (iv) In light of Senator Hatch's 1997 decision regarding the ABA, this approach would ensure symmetry in Presidential and Senatorial treatment of the ABA; ~~and~~
- (v) As a broader matter, this approach would help (along with Senator Hatch's 1997 decision) to publicly unmask the ABA as a political organization, rather than a supposed neutral arbiter of law. That will be of assistance when the ABA chooses (as it almost certainly will) to criticize policies and decisions of the President, the Attorney General, and the Department of Justice.

Second, and alternatively, the President could formally utilize the ABA so that the ABA would provide advice and ratings on potential nominees *before* the President submits them to the Senate. (The President presumably could utilize the ABA for all nominees, only for circuit and district court nominees, or only for district court nominees.)

The advantages of this second approach are as follows:

- (i) It may temporarily placate the ABA and temper its opposition and hostility to the Administration's policies and nominees;
- (ii) It might generate some praise (or at least avoid some criticism) from certain editorial pages and opposition Senators; and
- (iii) It might assist the President in fending off Senators who are seeking nomination of unqualified nominees.

Recommendations

1. I recommend that the President follow the lead of Senator Hatch and treat the ABA like every other interested legal, political, and ideological organization in the United States. The President should *not* submit the name of a nominee to the ABA before he submits that nomination to the Senate. As a matter of sound government and fairness, there is no logical reason why the ABA should be accorded preferential treatment over any other group, whether it be People for the American Way, the Federalist Society, the NAACP, or the American Enterprise Institute. That is particularly so given the evident and deeply rooted hostility of the ABA to the President's policy positions. (By saying as much, I do not mean to criticize the ABA for its strong views; I simply suggest that any organization with such strong views should not perform such a quasi-official role in the judicial selection process.)

2. If the President follows this course, there may well be some editorial criticism of the President, as well as some tactical responses from Senate Democrats. In my view, the proper role of the ABA in the judicial selection process raises an important question of constitutional principle. As such, the prospect of temporary, tactical criticism should not unduly alter the decision. In any event, as explained below, we can communicate good answers in response to any such criticism.

Moreover, to the extent the reactions of others are relevant at all, it bears mention that the President's decision would generate enthusiasm from Republicans and conservatives (who have been bitterly criticizing the ABA for over a decade). Any such decision also would demonstrate the President's strong support for Senator Hatch's courageous 1997 decision to eliminate the ABA's formal role in the process.

3. In response to the inevitable media questions if the President chooses this course, I would recommend three primary messages: (i) the President has studied and been persuaded by the 1997 decision of Senator Hatch to treat the ABA like every other interested group; (ii) the President does not believe it fair or appropriate to single out one group and give it preferential treatment above all other groups who are interested in the judicial selection process; and (iii) the President continues to welcome the views and input of the ABA in the nomination process, just as he will welcome the views and input of all interested parties. The question, therefore, is not whether the ABA's voice should be heard; it is whether the ABA should be entitled to have its

voice heard *before* and *above* all other voices.