

September 26, 2006

Karen J. Mathis
President
American Bar Association
321 North Clark Street
Chicago, IL 60610

Dear Ms. Mathis,

Since 1948 the American Bar Association (“ABA”) has been granted a singular honor by the Senate Judiciary Committee. It has reviewed the nominees to the bench selected by the President and provided its findings on their qualifications to the Judiciary Committee. The ABA’s strong reputation in 1948 for non-partisanship and fairness was key to the Committee’s grant of this privilege. We, past and present members of the ABA, fear that recent developments have undermined that reputation and may result in the loss of this privilege and reduce the voice of the ABA to simply another partisan special pleader. In order to forestall this possibility and retain the benefits of such review and participation by the ABA, the following unprecedented and troubling incidents must be investigated, addressed, and where found improper, corrected immediately.

For example, it has been reported that the ABA Standing Committee on Federal Judiciary (the “Standing Committee”) violated its own rules when it inexplicably re-rated Brett Kavanaugh, a nominee to the D.C. Circuit, and did not allow him to respond, as required by the Standing Committee’s own rules, to the new “evidence” that resulted in his rating being changed from “well qualified” to “qualified.” We are troubled by reports that this re-rating took place in consultation with a United States Senator who had been investigated by Judge Kavanaugh when he was serving as an assistant to Independent Counsel Kenneth Starr.

The unexpected rating of Michael B. Wallace, a nominee to the Fifth Circuit, also troubles us. Nominees with his outstanding credentials and experience have never received this type of treatment. Mr. Wallace graduated cum laude from Harvard University, and received his J.D. degree from the University of Virginia, where he was a member of the Law Review and the Order of the Coif. He clerked for the Mississippi Supreme Court and the U.S. Supreme Court. He is a member of the American Academy of Appellate Lawyers, an invitation-only organization, and has successfully argued cases before the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth Circuit and the Mississippi Supreme Court. It would be unfortunate if the Standing Committee’s process subjectively produces a lower evaluation for a person like Mr. Wallace merely for his advocacy of positions with which members of the Standing Committee do not agree.

Should a member of the Standing Committee recuse himself or herself when there is evidence of bias for or against the nominee? Was the question of the recusal of Standing Committee Chair Stephen Tober addressed given that Mr. Tober had passionately opposed Mr. Wallace’s efforts as a director of the Legal Service Corporation? Should there be a higher recusal standard for the Chair given his opportunity to influence and pressure other members of the Committee?

We all agree that partisan politics or special interests should play no role in the evaluation and selection of qualified judicial nominees. To guarantee that all nominees are fairly evaluated,

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what efforts are you and the ABA making to ensure that members of the Standing Committee represent the full spectrum of judicial philosophies of the members of the ABA and legal community at large?

We are sure you agree that even an appearance of partiality is problematic. The ABA could easily remedy this problem by allowing for more transparency in the review process (while respecting nominees' privacy), establishing a clear recusal policy for conflicts of interest, and selecting members for the Standing Committee who reflect the broad judicial philosophies of the entire legal community. If the ABA is to continue to play its important role in reviewing the credentials of presidential nominees to the federal bench, the ABA judicial review process needs to be free from even the appearance of a conflict, and the ABA needs to focus exclusively on assisting both Democrat and Republican Presidents with getting the best possible nominees confirmed.

We look forward to your response.

Sincerely,

Charles Cooper, former
Assistant Attorney General for
the Office of Legal Counsel,
Department of Justice

David Norcross
Former member

Frank B. Strickland,
former Member, House of
Delegates, ABA

Patricia J. Paoletta,
former Co-Chair of the
International Communications
Committee, ABA

Robert Barker,
Committee on Foreign
Investment, International Law
Section, ABA

Thomas W Brooke,
Council Member, Section of
Intellectual Property Law,
ABA

David Busby,
former Chair of the Judicial
Selection Committee of the
Federal Circuit Bar
Association; former Chair,
Standing Committee on
Customs Law, ABA

Jim Bushee,
past Vice-Chair,
Environmental Quality
Committee of the Section of
Natural Resources, ABA

Heather S. Heidelbaugh,
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Hon. Lawrence C. Waddington,
retired Judge, Los Angeles
Superior Court

Robert J. Horn,
Co-chair, Subcommittee on
Free Trade Areas of the
Americas, Section on Dispute
Resolution, ABA

Professor Ronald D. Rotunda,
Professor of Law, George
Mason University School of
Law

cc: Senator Arlen Specter, Senate Judiciary Committee Chairman
Senator Patrick J. Leahy, Senate Judiciary Committee Ranking Member

*For the complete list of the 228 signers or for more information please contact
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