S. HRG. 104–497

THE ROLE OF THE AMERICAN BAR ASSOCIATION IN THE JUDICIAL SELECTION PROCESS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

EXAMINING THE ROLE OF THE AMERICAN BAR ASSOCIATION IN THE SELECTION OF FEDERAL JUDGES

MAY 21, 1996

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APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

CENTER FOR JUDICIAL ACCOUNTABILITY, INC.,
White Plains, NY, May 27, 1996.

Senator ORRIN G. HATCH,
Chairman, U.S. Senate Judiciary Committee,
Dirksen Senate Office Building,
Washington, DC.

RE: *ABA Role in Judicial Nominations May 21, 1996 Hearing*

DEAR CHAIRMAN HATCH: We are a national non-partisan, non-profit citizens' organization, focusing on the twin issues of judicial selection and discipline—on the federal, state, and local levels. A copy of our informational brochure is enclosed for your reference.

The Center for Judicial Accountability, Inc. has a tremendous amount of documentary information to contribute to the Senate Judiciary Committee about the American Bar Association's behind-closed-doors screening of judicial candidates. Consequently, we were most distressed not to have been informed of the Committee's hearing last week on the ABA's role in federal judicial nominations.

More than four years ago, the local citizens' group from which the Center emerged undertook a six-month investigative study of the federal judicial nominations process. That study effectively pierced the "veil of secrecy" shrouding the ABA's so-called screening of judicial candidates.

What we established, through a document-based case study and analysis, was *not* the publicly-perceived partisan issue of whether the ratings of the ABA's Standing Committee on Federal Judiciary are contaminated by a "liberal" agenda. Rather, we established the issue that must concern *all* Americans: the gross deficiency of the ABA's judicial screening in failing to make proper threshold determinations of "competence", "integrity" and "temperament".

Those findings were presented to the Senate Judiciary Committee as our "Law Day" contribution in May 1992, as part of a 50-page Critique, supported by a Compendium of over 60 documentary exhibits. We also presented our Critique to former Senate Majority Leader Mitchell, under a May 18, 1992 coverletter that was sent to *every* member of the Senate Judiciary Committee. A copy of that coverletter, calling for a *moratorium* of all judicial nominations, pending official investigation of the deficient judicial screening process, is enclosed, as is a copy of the Critique and Compendium.

Also enclosed is a copy of our Letter to the Editor about the ABA's insupportable ratings, which was published in the July 17, 1992 *New York Times* under the title "Untrustworthy Ratings?".

Ironically, the ABA member who was *most* directly responsible for the incompetent investigation of the judicial nominee, who was the subject of our case study, was William Willis, Esq., then the Second Circuit representative on the ABA's Standing Committee on Federal Judiciary. Immediately thereafter, Mr. Willis became its Chairman. Mr. Willis testified at last week's Senate Judiciary Committee hearing.

Following submission of our Critique, we engaged in a voluminous correspondence with the Senate Judiciary Committee and the ABA—among others. Copies of our letters to the ABA were all sent to the Senate Judiciary Committee and have been collected in a Compendium. It, as well as two other Compendia, one collecting correspondence with the Senate Judiciary Committee and Senate leadership, the other with the Association of the Bar of the City of New York and Federal Bar Council, are also enclosed.

The file of our ABA correspondence—spanning to November 1993—dispositively shows that the ABA turned its back on its ethical and professional duty to take corrective steps. In the face of our documented showing of deficiencies of the Standing Committee's judicial screening, the ABA refused to retract its indefensible rating or to address the deficiencies of its screening process.

Such unassailable proof leaves no doubt but that the ABA is wholly unworthy of the public trust—and of the trust of its elected officials who nominate and confirm our life-time federal court judges largely based on its *bare-bones* ratings.

The Center's more recent contacts with the ABA's Standing Committee on Federal Judiciary, this year and last, show this even more glaringly. Such contacts have related to its screening of a judicial candidate—thereafter nominated by President Clinton. They reveal that the problem with the ABA goes beyond incompetent screening. The problem is that the ABA is knowingly and deliberately *screening out* information adverse to the judicial candidate whose qualifications it purports to review.

So that there is no mistaking how serious this most recent matter is, we enclose a copy of our October 31, 1995 letter to the Second Circuit representative of the ABA's Standing Committee on Federal Judiciary. That letter, accompanied by supporting documentation, established how New York State Supreme Court Justice Lawrence E. Kahn, whose qualifications the Standing Committee was then reviewing for a district court judgeship in the Northern District of New York, had used his judicial office to advance himself politically. Specifically, we showed that Justice Kahn had perverted *elementary* legal standards and *falsified* the factual record to "dump" a public interest Election Law case which challenged the manipulation of judicial nominations in New York State by the two major political parties.

How did the ABA Standing Committee respond to our meticulous presentation documenting the unfitness of Justice Kahn? We heard nothing from it at all. Finally, after more than two months, in January of this year, we telephoned the office of the Standing Committee's Second Circuit representative. The secretary there told us that she was just about to call us to inquire whether we wanted our materials back. We responded that indeed we did—if the Standing Committee were through with them.

The materials reached us the following day—in the very same box in which we had hand-delivered them to the Second Circuit representative two months earlier and, seemingly, in the very same condition. The materials appeared to have been "untouched by human hands". No coverletter accompanied the return—not even a note of thanks for the clearly herculean effort represented by our comprehensive, completely *pro bono* submission to the Standing Committee.

We would note that the next month, in February, at the ABA's midyear convention in Baltimore—at which it held two programs on the federal judicial screening and confirmation process—we tried to speak to the Standing Committee's current Chair, Carolyn Lamm, about how there had been no follow-up by the Second Circuit representative to our October 31, 1996 letter—a copy of which we had sent to her. Ms. Lamm's response was arrogant and abusive. She was uninterested in hearing what we had to say about how the Second Circuit representative had handled the review. And she was not ashamed when we told her that the materials had been returned to us without even so much as a note of thanks. Indeed, her position was that our civic contribution was not entitled to any expression of thanks by the ABA.

Just over two months later, in April of this year, President Clinton nominated Justice Kahn to the district court for the Northern District of New York. It more likely than not that such nomination did not follow upon an ABA rating of "not qualified". Indeed, we believe that had the ABA Standing Committee been inclined to "stick out its neck" by rating Justice Kahn "not qualified", it would have been sure to contact us for further information about our negative experience with him.

We understand that following Justice Kahn's nomination, his ABA rating was transmitted to the Senate Judiciary Committee. Your staff has told us that the Committee's policy is not to make that rating publicly available until the confirmation hearing.This is a departure from our experience *four years ago,* when we were able to obtain that information from the Senate Judiciary Committee relative to President Bush's judicial nominee that we were studying.

By letter dated April 26, 1996, a copy of which we enclose, we requested that the Senate Judiciary Committee staff confirm such policy, inform us how long it has been in effect, and explain

> the reason the ABA's rating—upon which the President of the United States relies in making his nomination—is not made publicly available once the nomination is announced."

We believe it would be most fitting for you, as Chairman of the Senate Judiciary Committee, to respond to such inquiry. By this letter, we further request that the Committee reconsider such policy and, specifically, that Justice Kahn's ABA rating be made publicly available at this time.

We would note that we have tried to obtain Justice Kahn's ABA rating from the ABA. Irene Emsellem, the ABA liaison to the Standing Committee, told me last week that the ABA only makes the rating public after the nomination is made public. However, she refused to explain why the nomination is not considered public when it is announced by the President.

We have also tried to obtain Justice Kahn's ABA rating from the U.S. Justice Department. I spoke with Eleanor D. Acheson, the Assistant Attorney General in charge of these matters, as well as with her assistant, Joseph Thesing, inquiring if the Justice Department, on behalf of the President, would disclose this and other ABA ratings at the time of nomination. They have not gotten back to us.

Copies of this letter are being sent to the other members of the Senate Judiciary Committee. Based upon what is herein set forth, we expect you will want to afford us an opportunity to personally present the within documentary proof—which we would have presented at the hearing—as to how the ABA fails the public, which is utterly disserved and endangered by its behind-closed-doors role in the judicial screening process.

In any event, we respectfully request that a copy of this letter be included in the record of last week's hearing—together with all the enclosed documentary materials.

Finally, we ask that this letter serve as the Center's standing request to be placed on a "notifications" list so that, in the future, we are immediately contacted when matters bearing specifically on judicial selection, discipline, and judicial performance are being considered by the Senate Judiciary Committee or any of its subcommittees.

Yours for a quality judiciary,

ELENA RUTH SASSOWER,
Coordinator, Center for Judicial Accountability, Inc.

[EDITOR'S NOTE: Above mentioned materials were not available at presstime.]