ABA WATCH®

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THE ABA'S ROLE IN EVALUATING SUPREME COURT NOMINEES

For several decades, the American Bar Association's Standing Committee on the Federal Judiciary offered its assessment of federal judicial nominations to the Executive Branch and the United States Senate before the nominations were announced to the public. The practice, adopted by the Senate Judiciary Committee in 1948 and by the Executive Branch during the Eisenhower Administration, gave the ABA a quasi-official role in the nominations process. The Association's ratings, which were based on nominees' integrity, professional competence, and judicial temperament, became crucial to their successful confirmation.

The failed nomination of Judge Robert Bork to the U.S. Supreme Court in 1987 provoked allegations that the ABA's rating system was biased against conservative candidates. Many charged that the Association's split rating against Bork contributed to his defeat. In 1997, over two years after Republicans gained control of the Senate, Judiciary Committee Chairman Orrin Hatch severed the ABA's arrangement with the Senate, maintaining that it detracted from the "moral authority of the courts themselves." Likewise, in March 2001, White House Counsel Alberto Gonzales announced that President George W. Bush wished to end the Executive Branch's consultation with the ABA. Gonzales explained it would be inappropriate to grant a "preferential, quasi-official role to a group, such as the ABA, that takes public positions on political, legal, and social issues that come before the courts."

The ABA questioned whether politics was involved with the termination of its arrangement with the Executive Branch, but the Bush Administration's decision was firm. To continue to play some role, the ABA ultimately decided to continue offering its rating of judicial candidates, although after the public announcement of nomination. The findings would instead be shared with interested members of the Senate Judiciary Committee.

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ANNUAL MEETING RECOMMENDATIONS:

JUDICIAL INDEPENDENCE, VOTING RIGHTS ACT, CRIMINAL JUSTICE, MARINE ECOSYSTEMS

The American Bar Association House of Delegates will consider dozens of resolutions at its annual meeting in Chicago on August 8. If adopted, these resolutions become official policy of the Association. The ABA, maintaining that it serves as the national representative of the legal profession, may then engage in lobbying or advocacy on behalf of its members. Resolutions scheduled to be debated at this meeting include recommendations concerning judicial independence, the Voting Rights Act, the homeless, domestic violence, oceans policy, criminal defense, and a federal shield law for reporters.

Judicial Independence

The State Bar of Texas offers recommendation 10A, which "deplores attacks on the independence of the judiciary that demean the judiciary as a separate and co-equal branch of government." The recommendation calls for the ABA to affirm that "a fair, impartial, and independent judiciary is fundamental to a free society" and calls upon all Americans to defend the role of the judiciary. A second recommendation, offered by House of Delegates member and former ABA president Jerome Shestack, was incorporated into this report.

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chair the Executive Committee of the Judicial Conference of the United States. She was nominated by President Jimmy Carter to the Fifth Circuit in 1979. Prior to becoming a judge, she was engaged in private practice in Houston, including ten years at Fulbright & Jaworski. According to her ABA profile: "A beneficiary of the Civil Rights Act, King was hired in 1962 at a large law firm as the first women to be paid the same salary as the men starting at the firm. She courageously quit her job in protest after being passed up twice for partner, setting an example and forcing the firm to offer equal opportunities for women. Since her appointment to the bench, she has ensured that more than half of her law clerks are women, and her influence on the appointment of women judges is significant."

ABA Medal

The 2005 ABA Medal, the highest award offered by the ABA, will be presented to **Judge George N. Leighton**, a retired federal trial court judge in Chicago.

ABA President Robert Grey stated in announcing the award: "It is an honor for the ABA to recognize this valiant champion of human dignity. As a lawyer, he put his own career on the line for the sake of his clients, to the point that he faced indictment for inciting a riot because he fought in court to secure safe residency for an African-American family attempting to move into a segregated Chicago suburb in 1951. He represented those accused of crimes and those denied their rights, with a passionate commitment to assuring the government operates according to law. As a judge, he upheld the free speech rights of African Americans and Nazis, protecting the rights of all."

A graduate of Howard University and Harvard Law School, Leighton settled in Chicago and practiced civil rights and criminal defense law before being elected as a judge in Circuit Court of Cook County in 1964. From 1969-1976, he served as a justice on the First District Illinois Appellate Court. In 1976, he was appointed to the U.S. District Court for the Northern District of Illinois. Throughout his career, he was active in the NAACP (serving as president of the Chicago Chapter), the ACLU, the ABA, and several other community organizations. He was also active in the state and local Democratic party until becoming a judge, including the Richard J. Daley mayoral campaign and the John Kennedy presidential campaign. Until 2004, he taught at John Marshall Law School.

His famous cases include a successful challenge to an Alabama constitutional amendment (known as the Boswell Amendment case) establishing a constitutional knowledge test as a prerequisite for voting and a successful 1950 challenge to a segregated school system in Harrisburg, Illinois.

Allies for Justice Reception Honoree

At the Allies for Justice Reception, sponsored by the National Lesbian and Gay Law Association (NLGLA), the ABA's Section of Individual Rights and Responsibilities traditionally honors a bar member who, in their position of leadership, has allied with the lesbian, gay, bisexual and transgender community to make a "noteworthy contribution to the struggle for civil rights and equality before the law." This year, the IRI Section & the NLGLA will honor Yale Law School **Dean Harold Koh**. He will be honored, according to the IRR Section, because of Yale's "leadership against the Solomon Amendment, and also for his personal commitment to promoting equality, as evidenced by his role as counsel of record for the human rights organizations' amicus brief in *Lawrence v. Texas* which may prove to be an important decision for the incorporation of international human rights law into U.S. jurisprudence."

The Solomon Amendment provides for the Secretary of Defense to deny federal funding to institutions of higher learning if they prohibit or prevent ROTC or military recruitment on campus. On November 29, 2004, a divided panel of the U.S. Court of Appeals for the Third Circuit issued a preliminary injunction against the enforcement of the law based on the First Amendment.

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The ABA and the Supreme Court (Continued from pg. 1)

With the resignation of Supreme Court Justice Sandra Day O'Connor, *ABA Watch* decided to take a closer look at the Association's past record in evaluating nominees to the Supreme Court and how that procedure will evolve this summer.

Organization

The Standing Committee on the Federal Judiciary is composed of fifteen members—one from each judicial circuit except the Ninth Circuit (which has two representatives), and one member-at-large. Terms last for three years, and members may serve up to two terms. The Committee evaluates candidates according to their integrity, professional competence, and judicial temperament. With respect to the Supreme Court, "The Committee's investigation is based on the premise that the Supreme Court requires a person with exceptional professional qualifications. The significance, range, and complexity of the issues considered by the justices, as well as the finality and nationwide impact of the Supreme Court's decisions, are among the factors that require the appointment of a nominee of exceptional ability." Committee members in partnership with teams of law professors and lawyers conduct interviews and extensively study the legal writings of the nominee. Nominees are then rated as "well qualified," "qualified," or "not qualified." The rating is then reported to the White House, the U.S. Department of Justice, all members of the Senate Judiciary Committee, and the nominee. Members of the ABA Committee historically have testified at the nomination hearing before the Senate Judiciary Committee about the rationale behind the rating.

Early Controversies

Even before the formation of the ABA Standing Committee on the Federal Judiciary, early bar leaders voiced their views on prospective nominees. In 1916, President Woodrow Wilson's nomination of Louis Brandeis to the Supreme Court resulted in much controversy. Opponents feared that Brandeis had committed ethical improprieties with clients and that he would subscribe to a "radical" judicial philosophy with few constitutional limits. ABA president Elihu Root and four former ABA presidents signed a letter opposing the nomination and sent it to the Senate Judiciary Committee. Former ABA presidents Moorfield Story and Peter Meldrim signed

similar, separate letters. Brandeis was ultimately confirmed and served on the Supreme Court until 1939.

Official ratings did not begin until the Eisenhower Administration. Justice Potter Stewart, nominated in 1958, may have been the first proposed Supreme Court justice to receive a dissenting vote in the Standing Committee, though ABA records remain unclear as to whether this is true.

In 1969 and 1970, President Richard Nixon nominated Judge Clement F. Haynesworth, Jr. and Judge G. Harrold Carswell to replace Supreme Court Justice Abe Fortas. Both nominations resulted in a great deal of opposition, and the ABA was criticized for its lack of scrutiny of these two nominees. The Committee initially rated Judge Haynesworth as unanimously qualified, but then split 8-4 after allegations arose that Judge Haynesworth failed to disqualify himself from cases in which he had conflicts of interest. The Senate consequently rejected the nomination. After Carswell's nomination failed, the ABA refused to endorse alternate Nixon choices Mildred Lillie and Herschel Friday, whose names were not forwarded to the Senate.

At the time, Lawrence Walsh, who served as the chairman of the ABA Standing Committee on Federal Judiciary, defended the Association's evaluation against charges it had not applied "higher standards of professional qualification." He reiterated that the Committee traditionally ignored political and ideological factors and should continue to do so, leaving those questions to the President and the Courts. Walsh elaborated after the failure of the Carswell nomination:

> The Committee cannot make a plenary recommendation to the Senate because it is unable to take a position on political and ideological factors that may dominate the question of confirmation. The question of professional qualifications is frequently lost and distorted in the conflict of political and ideological viewpoints. The wide range between a nomination ideal in terms of professional qualifications and one so bad that it should be actively opposed for inadequate professional qualifications is likely to place the Association regularly in a position of supporting a nomination less than ideal. Accordingly, it is said, the action of the American Bar Association will become an incident to be exploited by partisans in a broader political and ideological conflict but never a true standard for Senate guidance. Yet the violence of these political and ideological controversies may impair the usefulness of the Committee in its evaluation of nominees to other federal courts.

He concluded, "The investigation of the nominee's professional qualifications by the Association is likely to be more impartial than that conducted by partisans. It will furnish some counterbalance to emotionally exaggerated criticism."

Allegations of political bias hounded the ABA during the Reagan Administration, as critics questioned why Reagan Administration nominees received lower ratings than judges nominated by previous presidents. In 1986, critics questioned the bias of Committee member John D. Lane, a Democrat. Lane attracted the ire of conservatives, who accused him of being overly aggressive in evaluating some prospective judicial candidates, including former OMB general counsel Michael Horowitz and former White House advisor Faith Ryan Whittlesey, ultimately neither of whom were nominated to the bench. Critics also were concerned that Lane was leaking committee information to liberal lobbying groups. They also questioned why other candidates, such as University of Texas Law Professor Lino Graglia and former Legal Services Corporation Chairman William F. Harvey, were opposed during screenings. ABA President-Elect Eugene C. Thomas did not reappoint Lane to a second three-year term, leading some ABA supporters to claim that Thomas bowed to conservative pressure in making this decision. However, Lane was reappointed the following year before the Bork nomination.

The Bork Nomination

President Ronald Reagan's first nomination to the Supreme Court was also the first nomination of a woman to the Court, Sandra Day O'Connor. O'Connor was rated "well qualified," with a minority of the ABA Federal Judiciary Committee voting "qualified." President Reagan's next nominee, Antonin Scalia, received a unanimous "well qualified" rating when nominated as an associate justice in 1986. Justice William Rehnquist received the same unanimous rating when nominated as chief justice that same year.

In the summer of 1987, President Reagan nominated D.C. Court of Appeals Judge Robert Bork to the court. In September 1987, the ABA released its rating of Judge Bork to much controversy. The Standing Committee's investigation resulted in a split vote, with ten members giving Judge Bork its highest rating of "well qualified," four members rating him "not qualified," and one member voting "not opposed." Judge Bork previously received the unanimous rating of "well qualified" when he was first nominated to the federal bench in 1981.

In a letter to Senate Judiciary Committee Chairman Joseph Biden, ABA Federal Judiciary Committee Chairman Harold R. Tyler, Jr. wrote that the majority of the Committee found him well qualified because of his "varied experience in virtually all facets of the legal profession, his service as a ranking public official, and his high intellect." However, a minority disagreed, "not because of doubts as to his professional competence and integrity, but because of its concerns as to his judicial temperament, e.g., his compassion, open mindedness, his sensitivity to the rights of women and minority persons or groups and comparatively extreme views respecting Constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment." One member also expressed reservations based on Judge Bork's actions as Solicitor General under President Nixon. In the letter, Tyler listed the groups that the ABA consulted with, all of which opposed Judge Bork's nomination. These groups included the ACLU, the National Women's Bar Association, the National Women's Law Center, the AFL-CIO, the Lawyers Committee for Civil Rights Under Law, the NAACP, Public Citizen, and People for the American Way. Members of the Reagan Administration and the ABA Antitrust Section expressed support for the nomination. Tyler noted that

the ABA committee interviewed 172 federal and state judges, 79 law school deans and professors, and 150 attorneys, most of whom gave outstanding reviews of Bork.

The unprecedented split rating for a Supreme Court nominee ignited a firestorm of controversy. Reagan Administration officials initially treated the overall favorable rating as a positive endorsement, though critics focused on the four members who rated Bork as not-qualified. Senator Orrin Hatch, a Judiciary Committee member, assailed the ABA's rating and declared that the dissenters were playing politics. He and other Senate Republicans, including Alan Simpson of Wyoming and Charles Grassley of Iowa, charged that Bork was defenseless against anonymous attacks by the ABA. He and other conservative critics noted that one of the ABA Committee on Federal Judiciary members, Jerome J. Shestack (who later served as ABA president), belonged to a lawyers committee that supported Judiciary Committee Chairman Biden's anticipated 1988 presidential campaign, as well as provided financial support.

Tyler answered his critics by stating he believed members "were proceeding in good faith and voting their consciences." He noted that several conservative critics of the rating, including Senator Hatch, had previously praised the Committee on Federal Judiciary. Tyler also revealed in his testimony before the Senate Judiciary Committee that at least one ABA committee member held concerns about Bork's role in firing special Watergate prosecutor Archibald Cox. The committee member worried that Bork was "inconsistent and possibly misleading" in describing the incident to the ABA when he was first nominated as a federal judge.

ABA opposition to the Bork nomination extended beyond the Federal Judiciary Committee. Two former ABA presidents, Robert Meserve and Chesterfield Smith, testified before the Senate Judiciary Committee to oppose the nomination. Meserve stated, "If I were on your committee, I would vote against confirmation. I should refuse to confirm a doctrinaire person who has demonstrated his lack of compassion for and understanding of the lot of the underprivileged, because of his firm and oft-repeated belief that in interpreting our constitution, we should disregard two centuries of American history." Smith agreed, testifying, "There are large segments of the people who believe he has a knee-jerk reaction. I'd like to feel there's someone I could talk to who's not knee-jerk already."

In October, the Senate rejected the Bork nomination. President Reagan's next choice, Judge Douglas H. Ginsburg, was short-circuited after revelations of marijuana use, and was not rated by the ABA. Before Judge Ginsburg stepped aside, some Senate Republicans accused the ABA of delaying its work in evaluating the nomination. Criticism of the ABA also grew after the *Washington Post* quoted an ABA Committee member describing Judge Ginsburg's nomination as: "It looks to me like we may be going from a Bork to a Borklet."

President Reagan ultimately nominated Anthony Kennedy for the open seat on the Court. Kennedy received a unanimous "well qualified" ABA rating and was easily confirmed by the Senate.

In 1988, Senator Biden agreed to hold hearings to discuss the ABA's role in judicial confirmations. Despite harsh criticism from Senate Republicans, the bar association retained its role as the judicial evaluator.

George H.W. Bush Administration: Souter and Thomas

Attorney General Richard Thornburgh urged reform of the ABA ratings as the George H.W. Bush Administration assumed office. The committee language about political and ideological considerations was tweaked by the ABA and the rating of "extremely well qualified" was deleted for lower court nominees.

President George H.W. Bush's first nominee to the Supreme Court, David Souter, was unanimously rated "well qualified." Ralph Lancaster, chairman of the Committee on Federal Judiciary, testified. When asked by Committee Chairman Biden about assessing Souter's political philosophy, Lancaster answered, "I would agree that the ABA's investigation should not include any investigation into or consideration of his ideology or his political philosophy. To the extent that his judicial philosophy were to be shown to affect either his predilections toward or his bias or his commitment to equal justice, I think they are proper within the scope of our investigation."

Senate Judiciary Committee member Charles Grassley quizzed Lancaster on why the ABA's evaluation was needed, stating that the ABA committee's work was redundant. Senator Grassley asserted, "Because you can't do anymore than we can, you can't tell us anything that we don't already know and have known for several weeks. In fact, someone more cynical than I might suggest that the only time the ABA has a meaningful role in Supreme Court nominations is when you smuggle illicit political considerations into the evaluation. On the other hand, when the ABA sticks to objective criteria, the result is just that we'd expect." Others on the Senate Committee, including Senator Arlen Specter, praised the ABA Committee for its work.

First Circuit Representative on the ABA Standing Committee, Alice Richmond, testified to the favorable assessment that Souter received, stating, "I think it's fair to say that the vast, vast majority of the people with whom I spoke had nothing but praise for Judge Souter's temperament."

Bush's second nominee, Judge Clarence Thomas of the D.C. Circuit Court of Appeals, received a split "qualified" rating from the Association. Two ABA Committee members rated him "not qualified" and a third member did not vote. No one on the Committee rated him "well qualified." In 1989, when Thomas was first nominated as a federal judge, he received a unanimous "qualified" rating from the ABA.

Senators Hatch and Grassley immediately questioned whether politics was behind the lower rating. At the time of Thomas' nomination, four members from the time of the Bork nomination remained on the Standing Committee on Federal Judiciary.

Chairman Ronald Olson testified, with Judah Best and Robert Watkins, before the Senate Judiciary Committee. Olson testified that while Thomas had in fact distinguished himself in each of the ABA's three criteria, "there were limitations in his

work that precluded the committee from finding him well qualified." His Court of Appeals opinions were "well-written, very well-documented, very well-explained." Olson described Thomas as having dealt with precedent honestly, carefully, and without bias. But ultimately, Thomas was not experienced enough to garner the highest ABA rating. According to Olson:

> [H]is opinions have been limited in number. He has not been tested in many of the fundamental issues that the United States Supreme Court will face. He's not had the opportunity to face questions of first impression. He's not had the opportunity to deal with important constitutional concepts such as federalism, separation of powers, first amendment, many others. He has not been faced with those experiences yet and, therefore, has not had the opportunity to demonstrate them. That does not mean that he is incapable of doing so. It simply means that he's untested. But being untested left us with a sense that he was less than our "well qualified" rating would indicate.

Olson testified about the minority who found Thomas not qualified.

> The minority view focused on the criteria of professional competence. The minority of two did not reach any resolution of the other two issues. But they determined that with regard to professional competence that Judge Thomas did not measure up with respect to his track record. He had not had the…depth of experience to demonstrate in their mind that he is at the top of the profession...[The minority] focused on the mixed writing that we have seen from Judge Thomas. As I've noted earlier, the opinions that he's crafted on the Court of Appeals have been highly praised. On the other hand, the writings that he's done off the court, particularly those published in legal journals, have been generally criticized by a wide range of individuals. I think it's that unevenness which was of particular concern to the minority of two.

Olson elaborated that the minority found Thomas' writing "shallow." Olson reiterated that the assessment was not based on philosophy or politics.

Olson summed up the concerns as following: "He's had very little practice dealing with cases of first impression, at least as far as the written record is concerned. He's had very little practice dealing with the fundamental constitutional principles that govern wide areas of conduct. He's had very little practice reaching out and defining overarching principles that go across the spectrum of our Constitution…Those were the kinds of area that limited the rating that was given to Judge Thomas."

Thomas was ultimately confirmed by the U.S. Senate, but his nomination was clouded by allegations that he sexually harassed attorney Anita Hill in the workplace several years prior. Thomas vehemently denied the allegations, which were never proven. In 1993, Hill was honored by the ABA's Commission on Women in the Profession. Hillary Clinton delivered the keynote address at the luncheon honoring Hill and declared, "All women who care about equality of opportunity, about integrity and morality in the workplace, are in Professor Anita Hill's debt." [Now-Senator Clinton is being honored this year with the ABA's Commission on Women in the Profession's Margaret Brent Women Lawyer of Achievement Award.]

Clinton Administration

Both Supreme Court nominations by President Bill Clinton—Ruth Bader Ginsburg and Stephen Breyer—received unanimous "well qualified" ratings by the ABA.

In 1999, the ABA honored Justice Ginsburg with its Thurgood Marshall Award "in recognition of her long-term contributions to the advancement of gender equality."

The Next Nomination

President George W. Bush has nominated Judge John Roberts of the DC Circuit to replace Justice O'Connor. The ABA Standing Committee on Federal Judiciary's investigation is expected to be launched shortly. Read the next Barwatch Update email, found on www.fed-soc.org, for an update on the evaluation.

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Annual Meeting Recommendations (Continued from pg. 1)

The sponsor notes that judicial independence is a long-established goal of the ABA. According to the sponsor, "Judges must be able to decide cases from a position of neutrality, influenced solely by the facts and law, and not subjected to political and public pressure and reprisals."

The sponsor notes that this recommendation comes in the wake of "*severe and unprecedented* attacks" (emphasis added) on the judiciary from "current events and particular judicial decisions." The attacks are based on "inaccuracies, misstatements, and misinformation." Descriptions of the alleged attacks are not specified, though they are described as "strident and unjustified." The sponsors note that "the public is often not informed of the facts of a case, its procedural posture, and/or the underlying principles that may influence the decision-making of a judge."

The sponsor emphasizes the ABA's importance in affirming judicial independence and calls for the Association to take a leading role in educating the public and correcting misstatements "during these difficult times." Calls and letters to public officials, op-eds, and calls to reporters are ways in which the alleged misinformation can be addressed.

Many have maintained that criticism of certain decisions or judges is not unfounded or unprecedented. Criticism of the judiciary has existed since the nation's founding, and decisions in recent cases