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Examining the American Bar Association's
Ratings of Nominees to the U.S. Courts of
Appeals for Political Bias, 1989-2000

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Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000

James T. Lindgren

Abstract

In this study, Professor Lindgren examined data on the 108 confirmed nominees to the U.S. Circuit Courts of Appeal from the administrations of George H.W. Bush and William J. Clinton. He shows - for the first time - evidence of differential treatment of nominees by the American Bar Association's rating committee. Yet this is not a simple story of apparent ABA bias toward Clinton nominees. Among confirmed nominees with the most important credential - prior judicial experience - Bush nominees fare roughly as well and sometimes even better than Clinton nominees. The problem arises for those without judicial experience. Here the apparent preference for Clinton appointees is strikingly large. Without controlling for any credentials, Clinton confirmed nominees have 9.1 times as high odds of getting a unanimous well qualified rating as do Bush confirmed nominees. Controlling for credentials, Clinton nominees have 9.7-15.9 times as high odds of getting a unanimous well qualified ABA rating as similarly credentialed Bush appointees. For those without prior judicial experience, just being nominated by Clinton instead of Bush is a stronger positive variable than any other credential or than all other credentials put together. The differences in how the ABA treats Bush and Clinton nominees reaches even to the committee's internal decision making. The ABA committee split its vote 33% of the time while evaluating Bush appointees, but only 17% of the time when evaluating Clinton appointees. This difference was concentrated among those who lacked prior judicial experience, where 50% of Bush appointees had split ratings, compared to only 10% of Clinton appointees with split ratings.

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Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000

*James Lindgren*¹

I Introduction

The American Bar Association has been rating federal judges since the late 1940s.² It was first brought into the process for political reasons—to reduce the ability of Harry Truman to appoint minorities, women, and “leftists.”³ Whether in its judicial ratings the ABA might still be performing

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The data for this project were collected by Leonard Leo, Peter Redpath, and Gerarda Walsh of the Federalist Society for the newsletter ABA Watch. I checked four of the six credentials variables against the standard academic database and resolved differences by going to original sources. The ABA Watch's collection and coding was substantially more accurate than the standard database. I am grateful for the willingness of Leonard Leo and ABA Watch to share their data with me even before publication.

My work on political diversity is currently supported by research grants available to Northwestern faculty, including summer research funding and a 2001-2002 grant from the G.D. Searle Fund. I would like to thank the Searle Fund and Dean David Van Zandt for their financial support.

I must disclose that I have in the past received substantial funding for my work from the American Bar Foundation (ABF), a think tank affiliated with the American Bar Association. From 1979 through 1982, I was a salaried Research Attorney and Project Director for the ABF and was the Review Editor of the *ABF Research Journal*.

². See Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan* 86-88 (1997); Michael D. Schattman, Article: *Picking Federal Judges: A Mysterious Alchemy*, 96 *Mich. L. Rev.* 1578, 1584-85 (1998).

³. See *Picking Federal Judges*, supra note 2, at 86-88; Schattman, supra note 2, at 1584-85.

a political function (though of a different sort) is the question that this study examines.

In recent years, the ABA's role in rating judges has become increasingly controversial,⁴ but mostly among those who are not academics. While professors have noted that Bill Clinton's nominees were more highly rated by the ABA than Ronald Reagan's or George H.W. Bush's nominees,⁵ scholars usually use this as evidence of how highly qualified the Clinton nominees really are.⁶ Sheldon Goldman and Elliot Slotnick, the political scientists who have published more articles discussing the ABA ratings than any other academics, recently concluded that the ABA's special role in the pre-nomination reviews of judicial candidates "has for the most part worked well for Republican and Democratic administrations over the last half

⁴. R. Townsend Davis, Jr., *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 *Colum. L. Rev.* 550 (1989); Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 *St. John's L. Rev.* 757 (1993); Orrin G. Hatch, *The Politics of Picking Judges*, 6 *J.L. & Pol.* 35 (1989); R. Samuel Paz, *Federal District Court Nomination Process: Smears of Controversy and Ideological Sentinels*, 28 *Loy. L.A. L. Rev.* 903 (1995).

⁵. See Sheldon Goldman and Elliot Slotnick, *Clinton's Second Term Judiciary: Picking Judges Under Fire*, 82 *Judicature* 265 (1999) ("six years' worth of Clinton appointees yielded the highest proportion of all four administrations receiving the top ratings from the Standing Committee on Federal Judiciary of the American Bar Association."); Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 *Rutgers L. Rev.* 827, 839 (2000) ("Moreover, the American Bar Association gave the Clinton nominees the highest rankings since the Bar Association began assessing the competence of candidates . . ."); Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 *Law & Ineq. J.* 159, 167-68 (2001) ("Moreover, the ABA assigned sixty-three percent of the nominees whom the President tendered the highest ranking as well qualified; this number was ten percentage points greater than the ratings earned by those lawyers whose names the Reagan and Bush Administrations submitted.").

⁶. See Sheldon Goldman, Elliot Slotnick, Gerald Gryski, and Gary Zuk, *Clinton's Judges: Summing Up the Legacy*, 84 *Judicature* 228, 245 (2001) ("Measures of the quality of the appointees are subjective; however, whatever their flaws, the ABA ratings are seen by most observers as a rough measure of how leading members of the bar and bench view the candidates for judicial positions. By this measure, the Clinton administration's overall record yielded the highest quality judiciary since the ABA began its rating system."); *id.* at 248. See also Sheldon Goldman, Elliot Slotnick, Gerald Gryski, and Gary Zuk, *Recent Clinton Nominees*, 84 *Judicature* 232 (2001) ("During 1999 and 2000 there were a number of Clinton appointees with particularly strong professional credentials who also received the highest ABA rating of 'well qualified.'")

century.”⁷ The conservative grumblings about possible ABA political favoritism recently led the White House to end the ABA’s privileged position in screening candidates before nomination, despite the allegations being largely impressionistic and anecdotal.

Without controlling for background credentials, one cannot make even a good circumstantial case for the existence of political bias in rating the qualifications of judges. Even with good control variables for many important qualifications, still one does not prove bias with statistics. One at most shows data consistent with the hypothesis that there is bias. This study does precisely that.

The dawn of a new administration is a good time to assess aspects of the last one. For comparison with the Clinton administration, I examined data from the first Bush administration, that of George H.W. Bush. After examining data on nominees to the U.S. Circuit Courts of Appeal over these two administrations, this study shows—for the first time—strong evidence of differential treatment of nominees by the ABA’s rating committee. This study compares the ABA ratings to the credentials of the 108 men and women nominated and confirmed for the U. S. Courts of Appeals during the last two presidential administrations (including one recess appointment). I have no data on those who were not confirmed, so I do not know whether the patterns in these data are stronger or weaker for them.

The task of evaluating the credentials of judges has been undertaken by the Association’s 15-member Standing Committee on the Federal Judiciary. The ABA rates judges as Well Qualified, Qualified, or Not Qualified. Judges who receive a "Not Qualified" rating would not ordinarily be viable candidates to get through Senate confirmation. The ABA committees often split their votes on the ratings, so it is possible to get, for example, a majority of the ABA committee voting "Qualified" and a minority voting "Not Qualified." Effectively, this particular split rating is the lowest one that would give a judge a reasonable chance of getting appointed and the lowest rating that I found in these data.

The credentials used by the ABA are set out in numerous public statements, articles, and booklets. The ABA-published booklet on the ratings process states, “The Committee’s evaluation of prospective nominees...is



⁷. See Clinton’s Judges, *supra* note 6, at 254 n.17.

directed to professional qualifications—integrity, professional competence and judicial temperament.”⁸

As for integrity, the ABA notes, “The prospective nominee’s character and general reputation in the legal community are investigated, as are his or her industry and diligence.”⁹ Professional competence “encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of professional experience.”¹⁰ For appellate court nominees, the ABA states that “the Committee may place somewhat less emphasis on the importance of trial experience as a qualification,”¹¹ yet appellate nominees “should possess an especially high degree of scholarship and academic talent and an unusual degree of overall excellence.”¹² Regarding judicial temperament, the ABA states that the Committee “considers the prospective nominee’s compassion, decisiveness, openmindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice.”¹³

Some of the qualifications that are reviewed by the ABA to assess professional experience, competence, and intellect can be measured empirically. Most of the variables examined in this study are both important in themselves (such as having judicial or practice experience) and important markers of intellectual or other sorts of ability (such as attending an elite law school or serving on law review). Some of the ratings criteria, however, cannot be measured empirically, such as integrity and judicial temperament. Seven of the nine variables I used as predictors are staples of other studies of the judicial nomination process (judicial experience, top 10 law school, private practice, government practice, race, gender, and nominating president). The two new predictor variables (law review and federal clerkship) favor Clinton’s candidates, so their inclusion tends to explain a

⁸. American Bar Association, Standing Committee on Federal Judiciary: What It Is and How It Works 3 (March 1991). See Also Roberta Cooper Ramo and N. Lee Cooper, *The American Bar Association's Integral Role In The Federal Judicial Selection Process: Excerpted Testimony Of Roberta Cooper Ramo and N. Lee Cooper Before The Judiciary Committee Of The United States Senate*, May 21, 1996, 12 St. John's J.L. Comm. 93 (1996).

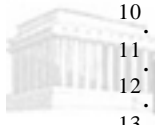
⁹. See ABA, Standing Committee, *supra* note 8, at 3.

¹⁰. *Id.*

¹¹. *Id.* at 4.

¹². *Id.*

¹³. *Id.*



small part of the observed differences between Clinton and Bush nominees. Without the two new variables, the apparent political bias in the data would have been even worse.

The data in this study were collected by ABA Watch, a newsletter that evaluates the activities of the ABA,¹⁴ and supplied to me for analysis. I checked over 70% of the data against other published databases and sources. ABA Watch collected information about the professional qualifications of confirmed judicial nominees, using primarily publicly available sources such as the Federal Judicial Center's web site, ABA archives and annual reports, law reviews, and online professional and academic databases. If necessary, they contacted judges directly to fill gaps in publicly available information. Specifically, in addition to the ABA ratings, ABA Watch coded the following credentials:

- Whether the nominee served as a private practitioner.¹⁵
- Whether the nominee served as a government lawyer.
- Whether the nominee had already served as a judge.
- Whether the nominee attended a law school ranked as one of the 10 best in the current rankings from U.S. News and World Report.
- Whether the nominee served on law review while in law school.
- Whether the nominee had served as a law clerk to a federal judge.

Examining data on confirmed nominees to the U.S. Courts of Appeal over the last two administrations, I found significant differences in how the ABA Standing Committee evaluated the professional qualifications of Bush and Clinton appointees. While making simple comparisons between the credentials of Clinton and Bush nominees, I found only three statistically significant differences: (1) Clinton confirmed nominees are more likely to be minorities (27%) than are Bush nominees (10%)¹⁶; (2) for those who lacked prior judicial experience, the ABA committee split its votes more often for

¹⁴. ABA Watch is a project of the Federalist Society.

¹⁵. As for the length of practice, I performed analyses with linear and transformed nonlinear predictor variables using the number of years of each type of practice. The coefficients for the Clinton/Bush nominee variable are roughly similar when controlling for the length of time in practice. See Appendix Table 11 for one of these models.

¹⁶. Significance using exact versions of various tests (Gamma, Pearson's R, Pearson chi-square, Spearman correlation, and Likelihood ratio chi-square) met the .05 criterion: .029.

Bush appointees (50%) than for Clinton appointees (10%);¹⁷ and (3) for candidates without judicial experience, Bush appointees received lower ABA ratings.¹⁸ Among those without prior judicial experience, the differences were stark: 65% of Clinton nominees received the ABA's highest rating compared to 17% of Bush nominees.¹⁹

II

Are Democratic Nominees Favored by the ABA?

The ABA appears to have used very different measurable criteria for evaluating Clinton appointees to the federal appellate bench than those used for evaluating G.H.W. Bush's candidates. Bush appellate appointees who were lower court judges appear to have been equally treated compared to Clinton appointees.²⁰ Indeed, Bush nominees got an insignificant, advantage. But among those without the central qualification—prior judicial experience—the Clinton appointees appeared to get an extremely strong boost just for being appointed by Bill Clinton, rather than some guy named Bush.

Extensive data analysis revealed different patterns for evaluating Clinton and Bush appointees. Logically, the most important credential for being a judge is already being a judge. Further, it is unlikely that either party would tend to elevate the worst judges among the many already in the profession. Thus, being a judge was a strong positive credential—both theoretically and in parts (but not all) of our data. Further, the ABA showed no substantial differences one way or the other in evaluating candidates who were former judges; Bush lower court judges fared about as well as Clinton

¹⁷. Significance met the .05 criterion: gamma (.021), Pearson's R (.003), Pearson chi-square (.003), Spearman correlation (.003), and Likelihood ratio chi-square (.004).

¹⁸. The Clinton nominees did not fare better because of any supposed affirmative action, because the data did not suggest that any existed. Minority Clinton nominees got slightly lower ABA ratings than their credentials would predict. Minority Bush nominees got much lower ratings than their credentials would predict. Compare Tables 9 and 10 in the Appendix (column B).

¹⁹. Significance was easily met for those without judicial experience: gamma (.001), Pearson's R (.002), Pearson chi-square (.002), Spearman correlation (.002), and Likelihood ratio chi-square (.002).

²⁰. See *infra* Appendix, Tables 6-8.

lower court judges in ABA ratings for open federal appellate posts—in some statistical models insignificantly better.²¹

The interesting pattern is among those candidates who were not already judges. Here, since the candidate lacked the most obvious credential for the job, the ABA committee's evaluations can be more subjective. Here Clinton nominees fared strikingly better than Bush nominees. For example, without judicial experience, 65% of Clinton appointees were unanimously rated well qualified, while only 17% of the Bush appointees were so rated.

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

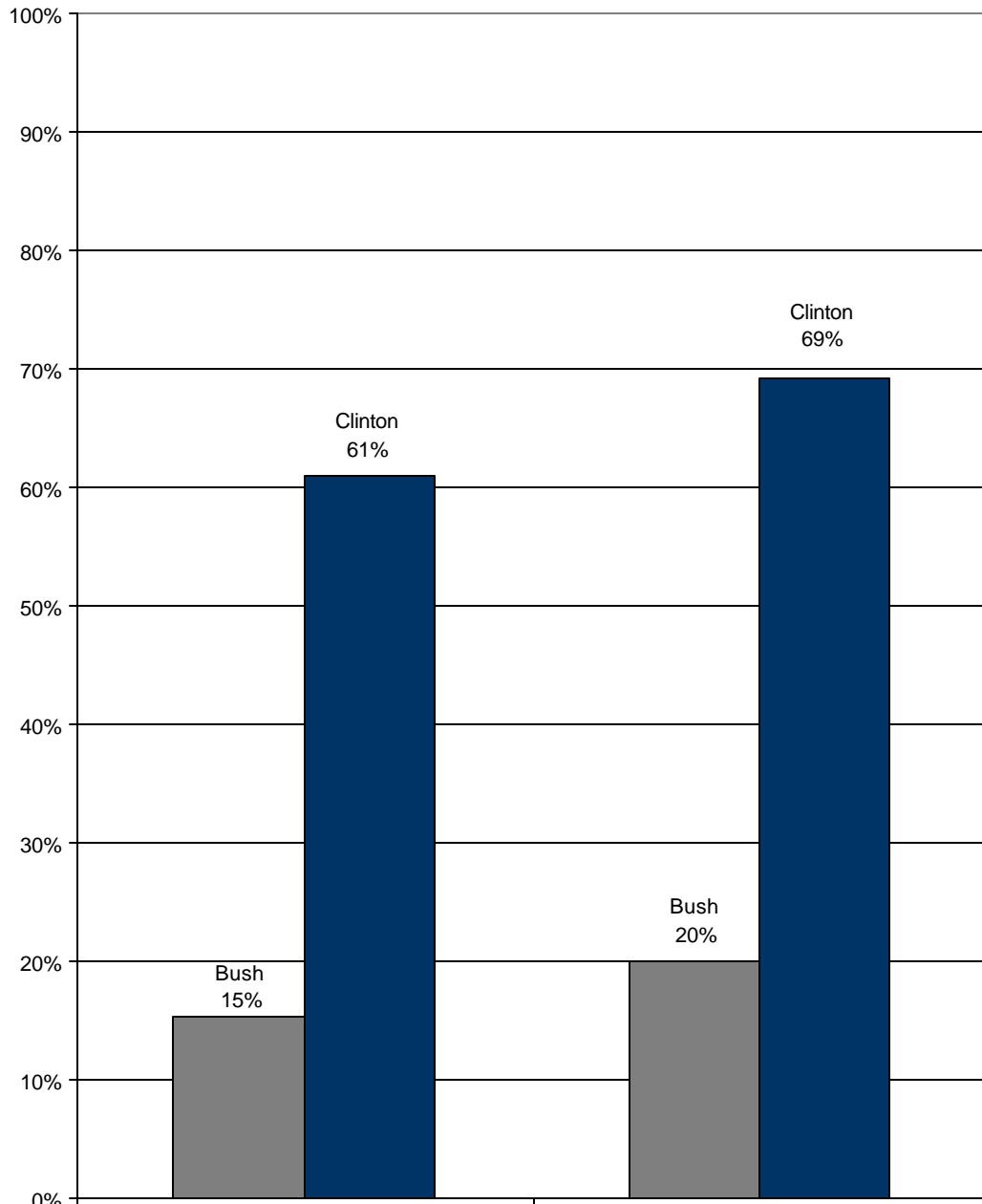
As you can see from this simple presentation of data in Chart 1, without judicial experience Clinton nominees with few credentials are rated much better (61% of the less qualified get the highest rating) than Bush nominees with more credentials (only 20% of the more qualified get the highest rating). Further, as the credentials of Clinton nominees improved, their chances of getting the highest rating changed only slightly—from 61% to 69%. That indicates that the evaluation process for Clinton appointees is not driven by measurable credentials. Breadth of experience has little effect on the ratings of Clinton appointees.



²¹. See *infra* Chart 4; Appendix, Tables 6-8.

Chart 1: % of Appellate Nominees Getting a "Well Qualified" ABA Rating With Any of 5 Credentials (Private Practice, Government Practice, Top 10 School, Law Review, Federal Clerkship)

1989-2000 Confirmed Nominees With No Prior Judicial Experience, n=49



■ BUSH
■ CLINTON

Total Number of Credentials for a Nominee

To perform more sophisticated analyses controlling for credentials, researchers like to predict the relative odds of a particular outcome.²² Here about 9 Clinton appointees are rated “Well Qualified” for every 5 who are rated less qualified—a 65% to 35% probability translates into a 9 to 5 odds of being “Well Qualified.” For Bush appointees, 1 appointee is rated “Well Qualified” for every 5 rated lower than that (a 17% to 83% probability translates into about 1 to 5 odds of being rated “Well Qualified”). Stated another way, the odds of getting a “Well Qualified” rating are 9.1 times higher for Clinton appointees than for Bush appointees. For every five lower rated candidates, Bush would get only one highly rated candidate; Clinton would get nine.²³

I then did logistic regression analysis to predict the odds of receiving the highest rating. When one controls for other credentials, the pattern of preference for Clinton appointees just gets stronger. If one adds in control variables for practice experience as either a private or government attorney—among those without judicial experience Clinton appointees had 9.7 times greater odds of getting the highest ABA rating than similarly qualified Bush I appointees (Table 1). Just being nominated by Clinton instead of Bush is better than any other credential or than all other credentials put together.²⁴

²². Odds-ratios (and log odds-ratios) are the staple of categorical data analysis in the social sciences—being the heart of both logistic regression analysis and loglinear analysis. Although less intuitive than percentages for all but frequent gamblers, odds-ratios and log odds-ratios have more powerful statistical properties for modeling ratios.

²³. Here is a more precise version of the computations for appointees without judicial experience. Comparing a 64.52% rate of highest ABA ratings for Clinton appointees with a 16.67% rate for Bush appointees, the precise relative odds are computed as: $(.6452/(1-.6452)) / (.1667/(1-.1667)) = 9.1$ to 1. Thus the odds of a Clinton appointee without judicial experience getting a well qualified rating are 9.1 times higher than the odds of a Bush appointee without judicial experience getting the same rating.

²⁴. Indeed, the influence of the other credentials is negative in the model (see column “B”).

Table 1
Predicting the Odds of Getting a Well Qualified Rating
From the ABA Without Judicial Experience
But With Several Predictors:
Experience in Private Practice or as a Government Lawyer
U.S. Court of Appeals Confirmed Nominees, 1989-2000

Multiple Logistic Regression Analysis (n=49)

Dependent Variable: Well Qualified Rating

-2 Log Likelihood	56.145
Goodness of Fit	48.343
Cox & Snell - R ²	.211
Nagelkerke - R ²	.281
Significance	.009

Variable	B (log-odds)	S.E.	Signif.	R	Exponent of B (odds)
Clinton Nominee	2.277	.753	.003	.355	9.743
Private Practice	-.580	1.053	.582	.000	.560
Govt. Lawyer	-.171	.654	.793	.000	.843
Constant	-1.053	1.088	.334		

Because this database contains all the nominated and confirmed judges, not a sample of them, statistical significance is literally meaningless. Significance testing is designed to assess the degree of confidence one can have that estimates obtained from a sample will approach the true parameters of the population from which they were drawn. Thus, little weight should be given to statistical significance here, since our means are exactly the population means. What is important here are the strength of relationships and the explanatory power of variables.

Nonetheless, the computed significance of this model is .009, easily meeting the standard .05 significance level. The computed significance of any variable is shown in the "Signif." column; being a Clinton nominee v. a Bush nominee is significant at the .003 level. The column "R" shows a high

pseudo-R²⁵ of .355. The column “Exponent of B” (exponent of the coefficient in the “B” column) shows the relative odds of being a Clinton nominee v. a Bush nominee (here 9.7 times). The “B” column is the increase or decrease in the log of the odds of being rated well qualified associated with any particular variable. A logistic regression equation is based on fitting a constant and each variable and its log-odds (using data in the second column of the table).²⁶

When one controls for experience as a federal court clerk, attending an elite (top 10) law school, and serving on law review, the preference for Clinton appointees gets stronger still. Now controlling for all measured credentials, Clinton appointees without judicial experience have 10.5 times greater odds of getting a well qualified rating from the ABA than Bush appointees (Table 2). As in Table 1, just being nominated by Clinton instead of Bush is better than any other credential or than all other credentials put together.

Applying this model fitting the data, consider a fairly well qualified appointee with private and government practice experience, federal clerkship experience, law review, and a J.D. from an elite law school. If that person were nominated by Clinton, she would have an 60% probability of getting the ABA’s highest rating. If that person were instead nominated by Bush, she would have only a 13% probability of getting the highest rating.

Or consider a less qualified candidate. Assume that he has private practice experience and no other standard credential. He could expect a 67% chance of getting the ABA’s highest rating if he were a Clinton nominee, but only a 16% chance if he were a Bush appointee, despite having identical mediocre credentials.

²⁵. This pseudo-R is roughly equivalent to R, a standardized correlation coefficient in linear regression.

²⁶. Each variable is coded “1” if the credential is present, “0” if the credential is not present. The logistic regression equation in Table 1 is:
 $y = -1.053 + (2.277 * \text{Clinton Nominee}) + (-.580 * \text{Private Pract}) + (-.171 * \text{Govt Lawyer})$.

Table 2
Predicting the Odds of Getting a Well Qualified Rating
From the ABA Without Judicial Experience
But With Several Predictors:
Politics, Federal Clerkship, Elite Law School, Law Review, and
Practice Experience
U.S. Court of Appeals Confirmed Nominees, 1989-2000

Multiple Logistic Regression Analysis (n=49)

Dependent Variable: Well Qualified Rating

-2 Log Likelihood	53.41
Goodness of Fit	46.33
Cox & Snell - R ²	.254
Nagelkerke - R ²	.338
Significance	.026

Variable	B (log-odds)	S.E.	Signif.	R	Exponent of B (odds)
Clinton Nominee	2.354	.800	.003	.345	10.527
Private Practice	-.741	1.177	.529	.000	.476
Govt. Lawyer	-.343	.682	.615	.000	.710
Top 10 JD	-1.094	.778	.160	.000	.335
Law Review	.459	.738	.534	.000	1.583
Fed. Clerkship	.679	.738	.358	.000	1.972
Constant	-.895	1.316	.497		

But perhaps there is something else going on here. Perhaps minority and female appointees have less traditional credentials. Since Clinton appointed more females and minorities than Bush, perhaps I should control for being minority or female (even though they are not credentials per se). In Table 3 I do just that. When one controls for being minority or female and all measured credentials, the Clinton appointees have 9.9 times higher odds of receiving the highest rating from the ABA. As in Tables 1-2, for those without judicial experience, just being nominated by Clinton instead of Bush is better than any other credential or than all other credentials put together.

In evaluating those who lack judicial experience, the pattern of apparent preference for Democrats is extremely strong and consistent for all models with various control variables. When one controls for relevant credentials, such as education and work experience, the ABA preference for Clinton appointees just gets trivially stronger.

Table 3
Predicting the Odds of Getting a Well Qualified Rating
From the ABA Without Judicial Experience
But With Several Predictors:
Politics, Federal Clerkship, Elite Law School, Law Review,
Practice Experience, Gender, and Ethnicity
U.S. Court of Appeals Confirmed Nominees, 1989-2000

Multiple Logistic Regression Analysis (n=49)

Dependent Variable: Well Qualified Rating

-2 Log Likelihood	53.197
Goodness of Fit	46.367
Cox & Snell R ²	.257
Nagelkerke R ²	.343
Significance	.069

Variable	B (log-odds)	S.E.	Signif.	R	Exponent of B (odds)
Clinton Nominee	2.289	.807	.005	.337	9.862
Private Practice	-.818	1.172	.485	.000	.441
Govt. Lawyer	-.276	.706	.696	.000	.759
Top 10 JD	-1.093	.814	.179	.000	.335
Law Review	.481	.803	.549	.000	1.617
Fed. Clerkship	.667	.745	.371	.000	1.947
Female	.423	1.069	.692	.000	1.527
Minority	.397	1.440	.783	.000	1.488
Constant	-.902	1.300	.488		

III Were Different Criteria Used to Evaluate Bush and Clinton Nominees?

The widely different ratings given to Bush and Clinton appointees with the same measured credentials suggest a different set of criteria used to evaluate Bush and Clinton appointees. That possibility is explored in this section.

Running separate logistic regression equations for Bush and Clinton appointees reveals different patterns of evaluation. If one looks first at the Bush appointees, one sees a striking pattern. Without judicial experience, Bush appointees have little hope of getting a “Well Qualified” rating from the ABA. While it is logical that judicial experience would be the pre-eminent credential, the strength of the relationship is surprising. For Bush appointees, being a judge increases the relative odds of getting the highest rating by over 1,300 percent (14.8 times greater odds). If a Bush appointee does not have prior judicial experience, however, the ABA appears to start with a strong presumption that the candidate is not “Well Qualified.”

Bush appointees without measurable credentials start at an extremely strong disadvantage (a probability of 5% of getting the highest rating).²⁷ Then one credential—judicial experience—counts strongly to move Bush appointees toward obtaining a “Well Qualified” rating. It is the only variable that is statistically significant and the only variable that substantially drives the explanatory power of the model. For example, being a judge raises the initial probability of receiving the highest ABA rating from 5% to 45%.²⁸ Each other credential moves the candidate toward higher ratings (except for attending an elite law school, which has a small negative effect). Having private practice experience would increase the probability of a high rating from the starting point of 5% to only 10%.

In other words, for Bush appointees credentials are very important predictors of high ratings (as they logically should be). The model is statistically significant despite the small number of cases. While the

²⁷. The constant of -2.907 in the 2nd column can be converted to a probability of 5%.

²⁸. If you sum the constant (-2.907) and the coefficient B (2.697) for judicial experience, you get $-.21$, which translates to a probability of 45%.

measured disadvantage for not having prior judicial experience seems much too large to be justified on policy grounds, the process is roughly bureaucratically rational in the Weberian sense. Those without any of the traditional credentials have little hope of getting a top rating from the ABA. As credentials improve, the ratings of Bush appointees rise. Although very harsh for those lacking judicial experience, the ABA process for Bush candidates is based on measurable credentials that the ABA considers important—practice experience, educational background, and especially judicial experience.

Table 4
Predicting the Odds of Getting a Well Qualified Rating
From the ABA For Bush Nominees
With Several Predictors:
Judicial Experience, Federal Clerkship, Elite Law School,
Law Review, And Practice Experience
U.S. Court of Appeals Confirmed Nominees, 1989-1992

Multiple Logistic Regression Analysis (n=42)

Dependent Variable: Well Qualified Rating

-2 Log Likelihood 44.838
Goodness of Fit 42.728
Cox & Snell R² .266
Nagelkerke R² .356
Significance .043

Variable	B (log-odds)	S.E.	Signif.	R	Exponent of B (odds)
Judicial Exp.	2.697	.918	.003	.379	14.829
Private Practice	.714	1.210	.555	.000	2.042
Govt. Lawyer	.443	.819	.589	.000	1.558
Top 10 JD	-.245	.770	.750	.000	.783
Law Review	.610	1.043	.558	.000	1.841
Fed. Clerkship	.617	1.050	.557	.000	1.853
Constant	-2.907	1.486	.051		

For Clinton appointees to the federal appellate bench, the pattern is somewhat different—experience matters much less than it should. Here Clinton appointees without any measured credentials start off with a very strong presumption (a 48% probability) that they are “Well Qualified.” On balance, credentials do not increase the odds of getting the highest ABA rating by as much as would seem reasonable. Moreover, the model has very poor explanatory power. Judicial experience logically should be a strong positive credential, but it is instead an insignificant influence on ABA ratings for Clinton appointees.

Table 5
Predicting the Odds of Getting a Well Qualified Rating
From the ABA For Clinton Nominees
With Several Predictors:
Judicial Experience, Federal Clerkship, Elite Law School,
Law Review, and Practice Experience
U.S. Court of Appeals Confirmed Nominees, 1993-2000

Multiple Logistic Regression Analysis (n=66)

-2 Log Likelihood	84.176
Goodness of Fit	65.871
Cox & Snell R ²	.050
Nagelkerke R ²	.068
Significance	.757

Variable	B (log-odds)	S.E.	Signif.	R	Exponent of B (odds)
Judicial Exp.	.067	.589	.909	.000	1.070
Private Practice	-.123	.781	.875	.000	.885
Govt. Lawyer	.505	.544	.353	.000	1.658
Top 10 JD	-.120	.545	.826	.000	.887
Law Review	.286	.585	.625	.000	1.331
Fed. Clerkship	.815	.603	.176	.000	2.259
Constant	-.096	1.032	.926		

This table’s data are disturbing because the influence of credentials (the “B” column and the “R” column) is weak, accounting for trivial amounts of the variance in the data. Measured credentials should increase one’s ABA ratings substantially, but they don’t. It is as if the ABA

evaluated Bush appointees according to measured credentials, but for Clinton appointees, experience had little influence on what are subjective judgments reached on other grounds. The process for evaluating Clinton nominees does not appear to be bureaucratically rational in the rough Weberian sense.

Consider this example applying the Bush and Clinton logistic regression models (Tables 4 and 5). Which nominee would you expect to be more likely to get a “Well Qualified” rating? According to the statistical model fitting the data, Clinton nominees without relevant measurable credentials rate higher than Bush nominees with extensive relevant experience:

Clinton Nominee

NO Elite Law School JD
NO Federal Court Clerkship
NO Law Review Experience
NO Private Practice
NO Government Practice

Probability of Highest Rating: 48%

Bush Nominee

Elite (Top 10) Law School JD
Federal Court Clerkship
Law Review Experience
Private Practice
Government Practice

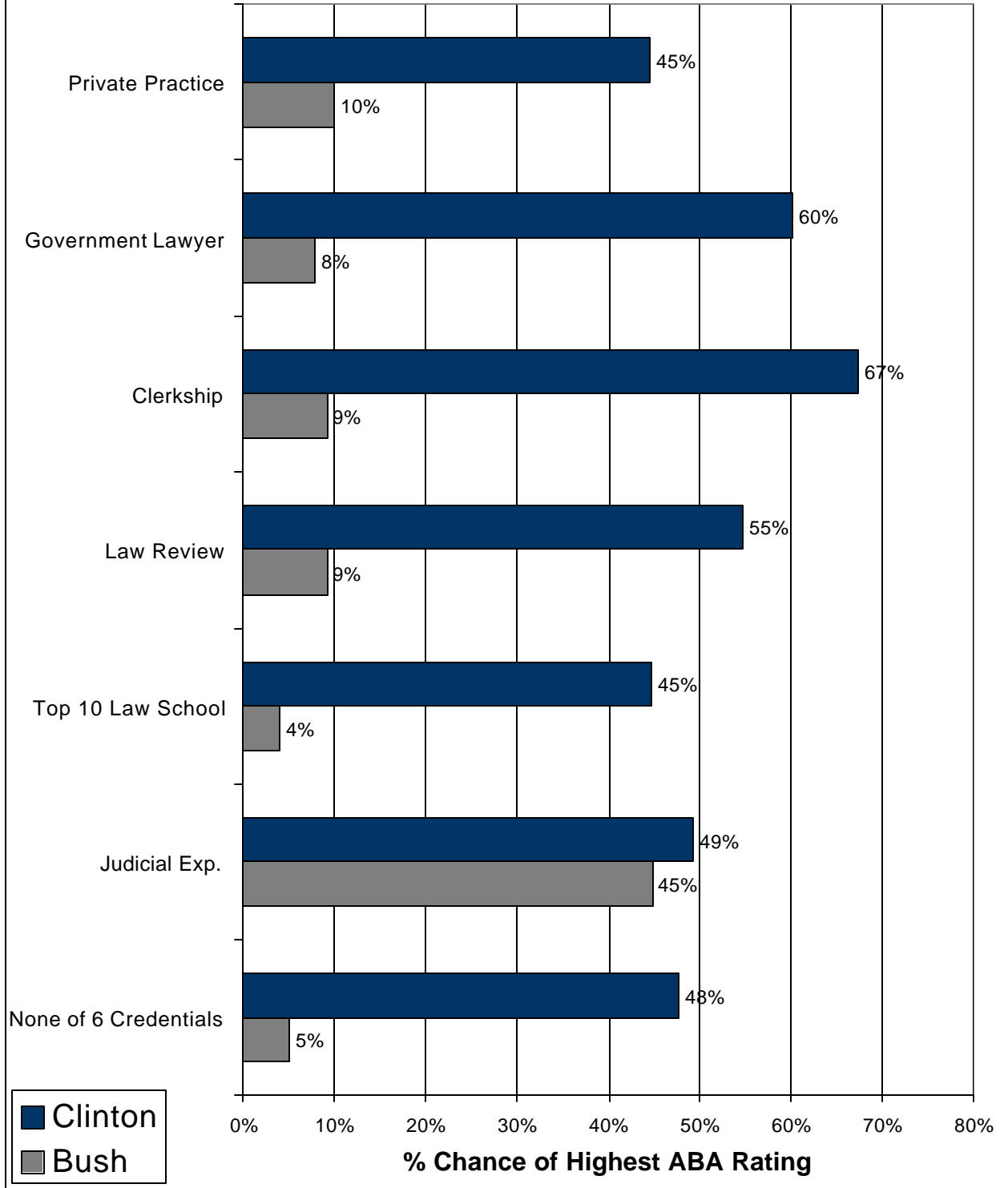
Probability of Highest Rating: 32%

Amazingly, a Bush appointee with good credentials— both private and government practice experience, a top-10 law school education, law review experience, and a federal court clerkship—has a lower probability (32%) of getting the highest ABA rating than a Clinton appointee who has none of these credentials (48% chance). If a Clinton nominee had any one of these five credentials, he would have at least a 45% chance of getting the highest rating. If a nominee had all five credentials, she would have a 77% chance if she were a Clinton nominee and a 32% chance if she were a Bush nominee.

Based on a comparison of the relative odds corresponding to the coefficients of the constants between the Bush and Clinton models (Tables 4 and 5), for candidates with no measured credentials the odds of a Clinton appointee getting a “Well Qualified” ABA rating are a staggering 16.6 times higher than for a Bush appointee. Converting relative odds to probabilities, if a Clinton appointee with no measured credentials has a 48% chance of getting the highest ABA rating, an identically unqualified Bush appointee would have only a 5% chance of getting the top ABA rating. It is rare to see a nonobvious relationship of this size in the social sciences.

Chart 2: Chances of Getting a "Well Qualified" ABA Rating by Specific Credentials of U.S. Court of Appeals Nominees by Presidential Administration

1989-2000 Confirmed Nominees, model Ns=66+42



Of course, neither president is appointing completely unqualified nominees.²⁹ Thus, this last comparison of seemingly unqualified candidates is more theoretical than actual. What these stark model effects really reflect is that, for Bush appointees, credentials (particularly judicial experience) really matter in raising their chances for a higher rating. For Clinton appointees, on the other hand, ratings do not turn much on their measured professional credentials. It is enough to have been recommended by Bill Clinton.

What about more common sets of credentials? In Charts 3 and 4, I present the nine most common sets of actual credentials that the nominated judges presented for ABA evaluation (4 to 9 nominees presented each set of credentials). Computing the probabilities of several sets of credentials using the Clinton and Bush logistic regression equations in Tables 4 and 5, we see two very different patterns. For those without judicial experience, Clinton nominees have much better chances of getting the highest ABA rating of unanimously well qualified (Chart 3).

For those with judicial experience, however, the Bush nominees are treated somewhat better than the Clinton nominees in all models that include private practice experience (Chart 4). That is because the strongest positive variable for Bush appointees is judicial experience, while the strongest negative credential for Clinton appointees is private practice experience. In the one model in Chart 4 without private practice, Clinton appointees have a trivially higher probability of getting the highest ABA rating—unanimously well qualified. In the other models, Bush nominees are actually advantaged by 11-16%, though these moderately substantial effects are small enough to be statistically insignificant.

²⁹. Two of the three Clinton nominees with only one of the six credentials got the highest “Well Qualified” rating (67%), while only one of the five Bush nominees with a single credential was rated “Well Qualified” (20%).

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

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

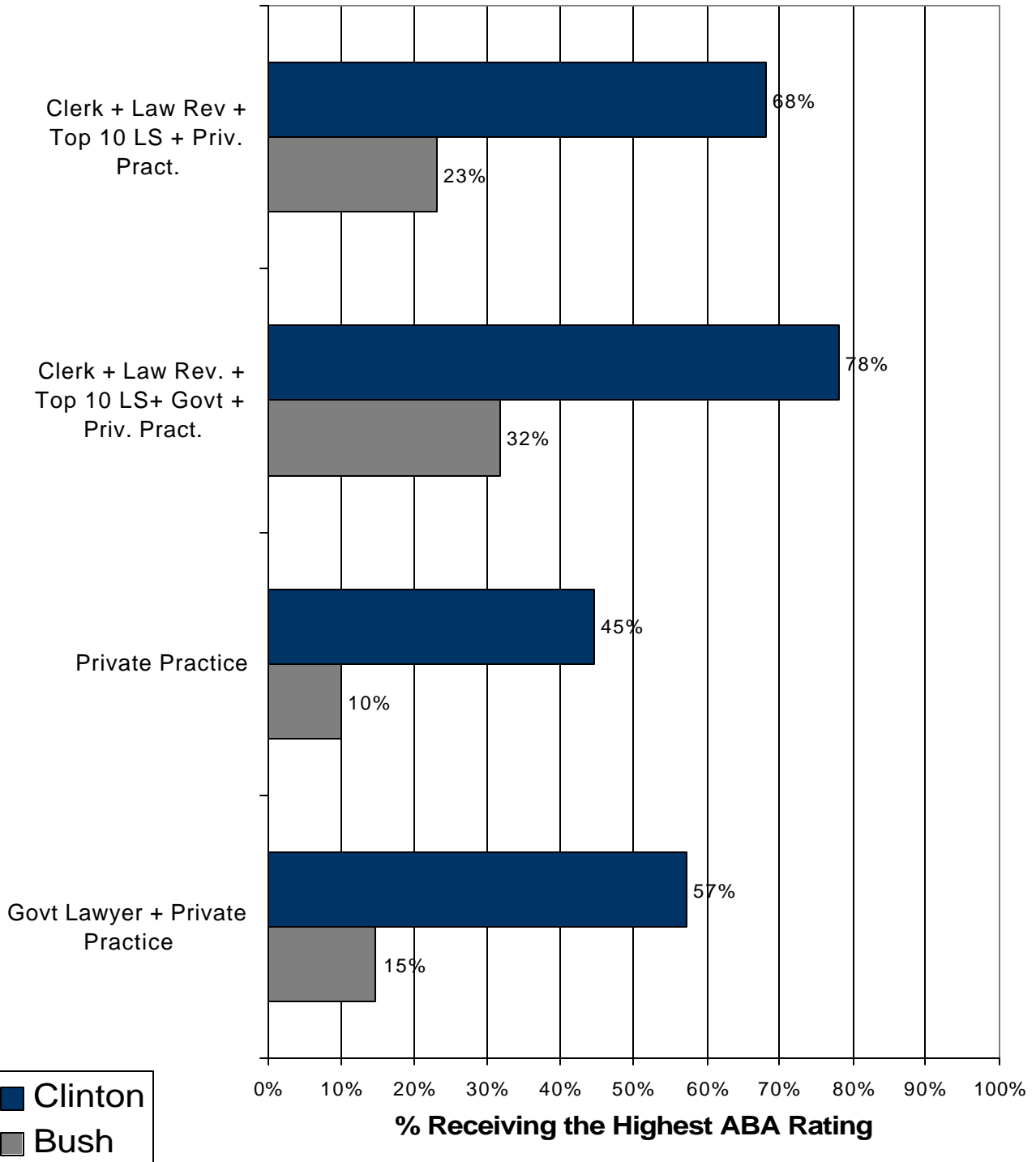
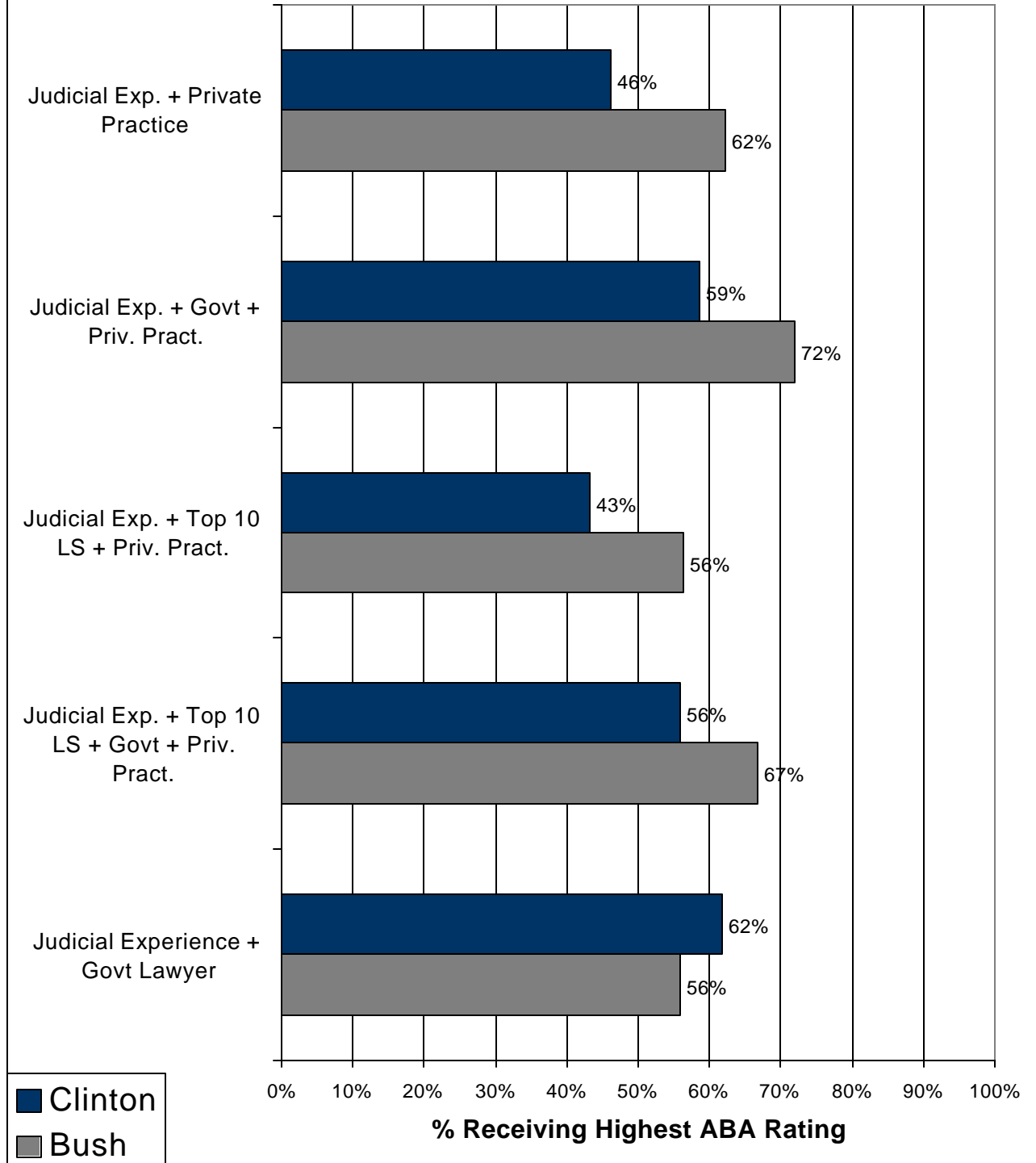


Chart 4: Chances of Getting a "Well Qualified" ABA Rating by Specific Credentials of U.S. Court of Appeals Nominees by Presidential Administration

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



IV Policy Implications

The policy question of how to use ABA ratings in evaluating nominees for appointment naturally arises. Yet this is not a social science question; statistical information cannot tell us what the White House, the U.S. Senate, or the ABA *should* do. There is no reason in this study to question the validity of ABA ratings of Republican nominees with lower court judicial experience. They do just fine. As for the ratings of nominees with no lower court experience, however, the patterns revealed in the data are consistent with a conclusion of strong political bias favoring Democrats. While a cautious academic would not determine conclusively that such a bias exists, neither would a cautious academic likely favor continuing to use the results of an evaluative process that seems to be so strongly biased. This is not a problem of a few percentage points here or there; the effect sizes are extremely large. Nonetheless, one should always be cautious in drawing conclusions, especially where there are important unmeasured variables not in the models, such as integrity or judicial temperament.

The process of evaluating Clinton nominees cannot be shown to bear any logical relation to some of the criteria that the ABA purports to use. If the ABA's highly subjective process is somehow consistent with ABA standards, it would have to be because differences in unmeasured criteria (e.g., integrity and judicial temperament) are so huge, important, and identifiable that they entirely swamp the measured criteria of judicial experience, law school background, and legal practice experience. Not only does that seem extraordinarily unlikely, but whether such a sanguine state of affairs exists is a matter of faith, not evidence.

The business of evaluating prospective judges is not driven by academic standards; decisions must be made. One obvious policy response would be for the ABA to cease rating judges until it can eliminate the apparent bias or show that no bias exists. Another approach might be for the Senate, the White House, and the press to de-emphasize or ignore entirely the ABA ratings because of probable political bias. The White House of George W. Bush recently ended a long-standing practice of allowing the ABA to pre-screen judicial candidates, but the Democratic-controlled Senate Judiciary Committee has vowed not to hold any hearings until it has reviewed the ABA's ratings.

Another possible approach would be to adjust the Republican ratings for the measured amount of observed preference for Democrats.³⁰ I tentatively suggest how this probable bias can be quantified in usable terms. The committee decisions are sometimes unanimous. Other times, they are split—such as between “Qualified” and “Well Qualified”—necessitating some combinations of ratings. Consider the following 4-point scale of ABA ratings:

- 0—Not Qualified/Qualified (split)
- 1—Qualified (unanimous)
- 2—Qualified/Well Qualified (split)
- 3—Well Qualified (unanimous)

Multiple linear regression analysis can provide an estimate of the amount of apparent political discrimination present in the data.³¹ For those candidates without judicial experience, controlling for all measured credentials, the mean ABA bias effect is .9 rating point, rounded to the nearest tenth of a point. In other words, Bush nominees are rated nearly one point lower than Clinton nominees with the same level of measured credentials.

For example, assume a Bush nominee was rated with a split decision between “Qualified” and “Well Qualified” (coded at 2 points). After correcting for the ABA bias effect by adding .9 points, he or she could be considered by the Senate as having 2.9 points, nearly the equivalent of a Clinton nominee with the highest rating of unanimously “Well Qualified,” rated at 3 points. No bias adjustment is necessary for Republican nominees with prior judicial experience, who appeared to have received measurably fair treatment from the ABA in the 1989-92 period.

What might the ABA do to eliminate the apparent bias? The most obvious solution is not without problems: its evaluation committee could be explicitly balanced by party affiliation. But the goal should be nonpartisan ABA evaluations, not bipartisan ABA evaluations. Bipartisan committees might result in more split evaluations and a different role for committee members who might think that they are supposed to represent their party’s interests.

³⁰. This study modeled the party of the president, not the party of the nominee.

³¹. See *infra* Appendix, Table 11.

Certainly, the ABA should monitor the results of its evaluative process of judicial nominees in the current Bush administration to see if the ABA has fallen back into its old ways: the hard, skeptical approach that it used to evaluate the credentials of nominees in the first Bush administration but dropped when Bill Clinton took office. The ABA should be particularly careful not to replicate what appears to have been its especially harsh treatment of minority Republican nominees from the first Bush administration (compared to their credentials).³²

Rooting out political bias is more difficult than it might seem. There are no quick fixes. But if the ABA cannot overcome its apparent political biases (or plausibly demonstrate that they do not exist), the ABA should reluctantly withdraw from the process of rating federal court nominees. At the end of the day, one nagging question remains: why didn't the ABA itself see the extraordinarily large political differences in its evaluative processes and work harder to understand, explain, or eliminate them?

V Conclusion

The American Bar Association's ratings of nominees to the U.S. Court of Appeals reveal some disturbing patterns. Yet this is not a simple story of apparent ABA bias toward Clinton nominees. The patterns are more complex than that. Among nominees with the most important credential—prior judicial experience—Clinton nominees are not favored over Bush nominees; Bush nominees fare roughly as well and sometimes even better than Clinton nominees (though the differences are not large enough to be statistically significant). In some cases involving particular sets of credentials, the probability that a Bush nominee might get the highest ABA

³². See *infra* Table 9. Bush minority appointees were 11 times more likely than white Bush appointees with identical credentials to get a rating below unanimously well qualified. Because of the low number of Bush minority nominees, this effect was not statistically significant ($p=.14$). The suggestion that minorities get lower ABA ratings than their credentials would predict has been made before. Roger E. Hartley, *Senate Delay of Minority Judicial Nominees: A Look at Race, Gender, and Experience*, 84 *Judicature* 190 (2001).

rating is even higher than the probability for a similarly credentialed Clinton nominee.³³

The problem arises for those without judicial experience. Here the apparent preference for Clinton appointees is strikingly large. Controlling for credentials, Clinton nominees have over 10 times better odds of getting a unanimous well qualified rating than similarly credentialed Bush appointees. Just being nominated by Clinton instead of Bush is a stronger positive variable than any other credential or than all other credentials put together.³⁴

These results are consistent with reports from some participants in the process of judicial selection. Stephen Calabresi, a Northwestern law professor who was involved in judicial selection in the Reagan-Bush era, commented, “After the Democrats regained control of the Senate in 1986, we made determined efforts to pick sitting federal or state judges for appellate court vacancies. We assumed that lower court judges would have an easier time being reviewed by the ABA.”³⁵ Asked if this had an effect on who was picked, Calabresi said, “Definitely, yes.”³⁶ It is worrisome to think that the political preferences of ABA committee members might be driving who is selected by a president to serve on the U.S. Court of Appeals.

Even the process of evaluation is different: the ratings of Bush nominees can be shown to be related to measurable credentials; the evaluation of Clinton nominees cannot. Using multiple logistic regression analysis, I explored whether the basic credentials—(1) judicial experience, (2) a top-10 law school education, (3) law review, (4) a federal court clerkship, (5) private practice experience, and (6) government practice experience—were evaluated similarly when considering Bush and Clinton appointees. Surprisingly, a Bush appointee with top credentials on five of these six criteria (excluding only judicial experience) has a lower chance (32%) of getting the highest ABA rating than a Clinton appointee (48%) who has none of these six credentials.

If one examines Bush and Clinton nominees separately, one sees that Bush nominees face an uphill battle to get the ABA’s highest rating, but

³³. See *supra* Chart 4.

³⁴. See *supra* Charts 1-3.

³⁵. Personal communication with Stephen Calabresi, July 11, 2001.

³⁶. *Id.*



winning the battle is based on measured credentials. On the other hand, there measured credentials have only a modest effect on the already favorable odds that a Clinton nominee will be rated well qualified. The process for Bush nominees is substantially objective; the process for Clinton nominees is almost entirely subjective.

The differences in how the ABA treats Bush and Clinton nominees reaches even to the committee's internal decision making. The ABA committee split its vote 33% of the time while evaluating Bush appointees, but only 17% of the time when evaluating Clinton appointees.³⁷ This difference was concentrated among those who lacked prior judicial experience, where 50% of Bush appointees had split ratings, compared to only 10% of Clinton appointees with split ratings.³⁸ These splits are doubly odd because the Clinton appointees were more subjectively evaluated than the Bush appointees. This odd unanimity is suggestive of a strong shared mindset favoring Clinton appointees without regard to measured credentials.

If Clinton nominees had been evaluated according to the credentials and background characteristics (race and gender) used to rate Bush appointees (Table 9's model³⁹), only 36% of Clinton nominees would have received the highest ABA rating, rather than the 62% that actually received that rating. Clinton's nominees would have fared very poorly if they were evaluated according to the pattern revealed in the data for Bush nominees.

What if one leaves race and gender effects out of the models and sticks just to intellectual and experience credentials? If Clinton nominees had been subjected to the same credentials-driven process that Bush candidates were subjected to (Table 4's model), only 46% of Clinton's nominees would have been unanimously rated as well qualified, rather than the 62% that actually received that top rating from the ABA. This 46% is nearly identical to the 45% well qualified ratings that George H.W. Bush's nominees actually received from the ABA. In other words, using the standards for weighting measured credentials that the ABA applied to the

³⁷. Significance tests done in the normal fashion met the .05 criterion. Tests done as exact tests miss it slightly: gamma (.061), Pearson's R (.061), Pearson chi-square (.042), Spearman correlation (.061), and Likelihood ratio chi-square (.061).

³⁸. Significance met the .05 criterion: gamma (.021), Pearson's R (.003), Pearson chi-square (.003), Spearman correlation (.003), and Likelihood ratio chi-square (.004).

³⁹. See Appendix, Table 9.

Bush nominees, the Bush and Clinton nominees had on average almost identically strong qualifications. Yet both groups were not rated identically by the American Bar Association. Despite having no better measured credentials than Bush nominees, the Clinton nominees were rated as more qualified.

APPENDIX

Table 6
Predicting the Odds of Getting a Well Qualified Rating
From the ABA With Judicial Experience
U.S. Court of Appeals Confirmed Nominees, 1989-2000

Multiple Logistic Regression Analysis (n=59)

Dependent Variable: Well Qualified Rating

-2 Log Likelihood 74.459

Goodness of Fit 58.481

Cox & Snell R² .057

Nagelkerke R² .078

Significance .324

<i>Variable</i>	<i>B (log-odds)</i>	<i>S.E.</i>	<i>Signif.</i>	<i>R</i>	<i>Exponent of B (odds)</i>
Clinton Nominee	-.467	.584	.424	.000	.627
Private Practice	.835	.806	.300	.000	2.305
Govt. Lawyer	1.061	.624	.089	.107	2.890
Constant	-.524	.946	.580		

Table 7
Predicting the Odds of Getting a Well Qualified Rating
From the ABA With Judicial Experience
U.S. Court of Appeals Confirmed Nominees, 1989-2000

Multiple Logistic Regression Analysis (n=59)

Dependent Variable: Well Qualified Rating

-2 Log Likelihood 69.782

Goodness of Fit 58.190

Cox & Snell R² .129

Nagelkerke R² .176

Significance .227

<i>Variable</i>	<i>B (log-odds)</i>	<i>S.E.</i>	<i>Signif.</i>	<i>R</i>	<i>Exponent of B (odds)</i>
Clinton Nominee	-.671	.629	.286	.000	.511
Private Practice	.623	.840	.458	.000	1.865
Govt. Lawyer	1.145	.681	.093	.106	3.143
Top 10 JD	.362	.627	.563	.000	1.437
Law Review	.817	.807	.311	.000	2.264
Fed. Clerkship	1.371	.875	.117	.078	3.940
Constant	-.788	.977	.420		

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Table 8
Predicting the Odds of Getting a Well Qualified Rating
From the ABA With Judicial Experience
U.S. Court of Appeals Confirmed Nominees, 1989-2000

Multiple Logistic Regression Analysis (n=59) Dependent Var.: Well Qualified

-2 Log Likelihood	66.028				
Goodness of Fit	58.849				
Cox & Snell R ²	.183				
Nagelkerke R ²	.249				
Significance	.155				

<i>Variable</i>	<i>B (log-odds)</i>	<i>S.E.</i>	<i>Signif.</i>	<i>R</i>	<i>Exponent of B (odds)</i>
Clinton Nominee	-.662	.710	.351	.000	.516
Private Practice	.850	.920	.356	.000	2.339
Govt. Lawyer	1.396	.740	.059	.150	4.038
Top 10 JD	.303	.653	.642	.000	1.354
Law Review	.503	.835	.547	.000	1.654
Fed. Clerkship	1.594	.910	.080	.124	4.925
Female	.939	.695	.177	.000	2.556
Minority	-.832	.701	.235	.000	.435
Constant	-1.154	1.102	.295		

Table 9
Predicting the Odds of Getting a Well Qualified Rating
From the ABA For Bush Nominees
U.S. Court of Appeals Confirmed Nominees, 1989-1992

Multiple Logistic Regression Analysis (n=42) Dependent Var.: Well Qualified

-2 Log Likelihood	42.220				
Goodness of Fit	40.930				
Cox & Snell R ²	.311				
Nagelkerke R ²	.415				
Significance	.048				

<i>Variable</i>	<i>B (log-odds)</i>	<i>S.E.</i>	<i>Signif.</i>	<i>R</i>	<i>Exponent of B (odds)</i>
Judicial Exp.	3.233	1.074	.003	.397	25.350
Private Practice	.244	1.294	.850	.000	1.276
Govt. Lawyer	.243	.862	.778	.000	1.275
Top 10 JD	-.572	.825	.488	.000	.565
Law Review	.796	1.081	.462	.000	2.216
Fed. Clerkship	.815	1.104	.460	.000	2.260
Female	-.527	1.062	.620	.000	.590
Minority	-2.398	1.623	.140	-.064	.091
Constant	-2.401	1.546	.120		

Table 10
Predicting the Odds of Getting a Well Qualified Rating
From the ABA For Clinton Nominees
U.S. Court of Appeals Confirmed Nominees, 1993-2000

Multiple Logistic Regression Analysis (n=66) Dependent Var.: Well Qualified

-2 Log Likelihood	81.178
Goodness of Fit	66.243
Cox & Snell R ²	.092
Nagelkerke R ²	.126
Significance	.6025

<i>Variable</i>	<i>B (log-odds)</i>	<i>S.E.</i>	<i>Signif.</i>	<i>R</i>	<i>Exponent of B (odds)</i>
Judicial Exp.	-.162	.663	.807	.000	.850
Private Practice	-.018	.802	.982	.000	.983
Govt. Lawyer	.549	.562	.328	.000	1.732
Top 10 JD	-.010	.564	.986	.000	.990
Law Review	-.001	.638	.999	.000	.999
Fed. Clerkship	.911	.618	.141	.045	2.487
Female	1.063	.663	.109	.082	2.894
Minority	-.297	.666	.656	.000	.743
Constant	-.287	1.064	.787		

Table 11
Predicting the ABA Ratings For Nominees Without Judicial
Experience, Linear Regression Model
U.S. Court of Appeals Confirmed Nominees, 1989-2000

Multiple Linear Regression Analysis (n=49) Dependent Var.: ABA 4-point Rating

R: .569 R²: .324

	<i>F</i>	<i>df</i>	<i>Significance</i>
Model	2.392	8	.033

<i>Variable</i>	<i>B</i>	<i>S.E.</i>	<i>Beta</i>	<i>t</i>	<i>Sig</i>
Clinton Nom	.873	.272	.442	3.204	.003
Private Pract	-.143	.490	-.049	-.293	.771
Yrs. Priv. Pr. (Stand.)	-.033	.171	-.037	-.195	.846
Government Lwr	-.534	.333	-.279	-1.601	.117
Yrs. Govt. Pr. (Stand.)	.227	.185	.241	1.225	.228
Fed. Clerkship	.117	.288	.061	.407	.686
Law Review	.431	.278	.226	1.552	.129
Top 10 JD	-.660	.277	-.346	-2.382	.022
Constant	2.067	.501		4.129	.000