



CAIT LIN FOTO

# MINORITY JUDICIAL CANDIDATES HAVE CHANGED

## The ABA Ratings Gap Has Not



*This study presents an exploration of trends in the American Bar Association ratings of minority judicial candidates over time. Notably, the demographics of minority candidates have changed over time, with minority candidates increasingly resembling white candidates in terms of their educational and professional profiles. However, minority candidates are still more likely to receive lower ratings from the ABA than their white counterparts.*

by **MAYA SEN**

### Introduction

The nomination of federal judges is a delicate task. On the one hand, the president seeks to nominate ideological allies. On the other, the president also wants to nominate those individuals who are qualified enough to serve as federal judges. The first point is straightforward, and numerous scholarly works have addressed

presidential attempts to assess candidates' ideologies. But the second question is sufficiently interesting in its own right. How does the president assure himself and the public that he is appointing candidates of the highest quality? What does it even mean for a candidate to be qualified? Is there such a thing as a "qualified" federal judge?

Presidents since Eisenhower have outsourced many of these questions to the American Bar Association (ABA), which for decades has evaluated the qualifications of federal nominees. The ABA's ratings are influential: By some accounts, a number of President Obama's nominees have failed to clear the confirmation hurdle because they were

deemed “Not Qualified” by the ABA.<sup>1</sup> This ratings process, which appears to affect women and minorities at greater rates, has rankled some progressive groups that wish to see the number of such candidates grow.<sup>2</sup> This procedure has also rankled conservatives, who maintain that the ABA has a leftward tilt and that the process has the effect of hurting otherwise strong conservative candidates. Indeed, the George W. Bush administration took a strong stance against the use of ABA ratings when the president directed his attorney general, Alberto Gonzales, to decline to use the ratings in the consideration of judicial nominees.<sup>3</sup>

Given this controversy, there has been relatively little empirical work tracing the influential role of the ratings over time. Some existing studies have shown that minority judicial candidates are more likely to receive negative ratings than white candidates, even after controlling for potential educational and professional differences.<sup>4</sup> However, these papers haven’t specifically taken into account the fact that the demographics of judges—specifically minority and female judges—might have changed over time. There are significantly greater educational and professional opportunities for minorities than there were even 20 or 30 years ago. One line of attack on these studies has therefore been that the results are driven, in the words of the ABA president, by “Mad Men-era statistics,”<sup>5</sup> reflecting an earlier time

when minorities were systematically denied opportunities and when society lacked the more egalitarian norms of today.

This article examines these issues in the context of minority nominations to the U.S. district courts. First, I examine how the demographics of minority nominees have varied over time in order to assess whether increased educational and professional opportunities have changed the profiles of minority candidates to the federal courts. I find that the demographics of these judges have indeed changed: Minority judges are now in many respects (and on average) closer than ever to white judges in terms of their educational, clerkship, and professional backgrounds. As an illustration, the modal black judge used to be educated at *Howard* Law School; today, the modal black judge is educated at *Harvard* Law School. Second, I examine whether these increased opportunities have translated into a narrower gap in ABA ratings awarded to minority candidates. I don’t find much, if any, evidence that this gap has narrowed. Quantitative analysis of contemporary nominations suggests that minority candidates still receive lower ABA ratings than do comparable whites. I find similar patterns when it comes to female nominees, although there is some evidence that the gap between them and male candidates has attenuated slightly.

This article proceeds as follows.

I first briefly lay out the contours of the ABA ratings process. I then describe the data involved here, which involve some 1,500 nominations to the U.S. district courts from 1960-2012. I next demonstrate that the demographics of minority candidates have shifted in important respects over time, with minority candidates on average resembling more and more the “average” candidate in terms of their education and professional profiles. Next, I show that, despite accounting for these changes, minority (and also female) candidates continue to receive lower ratings from the ABA, a gap that, for minority candidates, has not attenuated. I conclude by discussing important questions left open by this research.

## An Overview of the ABA Ratings Process

The ratings process is initiated when the White House confidentially forwards a list of potential nominees to the ABA Standing Committee on the Federal Judiciary.<sup>6</sup> The Standing Committee then reviews a host of material and conducts interviews to formulate a rating based on the candidate’s “temperament,” “integrity,” and “competence.”<sup>7</sup> These ratings are then sent back to the White House, again in confidence, leaving the president the option to pursue the confirmation(s) or decline to move forward.<sup>8</sup>

The ABA ratings are important across several dimensions. First, the White House submits the names of potential candidates before they are formally nominated. This means that some candidates are confidentially dropped before being formally nominated, raising the negative impact ABA ratings could have on a potential candidate.<sup>9</sup> Second, the ABA ratings of formally named candidates appear to be highly predictive of a candidate’s eventual Senate confirmation. For example, one study found that candidates who are rated “Not Qualified” are significantly more likely—around 35 percentage points more likely—to see their nominations fail.<sup>10</sup> For those individ-

1. Charles Savage, *Ratings Shrink President’s List for Judgeships*, N.Y. TIMES, Nov. 23, 2011, at A1.

2. Nicole Flatow, *What We Can Learn from ABA’s Ratings of Obama Judicial Candidates*, ACS BLOG AMERICAN CONSTITUTION SOCIETY (Mar. 28, 2013, 2:55 PM), <http://www.acslaw.org/acsblog/what-we-can-learn-from-abas-ratings-of-obama-judicial-candidates>.

3. Letter from Alberto Gonzales, U.S. Attorney General, to Martha Barnett, President of the American Bar Association (2001).

4. See, e.g., Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, 2 J. LAW & COURTS 33-65 (2014); Dustin Koenig, *Bias in the Bar: ABA Ratings and Federal Judicial Nominees from 1976-2000*, 95 JUDICATURE 188-195 (2012); Susan Brodie Haire, *Rating the Ratings of the American Bar Association Standing Committee on Federal Judiciary*, 22 JUST. SYS. J. 1-17 (2001); John R. Lott, Jr., *The American Bar Association, Judicial Ratings, and*

*Political Bias*, 17 J. LAW & POL. 41 (2001).

5. James R. Silkenat, Letter to the Editor, *A.B.A.’s Vetting of Judges*, N.Y. TIMES, May 9, 2014, at A26.

6. The Standing Committee is comprised of 15 members, one from each of 12 federal appeals circuits, two from the larger Ninth Circuit, and one chair.

7. American Bar Association, *Standing Committee on the Federal Judiciary: What It Is and How It Works*, 6 (2009) [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/federal\\_judiciary/federal\\_judiciary09\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09_authcheckdam.pdf).

8. As discussed in Sen, *supra* note 4, this raises some potential estimation problems; however, that paper estimates the number of candidates that would need to be dropped by various administrations to account for the ABA ratings gap between white and black candidates.

9. See Sen, *supra* note 4; Savage, *supra* note 1.

10. See Sen, *supra* note 4.



uals who receive poor ratings, this can be devastating.

More worrisome is the possibility that the ratings could potentially be skewed against certain kinds of candidates, a possibility that has been supported by empirical analyses on point. For example, several studies have found that candidates to the federal appeals courts who are more conservative or appointed by Republican presidents are more likely to be awarded lower ABA ratings than are liberal or Democratic candidates.<sup>11</sup> When it comes to gender and race, the findings are a bit more conflicted, with some studies finding no differences and some studies finding slight differences in their ratings.<sup>12</sup> A recent study looking at district court appointments found a gap between female and male candidates, and between minority (primarily black) and white candidates; the findings in that study were robust to matching comparable candidates together; they were also robust to the potential bias resulting from the White House's practice of dropping some portion of confidentially vetted candidates pre-nomination.<sup>13</sup>

However, the literature that finds lower ABA ratings for minority (and possibly also female) candidates for the most part does not take into account the possibility that the demographics of minority (and also female) candidates could vary across time. As other scholars have noted, the early female and minority appointments came from civil rights positions, law professorships, and nonprofits.<sup>14</sup> Many of these appointees had been denied opportunities to pursue elite law schools, clerkships, and law firm careers. However, since the mid-twentieth century, many more educational and professional opportunities have opened, creating a more open playing field for minority and female candidates.

This transformation within the legal profession raises an important empirical and normative point. Perhaps a gap in ABA ratings between minority (and also female) candidates and others is reflective of an earlier period in which these

candidates were denied equal opportunities and faced many obstacles. Indeed, finding that gaps existed earlier but do not exist today would paint a positive picture of the ratings system, one in which gaps are erased both through the vigilance of political and legal actors and through more fully realized equal opportunities for minorities (and for women) within the legal profession. On the other hand, finding that a gap still exists would be more discouraging, suggesting roadblocks remain despite the remarkable advances of these individuals within the legal profession.

### Data on U.S. District Court Judges

With these conceptual questions delineated, I next turn to discussing the data used in this project. Data for this analysis come from the federal district courts, the lowest tier of the federal judiciary. I explore the district courts because the wealth of observations makes it more straightforward to detect statistical effects. In addition, I juxtapose my results with findings on the federal courts of appeals, which, although mixed, for the most part reveal no differences between minority and white candidates.<sup>15</sup> Finding a difference between district and appeals judge nominations raises questions about the relative political importance of the two tiers.<sup>16</sup>

The raw data come from the Federal Judicial Center (FJC), "the research and education agency of the federal judicial system,"<sup>17</sup> which maintains a biographical database of U.S. federal judges. Among the information reported by the FJC is data on each federal judge's ABA rating, race,<sup>18</sup> gender, age, education (both undergraduate and law school), previous judgeships, previous political experience, and a host of variables speaking to the political environment under which the candidate was named (e.g., the Senate vote on the confirmation, the Senate composition, etc.). Most importantly, the FJC reports for each federal judge a short description of his or her previous professional employment, including whether he or she was a partner in

a law firm, a state or federal prosecutor, a public defender, law professor, or nonprofit attorney. I used automated content analysis to disaggregate these descriptions, creating dummy variables to take into account various types of professional experiences. In other words, a computer program read each description and documented whether the judge had any of these types of experience. In all, I collected data on 1,776 judges to the federal courts, starting in 1960 and moving to 2012. Because the ABA purports to take into account the years of previous experience, I also scraped the data to create a variable denoting how much trial or practical experience each judge had.

The FJC only includes data for those judges who were actually confirmed and invested, a potential problem as the ABA also rates candidates whose confirmations failed. To assess the characteristics of those individuals whose confirmations were unsuccessful, I turned to other sources. For candidates nominated during and after Bill Clinton's administration, these names were reported by the Department of Justice. Finding information on older failed nominations required the use of secondary sources. These included books, newspaper articles, and other sources of information.<sup>19</sup>

11. *E.g.*, Susan Navarro Smelcer, Amy Stiegler & Richard L. Vining, Jr., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees*, 65 POL. RES. Q. 827-40 (2012); Lott, *supra* note 4.

12. *See, e.g.*, Sen, *supra* note 4; Lott, *supra* note 4; Haire, *supra* note 4.

13. *See* Sen, *supra* note 4.

14. *E.g.*, Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other 'Human Rights' Record*, 11 J. GENDER, SOC. POL'Y & L. 1131-63 (2002).

15. *E.g.*, Smelcer et al., *supra* note 11; Lott, *supra* note 4.

16. *See* Susan Navarro Smelcer, Amy Stiegler & Richard L. Vining, Jr., *Where One Sits Affects Where Others Stand: Bias, the Bar, and Nominees to the Federal District Courts*, in this volume.

17. Federal Judicial Center, <http://www.fjc.gov>.

18. The racial categories used by the FJC are "white," "African American," "Hispanic" (Latino/a), "Asian American," "American Indian," and "Pacific Islander." "Hispanic" is a mutually exclusive category.

19. A particularly helpful secondary source was SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997).

**TABLE 1. Racial/Ethnic and Gender Distribution of Judicial Nominees by President (through Spring 2012)**

President	Whites	African Americans	Hispanics	Women	N
Barack Obama	0.7	0.2	0.11	0.49	122
George W. Bush	0.84	0.06	0.1	0.2	283
William J. Clinton	0.76	0.18	0.06	0.28	343
George H.W. Bush	0.89	0.06	0.05	0.18	177
Ronald Reagan	0.94	0.02	0.04	0.08	302
Jimmy Carter	0.78	0.15	0.07	0.14	207
Gerald Ford	0.92	0.06	0.02	0.02	55
Richard M. Nixon	0.96	0.03	0.01	0.01	178
Lyndon B. Johnson	0.92	0.05	0.03	0.02	118

Source: Federal Judicial Center

**TABLE 2. Distribution of ABA Ratings for U.S. District Judge Candidates (1960-2012)**

	Not Qualified	Qualified	Well Qualified	Exceptionally Well Qualified	N
All	0.01	0.44	0.53	0.02	1,776
Whites	0.01	0.41	0.56	0.02	1,484
Blacks	0.02	0.58	0.40	0	163
Hispanics	0.02	0.59	0.38	0.01	102
Women	0.01	0.49	0.50	0	304
Men	0.01	0.42	0.54	0.03	1,472
Democrats	0.02	0.44	0.52	0.02	788
Republicans	0.01	0.43	0.54	0.02	988

Source: Federal Judicial Center

In total, I collected data on 134 failed candidates.<sup>20</sup>

Table 1 presents some basic summaries of the numbers of candidates—disaggregated also by

20. Note that some of the variables—for example years of trial or professional experience—were simply impossible to collect for these non-confirmed candidates (because existing secondary sources do not comport exactly with the data collected by the FJC).

21. For the Obama Administration, the data collection period ends in April 2012.

22. I start the period of analysis in 1960, which corresponds to the timeframe when the first African Americans were appointed to the U.S. district courts. James Parsons, the first, was appointed to the U.S. District Court for the Northern District of Illinois by John F. Kennedy in 1961.

gender and by race—among the various presidential administrations.<sup>21</sup> Table 2 shows the distribution of ABA ratings among the various groups. These data echo the results found in other studies. First, the number and share of diverse appointments has risen markedly. Second, minorities (and also women) on average appear to receive lower ratings than others.

### Changes in Minority and Female Candidates Over Time

I begin the empirical inquiry by addressing the question of whether the characteristics of minority can-

didates have changed over time, reflecting the significant removal of barriers to admissions into elite law schools, prestigious clerkships, and white-shoe law firms. For ease of presentation, I present characteristics for judicial candidates by comparing those named pre-1993 versus post-1993,<sup>22</sup> with 1993 being the year Bill Clinton started making appointments. Obviously, demographic changes and the removal of entry barriers into the legal profession have been gradual; however, there is a clear intuition behind this operationalization. Affirmative action programs started in the early 1960s, and many universities and law schools attempted to address past discrimination by addressing unequal treatment and by creating more diverse classrooms. Thus, members of the baby boom generation (those born in the post-WWII era of the 1940s) were able to benefit from this promotion of minorities' and women's interests in university admissions, whereas those from earlier generations certainly could not; indeed, earlier generations had to face segregated environments and other acts of discrimination. With Bill Clinton being the first baby boom president, and with his judicial appointments drawn from this post-War generation, comparing those appointments made during and following Clinton to those made before him provides a good overview of generational trends over time. Descriptive statistics that compare pre- and post-Clinton nominees are displayed in Table 3.

Table 3 highlights two important points. The first is that the number of diverse appointments has risen between the pre- and post-Clinton periods. Prior to Clinton, six percent of candidates (62 out of 1031) were African American, four percent were Latinos (41), and nine percent were women (89). After Clinton, these numbers rose to 13 percent African American (100 out of 747), eight percent Hispanic (61), and 29 percent women (214). There is no question that the share of minority and female candidates nominated to

**TABLE 3. Demographics of U.S. District Court Nominees Named from 1960-1992 (Pre-Clinton) and from 1993-2012 (Post-Clinton)**

	Whites Pre-Clinton	Whites Post-Clinton	Blacks Pre-Clinton	Blacks Post-Clinton	Latinos Pre-Clinton	Latinos Post-Clinton	Women Pre-Clinton	Women Post-Clinton
Ave Age at Investiture	49.85	51.42	48.34	48.69	47.28	48	45.79	48.88
Female	0.08	0.26	0.16	0.35	0.12	0.38	1	1
Nominated by Democrat	0.29	0.59	0.58	0.82	0.44	0.54	0.36	0.74
Harvard Law School	0.08	0.08	0.05	0.09	0.02	0.08	0.07	0.09
Howard Law School	0.001	0.19	0.07	0.03	0.01			
Private Law School	0.49	0.56	0.74	0.60	0.40	0.46	0.56	0.60
Law Clerk	0.15	0.35	0.03	0.21	0.10	0.12	0.33	0.36
Law Professor	0.05	0.05	0.16	0.09	0.10	0.03	0.07	0.07
Private Practice	0.96	0.90	0.79	0.77	0.90	0.80	0.80	0.84
U.S. Attorney	0.11	0.07	0.02	0.04	0.10	0.02	0.06	0.06
Justice Department Lawyer	0.04	0.06	0.10	0.06	0.05	0.03	0.09	0.05
Public Defender	0.01	0.06	0.05	0.16	0.08	0.20	0.02	0.08
U.S. Magistrate	0.04	0.14	0.02	0.15	0.05	0.18	0.10	0.23
State Judge	0.39	0.35	0.57	0.53	0.52	0.48	0.52	0.39
Years of Practice	16.75	16.77	10.95	9.50	12.69	13	9.26	11.81
N	920	566	62	100	41	61	89	214

Source: Federal Judicial Center

the U.S. district courts rose in just a few generations.

Second, Table 3 shows that across many characteristics, minority (and to a lesser extent female) judicial nominees appear to have become more and more like the average white candidate. (I discuss some important exceptions below.) For example, consider legal education. Among federal judges, the modal law school is also one of the most prestigious—Harvard Law School. As Table 3 shows, around eight percent of white candidates attended Harvard Law School. Among African American candidates, the figure was five percent pre-Clinton and nine percent post-Clinton, the second figure being comparable with the white average. For Latinos/Hispanics, it was three

percent versus eight percent, matching the white average.

Interestingly, the numbers are reversed when we examine Howard Law School, among the nation's most prestigious historically black law schools and alma mater of Thurgood Marshall. Around 20 percent of all African American candidates named before Clinton attended Howard Law School; that number drops markedly after Clinton to only seven percent. This appears to indicate a movement toward an educational business model centered on "Top 14" schools like Harvard Law School. For better or for worse, these data show a movement by minority candidates toward the educational and professional path pursued by white candidates.<sup>23</sup>

Other traits demonstrate similar

patterns. Among white candidates, 15 percent pre-Clinton and 35 percent post-Clinton served as law clerks, a rise indicative of the increased importance of such prestige markers. Among African American candidates, only three percent pre-Clinton had served as

23. Important empirical work has shown that minority and female judges vote differently than white or male judges. See, e.g., Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167 (2012); Christina Boyd et al., *Untangling the Causal Effect of Gender on Judging*, 54 AM. J. POL. SCI. 389-411 (2010); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COL. L. REV. 1 (2008). The movement of minorities and women toward pursuing education and professional paths more similar to those of men and of whites could attenuate such voting differentials, which would implicate the normative ideals of descriptive representation. This aspect remains to be researched.

**TABLE 4.** Distribution of ABA Ratings for U.S. District Judge Candidates Named from 1960-1992 (Pre-Clinton) and from 1993-2012 (Post-Clinton)

	Not Qualified	Qualified	Well Qualified	Exceptionally Well Qualified	N
Pre 1992	0.01	0.49	0.47	0.04	1,022
Post 1992	0.01	0.37	0.62	0	746
Blacks Pre 1992	0.03	0.69	0.27	0	62
Blacks Post 1992	0.01	0.51	0.48	0	100
Latinos Pre 1992	0	0.70	0.28	0.02	40
Latinos Post 1992	0.03	0.51	0.46	0	61
Women Pre 1992	0.01	0.66	0.33	0	89
Women Post 1992	0.005	0.42	0.57	0	214

Source: Federal Judicial Center

law clerks; between the Clinton and Obama Administrations, however, 21 percent had this kind of experience—a striking jump that is much closer to the white average. The trend works in other ways, as well. For example, the share of law professors among African Americans, Latinos, and women has fallen post-Clinton to nine percent, three percent, and seven percent respectively, again closer to the white average of five percent. Across several important characteristics, minority (and to a lesser extent female) candidates are moving closer to the profiles of white candidates.

There are some important exceptions. First, consider the share of judicial candidates who are public defenders. Among whites, the share is one percent pre-Clinton and six percent post-Clinton—a slight uptick. However, among African Americans, the share jumps from three percent to 17 percent, and for Hispanics eight percent to 19 percent—both figures quite a bit higher than the white average. One explanation may be that something about being a public defender draws a particularly diverse pool—perhaps unsurprising if politically minded black and His-

panic candidates (especially those appointed by Democrats) care deeply about racial and social justice.

Second, the share of minority candidates that has some sort of previous judgeship continues to differ between minority and white candidates, particularly when it comes to state judgeships (less so on U.S. magistrate positions). Among white post-Clinton candidates, the share with some experience in a state judicial system is around 35 percent. Although the number has fallen in pre- and post-Clinton years for blacks and for Hispanics, it is still much higher than this: 53 percent for blacks and 48 percent for Hispanics. The reasons behind this are less clear.

To sum, the implications of this discussion are twofold. The first is that the number and share of candidates named to the U.S. district courts who are minority (or female) has risen over time. The second is that the educational and professional profiles of these candidates have become more similar to those of white (or male) candidates, with a few key exceptions. The normative and philosophical implications of these shifts are significant and should be the subject of future research and theorizing. For the purpose of this study, I now turn to exploring what these pat-

terns mean for the ratings awarded to minority candidates by the ABA.

### The Persistence of the ABA Ratings Gap

As Table 2 shows, minority (and also female) candidates have been less likely to receive one of the higher ratings awarded by the ABA, a conclusion supported by several studies.<sup>24</sup> A potential critique of these analyses is that those findings are driven by the earlier (pre-Clinton) minority appointments—those who faced more overt forms of discrimination and had fewer opportunities in terms of positions at white-shoe law firms, legal clerkships, etc. That is, these results are being driven by the differences illustrated in the above discussion. Table 4 provides ammunition for this as it shows increasing shares of black and Latino nominees are now receiving the “Well Qualified” ABA rating compared to earlier time periods.

To assess how these potential changes could—or could not—be affecting the results, I ran several multivariate regression analyses that control for potential differences and allow us to compare how race or ethnicity have correlated with ABA ratings over time. The outcome in these analyses are the candidates’ ABA ratings, operationalized as whether the candidate in question received the highest, “Well Qualified,” rating. (In running the analyses on pre-Clinton candidates, I group together the “Exceptionally Well Qualified” rating, which was discontinued in 1989, with the “Well Qualified” rating.) Thus, the outcome is a 1 or a 0, which compares those who received “Well Qualified”/“Exceptionally Well Qualified” with “Qualified”/“Not Qualified.” Operationalizing this outcome in other ways (for example, as a categorical ordered variable) does not change the inferences.

Because the outcome variable here is a 0 or 1, I use a logit regression with various controls. (Logit regression coefficients can sometimes be hard to interpret, so I also discuss predicted probabilities.)

24. See Sen, *supra* note 4; Lott, *supra* note 4, Haire, *supra* note 4.



Among these are whether the candidate was white, black, Hispanic/Latino, female, or male and whether the judge was a former law clerk, law professor, attorney in private practice, U.S. attorney, assistant U.S. attorney, justice department attorney, public defender, federal magistrate, federal bankruptcy judge, or state judge. All of these variables were 0 or 1 variables. I also include dummies for district court nomination year in order to capture temporal variation. (This would have the effect of controlling, for example, for Senate composition or recently decided Supreme Court cases.) In results not shown, I also include years of practical experience; this has the effect of winnowing down the sample size to only those candidates who were confirmed. Because this could bias the results, I opt against presenting those results here; however, the findings are substantively consistent with what I present in Table 5.

To assess the relative importance of time, and to explore whether earlier nominations are driving the gap, I present three models. Column (1) presents results sub-setting the sample to only those nominees named pre-Clinton (1960-1992) while Column (2) presents the same results for nominees named during the Clinton Administration and after (1993-2012). Column (3) presents a model that includes all nominees (1960-2012) with the race/ethnicity and gender variables interacted with whether the nomination happened pre- or post-Clinton. This is designed to test very simply whether there exists a discernible difference played by race/ethnicity or gender in the two time periods. In all of the models, white is the omitted racial category.<sup>25</sup>

The results are clear with regard to minority candidates. Both Columns (1) and (2) show clear differences between black and white, and Latino and white candidates, with black and Latino candidates being significantly less likely to receive the higher ABA ratings. Translating the logit coefficients

into predicted probabilities, black candidates are on average 24 percentage points less likely to get a high rating than whites in the pre-Clinton period and 23 percentage points less likely in the post-Clinton period; Latinos are 20 percentage points less likely to get a high rating than whites in the pre-Clinton period and 19 percentage points less likely in the post-Clinton period.<sup>26</sup> The models also show some differences between female and male candidates, with women being 19 percentage points less likely to get a high rating than men in the pre-Clinton period and eight percentage points less likely in the post-Clinton period (although it is important to note that the coefficient in Model 2, the post-Clinton period, is significant only at the 10 percent level).

These differences between minorities and whites persist despite controlling for those variety of attributes routinely held up as being important in the ABA ratings process. The sizes of the effects are also roughly comparable between the pre- and post-Clinton periods, again especially with regard to black and Latino candidates. A formal test between the two periods, via the interaction in Column (3), which is not significant, shows that there is no way to rule out that there are no differences in the ratings awarded to these groups in earlier versus more modern eras. The only discernable attenuation perhaps has been with regard to female nominees, for whom the interaction in Column (3) is significant at the five percent level. However, the gap between male and female candidates does continue somewhat into the more modern era, as evidenced by the negative and statistically significant coefficient on the gender term in Model 2, which is significant at the 10 percent level.

Thus, there is no empirical basis on which to argue that the gap in ABA ratings between white and minority candidates has attenuated over time, despite the changing demographics of minority candidates. There is, at best, some basis to argue that there has been attenu-

ation in the gap between women and men.

## Discussion and Concluding Remarks

The empirical contributions of this piece are twofold. First, the composition of the lower federal courts has changed rapidly. In addition, as minorities have made increasing inroads into the legal profession, minority candidates are more likely than ever to have prestigious legal education, clerkships, and impressive professional experience. Some important differences remain, however; for example, minority nominees are more likely to come from public defender ranks or to have held state judgeships. However, over time minority candidates have come to resemble the overall population of judicial candidates.

When it comes to ABA ratings, the picture is more troubling. Despite the inroads minorities (and also women) have made into the legal profession, and despite the awareness of implicit biases and other kinds of discrimination, these candidates are still less likely than other comparable candidates to receive the ABA's top marks. For blacks and Latinos, this gap has persisted over time in the modern era of nominations, and there is no sign of attenuation. For women, the gap has also persisted, although the good news is that it appears to have narrowed (if not completely eliminated). As other studies have noted, this discrepancy could adversely affect the ability of minorities and women to move past confirmation.

The results here leave open some areas of research. For example, this study examines district court nominations rather than appeals court nominations. The appeals court literature, however, comes to different conclusions about the possibility of racial or ethnic disparities.<sup>27</sup> Why

25. Note that "Hispanic" (or "Latino") is a mutually exclusive category in these analyses. This reflects the coding decision made by the FJC.

26. Predicted probabilities are calculated using regression presented in Model (2), holding other variable values at their mode.

27. *E.g.*, Smelcer et al., *supra* note 11.

**TABLE 5. Logit Regression for U.S. District Court Nominations (1960-2012)**

	Whether Nominees Receive High ABA Ratings		
	Model 1	Model 2	Model 3
African American	-1.06*** (0.34)	-0.99*** (0.30)	-1.14*** (0.33)
Hispanic/Latino	-0.83** (0.38)	-0.73** (0.33)	-0.88** (0.38)
Post-Clinton			13.32 (535.41)
Female	-0.80*** (0.28)	-0.38* (0.22)	-0.89*** (0.27)
Age	0.07*** (0.01)	0.05*** (0.02)	0.06*** (0.01)
Top 14 Law School	0.27* (0.16)	0.06 (0.23)	0.23* (0.13)
Private Law School	0.12 (0.15)	0.36* (0.20)	0.19 (0.12)
Law Clerk	0.37* (0.22)	0.08 (0.21)	0.21 (0.15)
Law Professor	0.17 (0.30)	-0.45 (0.41)	-0.04 (0.24)
Private Practice	0.83** (0.36)	0.29 (0.29)	0.50** (0.22)
U.S. Attorney	-0.18 (0.25)	-0.13 (0.40)	-0.21 (0.21)
Assistant U.S. Attorney	0.20 (0.21)	1.36*** (0.27)	0.63*** (0.16)
Justice Department	0.37 (0.37)	-0.10 (0.45)	0.20 (0.28)
Public Defender	0.26 (0.59)	0.24 (0.34)	0.23 (0.29)
Federal Magistrate	0.33 (0.36)	1.09*** (0.31)	0.77*** (0.23)
Bankruptcy Judge	0.70 (0.61)	1.50* (0.89)	0.89* (0.49)
State Judge	0.26* (0.15)	0.34* (0.20)	0.27** (0.12)
African American*Post-Clinton	—	—	0.45 (0.42)
Hispanic*Post-Clinton	—	—	0.30 (0.49)
Female*Post-Clinton	—	—	0.71** (0.33)
Constant	-18.88 (882.74)	-2.28** (0.99)	-17.23 (535.41)
N	971	658	1,629
Log Likelihood	-604.04	-369.44	-985.85
AIC	1,304.08	808.88	2111.70

Source: Federal Judicial Center

(Outcome variable is whether the nominee received a (1) Well Qualified ABA or Exceptionally Well Qualified rating versus (2) a Not Qualified or Qualified rating. Column (1) includes pre-Clinton nominees only (1960-1992). Column (2) includes post-Clinton nominees only (1993-2012). Model 3 includes all judges and interacts the race and gender variables with whether nomination occurred pre- or post-Clinton.)

\*\*\*p < 0.01; \*\*p < 0.05; \*p < 0.1

might this be the case? One possibility is that this might be due to the political importance of the federal appeals courts. Another possibility is that the educational and professional characteristics of the appeals courts nominees differ systematically from those of the lower courts. For example, it could be the case that nominees to the higher courts have *less* variance in terms of their educational and professional backgrounds but *more* variance in terms of their politics. This is an open research question.

Another open question concerns the changing nature of diverse appointments. The literature on descriptive representation—as well as case law on affirmative action (e.g., *Bakke v. California Board of Regents*)—suggests that a benefit of diversity is that people of color and women bring different and important viewpoints into a discussion. But what these descriptive data show is that, increasingly, the profiles of minority candidates (and to a lesser extent female candidates) resemble more and more the profiles of white candidates. What does this mean for descriptive representation? What does it mean for descriptive representation that today’s modal black judge comes not from Howard Law School but from Harvard Law School?

These questions are important. And, as we move forward into an era of greater diversification of our federal courts, they are of increasing salience. ★

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