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**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†**

ROBERTA COOPER RAMO* AND N. LEE COOPER**

The mission of the American Bar Association (ABA), as stated in its constitution, is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for law.¹ For the past 118 years, the Association has labored diligently to fulfill these ambi-

† Footnotes supplied by editors.

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¹ See ABA CONST. art. 1, § 1.2 (adopted Aug. 24, 1936; substantially revised effective July 21, 1971; 1984; 1994).

The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

Id.; see also *Annual Meeting in Chicago Caps 1983-84 Year*, 70 OCT. A.B.A. J. 109, 109 (1984). Chief Justice Warren E. Burger stated that the ABA's "vision should be of an American Bar that will focus the influence, the power and the programs of this great body — the largest association of lawyers in the world — upon the objectives that brought it into being more than 100 years ago. These purposes were to improve justice and ensure an honorable profession." *Id.*

tious purposes.² It has done so in a myriad of ways, including establishing high standards for legal education, developing model codes of ethics for lawyers and judges, educating its members about new developments in all areas of practice, educating the public about the constitutional system of government and the rule of law, bringing the expertise of lawyers to bear on matters of public policy having significant constitutional and legal aspects, and providing objective evaluations of the professional qualifications of potential judges for the federal bench.³

It is ironic that the ABA, one of the very few associations in Washington which does not have a political action committee, does not make campaign contributions, does not endorse candidates for public office and does not rate the performance of congressional incumbents is often charged with being a partisan political group. The ABA's members represent all aspects of the legal community; they are from all political backgrounds and affiliations and they join out of a desire to improve their ability to represent their clients and to improve the system of laws which govern this country—nothing less and nothing more.⁴

² See ABA CONST. art. 2, § 2.1 (1994) (stating that American Bar Association was founded on August 21, 1878); see also R. Townsend Davis, Jr., Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 COLUM. L. REV. 550, 560 (1989) (stating that ABA sought involvement in judicial nomination process since 1870s).

³ See, e.g., William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 161-62 (1995) (explaining that ABA is responsible for rules of conduct and responsibility that are supposed to be followed, either in ABA's format or similar state derived set of rules, by every attorney in United States); Jennifer Gordon, *Symposium: Economic Justice in America's Cities: Visions and Revisions of a Movement, We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 434 (1995) (stating how ABA funds awaken society to violations of immigrant workers' rights); Rhonda McMillion, *Ringling Out the 103d: A Partisan Congress Closes with Substantial List of Measures Passed*, 81 JAN. A.B.A. J. 87, 87 (1995) (describing ABA-supported legislation passed by 103d Congress); Lynn S. Muster, *A Proposal for the Hire and Tenure of Faculty of Color in Higher Education*, 20 T. MARSHALL L. REV. 45, 58 (1994) (stating that ABA involves itself in education and criteria for education of those who plan to and do attend law schools).

⁴ See ABA CONST. art. 3, § 3.1 (1994) (providing that "[a]ny person of good moral character in good standing at the bar of a state, territory or possession of the United States is eligible to be a member of the Association . . ."); see also Sandra Torry, *In Speech, Dole Reignites Feud Over Bar Association*, WASH. POST, Apr. 20, 1996, at A10 (quoting ABA President Ramo, stating that ABA membership is representative of profession, as "24 percent of its 370,000 members are women and 11 percent are minorities[, and] the ABA is mainly white and mainly male"); *What the Members Think: Expectations and Priorities Solicited Through an In-Depth Survey of the ABA Membership*, 78 NOV. A.B.A. J. 60, 60 (1992) (providing analysis of ABA membership, showing its diversity).

In 1936, the ABA adopted its current constitutional framework.⁵ One of the key elements of that structure was the creation of a broadly representative policy-making body, the House of Delegates.⁶ The House of Delegates is now roughly the size of the United States Congress. Members of the House of Delegates represent all segments of the legal profession and are chosen by state and local bar associations around the country, specialty sections of the ABA, other national legal organizations, and by ABA members in each state.⁷ Like the U.S. Senate, the ABA House of Delegates acts on dozens of recommendations brought to it each year by its members, either on their own motion or, far more typically, as representatives of another bar association or an ABA section or committee.⁸

The ABA's policy adoptions deal with internal governance, standards for accrediting schools, ethical standards for lawyers, recommendations for improvements in judicial administration, and recommendations for enhancements in areas of substantive law of concern to the Association's members, whether it be antitrust, tax, tort liability, intellectual property, family, criminal, administrative procedure, civil rights, or other areas of the law. Most of the policy adoptions concern relatively technical issues, important in their own right, but not of broad public interest. Other issues strike sensitive chords both within and without the Association, just as they do in Congress or among the general public. The Association has adopted more than 1,300 policy resolutions on matters of public policy. There are few, if any, policy positions on which all of the 340,000 members would agree, and many on which there are significant disagreements within the ABA's House and among its members.

The point is that the ABA has always been the home for a complete range of views on almost every topic imaginable. Further-

⁵ The American Bar Association Constitution was adopted August 24, 1936, and it was substantially revised effective July 21, 1971.

⁶ See ABA CONST. art. 6, § 6.1 (1994) (granting House of Delegates authority to "formulate policy" on behalf of ABA); see also Don Sarvey, *A Hundred Years' Journey*, 17 AUG. PA. LAW. 4, 11 (1995) (claiming that Pennsylvania Bar Association modeled its House of Delegates after that of ABA due to ABA's "strict principle of representation").

⁷ See ABA CONST. art. 6, §§ 6.3-6.10, 6.13 (1994) (describing how House of Delegates members are elected).

⁸ See ABA CONST. art. 43, § 43.1 (1994) (explaining that at every meeting House must act on recommendations properly submitted by state or local bar associations, affiliated organizations or sections, or members).

more, the House of Delegates is the elected body within the ABA that controls and administers the operations of the Association.⁹ It should be noted that the House of Delegates is the policy-making body of the Association, but its public policy votes are in no way binding on individual members of the Association; they only reflect the views of a majority of the members of the House.¹⁰

The House's adoption of positions on federal legislation and federal government policy has existed since the House's inception.¹¹ In the late 1930s, the Association was vocal in opposing President Roosevelt's "court-packing" plans.¹² Today, the Association still does not shy from adopting positions on issues which have substantial legal aspects and to which the expertise of the Bar may be appropriately applied. People, including members of the Association, may disagree with the ABA's conclusions and reject its counsel. They may also question why the Association adopts policies on some issues. All positions taken, however, are in furtherance of the Association's mission.

The Association takes particular pride in one aspect of its efforts to improve the justice system: its advisory role with respect to the evaluation of federal judges.¹³ In 1952, following the election of General Dwight D. Eisenhower, his Attorney General, the late

⁹ See ABA CONST. art. 6, § 6.1 (1994) (providing House of Delegates with its powers).

¹⁰ See *What's Happening in the ABA*, 1996 Apr. HAW. B.J. 32, 32 (1996) (explaining that ABA "House of Delegates establishes policy for the ABA and takes positions on professional and public issues"); see also Vicki S. Porter, *Agenda for the ABA House of Delegates at the 1995 Midyear Meeting*, 24 COLO. LAW. 19, 19 (1995) (stating that House of Delegates "controls, formulates policy for and administers the ABA").

¹¹ See Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 203 n.62 (1996) (explaining that House of Delegates was established in 1936 to attain uniform policy throughout legal society, similar to that of field of medicine); see also ABA CONST. art. 6, § 6.1 (1994) (granting House of Delegates with its powers to establish policy).

¹² See Sidney A. Shapiro, Symposium, *A Delegation Theory of the ABA*, 10 ADMIN. L.J. AM. U. 89, 97-98 (1996) (stating that President Roosevelt vetoed ABA-supported Walter-Logan Bill as response to ABA's opposition to court-packing plan); see also Edward A. Adams, *Inside the ABA: Procedural Weapons in Abortion Battle Membership-Wide Referendum at Issue*, N.Y.L.J., Aug. 9, 1993, at 7 (stating that there has not been "ABA-wide referendum since the 1930s, when votes were conducted on child labor laws and President Roosevelt's court packing plan").

¹³ See JOEL B. GROSSMAN, *LAWYERS AND JUDGES* 60-61 (1960) (discussing reasons for establishment of Standing Committee on Federal Judiciary); see also *Public Citizen v. United States Dept of Justice*, 491 U.S. 440, 443 (1989) (stating that ABA Standing Committee on Federal Judiciary supplies Department of Justice with advice concerning potential nominees for federal judiciary); Glenn R. Winters, *The Judicial Nominating Committee*, in *SELECTED READINGS: JUDICIAL SELECTION AND TENURE* 126, 126 (Glenn R. Winters ed., 1967) (stating that ABA, in 1937, claimed that "the most acceptable substitute for direct election of judges" is by having one committee investigate all credentials and abilities of potential judges).

Herbert Brownell,¹⁴ and his Deputy Attorney General, William P. Rogers,¹⁵ concluded that the Administration needed to have an independent review body to examine the qualifications of potential nominees to the federal bench.¹⁶ This independent review body was established to assist the Administration in resisting pressures to repay political debts by appointing persons who were not of sufficient caliber to be exercising the important responsibilities of the judiciary.¹⁷ Brownell and Rogers concluded that the nonpartisan, national professional organization of lawyers, indeed the only comprehensive "umbrella" lawyers' organization, the ABA, was precisely the group to carry out this mission.¹⁸ Ever since, the Standing Committee on Federal Judiciary ("Standing Committee"

¹⁴ See Bart Barnes, Obituaries, *Herbert Brownell Dies at 92; Eisenhower Attorney General*, WASH. POST, May 3, 1997, at C6 (stating that Brownell, former U.S. Attorney General, top White House adviser to Eisenhower, principal author of 25th Amendment to U.S. Constitution, and GOP Chairman from 1944 through 1946, died of cancer on May 1, 1996).

¹⁵ See David Lauter, *Ike Still Casts Long Shadow Over the Continent Geopolitics: His Legacy Shapes Both the Issues and the Options for Those Trying to Redraw the Map of Europe*, L.A. TIMES, May 8, 1990, at A8 (stating that Rogers was Deputy Attorney General and top political aide for President Eisenhower, then Secretary of State in President Richard M. Nixon's administration).

¹⁶ See John A. Sutro, *Merits of the Merit Plan for Judicial Selection*, in SELECTED READINGS *supra* note 13, at 154, 156 (quoting Herbert Brownell's observation that "all too often a judge gets his job as a reward for political loyalty and looks on the courthouse as 'a cozy rest home'"). *But see* Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal? An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REF. 351, 385 (1995) (finding that Eisenhower's appointments to federal bench were predominantly from his political party). *See, e.g.*, Herbert Brownell, *Civil Rights in the 1950s*, 69 TUL. L. REV. 781, 788-89 (1995) (stating that Eisenhower recognized "importance of appointing federal judges who would uphold the Constitution").

¹⁷ See *Justice Stevens Backs ABA's Screening Role*, SAN DIEGO UNION & TRIB., Aug. 4, 1996, at A13. "President Eisenhower began the process as a way of resisting pressure to use the bench for patronage appointments." *Id.*; *see also* EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 22 (1944). Haynes notes that within the Senate and the Presidency, the appointment of federal judges is extremely politicized. *Id.* The fact that senators do not have to reveal their reasons for disapproval contributes to the selection process remaining political. *Id.* President Hoover and Attorney General Mitchell made attempts to rid the judicial selection process of its politics. *Id.* at n.8 (citing Kenneth Sears, *The Appointment of Federal District Court Judges*, 25 ILL. L. REV. 54 (1930)); David A. Price, *Rating Those Who Rate Judges: Is Bar Association a 'Liberal Advocacy Group'?*, INV. BUS. DAILY, June 17, 1996, at A1. Since 1952, the ABA has offered assistance in rating potential federal judicial nominees based on their "integrity, professional competence and judicial temperament." *Id.*; ABA Informal Dec. C-744, *Campaigning for Judgeship*, Mar. 12, 1964. "Canon for Professional Ethics 2 in part provides: It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges." *Id.*

¹⁸ See GROSSMAN, *supra* note 13, at 71 (stating that Brownell, after initial doubts, decided that ABA's Standing Committee on Federal Judiciary was proper group to conduct independent reviews of potential judicial nominees); *see also* HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 121 (1972) (acknowledging fact that ABA House of Delegates established "Special Committee on the Judiciary"); Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 522-28 (1995) (justifying President Eisenhower's decision to nominate Wil-

or "Committee") has been doing so for Republican and Democratic administrations alike.¹⁹

I. COMMITTEE STRUCTURE

The ABA's Standing Committee on Federal Judiciary consists of fifteen members: an at-large member who serves as Chair, two members from the Ninth Circuit, and one member from each of the other twelve federal circuits.²⁰ The members are appointed for staggered three year terms by the President of the ABA.²¹ Although members may be re-appointed, no member serves more than two terms, therefore one-third of the Committee changes every year.²²

It is stressed that the Committee members are not selected on the basis of their politics; they are selected on the basis of their professional reputations and their commitment to an enormous investment of time and energy.²³ Additionally, as conditions to appointment, each member agrees not to seek or accept federal judicial appointment while on the Committee as well as for at least one year thereafter, each member agrees to do all of his or her

liam Brennan, Jr. to Supreme Court since more than just politics were used to arrive at decision).

¹⁹ See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 443 (1989) (stating that Presidents, since 1952, have sought advice from ABA Standing Committee on Federal Judiciary concerning potential federal judicial nominees); see also *Judicial Vacancies. The Processing of Judicial Candidates: Why It Takes So Long and How It Could Be Shortened*, 128 F.R.D. 143, 147 (1989) [hereinafter *Judicial Vacancies*] (noting that ABA's Standing Committee on Federal Judiciary has been consulted on almost every federal judicial appointment since 1952); Davis, *supra* note 2, at 561 (stating that ABA Standing Committee was created in 1946 and has advised every administration since Eisenhower).

²⁰ See AMERICAN BAR ASSOCIATION, *THE ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1* (1991) [hereinafter *WHAT IT IS*] (explaining structure of Standing Committee on Federal Judiciary); ABA CONST. art. 31, § 31.7 (1994) (describing structure of Standing Committee on Federal Judiciary).

²¹ See GROSSMAN, *supra* note 13, at 84 (explaining selection process for Standing Committee members); *WHAT IT IS*, *supra* note 20, at 1 (stating that Committee members are appointed to staggered three year terms by ABA president); Joan M. Hall, Symposium, *Confirmation Controversy: The Selection of a Supreme Court Justice, The Role of the ABA Standing Committee on the Federal Judiciary*, 84 Nw. U. L. REV. 980, 980 (1990) (stating that Standing Committee on Federal Judiciary consists of fifteen members who are appointed by ABA President, at staggered three-year terms).

²² See William G. Ross, *Participation By the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 36 n.162 (1990) (stating that Committee members may serve maximum of two terms and that all three year terms are staggered); *WHAT IT IS*, *supra* note 20, at 1 (instructing that Committee members may only serve maximum of two terms).

²³ See *Public Citizen*, 491 U.S. at 443-44 (stating that Committee members are selected by ABA president); GROSSMAN, *supra* note 13, at 84 (stating that Committee members are appointed by ABA president); *WHAT IT IS*, *supra* note 20, at 1 (noting fact that ABA president is granted authority to appoint members of Standing Committee).

Committee work personally, and all Committee members are mandated to refrain from partisan political activity on the federal level.²⁴ Furthermore, the President must select members who will evaluate only the professional qualifications of candidates, and will not consider ideology or philosophy.²⁵

Appointments to the Committee are based on only one criteria: Excellence. The ABA President seeks out members with outstanding reputations for competence and integrity and who enjoy the utmost confidence and respect in their communities. The current Committee essentially reflects the diversity of the profession. It is comprised of members with outstanding legal credentials. Many of the Committee members have distinguished service in federal and state governments and an assortment of legal organizations, including state and local bar associations, and they also have broad experience throughout the legal community. All of the Committee members are practicing attorneys who bring to the Committee's deliberations a broad knowledge of the bench and bar. They have been prosecutors, law professors, public interest lawyers, government service attorneys, legislators, judges, and law clerks. They practice corporate law, real estate law, environmental law, utilities and business law, medical and health law, banking and securities law, trusts and estates, employment law, civil and constitutional law, international and trade law, tort and insurance law, and general litigation. The Committee members are drawn from firms of varying sizes, including solo practitioners. The one aspect of the Committee members' background which remains unknown is their political affiliation. The ABA never asks. Doubtless, all have been involved in political activities on some level, but once on the Committee, they are forced to leave their politics at the door.²⁶

²⁴ See WHAT IT IS, *supra* note 20, at 2 (explaining ABA's strict requirements to help insure integrity and independence of Committee).

²⁵ See GROSSMAN, *supra* note 13, at 107 (explaining that Committee evaluates candidates by their "professional qualifications" and not their party affiliation); WHAT IT IS, *supra* note 20, at 1 (stating that "Committee does not consider a prospective nominee's philosophy or ideology"); see also Ross, *supra* note 22, at 36 (stating that political and ideological philosophies were investigated when candidates had "extreme views on such matters [that] might bear upon judicial temperament or integrity" but that such policy ceased in 1990).

²⁶ See WHAT IT IS, *supra* note 20, at 2 (explaining ABA's strict requirements to help insure integrity and independence of Committee).

It is important to note that, uniquely among Association entities, the Standing Committee is the final word on its evaluations.²⁷ Neither the Board of Governors, the House of Delegates, nor the officers of the Association play any role in the judgments rendered by the Standing Committee, and they also do not learn of the Committee's recommendations until the recommendations are released to the public.

The ABA Committee takes very seriously its responsibility for providing an impartial evaluation of a candidate's professional competence, judicial temperament and integrity. The Committee's practices and procedures are structured to achieve this goal, and they do not permit consideration of philosophy or political ideology in any evaluation. Over the last four decades every president, Republican and Democrat alike, has made regular use of the ABA Committee to evaluate the professional qualifications of nominees and to advise the Attorney General of their qualifications.²⁸

A review of the Committee's evaluations of the judicial nominations sent to the Senate by the last eight presidents demonstrates that few candidates have encountered serious opposition within the Committee. Since 1980, the ABA has rated 1,608 nominees, including all Supreme Court candidates, either "Qualified" or "Well Qualified." Of the twenty-six nominees the Committee found "Not Qualified," twenty-three were Democratic nominees and three were Republican.²⁹ Despite sporadic, and sometimes intense, criticisms that the Committee is either too conservative or too liberal, it is still the most consistent evaluator of professional credentials involved in the judicial evaluation process. In fact, it

²⁷ See ABA CONST. art. 31, § 31.7 (1994). The ABA's Standing Committee on Federal Judiciary has the power to promote or oppose nominations and confirmations of persons for appointments as judges of United States courts. *Id.*

²⁸ See *Public Citizen*, 491 U.S. at 443 (stating that "[s]ince 1952 the President, through the Department of Justice, has requested advice from the American Bar Association's Standing Committee on Federal Judiciary [] in making [federal judicial] nominations"); HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* 120-22 (1972) (explaining origin of Standing Committee's role in evaluating candidates for judiciary); GROSSMAN, *supra* note 13, at 64 (stating that Standing Committee's working relationship with Senate Judiciary Committee, between 1946 and 1952, facilitated its attaining involvement in evaluating candidates for Supreme Court).

²⁹ See Roberta Cooper Ramo, Editorial, *Criticism of ABA Misses the Mark*, BALT. SUN, June 5, 1996, at A16 (stating that twenty-six potential nominees, three Republicans and twenty-three Democrats, were nominated before Senate, even though ABA Standing Committee found them to be "Not Qualified").

is the only entity in the judicial selection process focused solely on professional qualifications.³⁰

A bipartisan study of judicial selection recently released by the University of Virginia's White Burkett Miller Center of Public Affairs found that "[a]lthough the role of the American Bar Association's Standing Committee on Federal Judiciary has been criticized, alternatively by liberals and conservatives, the Committee does serve a useful function in evaluating the professional qualifications of judicial nominees."³¹

It should also be noted that, despite differences on specific nominations, members of the Senate Judiciary Committee have recognized that the ABA Committee provides critical information to the judicial selection process. This bipartisan support was demonstrated in a recent exchange between then-Chairman Biden, and current Chairman Hatch during the confirmation hearing of Justice Ruth Bader Ginsburg.³²

³⁰ See WHAT IT IS, *supra* note 20, at 1 (explaining how Committee "restricts its review to issues bearing on professional qualifications").

³¹ THE MILLER CENTER OF PUBLIC AFFAIRS, IMPROVING THE PROCESS OF APPOINTING FEDERAL JUDGES: A REPORT OF THE MILLER CENTER COMMISSION ON THE SELECTION OF FEDERAL JUDGES 5 (1996) [hereinafter MILLER CENTER REPORT]. See *ABA Role in Judicial Selection: Hearings Before the Committee on the Judiciary*, (May 21, 1996) (statement of Daniel J. Meador) [hereinafter Meador Statement], available in 1996 WL 10164366 (stating that Miller Center implicitly endorsed ABA's role in evaluating judicial nominees); see also Marcia Cole, *Panel Issues Report on Judicial Selection Gridlock*, NAT'L L.J., May 27, 1996, at A10 (offering summary of Miller Center's findings and concluding that biggest problem in selection process is amount of time taken to fill vacancies).

³² *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Committee on the Judiciary*, 103d Cong. 377-78 (1993) (statements of Senator Hatch and Senator Biden).

The CHAIRMAN. I have no further questions. I only want to thank you again because I think people vastly underrate the incredible amount of work that you all undertake. We in this committee know because our staffs read every one of the opinions. We know what it is like.

You are in active practice at the time while you are doing it. We appreciate it, and I would like to publicly extend my thanks to you, both of you, and to the Bar Association generally for being willing to perform this function.

I yield now to my friend from Utah.

Senator HATCH. I want to join in that praise because I think the changes that have been made at the ABA and the renewed look at the committee and the restructuring of the committee have been very excellent. And I know that it takes a lot of time. It is a lot of effort. You folks are doing a tremendous job for the benefit of the legal community at large, but really for the public at large. And the committee has approached this in an apolitical way, as it should, and I just want to personally acknowledge that in front of everybody here today.

So thank you for the efforts you have put forth, the testimony you have given, and the work that you all have done.

Id.

It is well-known that the Committee provides an advisory and absolutely vital service to the government. While the ABA Committee's role is not dictated by the Constitution³³ and the President and the Senate are not obligated to consult with the Committee, the Committee is asked to conduct evaluations, as a direct result of the high value provided by its evaluations.³⁴

It is apparent from the questions currently being raised about the Committee and its ability to render impartial evaluations of the professional qualifications of federal judicial nominees, that perhaps the Committee's practices and procedures are not fully understood. In order to clarify any misunderstandings in this regard, it may be helpful to detail the Committee's evaluation process and criteria.

II. EVALUATION CRITERIA

The Committee's evaluation of prospective federal judicial nominees is directed [solely] to professional qualifications — integrity, professional competence, and judicial temperament.

Integrity is self-defining: The prospective nominee's character and general reputation in the legal community are investigated, as are his or her industry and diligence.

Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical ability, knowledge of the law and breadth of professional experience.

The Committee believes that ordinarily a prospective nominee to the federal bench should be admitted to the bar for at least twelve years.³⁵

The twelve year guideline is not an automatic disqualification and may be offset by compensating experience and accomplishments in the field of law. Substantial courtroom experience, or

³³ U.S. CONST. art. II, § 2, cl. 2. The President: shall have power, by and with the Advice and Consent of the Senate, to make Treaties . . . ; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States

Id.

³⁴ See *Judicial Vacancies*, *supra* note 19, at 147 (acknowledging fact that "[t]he ABA's participation is strictly a matter of Executive Branch custom and is not directed by law"); Linda Greenhouse, *Court Vacancy Renews Debate on A.B.A. Role*, N.Y. TIMES, Dec. 27, 1987, at A24 (stating that Committee's role in judicial selection is "defined by custom rather than law"); see also Ross, *supra* note 22, at 37 (stating that "Presidents have accorded different levels of deference" to Standing Committee's evaluations).

³⁵ See WHAT IT IS, *supra* note 20, at 3.

experience of a similar nature such as appearing before, or serving on administrative agencies or arbitration boards, or teaching trial advocacy or other clinical law school courses, is an important qualification for prospective nominees to both the appellate and the trial courts.³⁶ The Committee further believes that appellate court nominees should possess an especially high degree of scholarship and talent. The Committee, when investigating judicial temperament, considers the prospective nominee's "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice."³⁷

The Committee rates prospective nominees on the following scale:³⁸

"Well Qualified": To merit this rating, "the prospective nominee must be at the top of the legal profession in his or her legal community, have outstanding legal ability, wide experience, the highest reputation for integrity and either have shown, or have exhibited the capacity for, judicial temperament, and have the Committee's strongest affirmative endorsement."³⁹

"Qualified": This evaluation "means that the prospective nominee meets the Committee's very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the prospective nominee will be able to perform satisfactorily all of the responsibilities required by the high office of a federal judge."⁴⁰

"Not Qualified": A prospective nominee is found Not Qualified when "the Committee's investigation has indicated that the prospective nominee does not meet the Committee's standards with regard to integrity, professional competence, or judicial temperament."⁴¹

³⁶ See *id.* at 3 (stating that experience is important quality for potential nominees).

³⁷ *Id.* at 4.

³⁸ See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 444 n.2 (1989) (explaining that ratings used for Supreme Court nominee evaluations were "well qualified," "not opposed," and "not qualified"); *Washington Legal Fund. v. United States Dep't of Justice*, 691 F. Supp. 483, 487 (D.D.C. 1988), *aff'd sub nom.*, *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) (stating that system used in 1988 for lower court judges was that of "exceptionally well qualified," "well qualified," "qualified," or "not qualified").

³⁹ See *WHAT IT IS*, *supra* note 20, at 7.

⁴⁰ *Id.*

⁴¹ *Id.*

III. APPOINTMENTS TO THE CIRCUIT COURTS OF APPEALS, DISTRICT COURTS AND THE COURT OF INTERNATIONAL TRADE

To commence the Committee's evaluation of the professional qualifications of persons considered for appointment to the Courts of Appeals, District Courts, and the Court of International Trade,⁴² the Office of the Attorney General confidentially forwards to the Committee the name of a prospective nominee under consideration for a seat on one of these courts.⁴³ The Committee neither proposes candidates for the federal judiciary, nor does it lobby for any nomination.⁴⁴ Representatives of the Committee have always testified before the Senate Judiciary Committee on any circuit or district court nominee who receives a Not Qualified rating.

The Committee's investigation, which is conducted pre-nomination, is ordinarily assigned to the member of the Committee residing in the judicial circuit (the "circuit member") in which the judicial vacancy exists, unless that member is overburdened or a conflict exists. A second member of the Committee is asked to participate in an investigation when a candidate's career has extended geographically over more than one circuit, or to conduct an independent investigation, if it appears from the initial investigation that the candidate may receive a Not Qualified rating.

Receipt of the completed Personal Data Questionnaire (PDQ) is the starting point of the Committee's investigation. The PDQ provides substantial information regarding a candidate's professional background and experience, and it also includes writing sam-

⁴² See *Public Citizen*, 491 U.S. at 444. "Prior to announcing the names of nominees for judgeships on the courts of appeals, the district courts, or the Court of International Trade, the President, acting through the Department of Justice, routinely requests a potential nominee to complete a questionnaire drawn up by the ABA Committee. . . ." *Id.*

⁴³ *Id.* at 444 (explaining that "potential nominee's answers and the referral of his or her name to the ABA Committee are kept confidential"); GROSSMAN, *supra* note 13, at 46 (stating that Attorney General's office agrees to allow Standing Committee to investigate by supplying Committee with names of prospective nominees); WHAT IT IS, *supra* note 20, at 1 (stating that Attorney General refers names to Committee, then Committee begins its evaluation).

⁴⁴ See *Public Citizen*, 491 U.S. at 444 (stating that ABA Committee never evaluates potential judicial nominees on its own initiative); see also GROSSMAN, *supra* note 13, at 46-47 (stating that Standing Committee has opportunity to oppose nominations in Senate if President nominates "unqualified" candidate); WHAT IT IS, *supra* note 20, at 1 (stating that "Committee never proposes candidates for the federal judiciary, believing that to do so might compromise its evaluative function").

ples.⁴⁵ The circuit member then examines the available legal writings and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the prospective nominee. Persons contacted by the circuit member include federal and state judges, practicing lawyers in both private and government service, law school professors and deans, legal services and public interest lawyers, and representatives of professional legal organizations, such as state and local bar associations. A typical investigation takes about thirty days to complete.⁴⁶ In cases where questions are raised as to the candidate's qualifications, the circuit member will take whatever time is necessary to arrive at a fair, accurate and complete evaluation. The circuit member meets with the candidate to review his or her qualifications for a judgeship and also raises any adverse information discovered during the investigation. The information is discussed and the candidate is afforded the opportunity to provide any additional materials bearing on the information.

At the conclusion of the initial information-gathering, the circuit member prepares a written informal report containing a description of the prospective nominee's background, summaries of all interviews conducted, including the interview(s) with the prospective nominee, an evaluation of the prospective nominee's professional qualifications, and a recommended rating. After receiving the informal report and discussing it with the circuit member, the Chairperson discusses it with the Attorney General's office and indicates the tentative evaluation. If the office of the Attorney General so requests, the circuit member prepares a formal or final report which is sent to all members of the Committee, together with the response to the PDQ and copies of any other relevant material.⁴⁷ The Committee members then inform the Chairperson of their individual votes, and if questions are raised, the Commit-

⁴⁵ See *Judicial Vacancies*, *supra* note 19, at 148 (explaining Personal Data Questionnaire process); see also MILLER CENTER REPORT, *supra* note 31, at 15-28 (providing abstract of Standing Committee's questionnaire).

⁴⁶ See Meador Statement, *supra* note 31 (stating that Committee attempts to comply with self-imposed thirty day timetable); see also MILLER CENTER REPORT, *supra* note 31, at 8 (suggesting that Committee expand in size so that it will be able to complete its investigations within thirty days).

⁴⁷ See *Judicial Vacancies*, *supra* note 19, at 148 (explaining process by which Attorney General receives ratings); Davis, *supra* note 2, at 552 (explaining process by which Attorney General receives ratings).

tee discusses the prospective nominee either over a telephone conference call or at a meeting.⁴⁸

Once the Committee reaches a decision, the Chairperson confidentially advises the office of the Attorney General of the rating, indicating whether the vote was unanimous — if not unanimous, then the Chairperson relays the rating of both the majority and the minority.⁴⁹ If the President nominates the prospective nominee, the Senate Judiciary Committee holds public hearings where, upon request, the ABA rating will be released to both the candidate and the public. Copies of the report itself, which contains information gathered from confidential interviews, are never provided to anyone outside the Committee, including the President, the Attorney General, and the Senate Judiciary Committee, or anyone within the ABA.⁵⁰

IV. APPOINTMENTS TO THE SUPREME COURT

The Committee's investigation of candidates for the United States Supreme Court is also directed solely to professional qualifications: Integrity, professional competence, and temperament. While the same factors considered with respect to the lower federal courts are relevant to an appointment to the Supreme Court, the Committee's investigation is based on the premise that the Supreme Court requires a person with exceptional professional qualifications.⁵¹

There are several procedural differences between the Committee's investigations of Supreme Court candidates and candidates for other Article III courts that have evolved since the Committee began evaluating candidates for the federal judiciary. First, Presidents now will publicly announce their intention to nominate a particular candidate before referring the name to the ABA Committee. Second, all members of the Committee conduct interviews, within their own geographic areas, of those persons likely

⁴⁸ See *WHAT IT IS*, *supra* note 20, at 6 (explaining communications that occur within Committee).

⁴⁹ See *id.* at 6-7 (providing summary of confidentiality of ratings).

⁵⁰ See *Judicial Vacancies*, *supra* note 19, at 148 (describing process by which rating is released and fact that report remains in confidence); see also *WHAT IT IS*, *supra* note 20, at 7 (explaining process by which ratings may become public, while report does not); Davis, *supra* note 2, at 553 (stating that Committee strictly adheres to its policy on confidentiality).

⁵¹ See *WHAT IT IS*, *supra* note 20, at 8 (providing evaluation criteria and investigation procedures for potential candidates to Supreme Court).

to have information regarding the professional qualifications of the candidate. Typically, hundreds of such interviews are conducted.⁵² Third, teams of law school professors examine the legal writings (i.e. opinions, briefs, and articles) of the candidate.⁵³ Finally, a team of practicing lawyers, which may include former Supreme Court law clerks, examines the legal writings of a candidate, as a valuable cross-check on the academic evaluation. These independent outside reviews, like the investigation as a whole, are intended to weigh professional competence and not to assess the ideology of the candidate. The results of these analyses are reported to the full Committee for discussion and evaluation.⁵⁴

The Committee utilizes the same rating categories when evaluating prospective nominees to the United States Supreme Court as it utilizes when evaluating potential nominees for the other federal courts. To merit the Committee's evaluation of Qualified or Well Qualified, however, the

. . . nominee must be at the top of the legal profession, have outstanding legal ability and wide [legal] experience and meet the highest standards of integrity, professional competence, and judicial temperament. The evaluation of Well Qualified is reserved for those found to merit the Committee's strongest affirmative endorsement.

The third category consists of those who are found Not Qualified for appointment to the United States Supreme Court with respect to integrity, professional competence or judicial temperament.⁵⁵

The Committee's rating of a Supreme Court candidate is confidentially reported to the Attorney General and, following the nomination, reported to the Senate Judiciary Committee.⁵⁶ At the Sen-

⁵² See *Judicial Vacancies*, *supra* note 19, at 148 (stating that almost anyone in "position to evaluate the candidate's competence, integrity and temperament" is interviewed); see also *Davis*, *supra* note 2, at 552 (stating that anyone who can evaluate judicial competence of potential nominee is interviewed).

⁵³ See *WHAT IT IS*, *supra* note 20, at 9 (explaining process by which candidates works are investigated).

⁵⁴ See *id.* at 9 (explaining that this process is actually rather lengthy and may lead, in some instances, to another investigation).

⁵⁵ *Id.* at 9.

⁵⁶ See *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 445 (1989) (stating that after formal nomination, committee chair gives informal, confidential report to Attorney General, and when potential nominee is nominated, ABA Committee's rating, but not entire report, is revealed to Senate Judiciary Committee); see also *WHAT IT IS*, *supra* note 20, at 9 (explaining process by which ratings are communicated).

ate Judiciary Committee's confirmation hearings, a spokesperson for the Committee appears and reports on the reasons for the Committee's evaluation of the nominee.

The Standing Committee on Federal Judiciary is committed to ensuring that its evaluations of the professional qualifications of candidates are thorough and impartial. To this end, the Committee constantly seeks to refine and improve its standards and procedures and believes that opportunities to discuss the important work of the Committee and any concerns about its processes are always valuable.

Unlike the Senate Judiciary Committee, which is made up entirely of members of the U.S. Senate and reports directly to the U.S. Senate, the Federal Judiciary Committee of the ABA is not made up of members of the ABA House of Delegates and does not report to the ABA House of Delegates.⁵⁷ The Standing Committee is the final word on its evaluations. Neither the ABA Board of Governors, the House of Delegates, nor the officers of the Association play any role whatsoever in the judgments rendered by the Standing Committee.

As difficult as it may be to understand to those who have not participated in the Standing Committee's work, there is truly a wall of separation between the policies and the politics of the ABA and the workings of the Standing Committee. In addition, the Committee's own governing principles protect the Committee's independence and ensure its position as a neutral evaluator.

CONCLUSION

For more than 50 years, the ABA Standing Committee has provided, to Republican and Democratic administrations alike, the only objective and non-political evaluation of the professional qualifications of candidates.⁵⁸ The reputations of the Committee members and their pledge of confidentiality cause their peers to share comments with them that would otherwise never see the light of day. Clearly, the Committee's evaluation is but one factor

⁵⁷ See ABA CONST. art. 31, § 31.7 (1994) (stating that Standing Committee may act on behalf of ABA, requiring no additional procedures).

⁵⁸ See CHASE, *supra* note 18, at 20 (claiming that beginning in 1945 it became "customary" for Standing Committee to report on qualifications of federal judicial nominees); ROSS, *supra* note 22, at 62 (stating that ever since its inception in 1946, Standing Committee has been consulted in federal judicial selection).

the President considers in appointing judges and that the Senate considers in confirmation.⁵⁹ It is beyond question, however, that the Committee's evaluations have brought to the judicial selection process essential information about the professional qualifications of judicial candidates.⁶⁰

In its recent report, the Miller Center made a number of recommendations aimed at lessening the role of politics in and streamlining the increasingly prolonged process of appointing federal judges. The Commission included prominent members of both the Republican and the Democratic Administrations and members of Congress, including Attorney General Nicholas deBelleville Katzenbach,⁶¹ former Deputy Attorney General Harold R. Tyler, Jr.,⁶² former United States Senators Howard Baker⁶³ and Birch Bayh,⁶⁴ former White House Counsel Fred Fielding⁶⁵ and Lloyd N. Cutler,⁶⁶ and former judges A. Leon Higginbotham, Jr.,⁶⁷ Frederick B.

⁵⁹ See *Judicial Vacancies*, *supra* note 19, at 145-46 (stating that FBI and Department of Justice investigations are reviewed, as well as questionnaires and financial disclosures); see also Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092, 1098 (1991) (stating that President's desire approval by Standing Committee as indication that entire ABA is in support of candidates).

⁶⁰ See MILLER CENTER REPORT, *supra* note 31, at 5 (stating that Committee's evaluations of potential nominees' professional qualifications is useful); see also Marcia Cole, *Panel Issues Report on Judicial Selection Gridlock*, NAT'L L.J., May 27, 1996, at A10 (quoting former Attorney General Nicholas deBelleville Katzenbach as stating, "[i]f we didn't have the ABA to do what Attorney General Herbert Brownell first asked it to do, we would have to find some other guarantor of professional competence").

⁶¹ Nicholas deBelleville Katzenbach was an Assistant Attorney General and a Deputy Attorney General from 1961 through 1965 and was the Under Secretary of State and the Attorney General during the Lyndon B. Johnson Administration.

⁶² Harold R. Tyler, Jr. was the United States Attorney General from 1959 through 1960 and a district judge in the Southern District of New York from 1962 through 1975. He then became Deputy Attorney General under President Gerald R. Ford. Tyler was also, at one time, the chairman of the ABA Standing Committee on Federal Judiciary.

⁶³ Howard H. Baker, Jr. served Tennessee as a member of the United States Senate from 1967 through 1985, and he was the Senate Majority Leader from 1981 through 1985. Mr. Baker also served as the Chief of Staff for President Reagan during 1987 and 1988.

⁶⁴ Birch Bayh served three terms as a United States Senator from Indiana. He was also the Chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, the position from where he became the principal congressional author of the Twenty-fifth Amendment to the United States Constitution.

⁶⁵ Fred Fisher Fielding was Counsel to President Ronald Reagan, from 1981 through 1986. He was also Deputy Counsel to the President from 1972 through 1974 and was Assistant Counsel from 1970 until he was promoted to Deputy Counsel.

⁶⁶ Lloyd N. Cutler was Counsel to the President during President James Carter's last two years in office, and he also served as Special Counsel to President William J. Clinton for six months in 1994.

⁶⁷ A. Leon Higginbotham, Jr. is Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit, where he was a judge from 1977 through 1993. Prior to being a circuit judge, he was a judge of the United States District Court for the Eastern District of Pennsylvania for fourteen years.

Lacey,⁶⁸ and Kimba Wood.⁶⁹ The bipartisan study concluded that the ABA committee has played and should continue to play an important role in the judicial selection process.

⁶⁸ Frederick B. Lacey was a United States District Judge for the District of New Jersey from 1971 through 1986.

⁶⁹ Kimba M. Wood is a United States District Judge for the Southern District of New York. She was a member of the ABA House of Delegates in 1984.