Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees

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On March 17, 2009, President Barack Obama made public his decision to invite the American Bar Association (ABA) Standing Committee on the Federal Judiciary to return to its traditional role of evaluating the fitness of potential nominees to the federal courts. The ABA had maintained this quasi-formal role in vetting potential judges since the mid-twentieth century but was excused from advising the executive in March 2001 by the George W. Bush administration. This action followed long-standing accusations by conservatives of liberal bias in the ABA's ratings of nominees. Obama's reversal prompted a revival of these criticisms from the right and was widely praised by those sympathetic with the president.

The decisions to alter the ABA's participation in judicial selection by both George W. Bush and Barack Obama have prompted considerable debate over the proper role of the ABA's Standing Committee and whether it favors liberal prospective jurists over those who are conservative. This concern is not surprising, as the judicial selection process has become increasingly politicized in recent decades (see e.g., Bell 2002; Goldman 1997; Goldman, Slotnick, Gryski, Zuk and Schiavoni 2003; Scherer 2005; Scherer, Bartels and Steigerwalt 2008). Senators are now more likely than in earlier periods to scrutinize lower court nominees, and presidents expend considerable political capital to get controversial nominees confirmed. Not coincidentally, this increase in Senate scrutiny is concurrent with efforts by presidents to staff the lower federal courts with jurists sympathetic to their ideological preferences (Scherer 2005; Scherer, Bartels and Steigerwalt 2008).

Because of the dynamic nature of the judicial selection process and the fluid role of the ABA Standing Committee on the Federal Judiciary, questions as to potential bias in the ABA's nominee ratings have again taken center stage. In this paper, we (1) investigate what factors explain the ABA ratings of judicial nominees to the United States Courts of Appeals from 1985-2008 and (2) probe whether prospective Republican and/or conservative judges are systematically disadvantaged.

The ABA and its Evaluation of Judicial Candidates

In his seminal study of the American Bar Association's role in the vetting process for federal judges, Grossman (1965) explained that the ABA has evaluated prospective judicial nominees since 1946 and established a Standing Committee on the Federal Judiciary in 1949 (Grossman 1965, 52; 68). The organization maintained this role throughout the 1950s, and in 1958, the ABA began using a four-point scale to evaluate potential judicial nominees (76). In these formative years, the ABA was recognized as having a special expertise necessary in the vetting of judicial candidates, and its participation was maintained despite partisan turnover in the White House until 2001. As discussed above, President Obama recently reinstituted the ABA to its traditional role in evaluating potential nominees.

The formal process by which the Committee evaluates nominees has been relatively static since the initial involvement of the ABA in the mid-1940s. The Committee has been comprised of 15 members since 1987.[1] This includes one member from the Federal Circuit, one member

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[1] From August 1977 until early 1987, the Standing Committee included 14 members (Abraham 1990, 62).

from the D.C. Circuit, one member from each of the 11 numbered geographical circuits, and a second member from the Ninth Circuit (due to its large size). The Standing Committee also includes an at-large chairman not affiliated with a particular circuit. Members of the Committee are appointed by the President of the ABA for staggered three-year terms, and they may not serve more than two terms consecutively. They are drawn from a variety of professional backgrounds, are expected to be of the highest integrity and stature, and perform their duties *pro bono* (American Bar Association 2007, 1).

Once given a judicial candidates' name, the Standing Committee on the Federal Judiciary is charged with evaluating his or her (1) professional competence, (2) integrity, and (3) judicial temperament. In determining professional competence, a great deal of attention is given to a potential judge's prior legal experience. Since the Carter administration, the Committee guidelines have stated that "ordinarily a nominee to the federal bench should have at least twelve years' experience in the practice of law" (American Bar Association 2007, 4).[2] Both courtroom experience and trial experience as a lawyer or trial judge are considered, as are activities such as participation in administrative proceedings or arbitration, or the instruction of law school courses. The Committee's guidelines also state that it "may take into consideration whether opportunities for advancement in the profession for women and members of minority groups were limited" (American Bar Association 2007, 4).

The Committee's evaluation of a nominee's integrity and judicial temperament, however, is more subjective. This is the part of the ABA's evaluation process that has been singled out most often for criticism. The language of the Committee's guidelines as revised in 1980, 1983, and 1988 prohibited the investigation of political or ideological philosophy "except to the extent that extreme views on such matters might bear upon judicial temperament or integrity" (Kamenar 1990). Although this clause was subsequently removed, representatives of the ABA posit that the result was a change in perception of the committee by its presidential and senatorial audiences rather than the committee's actual behavior (Grassley 1990, 107). The guidelines continue to include "character and general reputation" among the criteria for integrity and "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law" as indicators of judicial temperament. The concern expressed by critics is that opinions about character and reputation may be colored by one's ideological preferences, as might views about compassion, open-mindedness, and freedom from bias.

Prospective judges evaluated by the committee are given a personal data questionnaire (PDQ) that includes a series of questions about their professional qualifications, employment history, accomplishments, affiliations, investments, community service, and past allegations of criminal or unethical behavior (Haire 2001, 2-3). Prospective judges are also asked to provide writing samples and a list of professional contacts. After receipt of the PDQ, the primary responsibility for evaluation of a nominee goes to the committee member in whose circuit the

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[2] Prior to the Carter administration, the Committee's guidelines required fifteen years of legal experience. This was scaled back to accommodate President Carter's desire to appoint minorities and women to the federal bench who sometimes lacked the experience of their white male counterparts.

prospective judge would serve.[3] Paul D. Kamenar of the conservative Washington Legal Foundation argues that this initial investigation is crucial with regard to the fate of the prospective nominee (Kamenar 1990). The Committee member conducts confidential interviews with at least 40 individuals fit to assess the fitness of the individual for the bench with more conducted if questions are raised about the candidate (Raven 1990, 81). During the required personal interview of the nominee, individuals are given the opportunity to respond to any negative charges made against them. The member of the Committee conducting the investigation then uses the available information to issue a report to the Chair of the Standing Committee with a preliminary rating for the candidate. This report, after being reviewed by the Chair, is sent to each member of the Standing Committee. After individual review of this report, each member submits his vote to award the nominee a rating to indicate fitness for the federal bench.. A judicial candidate can be rated as either "Well Qualified," "Qualified," or "Not Qualified."

This range of ratings has been in place since early 1989, when the Committee eliminated the rating of "Exceptionally Well Qualified" that it had used previously, making "Well Qualified" the highest possible rating (Martinek, Kemper, and Van Winkle 2002). Individuals rated as "Well Qualified" are thought to have exceptional judicial ability, while a "Qualified" rating indicates the candidate meets the Committee's standards and should perform satisfactorily as a federal judge. A "Not Qualified" rating indicates the prospective judge does not meet the Committee's minimum standards. Candidates rated as "Not Qualified" are likely to have difficulty with the confirmation process, and may be withdrawn.

If the Standing Committee is unanimous in its rating, then that rating is reported to the White House, Department of Justice, and Senate Judiciary Committee via letter by the Chair of the Standing Committee. If the Standing Committee is split, the Chair reports "that the nominee received a certain rating from either a majority (8-9 members) or substantial majority (10-13 members) of the Committee and notes that a minority gave the nominee another rating or ratings. The majority rating represents the Committee's official rating of the nominee" (American Bar Association 2007, 9). The Standing Committee makes public only the final rating given to the nominee, and the publication of this rating is usually the last action taken by the ABA in the process. In those rare cases in which a nominee received a "Not Qualified" rating or a split "Not Qualified" rating, the Senate Judiciary Committee may invite someone from the Standing Committee to testify at the nominee's confirmation hearing and explain the reasons behind the "Not Qualified" evaluation.

Recent Changes in the Role of the ABA in Judicial Selection

As discussed above, the ABA has played a role in vetting nominees to the federal courts for over sixty years. The ABA began vetting potential judges to the lower federal courts at the

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[3] However, if for some reason that Committee member is unable to conduct the nomination, a former member from that circuit or a current member from another circuit may also conduct the investigation. More than one member may also be involved in the investigation if, for instance, the nominee has been employed in more than one circuit (American Bar Association 2007, 5; 7).

invitation of Senator Alexander Wiley (R-WI), then-Chair of the Senate Committee on the Judiciary, in 1946 (Grossman 1965, 64). Wiley sought to use the Committee to "stem the tide of 'leftist' judges periodically appointed during Democratic administrations...[announcing that] 'full weight will be given to the recommendation of recognized legal groups which have not been accorded the weight and respect which are their just due'" (Grossman 1965, 64). In the beginning, the "political orientation and policy values" of the ABA were "much closer to the Republican than the Democratic 'orbit' of supporting groups" (Grossman 1965, 80).[4] Despite this early political concordance between the ABA and Republicans, the ABA's relationship to the major political parties has changed over time. While the Nixon administration reacted with anger at the ABA's evaluation of its Supreme Court nominees (Abraham 1990, 310-311), the ABA Standing Committee was still widely viewed by liberal organizations as favoring conservative nominees (Ross 1990, 36-39).

President Carter mitigated the influence of the Standing Committee through the creation of the United States Circuit Judge Nominating Commission in 1977. Carter sought to appoint more women and minorities to the federal bench, but many of these non-traditional nominees received poor ratings due to their relative lack of legal experience.[5] Carter therefore used the independent evaluations provided by his commission to soften the impact of many of his nominees' poor ABA ratings (Ross 1990, 39).

The Reagan administration also minimized the influence of the ABA by submitting the names of potential nominees to the organization only after their selection by the White House, making the Reagan administration the first Republican administration in 30 years in which the ABA Standing Committee on the Federal Judiciary was not actively utilized and consulted in the pre-nomination stage (Goldman 1997, 323-327).[6] Modern conservative criticism of the ABA Standing Committee, one scholar argues, is a product of both "the ascendancy of ideological conservatism during the Reagan Administration [including Reagan's emphasis on selecting ideologically similar judicial nominees, as well as] changes within the ABA itself" (Ross 1990, 43). In particular, Ross states that Reagan attempted to appoint judicial nominees who were more conservative than the leadership of the ABA while the ABA was simultaneously diversifying the distribution of ideological preferences on the Standing Committee. This move resulted in the frequent splintering of the Standing Committee toward judicial nominations, as well as the belief that the Committee was increasingly hostile toward conservative judicial nominees (43-44).

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[4] In particular, Ross (1990) noted that Democratic Presidents Truman, Kennedy, and Johnson had poor relationships with the ABA Standing Committee which ranged from "stormy" to "indifferent" (38, fn. 177)

[5] The ABA's evaluation criteria have always suggested that nominees possess a minimum number of years of experience in the practice of law. Due to barriers to admission to law school for minorities and women, and accompanying discrimination at law firms for these two groups, many of Carter's nominees necessarily did not meet the ABA's minimum requirements and so were rated poorly based on this criterion.

[6] The Reagan administration would select nominees and then forward their names to the ABA and FBI. The ABA's evaluation would therefore take place before the nomination was sent to the Senate but only after the president had made his selection (Goldman 1997, 323-4).

Beyond its treatment of judicial candidates, the liberal positions taken by the ABA House of Delegates[7] on hot-button issues such as abortion, capital punishment, immigration, welfare reform, and arts funding, among others, have caused many conservatives to characterize the ABA as "left-leaning in its policies and in its role evaluating the worthiness of presidential nominees to the federal bench" (see e.g., Greenberger and Cloud 2001; Houston Chronicle News Service 1997; LaMarche 2001). The embrace of liberal policy positions inflamed conservatives and cast suspicion on the Standing Committee, which insisted its activities were separate from those of its parent organization (Raven 1990, 79-80). Although the ABA sometimes frustrated presidents with its evaluations, judicial scholar Henry Abraham (1990, 69) observed that the group tends to bend to the will of incumbent administrations regardless of their political leanings to secure its privileged role in the vetting process; he argues this is especially true since the Carter and Reagan administrations.

For most of its history, the Standing Committee reviewed the qualifications of all potential nominees also evaluated by the Department of Justice. Recent presidents have varied in their reliance on the Standing Committee. Presidents Reagan and George H.W. Bush chose to forward the names of judicial candidates only after their selection, but before the nominations were sent formally to the Senate (Abraham 1990). President Clinton chose to involve the ABA once a potential nominee was selected. The Clinton administration would simultaneously alert the ABA and the FBI, and each would conduct an independent investigation (Wilson 2003, 32). The distribution of ratings given to potential jurists for each president is listed in Table 1.

[Table 1 about here.]

As Grossman observed, "As with any political force that derives its strength from the indulgences of the President or the Senate, the ABA will occupy a role that reflects the needs of the officials who indulge it" (1965, 5). After more than fifty years of evaluating nominees at the request of the incumbent administration, the Standing Committee was removed from the vetting process in March 2001. In explaining the reasons for this change, representatives of the Bush (43) administration invoked many persistent complaints about the arrangement. White House Counsel Alberto Gonzalez argued that the ABA should not be given a role in judicial selection not provided to other groups (Murray 2001). Attorney General John Ashcroft asserted that the ABA's exclusion was justified by its record of bias, or even the possibility it could exist (Howlett 2001).

This decision by the Bush (43) administration was welcomed by conservative activists who believed the ABA had hamstrung efforts by earlier Republican presidents to appoint their ideological allies to the federal bench (see e.g., Goldstein 2001; Greenberger and Cloud 2001). The move was also praised by Senator Orrin Hatch (R-UT), then the chairman of the Senate Judiciary Committee (Goldstein 2001; Murray 2001). In what may be characterized as an ironic twist, ABA President Martha Barnett expressed concern that removing her organization from the vetting process meant that "politics may be taking the place of professionalism in the review" of potential judges (Murray 2001). She also argued that ABA evaluation "provides a buffer from partisanship and a buffer from political patronage" (Goldstein 2001). The ABA continued to

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[7] The House of Delegates is the policy-making body of the American Bar Association.

evaluate candidates for the bench, however, as the Senate Judiciary Committee decided it would forward the names of candidates to the ABA for review once they were received by the Senate, and wait for these reviews before allowing judicial nominees to move through the confirmation process (Rutkus 2008, fn. 114).[8] Thus, despite President Bush's removal of the ABA from its traditional role in vetting nominees, the ABA continued to influence the appointment of nominees to the federal bench because the Judiciary Committee continued to take seriously determinations that a nominee was "unqualified" for a federal judgeship.

Evaluating the Ratings of the ABA's Standing Committee on the Federal Judiciary

Political arguments concerning the proper role of the ABA's Standing Committee in the evaluation of judicial nominees have inspired studies by other social scientists and legal scholars. Grossman (1965, 126) argued more than four decades ago that the ratings system "is clearly susceptible to misuse" but did not test empirically whether such abuse occurred. He did, however, provide a comprehensive early history of the Standing Committee and its procedures.

The first important empirical studies of the ABA's ratings were contributed by Slotnick (1983a, 1983b), who examined the effect of individuals' backgrounds on the ratings of Carter nominees during the Ninety-sixth Congress. He found that race, gender, caliber of a nominee's legal education, clerkship, publications, and legal experience influenced ABA ratings. Later research followed Slotnick's lead, while examining different pools of judicial candidates and utilizing different modeling strategies.

A series of recent studies of the ABA ratings given to prospective federal judges were published in the wake of the Bush administration's decision in 2001 to remove that organization from the vetting process. Haire's (2001) study of confirmed nominees to the U.S. Courts of Appeals from 1977-1994 was the most comprehensive of these articles. She determined that the causal factors likely to result in a "Well Qualified" rating are increased judicial or legal experience, and that being a nontraditional nominee (female or minority) reduced the probability of that outcome. Although Haire studied only confirmed nominees to the circuit courts, her study substantiated some of Slotnick's earlier findings over a much longer time period.

The most provocative empirical study of ABA ratings to date was conducted by Lindgren (2001). In his study, Lindgren examined the influence of eight causal factors on the ABA ratings of President George H.W. Bush's and President Clinton's confirmed circuit court nominees. Lindgren concluded that the ABA was biased against Bush nominees who lacked judicial experience. However, he also found that Bush nominees with judicial experience received ratings as good as or better than comparable Clinton nominees. It is notable that Attorney General John

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[8] Perhaps most interestingly, this decision was made by Judiciary Chairman Patrick Leahy (D-VT) after control of the Senate switched hands in the summer of 2001 as a result of Jim Jeffords' decision to leave the Republican Party and caucus with the Democrats. When the Republicans regained control of the Senate in 2003, Orrin Hatch also regained the Chairmanship, and he continued this practice. For a more detailed discussion of the operation of the Senate Judiciary Committee in the judicial nomination process, see Rutkus (2008).

Ashcroft cited Lindgren's study when explaining to the ABA the reasons why the Standing Committee was stripped of its role in the vetting process (Howlett 2001).

Saks and Vidmar (2001) criticized Lindgren's decision to include in his analysis only candidates who were eventually confirmed for circuit judgeships. Additionally, Saks and Vidmar took issue with Lindgren's broad claims regarding the ABA's ratings of judicial nominees. They noted that Lindgren's conclusions were restricted to a subset of nominees: those who were confirmed and lacked judicial experience. As a result, Lindgren's ultimate conclusions may not extend to potential nominees more generally. Lindgren was also criticized for drawing conclusions from conversations and anecdotal evidence, even when unsupported by the results of his empirical analysis (Saks and Vidmar 2001).

Lott (2001) approached the question of alleged bias against conservatives directly, performing his own quantitative analysis of Clinton and G.H.W. Bush nominees. He found that Lindgren's results indicating bias in favor of Clinton nominees without judicial experience are not replicated when more sophisticated control variables (e.g., disaggregating racial groups, types of clerkships, legal experience and training) are employed in the analysis. Lott concluded that it was impossible to say whether bias definitely exists given the limited data. Interestingly, he found that racial characteristics have more influence than partisanship, with white Republicans rated highly but African-American Republicans having a very low probability of receiving a "Well Qualified" rating. Lott noted, however, that this combination could be capturing other factors related to nominee quality.[9]

Each study of ABA ratings has its weaknesses. The most problematic are omissions which bias the sample analyzed, such as Lindgren's (2001) study, which only examined confirmed nominees. All studies discussed also fail to examine district court nominees. We follow this body of research, extending it through the presidency of George W. Bush. We overcome flaws present in existing literature by examining all individuals nominated to the U.S. Courts of Appeals and rated by the ABA, rather than just those who were eventually confirmed. Future iterations of this project will extend this analysis to individuals nominated to the federal district courts.

Theory and Hypotheses

We present two competing views of the ABA's vetting process, termed in this study as the *professional theory* and the *political theory*, which reflect different characterizations of how that organization evaluates prospective judges. According to the professional theory, the ABA's Standing Committee on the Federal Judiciary evaluates the fitness of a potential judge by considering only qualifications related to that nominee's past employment and experience, without regard to partisan affiliation or ideological beliefs. Alternatively, the political theory suggests that these political factors do influence the rating a prospective judge receives from the ABA Standing Committee. In other words, the political theory of ABA ratings contends that a

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[9] Lott suggests that the variable for African-Americans in his study may be serving as a proxy for nominee quality rather race alone (2001, 53). It may also be related to the small number of African-American Republican judicial nominees in the data.

nominee whose ideological orientation is objectionable to the ABA Standing Committee will be less highly rated than a nominee with similar qualifications whose ideological orientation is more acceptable to the Committee. Proponents of the ABA's role in the judicial selection process tend to argue that the professional hypothesis rings true, while opponents of the ABA's involvement most often assert that the political theory is a more accurate accounting of the rating process.

We investigate the extent to which these two theories accurately reflect the ABA's rating of nominees to the lower federal appellate courts. We do so by constructing a predictive model to determine the characteristics and circumstances resulting in specific ratings by the Standing Committee. If prospective judges are evaluated based on their professional qualifications, then their ABA ratings should reflect their professional experience and competence. If, however, political, rather than professional, criteria determine the ABA ratings of candidates for the federal bench, the ABA, which is generally portrayed as a liberal organization, should give higher ratings to individuals of its preferred political stripe.

Among the criteria explicitly defined in the ABA's guidelines for the Standing Committee is professional experience. Grossman (1965, 112) explains that prior experience as a judge is most important to evaluators, followed by trial practice, success in legal academia, public service, and political credentials. Similarly, Haire (2001) finds that judicial and legal experience are powerful predictors of ABA ratings. Prior judicial experience, whether as a state or federal District Court judge, directly prepares an individual for the circuit bench. Experience in legal practice, whether in private practice or as a government lawyer, also provides appropriate preparation for the federal bench. Thus, the professional theory suggests that the *more years an individual has served as a judge, the higher his or her ABA rating will be*. Additionally, *the more years of legal experience in one's background, the better the ABA rating he or she will receive*.

Throughout its history, the Standing Committee has considered a background in legal academia to be a suitable substitute for courtroom experience. It is not, however, preferred over practical experience. The Reagan administration took issue with this valuation, accusing the ABA of bias against academics in its ratings (Abraham 1990, 69). While Haire's (2001) evaluation of this hypothesis failed to find a significant association between ABA ratings and employment as a law professor, Goldman found evidence that law professors nominated during the Reagan administration received lower ratings than other nominees (Goldman 1997, 343). Thus, we hypothesize that *judicial candidates employed as law professors will receive lower ABA ratings than those considered from other legal backgrounds*.

In addition to one's occupation and professional history, completion of a judicial clerkship serves as another indicator of professional competence. Lott (2001) found that those who served as law clerks, particularly for a federal appeals court judge, were more likely to receive a "Well Qualified" rating from the Standing Committee. Although he did not find such a result for the nominees submitted by George H.W. Bush or Bill Clinton, the same may be true of Supreme Court clerkships. To be selected for either position is a mark of excellence among law school graduates and indicates a high degree of familiarity with federal legal procedure. Accordingly, the final hypothesis emerging from the professional theory is as follows:

Individuals who served as law clerks for circuit judges or Supreme Court justices are likely to have higher ABA ratings than those who did not.

Alternatively, political factors may also influence ABA ratings of federal judicial nominees. If accusations of liberal bias by the ABA are true, then potential judges whose names were submitted by Democratic presidents should, all else being equal, receive higher ratings than nominees chosen by Republican presidents. This hypothesis conforms to the conclusions made by Lindgren (2001) with regard to candidates without judicial experience selected by Presidents George H.W. Bush and Bill Clinton – a relevant point given that study's apparent influence on Attorney General Ashcroft. Thus, if the political theory is correct, *prospective judicial nominees submitted by Democratic presidents should, ceteris paribus, receive higher ABA ratings than those chosen by Republican presidents.*

As discussed above, the "except" clause of the Standing Committee guidelines published throughout the 1980s indicates a preference against ideological extremists. The emphasis on compassion, sensitivity, and equal justice in determining a nominee's "judicial temperament," however, suggests a potential preference for liberal leanings. For example, the four members of the ABA who rated Judge Robert Bork as "Not Qualified" cited concerns about his level of "compassion, open-mindedness…(and) sensitivity to the rights of women and minority persons or groups" (Wermiel 1987). Watson and Stookey (1995) argue that temperament "can mean virtually anything to anybody, making it particularly susceptible to manipulation by actors in the appointment process" (75). In particular, they note that in Bork's case, the dissenting members of the Standing Committee interpreted open-mindedness and fairness as holding certain beliefs in relation to the roles of women and minorities; Bork ran into problems given the fact that he had written articles critiquing the Supreme Court's equal protection and privacy decisions (see e.g., Bork 1971). Inside the Beltway, Senator Charles Grassley (1990, 108) similarly argued in a book about issues with judicial selection that "temperament" can lead to bias towards more conservative nominees[10] It is reasonable to expect that the Committee member conducting the investigation will discover whether a prospective nominee is a committed ideological activist and respond accordingly. If the Committee skews toward the political left, then more conservative nominees should be given lower ratings. *The more conservative a potential nominee investigated by the Standing Committee, the lower the ABA rating he or she will receive.*

Some influential factors are not easily characterized as either political or professional. Among these are race and gender. Scholars including Slotnick (1983a, 1983b), Haire (2001), and Lott (2001) identify race or gender as having an effect on the ratings awarded to judicial candidates. Haire (2001) finds that nontraditional candidates were less likely to receive a "Well

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[10] However, conservative members of Congress, have, at times, relied on ABA ratings to show the high merit of stalled judicial nominees. For example, see Senator Grassley's remarks on the floor of the Senate on November 12, 2003 (149 Cong. Rec. 164, Book III, S14683-S14684). Specifically, in the face of minority opposition to several of President George W. Bush's conservative circuit court nominees, Sen. Grassley extolled the virtues of nominees who were being stonewalled by Senate Democrats. Among these virtues were the nominees' "Well Qualified" ABA ratings, which were offered as nonpartisan "proof of the pudding" of each nominee's quality and fitness for the bench.

Qualified" rating even when controlling for levels of judicial and legal experience and education. Lott (2001) provides the most precise findings in this area, concluding that African-Americans, particularly if Republican, are systematically rated lower by the ABA than similarly qualified individuals. Whether due to discrimination or acting as a proxy for other traits, we believe the findings of previous literature demand the inclusion of these factors in our explanatory model. Specifically, previous studies suggest that *minority or female nominees will receive lower ABA ratings*.

If professional considerations determine ratings awarded by the Standing Committee, the most influential causal factors should be those related to professional experience, occupation, and service in a clerkship. Alternatively, if political considerations are dominant, then the partisanship or ideology of judicial candidate should have a significant influence on nominees' ratings they are given. We argue that this framework for understanding ABA ratings of judicial nominees is valid across the period from 1985-2008.

Data and Methods

To test our hypotheses, we construct a series of causal models. We examine all nominations to the U.S. Courts of Appeals from 1985-2008, from the second term of Ronald Reagan through the second term of George W. Bush, who received ABA ratings. We include all nominations made during a Congressional term; as a result, we count separately persons who were nominated by two separate presidents, as well as persons who were re-nominated by the same president in successive Congresses. We do so because the ABA Standing Committee may decide to issue a new rating for nominees who are re-nominated in a later Congress. To this point, Stephen L. Tober, speaking on behalf of the ABA Standing Committee on the Federal Judiciary before the Senate Judiciary Committee, explained, "It is the established practice of the Standing Committee to conduct a further investigation on any nominee who is re-nominated, and the extent and scope of that further investigation is often influenced by the length of time that has passed from the date of the original evaluation and rating" (Tober 2006).[11]

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[11] Tober was testifying in reference to Brett Kavanaugh's re-nomination. Kavanaugh was originally nominated in 2003 and rated "Well Qualified/Qualified" by the ABA. His nomination was not acted upon, and Kavanaugh was re-nominated in 2005. However, after his re-nomination, the ABA conducted another investigation and changed his rating to majority "Qualified" in 2006. Tober explained, "There are at least three general reasons to support the most recent rating given to this nominee. First, there was a wider universe of individuals contacted during the supplemental evaluation, than during the initial formal report or its update…Second, some individuals who may have had no contact with the nominee in 2003 were now individuals who had crossed paths with him. Some in public service or in the practice of law in 2003 were now no longer active, having been replaced in some measure by others. And, simply put, events and times had moved on, creating new and different developments and landscapes in which the professional qualifications of the nominee could be viewed, that were not present in 2003 or even 2005…Third, it should be pointed out that with both earlier ratings issued by the Standing Committee, there was a 'minority Qualified' as part of the vote. The official rating by the Standing Committee has always been and remains the majority rating, yet

While 319 nominations were submitted to the Senate by the president during this period, only 317 received evaluations by the ABA's Standing Committee on the Federal Judiciary. This number includes both confirmed and unconfirmed nominations. This analysis builds on Haire's study by looking at a more recent grouping of nominations, and focuses its attention on nominations made during a period of both policy-based appointments and high levels of nominee scrutiny by senators, outside interest groups and the public (Goldman 1997; Scherer 2005; Scherer, Bartels and Steigerwalt 2008). We also address important critiques of previous analyses by examining the entire universe of individuals nominated to circuit court judgeships and evaluated by the ABA.

Our dependent variable is the *ABA Rating* of each nominee. We use an ordinal scale which ranges from Not Qualified to Well Qualified, and takes into account split ratings by the Standing Committee. Since our dependent variable is ordinal in nature, we employ an ordered logit model with robust standard errors clustered on the year of the nomination.[12] This method is consistent with the approach suggested but not employed by Lindgren (2001).

We created a series of independent variables in order to test the specific hypotheses listed above. In order to test the professional theory, we measure *the total number of years a nominee previously served as a state or federal court judge,*[13] *the total number of years a nominee worked as a lawyer,* and *whether the nominee worked as a full-time law professor.* We also included dummy variables for whether a nominee was a *clerk for a Circuit Court judge* or *a clerk for a Supreme Court justice* as other measures of professional qualifications.

In order to test the political theory, we employ two distinct measures to capture potential ideological and/or partisan effects: First, we created a dummy variable for whether the nominee was *nominated by a Democratic president.* Second, we used the Giles, Hettinger, and Peppers (2001) scoring methodology for assessing lower court nominee ideology (*GHP Scores*). These scores take into account the long-standing tradition of senatorial courtesy by using the home-state senators' Poole-Rosenthal Common Space scores when the home-state senators are from the same party as the president. When at least one home-state senator is not of the same party as the president, the president's Common Space score is used. With this measure, we are able to provide a more nuanced analysis of the effects of ideology, rather than simply the party of the appointing president, on how potential judges are evaluated by the ABA.

Additionally, we measure *the total number of years the nominee previously worked as either a House or Senate staffer* in order to determine whether previous political service negatively affects potential nominees' ABA ratings. Finally, in order to capture potential demographic effects, we control for the nominee's race and gender. Table 2 below provides

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nonetheless it is important to underscore that some members of the 2003 and 2005 Standing Committee considered this nominee to be 'Qualified'" (2006).

[12] Ordered logit models are an extension of logit models. While logit models are used for binary dependent variables, ordered logit is appropriate when the dependent variable takes on three or more ordered categories. Like logit models with binary dependent variables, ordered logit models are non-linear, utilize a logit link function, and are estimated using maximum likelihood (ML) methods. For a discussion of ordered logit models, see Long (1997).

[13] We include here all years spent as a state court judge, regardless of the level of the state court, as well as all years spent as a federal Magistrate, Bankruptcy and/or District Court judge.

summary statistics of our variables, as well as our expectations as to the expected effects of these variables on a nominee's ABA rating.

[Insert Table 2 about here.]

Results and Discussion

In the following section, we discuss four different models. The first two test our primary hypotheses regarding the professional and political theories of ABA ratings as discussed in the previous section. The second set of models further examines the extent to which the ABA distinguishes between different types of legal experience.

In order to illustrate the effects of the statistically significant variables, we also provide figures and/or tables which report the predicted probability of receiving a particular ABA rating as the variable of interest changes, holding all other independent variables at their means. This analysis of predicted probabilities is important for two reasons. First, such analysis is necessary to understand the substantive impact of each of these variables on the probability that a particular rating will be awarded to a nominee while controlling for other possible influences.[14] Second, the substantive impact of each variable may vary across different levels of the dependent variable. In other words, a large number of years of judicial experience may increase the probability of a nominee receiving "Well-Qualified" rating while, at the same time, decreasing the probability of that same nominee receiving a "Not Qualified" rating. Furthermore, a particular variable may have a strong impact on a nominee's likelihood of receiving a "Well Qualified" rating while only having a minimal impact on the same nominee's likelihood of being rated "Qualified."

Table 3 reports the results of Models 1 and 2. These two models test our primary hypotheses and differ only in how we measure the impact of potential partisan and/or ideological bias on the ABA's ratings. As explained above, we employ two distinct variables to tap into the potential effects of bias toward liberal nominees. In Model 1, we employ a straightforward indicator of whether the nominee was nominated by a Democratic or Republican president. In Model 2, we utilize the Giles, Hettinger, and Peppers (2001) scoring methodology to create a more nuanced ideology measure. GHP scores rely upon the Poole-Rosenthal Common Space scores which arrange legislators on an ideological continuum between -1, most liberal, to +1, most conservative. In general, with a few exceptions, Democrats are scored negatively and Republicans positively. In our dataset, all Republican-appointed nominees possess positive GHP scores and all Democrat-appointed nominees possess negative GHP scores. These two variables, *Democratic President* and *GHP Score,* are thus highly correlated since *GHP Score* is, in this instance, a more refined way of reflecting the influence of the party of the appointing president.[15] We therefore present our results using each of these measures in separate models in order to

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[14] While some statistical methods allow the reader to determine the substantive impact of a variable while looking at the coefficients reported in the model, that is not the case with ordinal logit. Instead, we must perform additional calculations in order to determine not just whether a specific factor is statistically significant, but also the degree of impact factor has on the probability of a nominee receiving a particular ABA rating.

[15] In the data, the GHP score associated with the judge and the party of the nominating president are correlated at $\rho = -0.9282$.

parse out any potential effects of simple partisan bias, as well as the existence of a more complex ideological effect.[16]

[Insert Table 3 about here.]

First, the models themselves perform quite well. In Model 1, in which GHP score is employed to measure a nominee's ideology, the average nomination (in which all variables are held at their means), has a 44 percent chance of being awarded a "Well Qualified" rating. A nominee's chance of receiving a "Well Qualified" rating is much greater than receiving any other rating. Comparatively, 46 percent of the nominations in our data received a "Well-Qualified" rating. When all variables in Model 1 are held at their mean, a nominee has a 20 percent chance of receiving a "Well-Qualified/Qualified" rating, an 8 percent chance of receiving a "Qualified/Well-Qualified" rating, an 18 percent chance of receiving a "Qualified" rating, a 10 percent chance of receiving a "Qualified/Not Qualified" rating, and less than a 1 percent chance of being awarded a "Not Qualified" rating. In Model 2, the predicted probabilities for the average nominee yield identical predicted probabilities for each category.

Evaluating the Political Theory of ABA Ratings

To evaluate the political theory of ABA ratings, we examine the effect of *Years as a Congressional Staffer* and our two different measures of judicial ideology. In Model 1, as discussed above, we use the GHP scoring methodology to capture the political ideology of each prospective circuit court nominee evaluated. In Model 2, we employ a simple measure of whether the appointing president was a Democrat or Republican.

Since our two measures of nominee ideology are highly correlated, the results of Models 1 and 2 are very similar. Moreover, the coefficients estimated for each of these variables in Model 1 are very similar those estimated in Model 2. In Model 1, the nominee's GHP ideological score is significant at the $p < 0.01$ level in the expected direction. Specifically, all else being equal, liberal (negative) scoring nominations are more likely to receive a higher ABA rating than conservative (positive) scoring nominations. In Model 2, holding all other factors constant, those nominations submitted by a Democratic president were significantly more likely to receive higher ABA ratings than nominations submitted by a Republican president.

[Insert Figure 1 about here.]

Figure 1 shows the predicted probability of receiving each possible ABA rating across the range of GHP scores in the data, holding all other factors at their means. Examining the results graphically allows us to understand the nuances of how ideology influences the ABA's ratings. The model predicts that, *ceteris parabis,* the most liberal nominees have a 62.3 percent chance of receiving a "Well-Qualified" rating, as opposed to only a 35.5 percent likelihood for the most

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[16] Given the high degree of correlation between these two variables, inclusion of both in the same model would result in multicollinearity. While multicollinearity does not bias the results of a model overall, it does lead to very large standard errors, increasing the possibility of Type II errors (i.e., when the researcher falsely concludes that the null hypothesis cannot be rejected because the model suggests the independent variable of interest does not significantly influence the dependent variable).

conservative nominees. In other words, similarly qualified liberal nominees are 27.1 percent more likely to receive a "Well-Qualified" rating than their conservative counterparts.

When we look at the other potential ratings, changes across the ideological spectrum are much less pronounced. The most conservative potential nominees are more likely, all else being equal, to receive a rating of either "Qualified" or "Qualified/Not Qualified" than the most liberal nominees though the changes in likelihood are only 11.7 percent and 8.5 percent, respectively. Finally, ideology only minimally influences the likelihood of receiving a "Not Qualified" rating. Specifically, the most conservative nominee is only .2 percent less likely to receive a "Not Qualified" rating than the most liberal nominee which suggests that the ABA is just as likely to rate poorly liberal nominees who lack acceptable qualifications as they are conservative nominees. In sum, when we isolate the effect of ideology, we find that, all else being equal, liberal nominees are more likely to receive the highest possible rating than their conservative counterparts.

[Insert Table 4 about here.]

Table 4 displays the change in the predicted probability of receiving a particular ABA rating given nomination by a Democratic president (in this data, President Clinton) as opposed to nomination by a Republican president (in this data, Presidents Reagan, G.H.W. Bush, or G.W. Bush). This table also displays, in the final column, the change in predicted probability of receiving a rating given nomination by a Democratic rather than Republican president. Similarly to Model 1, the nominee of a Democratic president is 14 percent more likely to receive a "Well-Qualified" rating than a nominee of a Republican president, holding all other variables at their means. Additionally, nominees of a Republican president are more likely to receive a rating of less than "Well Qualified" than nominees of a Democratic president. Thus, the results of Models 1 and 2 are very similar with respect to the effect of ideology.

[Insert Figure 2 about here.]

In Models 1 and 2, as the number of years spent as a congressional staffer increases, the probability of a nomination receiving a "Well Qualified" and "Well Qualified/Qualified" ratings decreases, ceteris paribus. At the same time, with all other variables held at their means, the probability of receiving "Qualified/Not Qualified" and "Not Qualified" ratings increases.[17] For example, Figure 2 illustrates that a nominee who spent no time as a congressional staffer (0 years) has a 46 percent chance of receiving a "Well-Qualified" rating and less than a 10 percent chance of receiving a "Qualified/Not Qualified" rating. Comparatively, a nominee with 14 years of experience as a congressional staffer (the maximum value in the data) has a less than a 3 percent chance of receiving a "Well-Qualified" rating, but a 71 percent chance of receiving a rating of "Qualified/Not Qualified" rating.

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[17] We also ran these models using a simple bivariate measure of whether or not the nominee served previously as a staffer, and the results were similar both statistically and substantively. In addition, even though more Republican nominees were former staffers than Democratic nominees, the results are robust across the two parties.

While many former staffers do serve in the position of Counsel, they do not act as lawyers in the traditional sense (even government lawyers) and undertake actions which are more overtly political. In addition, there is likely a presumption that these nominees received their nominations as a result of political patronage, rather than as a result of their legal pedigree. It is thus possible that the ABA evaluates former congressional staffers more strictly than those who follow a more traditional – and politically-neutral – path to a judgeship. In sum, Models 1 and 2 provide support for the political theory's main contention that the ABA's ratings are systematically lower for Republican/conservative nominee than for Democratic/liberal nominees.

Evaluating the Professional Theory of ABA Ratings

To test the professional theory, Models 1 and 2 include five variables which account for the professional competence and experience of appellate nominees: years of experience as a state or federal court judge, years of experience as a lawyer, whether the nominee worked as a full-time law professor, prior circuit court clerkship, and prior Supreme Court clerkship. In both models, three of the five variables exhibit statistically significant effects, all in the expected direction. As hypothesized, the greater the number of years spent as a judge increases the probability of receiving a higher ABA rating, as did experience as a law clerk in the federal circuit courts. Finally, as expected, employment as a law professor reduced the likelihood of receiving a high ABA rating. The ABA thus also relies on traditional measures of professional qualifications when evaluating potential nominees to the federal bench.

[Insert Figure 3 about here.]

Figure 3 illustrates predicted probabilities across the range of judicial experience possessed by circuit court nominees from President Reagan to President George W. Bush. As the nominee's years of judicial experience increase, the probability of that nominee receiving a "Well Qualified" rating increases from 0.36 with no prior judicial experience to 0.79 with 31 years of experience, increasing an average of 0.014 (1.4 percent) for each additional year of judicial experience. Alternatively, the probability of receiving a rating lower than "Well Qualified" decreases with each additional year of judicial experience. For example, a nominee a nominee with no previous judicial experience has a 21 percent chance of receiving a "Qualified" rating, while a nominee with 31 years of judicial experience has only a 5 percent chance of receiving a "Qualified" rating. Thus, the more judicial experience a nominee has, the more likely that nominee is to receive a rating of "Well Qualified," the highest rating awarded by the ABA.

[Insert Table 5 about here.]

Models 1 and 2 both find that former law professors, all else being equal, are more likely to receive a lower rating. However, when we look at the predicted probabilities across the different possible ABA ratings, we see in Table 5 that this negative effect is not consistent. On one hand, employment as a full-time law professor decreases the probability that the nominee will receive a "Well-Qualified" rating, while increasing the probability that the nominee will receive a rating lower than "Well-Qualified." For example, a nominee who has been employed as a law professor, *ceteris paribus,* has a 36 percent chance of receiving a "Well-Qualified" rating where as a nominee without such experience has a 46 percent chance of receiving that same rating. On the other hand, a nominee with experience as a law professor has a higher probability of receiving a "Qualified" rating than a nominee without such experience. These findings suggest

the ABA recognizes that law professors possess solid legal credentials, but is also more likely to favor nominees with experience more directly related to the courtroom.

As with judicial experience, prior employment as a circuit court clerk increases the probability of receiving a "Well-Qualified" rating while decreasing the probability of receiving a rating lower than "Well-Qualified." Notably, a nominee with circuit court clerkship experience has a 58 percent chance of receiving a rating of "Well-Qualified," 17 percent higher than if that same nominee had no such experience (see Table 6). Table 6 also indicates that a person with clerkship experience is 40 percent more likely to receive a "Well-Qualified" rating than "Well-Qualified/Qualified" rating, 45 percent more likely to receive a "Well-Qualified" rating than a "Qualified" rating, and 57 percent more likely to receive a "Well-Qualified" rating than a "Not Qualified" rating. Completing a clerkship also lowers the probability of receiving a rating lower than "Well-Qualified." A nominee with clerkship experience is 7 percent more likely to receive "Qualified" and 5 percent more likely to receive a "Qualified/Not Qualified" rating than nominees lacking such clerkship experience.

[Insert Table 6 about here.]

Overall, Models 1 and 2 provide support for both the political and professional theories. First, all else being equal, Model 1 indicates that liberal nominees are much more likely to receive the highest rating, all else being equal, than their more conservative counterparts. Similarly, Model 2 indicates that Democratic nominees are much more likely to receive a rating of "Well Qualified" than Republican nominees, while Republican nominees are slightly more likely to receive a rating lower than "Well-Qualified" than Democratic nominees. In addition, both Models 1 and 2 indicate that nominees with a more politically-oriented background (specifically, in our model, years spent as a congressional staffer) are more likely to receive lower evaluations than nominees who followed a more traditional (and politically-neutral) path to nomination.

Second, and equally as important, the ABA also clearly takes into account a nominee's professional qualifications. Nominees with more previous experience as a state or federal judge are more likely to receive higher ratings, as are former circuit court clerks. Former law professors are less likely to receive the highest rating of "Well Qualified," but are rewarded with other high ratings (such as a rating of "Well-Qualified/Qualified and Qualified/Well-Qualified) as compared to those who lack such experience. As a result, these findings suggest that the ABA indeed evaluates nominees based on their previous legal experiences and qualifications, but also that, all else being equal, Democratic/liberal nominees do receive some ideological benefit.

[Insert Table 7 about here.]

Does the Type of Legal Experience Affect a Nominee's ABA Rating?

Table 7 reports the results of Models 3 and 4. With these models, we present a more granular accounting of the possible types of legal experience a nominee could possess. In Models 1 and 2, a nominee's years of legal experience was estimated to be positively related to his rating, but this result was not statistically significant. In order to more fully examine the possible effects of prior work as a lawyer, we replace the variable *Years of Legal Experience* with three alternate variables: (1) *Years in Private Practice,* (2) *Years as a Public Interest Lawyer,* and (3)

Years as a Government Attorney.[18] While more years of legal experience are hypothesized to result in an increase in ABA rating, we examine whether the ABA Standing Committee treats different types of legal experience equally in determining a nominee's rating. We again run two models, using both *GHP Score* and *Democratic President* to capture a nominee's ideology.

Models 3 and 4 perform very similarly to each other and to Models 1 and 2. In both models, *Race,*[19] *Years of Judicial Experience, Years as a Government Attorney, Circuit Court Clerk, Years as a Congressional Staffer,* and the indicators for nominee ideology -- *GHP Score* and *Democratic President* -- are all statistically significant and in the expected direction. Once again, those with more previous judicial experience are more likely to receive higher ratings, as are white nominees and those who served as a circuit court clerk, while former congressional staffers are more likely to receive lower ratings. And, the effects for ideology stay constant across models as well – Democratic nominees and/or more liberal nominees are more likely to receive higher ratings than their Republican and/or conservative counterparts. Unlike Models 1 and 2, *Employment as a Law Professor* is not statistically significant, but is in the expected negative direction.

While *Years of Legal Experience* was not a statistically significant indicator in Models 1 and 2, a subset of this variable – *Years as a Government Attorney* – exhibits a positive and statistically significant effect on the nominee's probability of receiving any given ABA rating. Alternatively, neither longer service in private practice nor as a public interest lawyer statistically influences a nominee's ABA rating. Like *Years of Judicial Experience* in Models 1 and 2, the longer the nominee served as a government attorney, the greater his probability of receiving a "Well-Qualified" rating, all else being equal. Conversely, longer periods of employment as a government attorney decrease the probability of a nominee receiving a rating lower than "Well-Qualified." This is illustrated in Figure 4.

[Insert Figure 4 about here.]

A nominee with no experience as a government attorney (0 years) possesses a 39 percent chance of receiving a "Well-Qualified" rating, as compared to a 20 percent chance of receiving a "Qualified" rating, and an 11 percent chance of receiving a "Qualified/Not Qualified" rating. With 14 years of experience as a government attorney, this same nominee now has a 70 percent chance of receiving a "Well-Qualified" rating (a an increase of 31 percent) but only an 8 percent chance of receiving a "Qualified" rating (a 12 percent decrease) and a 4 percent chance of receiving a "Not Qualified/Qualified" rating (a 7 percent decrease). Thus, Models 3 and 4 suggest that while the ABA certainly considers a nominee's past experience as an attorney when

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[18] Nominees were counted as working in private practice whenever their biography listed their employment as private practice, or listed them as working for a private law firm or as a lawyer for a private company. Public interest lawyering is defined as working for some type of legal aid service. Finally, government attorneys are those who worked as a lawyer for the government, whether at the local, state or federal level. Government attorneys include, but are not limited to, those who have worked in a U.S. Attorney's office, a District Attorney's or public defender's office, and/or as a lawyer for an executive agency.

[19] Race, unlike the other variables exhibiting a statistically significant effect in these two models, is only statistically significant when using a one-tailed test.

rating the nominee, it is only service as a government attorney that significantly influences the rating a nominee is likely to receive.[20] Given the ABA's stated preference for nominees with significant courtroom and trial experience (American Bar Association 2007, 4), it is perhaps not surprising that those nominees most likely to possess this type of experience are rated more highly than those without such experience.

Discussion

The results of Models 1-4 provide support for *both* the political and professional theories. Our findings suggest the presence of some systematic bias toward Democratic nominees in the ABA's ratings, especially to the extent that a particularly nominee will be rated as "Well Qualified." It should be noted that these results are also robust across different model specifications. We must be cautious, however, in interpreting our findings vis-à-vis the political theory as we cannot decisively conclude what is driving the positive relationship between the measure of ideology employed in the models presented and the probability of receiving a "Well-Qualified" rating. One possible conclusion is that this finding is the result of an ideological bias against conservative-leaning nominees by the members of the ABA's Standing Committee on the Federal Judiciary. While the membership of the Standing Committee has changed between 1985 and 2008, it is indeed possible that the majority of members selected to serve on this committee have possessed a bias, conscious or not, toward liberal nominees.

Another possible conclusion is that there is something distinct about Democratic as opposed to Republican nominees which our measures of party and ideology indirectly capture. In our case, we ask whether our control for party/ideology is actually capturing the effect of some other variable that varies significantly among Democratic and Republican nominees but is not contained in our model. We focus on identifying key professional qualifications the ABA likely assesses when evaluating potential nominees. Importantly, all of our measures are based – including the GHP scores – on information the ABA possesses when investigating the nominees. It is possible, however, that there is something unique about Democratic nominees as a group as opposed to Republican nominees that explains the systematic bias we find in the ratings.

A final possibility is that the ABA's evaluation procedure, while designed to be neutral, contains an inherent liberal bias as to what qualifications or types of experience are valued by the Standing Committee. While "merit" is many times assumed to be a neutral quality, the reality is that different groups value different types of experience and differing types of qualifications. For example, certain people value hands-on business experience in candidates for public office, while others value formal education. Those who value business experience are thus more likely to construct an evaluation paradigm which favors such experience and potentially disfavors other types of experience, even if unintentionally. Similarly, long-standing notions of acceptable criteria for federal judges may inherently favor the types of judicial nominees Democrats are

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[20] As a reminder, "government attorneys" include all nominees who served as a lawyer for the government at either the local, state or federal level. Not surprisingly, a large proportion of nominees who served as government attorneys worked in areas which lend themselves to substantial courtroom and/or trial experience, such as work in a U.S. Attorney's office or a District Attorney's office.

more likely to select for appellate seats. In turn, the ABA's evaluation criteria, while intended to be neutral, may reflect these inherent biases. Such a proposition suggests that it might be appropriate for the ABA to reconsider what qualities a "good" judge possesses.

We believe the evidence presented above suggests both that the ABA plays a valuable role in evaluating the professional qualifications of potential appellate court nominees, and that attention must be paid to the possibility that a type of liberal bias exists in how the ABA rates these nominees. The ABA Standing Committee on the Federal Judiciary focuses on three categories of issues: integrity, professional competence and judicial temperament. Concerns have been raised in particular about the inclusion of "judicial temperament" as a criterion.

Specifically, the ABA includes within "judicial temperament" a nominee's compassion, open-mindedness, freedom from bias and commitment to equal justice under the law. This, in particular, is one area of the Standing Committee's evaluation that is not captured especially well by the models presented. A central objection is that these specific terms can be interpreted broadly in order to disfavor nominees who may, personally or professionally, have expressed opposition to positions such as gay rights and abortion rights, rather than merely ensuring that all potential federal judges have a commitment to hearing all cases *tabula rasa* and treating all types of legal parties similarly and fairly. As discussed above, four members of the ABA Standing Committee voted to give Judge Robert Bork a "Not Qualified" rating when he was nominated to the Supreme Court in 1987 due to his perceived lack of these three qualities towards minorities and women. At the same time, the minority voting to give Bork a low rating additionally noted concern about "comparatively extreme views respecting constitutional principles or their application" (Wermiel 1987). Thus, whether or not these more subjective requirements are separable from the nominee's ideology is unclear.

While we do not believe the ABA consciously promotes liberal candidates for federal judgeships over conservative nominees, our results lead us to conclude that the ABA should take affirmative steps to ensure liberal candidates are not being unconsciously favored and rated. In particular, our findings suggest that there is some systematic component of the evaluation process, possibly the use of the "judicial temperament" criterion, which lends itself to lower ratings of more conservative nominees. In evaluating judicial temperament, the ABA properly seeks to ensure that potential federal judges will approach each case with an open mind and a sense of fairness toward all parties, but our findings indicate that the Standing Committee should also guard against rating nominees based on their particular positions towards policies and legal doctrines which implicate issues of fairness and equal justice. In conclusion, the Standing Committee should strive to ensure that its evaluations reflect a careful balance of both objective and subjective criteria, and that the different types of criterion are given appropriate weight.

References

Abraham, Henry A. 1990. "Beneficial Advice or Presumptuous Veto? The ABA's Committee on Federal Judiciary Revisited." In *Judicial Selection: Merit, Ideology, and Politics*. Washington, D.C.: National Legal Center for the Public Interest.

American Bar Association. 2007. "Standing Committee on the Federal Judiciary: What It Is and How It Works," Available at http://www.abanet.org/scfedjud/home.html.

Bell, Lauren Cohen. 2002. *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation.* Columbus: Ohio State University Press.

Bork, Robert. 1971. "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1.

Giles, Micheal W., Virginia A. Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54: 623-641.

Goldman, Sheldon. 1997. Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan. New Haven, Connecticut: Yale University Press.

Goldman, Sheldon, Elliot Slotnick, Gerard Gryski, Gary Zuk, and Sara Schiavoni. 2003. "W. Bush Remaking the Judiciary: Like Father Like Son?" *Judicature* 86: 282-309.

Goldstein, Amy. 2001. "Bush Curtails ABA Role in Selecting U.S. Judges." *Washington Post*, March 23, 2001, A1.

Grassley, Charles E. 1990. "Reforming the Role of the ABA in Judicial Selection: Triumph of Hope Over Experience?" In *Judicial Selection: Merit, Ideology, and Politics*. Washington, D.C.: National Legal Center for the Public Interest.

Greenberger, Robert S., and David S. Cloud, "Bush to Weaken ABA Role on Nominees," *Wall Street Journal*, March 19, 2001, B11.

Grossman, Joel B. 1965. *Lawyers and Judges: The ABA and the Politics of Judicial Selection*. New York: John Wiley.

Haire, Susan B. 2001. "Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary." *Justice System Journal* 22: 1-17.

Houston Chronicle News Service. 1997. "ABA takes strong stand to put end to executions," *The Houston Chronicle,* February 4, 1997, A1.

Howlett, Debbie. 2001. "At Lawyers' Gathering, Ashcroft Defends Vetting Decision." *USA Today*, August 8.

Kamenar, Paul D. 1990. "The Role of the ABA in the Judicial Selection Process." In *Judicial Selection: Merit, Ideology, and Politics*. Washington, D.C.: National Legal Center for the Public Interest.

LaMarche, Gara. 2001. "Senate Confirmations: How Should We Judge Judges?," *Los Angeles Times*, July 15, 2001, M2.

Lindgren, James T. 2001. "Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000." *Journal of Law and Politics* 17: 1-40.

Long, J. Scott. 1997. *Regression Models for Categorical and Limited Dependent Variables*. Thousand Oaks, CA: Sage Publications.

Lott, John R., Jr. 2001. "The American Bar Association, Judicial Ratings, and Political Bias." *Journal of Law and Politics* 17: 41-61.

Martinek, Wendy L., Mark Kemper, and Steven R. Van Winkle. 2002. "To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977-1998." *Journal of Politics* 64: 337-361.

Murray, Frank J. 2001. "ABA's Role on Judges Ruled Out; Liberals Assail, Conservatives Hail." *The Washington Times*, March 23.

Raven, Robert D. 1990. "Judging the Judges: The American Bar Association's Role in the Screening of Judicial Nominees." In *Judicial Selection: Merit, Ideology, and Politics*. Washington, D.C.: National Legal Center for the Public Interest.

Ross, William G. 1990. "Participation by the Public in the Federal Judicial Selection Process." *Vanderbilt Law Review* 43: 1-84.

Rutkus, Denis Steven. 2008. *The Role of Home State Senators in the Selection of Lower Court Judges*. CRS Report RL34405 (March 6, 2008). Washington, D.C.: Congressional Research Service.

Saks, Michael J., and Neil Vidmar. 2001. "A Flawed Search for Bias in the American Bar Association's Ratings of Prospective Judicial Nominees: A Critique of the Lindgren / Federalist Society Study." *Journal of Law and Politics* 17: 219-254.

Scherer, Nancy. 2005. *Scoring Points: Politicians, Activists, and the Lower Federal Court Appointment Process*. Palo Alto, California: Stanford University Press.

Scherer, Nancy, Brandon L. Bartels, and Amy Steigerwalt. 2008. "Sounding the Fire Alarm: The Role of Interest Groups in the Lower Court Confirmation Process." *Journal of Politics* 70: 1026-39.

Slotnick, Elliot. 1983a. "The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part 1." *Judicature* 66: 348-362.

Slotnick, Elliot. 1983b. "The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment—Part 2." *Judicature* 66: 385-393.

Tober, Stephen L. 2006. "Statement on Behalf of the Standing Committee on the Federal Judiciary of the American Bar Association concerning the nomination of Michael Brett Kavanaugh to be Judge of the United States Court of Appeals for the District of Columbia Circuit before the Committee on the Judiciary, United States Senate," May 8, 2006.

Watson, George, and John A. Stookey. 1995. *Shaping America: The Politics of Supreme Court Appointments*. New York: Harper Collins.

Wermiel, Stephen. 1987. "Anti-Bork Members on ABA Panel had Several Concerns," *The Wall Street Journal*, September 22, 1987, A25.

Wilson, Sarah. 2003. "Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective," *Journal of Appellate Practice and Process*. 5: 29-47.

Table 1. Distribution of ABA Ratings of Nominations to Circuit Court Judgeships by President, 1985-2008.

President	Rating							Total
	Not Qualified	Not Qualified/ Qualified	Qualified/ Not Qualified	Qualified	Qualified/ Well Qualified	Well Qualified/ Qualified	Well Qualified	
Reagan	0 (0%)	0 (0%)	13 (22.41%)	12 (20.69%)	3 (5.17%)	3 (5.17%)	27 (46.55%)	**58 (100%)**
G.H.W. Bush	0 (0%)	0 (0%)	4 (7.55%)	12 (22.64%)	6 (11.32%)	9 (16.98%)	22 (41.51%)	**53 (100%)**
Clinton	0 (0%)	0 (0%)	3 (3.3%)	19 (21.11%)	4 (4.44%)	14 (15.56)	50 (55.56%)	**90 (100%)**
G.W. Bush	1 (0.86%)	0 (0%)	16 (13.79%)	13 (11.21%)	9 (7.76%)	31 (26.72%)	46 (39.66%)	**116 (100%)**
Total	**1 (0.32%)**	**0 (0%)**	**36 (11.36%)**	**56 (17.67%)**	**22 (6.94%)**	**57 (17.98%)**	**145 (45.74%)**	**317 (100%)**

Table 2. Summary of Expected Effects of Variables on ABA Rating

Variable	Expectation	Mean	Std. Dev.	Min.	Max.
ABA Rating	none	5.68	1.50	1	7
Professional Theory					
Years as Judge	+	5.65	6.97	0	31
Years as Lawyer	+	15.39	8.11	0	40
Law Professor	-	0.13	0.34	0	1
Circuit Court Clerk	+	0.20	0.40	0	1
Supreme Court Clerk	+	0.13	0.33	0	1
Political Theory					
Democratic President	+	0.28	0.45	0	1
GHP Ideology Score	-	0.19	0.37	-0.626	0.664
Years as Staffer	-	0.38	1.61	0	14
Demographic Indicators					
Male	+	0.78	0.41	0	1
White	+	0.86	0.35	0	1

Number of Observations = 317

Table 3. Ordered Logit Models of ABA Ratings for Circuit Court Nominees

Variables	Coefficient (Robust S.E.)	
	Model 1	**Model 2**
Race (White)	.541# (0.333)	.501# (.327)
Gender (Male)	-.110 (.218)	-.129 (.213)
Years Judicial Experience	.060** (.021)	.062** (.021)
Years Legal Experience	.023 (.020)	.024 (.021)
Law Professor	-.415# (.290)	-.376# (.288)
Circuit Court Clerk	.677* (.296)	.637* (.291)
Supreme Court Clerk	-.002 (.362)	.052 (.359)
Years Congressional Staffer	-.253** (.083)	-.259** (.082)
GHP Ideology Score	-.928** (.338)	—
Democratic President	—	.594* (.288)
	N = 317 Wald Chi2 = 42.10 Prob>chi2 = 0.000 Log pseudoliklihood = -427.11307	N = 317 Wald Chi2 = 37.63 Prob>chi2 = 0.000 Log pseudoliklihood = -428.71083
Significance Levels: # p<.10; * p<.05; ** p<.01; *** p<.001; one-tailed tests		

Figure 1. Predicted Probability of ABA Rating Given GHP Ideology Score
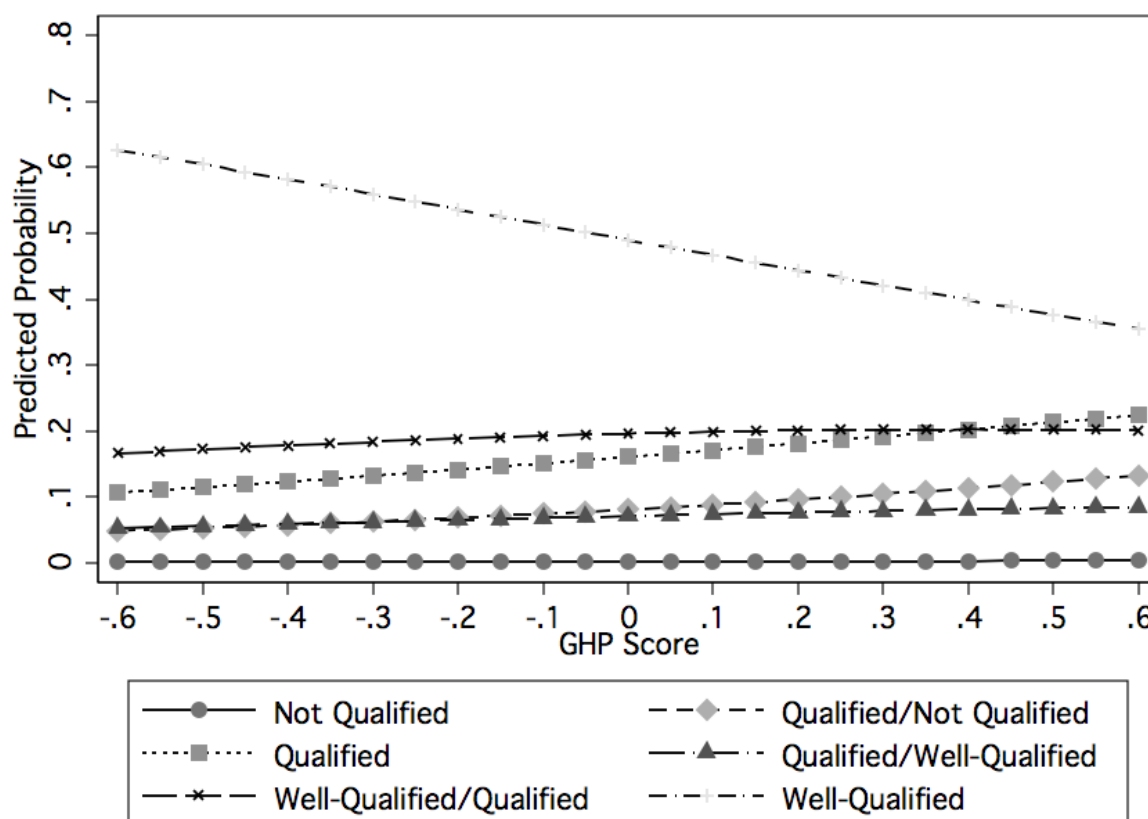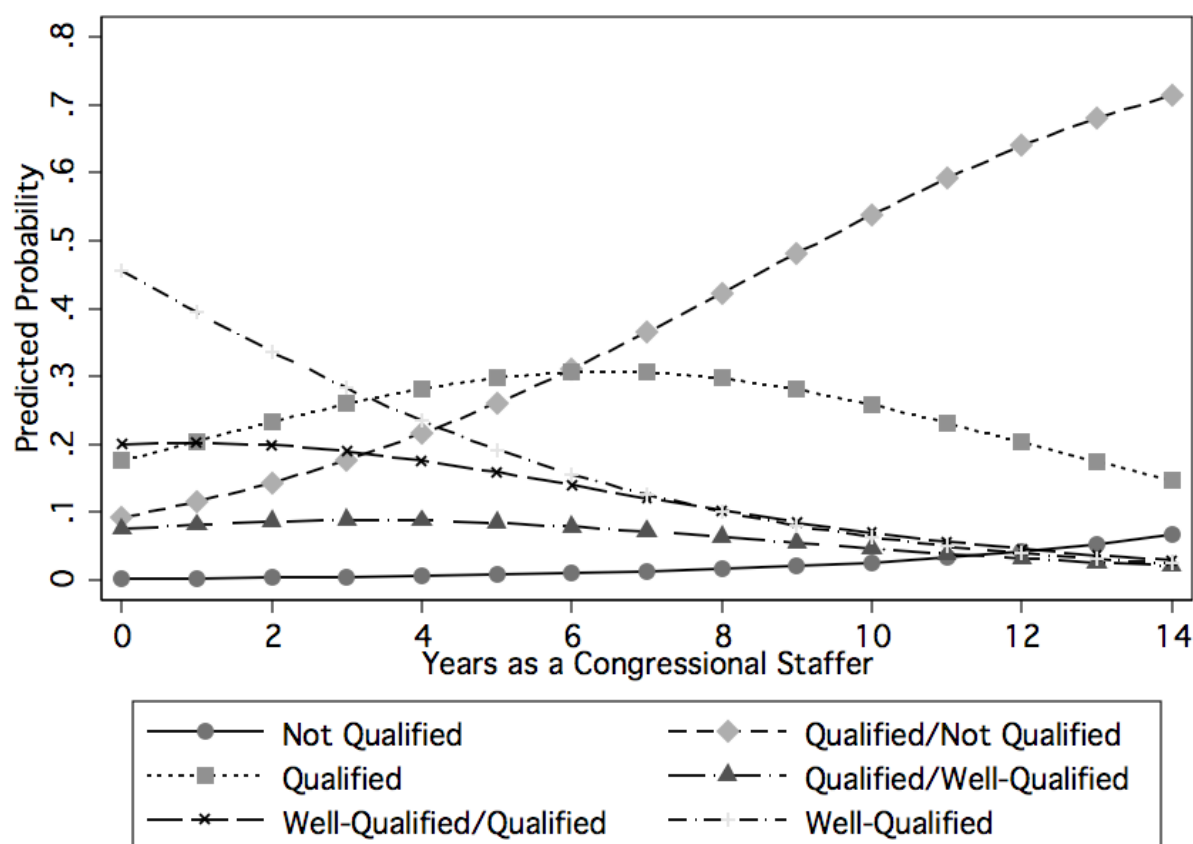

Note: There was no nominee during this time that received a rating of "Not Qualified/Qualified" by the ABA Standing Committee. Thus, the predicted probability of receiving that rating cannot be estimated. All other variables are held at their means.

Table 4. Predicted Probability of ABA Rating Given Nomination by a Democratic President

| ABA Rating	Democratic President	Republican President	Change in Pr(ABA Rating)
Not Qualified	0.0014	0.0026	-0.0012
Qualified/Not Qualified	0.0653	0.1121	-0.0468
Qualified	0.1354	0.1999	-0.0645
Qualified/Well-Qualified	0.0626	0.0802	-0.0176
Well-Qualified/Qualified	0.1838	0.2009	-0.0172
Well Qualified	0.5515	0.4043	0.1472

Note: Change is calculated as *Pr(ABA Rating|Democratic President =1) - Pr(ABA Rating|Democratic President = 0).* All other variables are held at their means. There was no nominee during this time that received a rating of "Not Qualified/Qualified" by the ABA Standing Committee. Thus, the predicted probability of receiving that rating cannot be estimated.

Figure 2. Predicted Probability of ABA Rating Given Years as a Congressional Staffer

Note: There was no nominee during this time that received a rating of "Not Qualified/Qualified" by the ABA Standing Committee. Thus, the predicted probability of receiving that rating cannot be estimated. All other variables are held at their means.

Figure 3. Predicted Probability of ABA Rating Given Years Judicial Experience
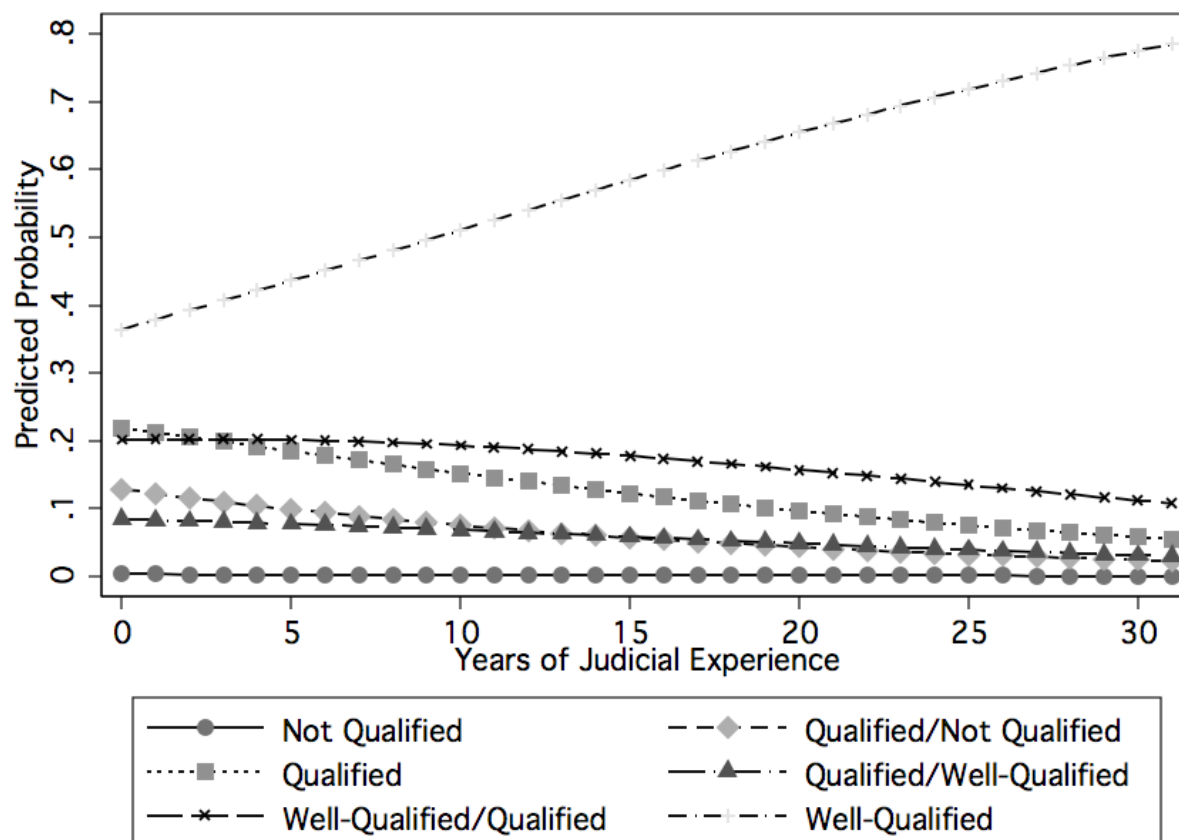
Note: There was no nominee during this time that received a rating of "Not Qualified/Qualified" by the ABA Standing Committee. Thus, the predicted probability of receiving that rating cannot be estimated. All other variables are held at their means.

**Table 5. Predicted Probability of ABA Rating Given Employment as a
Full-Time Law Professor**

ABA Rating	Law Professor	Not a Law Professor	Change in Pr(ABA Rating)
Not Qualified	0.0031	0.0021	0.0011
Qualified/Not Qualified	0.1309	0.0906	0.0402
Qualified	0.2215	0.1743	0.0472
Qualified/Well-Qualified	0.0844	0.0745	0.0099
Well-Qualified/Qualified	0.2011	0.1996	0.0015
Well-Qualified	0.3591	0.4589	-0.0999

Note: Change is calculated as *Pr(ABA Rating|Professor =1) - Pr(ABA Rating|Professor = 0)*. All other variables are held at their means. There was no nominee during this time that received a rating of "Not Qualified/Qualified" by the ABA Standing Committee. Thus, the predicted probability of receiving that rating cannot be estimated.

**Table 6. Predicted Probability of ABA Rating Given Experience in a
Circuit Court Clerkship**

| ABA Rating	Circuit Court Clerkship	No Circuit Court Clerkship	Change in Pr(ABA Rating)
Not Qualified	0.0013	0.0025	-0.0012
Qualified/Not Qualified	0.0580	0.1077	-0.0497
Qualified	0.1241	0.1961	-0.0720
Qualified/Well-Qualified	0.0589	0.0797	-0.0208
Well-Qualified/Qualified	0.1786	0.2023	-0.0237
Well Qualified	0.5792	0.4117	0.1675

Note: Change is calculated as *Pr(ABA Rating|Clerkship =1) - Pr(ABA Rating|Clerkship =0)*. All other variables are held at their means. There was no nominee during this time that received a rating of "Not Qualified/Qualified" by the ABA Standing Committee. Thus, the predicted probability of receiving that rating cannot be estimated.

Table 7. Ordered Logit Models Breaking Out Types of Previous Legal Experience

Variables	Coefficient (Robust S.E.)	
	Model 3	Model 4
Race (White)	.547# (0.379)	.507# (0.376)
Gender (Male)	-.137 (.215)	-.156 (.211)
Years Judicial Experience	.064** (.022)	.066** (.021)
Years Private Practice	.023 (.020)	.025 (.020)
Years Public Interest Lawyer	-.035 (.089)	-.034 (.093)
Years Government Attorney	.058* (.033)	.059* (.033)
Law Professor	-.339 (.285)	-.305 (.282)
Circuit Court Clerk	.561* (.307)	.522* (.305)
Supreme Court Clerk	.097 (.327)	.150 (.328)
Years Congressional Staffer	-.252** (.080)	-.259*** (.078)
GHP Score	-.946** (.342)	—
Democratic President	—	.615* (.296)
	N = 317 Wald Chi2 = 45.93 Prob>chi2 = 0.000 Log pseudoliklihood = -425.83561	N = 317 Wald Chi2 = 42.31 Prob>chi2 = 0.000 Log pseudoliklihood = -427.41458
Significance Levels: # p<.10, * p<.05, ** p<.01, *** p<.001, one-tailed tests		

Figure 4. Predicted Probability of ABA Rating Given Years as a Government Attorney
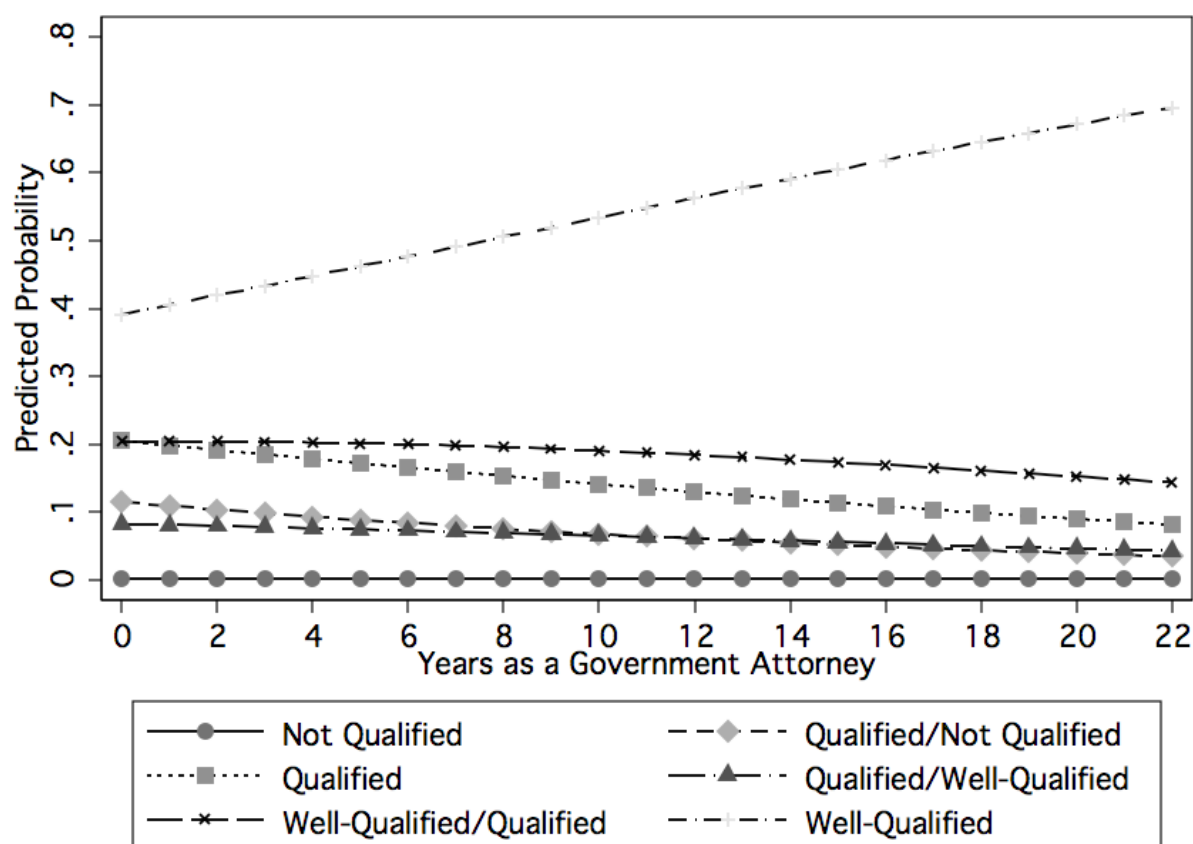
Note: There was no nominee during this time who received a rating of "Not Qualified/Qualified" by the ABA Standing Committee. Thus the predicted probability of receiving that rating cannot be estimated. All other variables are held at their means.