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The American Bar Association Broke Its Own Rules

Josh Blackman

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For decades, the American Bar Association has played a unique role in vetting federal judges. Starting with President Dwight Eisenhower, administrations would give the lawyers' group a heads-up about whom they intended to nominate to the federal bench. A committee would then assess the candidate's qualifications. In theory, at least, if the organization rated the nominee as "not qualified," the administration would reconsider the appointment.

Conservatives have long alleged that the ABA's process was biased against conservative nominees. And some data do back this claim up, though the ABA vigorously defends its independence. Unsurprisingly, over the past two decades, the ABA has whipsawed in and out of the White House. In 2001, President George W. Bush opted out of the process, and stopped giving the ABA "such a preferential, quasi-official role." In 2009, President Barack Obama welcomed the ABA back into the fold. And, like clockwork, in 2017, President Donald Trump fired the ABA. Since then, the group has reviewed Trump's nominees after they were announced, in its own capacity but not as part of the formal process, and found most of them qualified. Last week, however, there was one notable exception.

President Trump nominated Lawrence VanDyke to fill a vacancy on the U.S. Court of Appeals for the Ninth Circuit. He previously served as the solicitor general of Nevada and Montana. As the top appellate lawyer of two states in the Ninth Circuit, VanDyke argued two dozen cases and briefed scores more. (I worked with VanDyke on several cases over the past few years.) By any objective measure, VanDyke is qualified to serve as a federal judge.

The American Bar Association, however, rated him "not qualified." On the eve of VanDyke's confirmation hearing, the organization released a two-page letter relaying anonymously sourced criticisms. But I find many of the allegations are simply implausible, and border on misleading.

For example, the letter stated, "In some oral arguments [VanDyke] missed issues fundamental to the analysis of the case." Oral arguments are matters of public record. It should have been easy enough to cite several, or at least one, case in which VanDyke missed a fundamental issue. But the letter offers no such citation. (The law professor Orin Kerr reviewed a few of VanDyke's arguments, and said he seemed to be a "very good advocate.") Likewise, the letter asserted that "his preparation and performance were lacking in some cases in which he did not have a particular personal or political interest." If some objective evidence exists to back up this accusation, none was provided. The letter said VanDyke was "lacking in knowledge of the day-to-day practice including procedural rules." But it offered no evidence to support this claim, either.

Other claims in the letter were quite personal. For example, based on "assessments of interviewees," the ABA reported that "VanDyke is arrogant, lazy, [and] an ideologue"; "lacks humility"; and "has an 'entitlement' temperament." And it reported "a theme" that he "does not have an open mind, and does not always have a commitment to being candid and truthful."

Who would make such unfounded accusations? The letter states that the ABA's evaluator conducted "60 interviews with a representative cross section of lawyers (43), judges (16), and one other person" who have worked with VanDyke. Those interviews included "attorneys who worked with him and who opposed him in cases and judges before whom he has appeared at oral argument." Did all 60 people have the same opinions? The letter itself concedes that they did not, stating that "the interviewees' views, negative or positive, appeared strongly held on this nominee." Those positive views are not relayed in the letter, though, and it gives no indication of how widely held the negative views actually were.

Indeed, there is some evidence that the interviewees who supported VanDyke's nomination were not asked to rebut such slanderous charges. Former Nevada Attorney General Adam Laxalt told *National Review* that when he was contacted by the ABA, he'd spoken of VanDyke in glowing terms. (His assessment matches my own.) Laxalt was interviewed by Marcia Davenport, a Montana trial attorney who led the ABA's evaluation. Laxalt said that the interview was "short and perfunctory," and that Davenport "did not ask me to comment on anyone else's critiques of his character or professionalism." Nor did she ask Laxalt to comment on VanDyke's most important cases during his tenure as Nevada solicitor general. Laxalt told Fox News that Davenport "seemed completely disinterested." If people told Davenport that VanDyke was "arrogant" and "lazy" and routinely made errors in his professional dealings, then Laxalt and other interviewees with more positive impressions should have been given a chance to address those accusations.

Laxalt says he was not, and he is not alone. Davenport also interviewed Ashley Johnson, who worked with VanDyke at the Gibson Dunn law firm for several years. She wrote on Twitter that "the call lasted fewer than 5 minutes." Davenport did not tell Johnson "that she had received ANY negative comments or ask if they matched my experience over the 13 years I have known Lawrence. Instead, [Davenport] read through what was clearly a script of questions, thanked me for my time, and hung up," Johnson wrote.

Davenport also interviewed Joseph Tartakovsky, who served as Nevada's deputy solicitor general for three years under VanDyke. Tartakovsky told Fox News his interview also lasted about five minutes, and "it was clear to me that she was going through the motions." She did not ask follow-up questions, he said.

The Regent University law professor Brad Lingo also spoke with Davenport. He offered a similar account, also on Twitter. Lingo tweeted that he told Davenport that VanDyke was "one of the most earnest, humble, kind-hearted, and intellectually engaged lawyers I know." He added, "I was surprised that the interview lasted all of about 5 minutes." Indeed, VanDyke himself testified at his Senate confirmation hearing that during his ABA interview, Davenport

repeatedly cut him off whenever he attempted to respond. She said they didn't have enough time to go through all the points.

There seems to be a pattern. People who had good things to say about VanDyke, including VanDyke himself, report that they were cut short, and that their opinions did not make it into the letter. How many of these 60 people thought VanDyke was "arrogant" and "lazy"? We have no idea.

The most salacious accusation came from Davenport herself. The letter states: "Mr. VanDyke would not say affirmatively that he would be fair to any litigant before him, notably members of the LGBTQ community." I have watched many confirmation hearings. Often a nominee is asked whether he or she would be fair to a particular group. The nominee invariably replies, "I will be fair to everyone." It would be improper for a judge to single out any group for particular treatment.

When I first read the letter, I simply assumed that Davenport asked VanDyke the same question: Would he be fair to people in the LGBTQ community? No reasonable nominee would admit a bias toward LGBTQ people. During his hearing, VanDyke stated that he would be fair to everyone. But that is not what the ABA reported.

During his confirmation hearing, VanDyke rejected the letter's insinuation: "I did not say that," he recounted, while holding back tears. "I do not believe that. It is a fundamental belief of mine that all people are created in the image of God, and they should all be treated with dignity and respect, Senator."

We now have a situation of "he said, she said." I believe VanDyke. Davenport's account is utterly implausible. The Senate should call Davenport to testify under oath about her assertion. She should also be called upon to explain why her investigation appears not to have complied with the ABA's own procedures in three important regards.

First, ABA rules require members to recuse themselves from an investigation if their "impartiality might reasonably be questioned." In 2014, VanDyke ran for election to the Montana Supreme Court. The race was extremely divisive. According to public records, Davenport donated to VanDyke's opponent. Based on those standards, Davenport should have recused herself. She should not have been the lead investigator.

Second, ABA rules state that when a nominee is rated as "'not qualified,' the Chair will appoint a second evaluator" who will conduct "a new interview of the nominee." VanDyke was never interviewed a second time. The final letter considered only Davenport's interview with VanDyke. A follow-up discussion could have resolved any doubt about the LGBTQ comment, but none was held.

Third, the ABA rules provide that the written statement must be submitted to the Senate Judiciary Committee, as well as the nominee, 48 hours before the confirmation hearing. This gap is designed to address any possible errors, and perhaps to make last-minute corrections. In this case, the letter was released at 7 p.m., in advance of a hearing the next morning. VanDyke was ambushed.

At every juncture, the ABA seems to have cut corners. It apparently failed to ask VanDyke's supporters to respond to charges against him. The letter may have mischaracterized VanDyke's statements. And the investigation was led by a conflicted person who did not even appoint a second person to interview the nominee. The process was flawed from the outset, and should not be afforded any deference. Even if Davenport testifies, and justifies her actions, the damage has already been done—not to VanDyke, but to the ABA. This letter demonstrates that the organization can no longer be trusted to perform a fair assessment of nominees. (William Hubbard, chairman of the ABA committee that conducts judiciary-nominee evaluations, said in a statement, "The evaluations are narrowly focused, nonpartisan, and structured to assure a fair and impartial process.")

What happens next? Nominees, of course, could refuse to meet with the ABA. Though that option includes a risk: The most damning allegations will not be refuted. There is a far more productive approach. These interrogations should be treated as hostile depositions. A court reporter and videographer should be present, as well as privately retained counsel to push back on unfounded accusations. In the event that the nominee is rated as qualified, there would be no need to release the transcript. Going forward, when a nominee is rated as unqualified, the transcript should be released, and the recording should be posted publicly online. There is no reason to rely on disputed accounts of the interview.

As originally designed, the confidential nature of this process made some sense. The interviews were not recorded to ensure that members of the bar could candidly critique a potential jurist, and to prevent the nominee from facing public embarrassment if the report was released. But the VanDyke letter turns that practice on its head. He was sandbagged at the last minute, and he was not given a chance to address any of the accusations it contained. This wound was entirely self-inflicted. If the ABA wanted to rate a nominee like VanDyke as unqualified, the organization should have followed its own rules to a T. Instead, it ran a slipshod process, led by a person whose objectivity was open to question.

This process should no longer be a black box. If reports faithfully reflect the interviews, faith can be restored in the ABA. If the process remains shrouded in secrecy, Americans can safely discount future findings.

Josh Blackman is a constitutional law professor at the South Texas College of Law Houston and an adjunct scholar at the Cato Institute.