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It's time for the American Bar Association to admit its bias and work to correct it

3-minute read

James Sieja Special to the USA TODAY Network

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The Supreme Court has changed what higher education institutions can consider when determining applicants' qualifications, arguing that the use of race unconstitutionally distorted the admissions process.

To become a federal judge, a nominee goes through a process similar to applying to college, though the American Bar Association, a professional group of lawyers, makes the qualifications judgment. And there is now considerable evidence that partisan politics and race play significant distorting roles in the process.

It's time the ABA takes a hard look at its process and possible reforms, or presidents from both parties will continue to sideline it, despite the value the ABA adds.

My research, just published in Political Research Quarterly, shows that the partisanship of the member who investigates circuit court nominees matters. The article, which relies on over 60 years' worth of data never before gathered on individual members of the ABA Standing Committee on the Federal Judiciary, finds that Democratic-led investigations into Democratic nominees' backgrounds lead to systematically higher ABA ratings. The finding remains even after the application of rigorous statistical matching methods to root out any confounding influences on the ratings.

And racial and ethnic minority nominees need about nine years of experience as a federal judge to have the same chance of receiving the ABA's top rating as a white nominee with no experience as a federal judge.

Considering these findings, it's hard not to replay one of the most high-profile actions taken by the committee. On May 8, 2006, the Senate Judiciary Committee called the head of the ABA

Standing Committee to testify on a matter that no senator had ever experienced: For the first time since 1958, the SCFJ revised the rating it gave a circuit court nominee downward. What happened?

According to the committee head, the change was the result of recent interviews with the nominee's colleagues, who described the nominee as "insulated … immovable and very stubborn and frustrating to deal with on some issues." The revelations from the interviews caused some members of the committee to change their votes from the highest "well-qualified" rating to the lower "qualified" one.

Another change — one that the SCFJ didn't mention — was the person who did the interviews. When President George W. Bush initially put forward the nominee in 2003, former Reagan White House Counsel Fred Fielding, then the D.C. Circuit member on the SCFJ, conducted the background investigation. But when Bush put the nomination forward again in 2005 after the Senate failed to act on it, Pamela Bresnahan and Marna Tucker, both Democrats, reinvestigated the nominee.

What's the right explanation? Legitimate criticism based on new findings? Or the change in investigator partisanship?

Regardless, my findings directly counter the ABA's position that the SCFJ rates nominees solely based on their qualifications and judicial temperament. As a result, the ABA must take two steps to reduce the appearance of — and actual — bias going forward. The reforms also could make both Democratic and Republican administrations more likely to involve the ABA in judicial selection, preserving a process originally introduced as an expert assessment by legal industry peers.

First, the ABA needs to open up. "Sunlight is the best disinfectant," as Louis Brandeis observed, and the ABA could clean up quite a bit by making more data, such as the exact vote totals for the ratings, available.

Lists of people the investigators talked to would be immensely helpful. The ABA wouldn't need to release transcripts. Just the names of interviewees would suffice to show that the investigators rely on a broad range of sources.

Copies of the investigator reports, which the SCFJ already distributes to its 15 members, would go a long way in helping researchers to understand the bases for the committee votes.

Second, the SCFJ needs a simple structural reform: Double its size. Guarantee a Republican and Democratic member each year in every circuit. Many federal agencies guarantee

representation to both parties, so the SCFJ has models to work from. Having one Democrat and one Republican investigate every nominee helps expand the number and variety of people involved. And it would help police biases, whether implicit or explicit, that any particular SCFJ member may have.

The SCFJ should still be a part of the process. The investigators provide crucial information — essentially, peer reviews of the nominees — that no other organization can deliver well. That added value was a big reason conservative Reagan appointee to the 9th Circuit Diarmuid O'Scannlain, who received only a "qualified" rating, nevertheless supported the SCFJ's continued presence in the nomination process.

Furthermore, there have been astonishingly few leaks of sensitive information from the committee over the years. The Supreme Court itself can't measure up to the SCFJ's record. The lack of leaks suggests a well-functioning, albeit perhaps partisanly blinkered, SCFJ.

Oh, one last thing: the nominee whose rating was revised downward in the mid-2000s? You may have heard of him. He currently sits on the Supreme Court as its pivotal justice: Brett Kavanaugh. The controversy around his ABA rating easily raised Kavanaugh's profile in conservative legal circles, helping to pave his way to the high court. The ABA ought to be wary of influence like this on the process. It should stick to its original intent.

James Sieja is an assistant professor of government at St. Lawrence University in Canton, New York. His research focuses on the lower court selection, nomination and confirmation process. He teaches classes on American government, the judicial system, the presidency, constitutional law and research methods.