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

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

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ON

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

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associates at the annual meeting in Hawaii to support Leonard in his leadership and took great pleasure in the networking and educational activities which emanated from the American Bar Association's general meeting.

When I left Washington, D.C., clearly the center of U.S. federal tax practice, to practice tax law in my native state of California, I retained my membership in the American Bar Association's Section of Taxation. It seemed to me even more important that a tax lawyer practicing in the hinterlands of California should maintain the contacts and communication with the Section of Taxation in Washington, D.C. There were many times when information which I learned from the Section of Taxation's proceedings and publications was of direct value to my clients and helped me maintain my position as a cutting-edge tax lawyer.

But unfortunately for me, at an annual meeting held in Los Angeles in 1990, the House of Delegates was considering Resolution 106c, which read as follows:

> Be It Resolved, that the American Bar Association recognizes the fundamental rights of privacy and equality guaranteed by the United States Constitution, and opposes legislation or other governmental action that interferes with the confidential relationship between a pregnant woman and her physician, or with the decision to terminate the pregnancy at any time before the fetus is capable of independent life, as determined by her physician, or thereafter when termination of the pregnancy is necessary to protect the woman's life or health.

To its credit, when considering this resolution, the Board of Governors invited me and others to address the merits of Resolution 106c.

At the time, I urged them in the finest traditions of the legal profession to respect the diversity of the membership's views on the abortion issue and to vote no on the resolution. In considering how to vote, I requested them to weigh the costs and benefits to the American Bar Association of its passage. I reminded them that support for Resolution 106c was flatly contrary to the religious beliefs of ABA members who were Roman Catholics, Orthodox Jews, Mormons, Greek Orthodox and Evangelical Christians. As in the *Webster* case, there would be dozens of briefs written on both sides of the abortion issue. Planned Parenthood, one of the proponents of the resolution, would have its side ably presented to the court. I asked why the ABA was being urged to lend its prestige and financial support to 106c.

It seemed to me at the time, and it still does today, that the genesis of the resolution was part of an organized attempt by Planned Parenthood to influence a number of important organizations to build support for the Freedom of Choice Act. As you know, Planned Parenthood is the largest provider of abortions in the United States, and proponents of the resolution included those on the payroll of Planned Parenthood. At the same time the ABA was debating 106c, the AFL–CIO and other membership organizations were also being urged to adopt several resolutions. The *Webster* decision had recently been issued, the abortion debate had become increasingly and overwhelmingly a political one, state legislatures throughout the country were considering legislation to strike a balance between maternal and fetal rights based on all the factors, legal but also moral, ethical, religious, social and political.

Although our democracy is well suited to reflect the diversity of views on all of these issues, Resolution 106c did not strike a balance that I believed the ABA should adopt because it opted for the privacy and health of the woman exclusively, according no weight to the life of her little one. In principle, it was abortion on demand underwritten by ABA membership dues. In practice, it was one-and-a-half million abortions annually, abortion as birth control, abortion as the greatest American health hazard to our children. As an ABA member, I could not stand by while Planned Parenthood co-opted the American Bar Association for its agenda. As I pointed out in my remarks to the House of Delegates, Planned Parenthood wanted the respectability, the political clout, and the dignity of the American Bar Association, and they didn't really much care whether in the process they used the American Bar Association and drove a wedge between its members, many of whom viewed abortion, as do I, as the taking of innocent life.

Notwithstanding my efforts and those of others, on February 13, 1990, the American Bar Association through its House of Delegates passed Resolution 106c committing the ABA to a pro-abortion position. Resolution 106c was challenged later that year in Chicago at the annual meeting of the American Bar Association where the entire membership present and voting once again debated its merits. Attending that annual meeting, I spoke in opposition to Resolution 106c and in favor of maintaining neutrality by the American Bar Association on the abortion issue. My principal argument was that the issue, after the *Webster* decision, was increasingly a political one and that the American Bar Association should not become just another political advocacy group. Rather, it should focus on providing the important benefits to its

membership that I had so long enjoyed as a member of the Tax Section, the benefits of education and networking, which can be so important to a young lawyer. At the ABA assembly in Chicago, Resolution 106c was defeated. ABA members who registered at the annual meeting made their views known and voted in the Assembly, and the result was the demise of Resolution 106c. I could in good conscience remain an ABA member. But I want to emphasize that the position taken in Chicago by the Assembly was that the ABA should simply stay away from the abortion issue—(not to have the ABA characterized as pro-life or pro-choice)—simply to recognize that abortion was an issue which was political. With such a large number of ABA members who had deep moral convictions opposing abortion, it would be unfair for the ABA to speak as if there were unanimity.

But the ferment did not end there. Two years later, the American Bar Association once more voted in favor of a resolution promoting abortion, Resolution 110, thus rescinding the neutrality position which it had adopted in August of 1990. Under the circumstances, I, as a practicing Roman Catholic and an adoptive parent, believed I had no choice but to resign from the ABA. Attached to my statement are various exhibits which relate to the ABA's debate on abortion including my letter of resignation which I would like to include for the record.

Since 1992 I have not been a member of the American Bar Association. I take no joy in making that statement. But the political agenda of the American Bar Association continues to prevent me from becoming a dues-paying member and from sharing in membership benefits.

Nor is the abortion issue the only overtly political issue on which the American Bar Association is an advocate. I would also like to attach to my testimony a copy of the ABA's lobbying statement so that the committee can see the wide range of activities and political issues on which the ABA lobbies. Under the circumstances, I believe that it is inappropriate for the American Bar Association to have a special role in passing on the qualifications of judicial candidates. It would be more appropriate in my view for the ABA to be recognized simply as one of many special interest groups whose views are considered in the nomination process.

[EDITOR'S NOTE: The materials referenced where not supplied.]

The CHAIRMAN. Professor Meador?

STATEMENT OF DANIEL J. MEADOR

Mr. MEADOR. Mr. Chairman, members of the committee, it is a great privilege to be back here again. I have always viewed appearances before this committee as one of the most pleasurable and fascinating exercises I engage in.

The CHAIRMAN. We will still try to make it pleasurable for you.

Mr. MEADOR. I am here in a very limited role to report to the committee on the recommendations concerning the ABA's Standing Committee that were made recently by the Miller Center Commission on Federal Judicial Selection. The Miller Center of Public Affairs is a semiautonomous entity affiliated with the University of Virginia. It does studies, conducts research, and so on, mainly on problems with the presidency and related governance, and from time to time it creates independent, nonpartisan commissions to look at some aspect of governance.

So in the fall of 1994, the Miller Center created this commission to study the whole process of Federal judicial selection. This step was prompted by the enormous delays that have been encountered over the last 10 or 15 years in filling vacancies on the Federal courts through several different administrations—the inordinate delays, it seems to us, in staffing up the Federal judiciary with ever-growing workloads.

The commission was co-chaired by Nicholas Katzenbach, who was Attorney General in the Johnson administration, and Harold Tyler, who was Deputy Attorney General in the Ford administration and also a former Federal judge. The commission made a report last week and among its 16 recommendations as to how to ex-

pedite and simplify the whole process of filling vacancies there were three directed rather expressly at the ABA Standing Committee, and these three are quoted in my statement on page 3. I will give you the essence of them.

First, let me say this before mentioning those. The report of this committee goes on the assumption that the ABA Standing Committee will continue in being. It was rather assumed by the members of the commission without a great deal of indepth investigation and study that the function that is purported to be performed by the ABA committee is a function that is well worth having performed; that is to say, an independent, nonpartisan, professional evaluation of prospects for the Federal bench.

The committee members assumed that the ABA committee was functioning in that way, in a balanced, nonpartisan, objective way. Given that sort of function, the committee thought it well worth having that available there, and so we directed our attention to how the ABA committee's work might be improved and made more helpful.

The first recommendation is that the committee give reasons for its rating, and this would serve three ends. One, it would help the executive branch and the Senate better evaluate the qualifications of the nominee if it had explanations. Secondly, it would keep the ABA committee's focus more sharply fixed on professional competence and might constrain it from taking into account impermissible factors. Third, it might to some extent alleviate apprehensions and appearances that the committee was, in fact, taking into account improper factors.

The second recommendation we made is that the committee membership be enlarged so that it can conduct its investigations more expeditiously and always have them done within 30 days, which is not always the case now. There is only one member from each circuit. We think there should be more than one member in every circuit to expedite the process.

The third recommendation was that—and this is directed to you Senators as well as to the ABA committee and to the Attorney General's office and the White House, and that is that a single questionnaire be used by all of these interested entities. Now, three separate questionnaires, duplicating, overlapping, are required, and we think that much would be achieved by a single questionnaire. We suggested one for use which can be, of course, modified and altered as you see fit.

Let me just make another brief comment or two on my own, speaking now for myself and not for the commission. There is something that hasn't been said here today that I think it is important to keep in mind, and that is the ABA committee's advisory role really is something brought into being and maintained by the executive branch. I am not sure what this committee or the Senate or the Congress as a whole can do about that, other than ventilate the problems and perhaps get some discussion about them. I would suppose that a statute prohibiting the President from seeking advice from the ABA would be unconstitutional. Therefore, it is well to keep that in mind. The President can use the ABA committee as he sees fit, as it has been used in the past, or not use them.

A second problem that hasn't been mentioned here and I think should be kept in mind, and that is monitoring or reviewing the role of the ABA committee, which I think is not a bad idea—and certainly you are entitled to do it—is hampered considerably by the confidentiality that has to surround the ABA committee's work. It could not possibly perform its function unless it had a very high degree of confidentiality about what it does, the information it gets, its own discussions and deliberations, and so on. So you can't get at that, and properly so, I would say.

For example, one facet of that, if you look back over the years, are all of the would-have-been nominees we never heard of because when the Attorney General asked the ABA committee for an informal report before any nomination is ever made, which is the practice, and the ABA committee comes back and says there will be trouble about this, there are some problems here, and so on, the Attorney General takes this up and the nomination is never made. It is simply dropped quietly. The public never hears of it. The would-be nominee is not embarrassed, et cetera. All of that would have to be looked at to assess its role fairly and I would submit that it has played a very salutary role in preventing some undesirable nominees from ever surfacing. That has not been mentioned here.

On the whole, I would say this to conclude my remarks. One of the questions is what is the alternative. It seems to me it is desirable to have available an independent, professional evaluation of lawyers by lawyers, something that you can't get from lay groups, and the question is what is the alternative to the ABA committee, properly constituted and properly functioning. I have some difficulty coming up with that.

Every other bar organization that comes to my mind is a specialized bar of some kind. It is not a nationwide organization embracing all aspects of the law and the legal profession, and so you get into that difficulty. The question has been raised, what will we lose. One of the things we would lose without a body like the ABA committee would be the investigative resources and information that it does bring to light without any expense to the taxpayers. I think it does get information that the FBI does not get, could not get, that no other governmental entity might get. So all that has to be taken into account.

In the end, though, we are left with the President's prerogative to do this or not do this. The Senate can say, we won't pay any attention to it, and that is fine, but the President is left there with that decision to use the committee or not, as the President is doing.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Meador follows:]

PREPARED STATEMENT OF DANIEL J. MEADOR

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: At the request of the Committee, I appear to present the recommendations recently made by the Miller Center Commission on the Selection of Federal Judges concerning the American bar Association Standing Committee on Federal Judiciary (ABA Committee). Currently I am James Monroe Professor of Law Emeritus at the University of Virginia, and I served as a member of the Commission. By way of background, I should state that I was Assistant Attorney General, Office for Improvements in the Administration of Justice, Department of Justice, from 1977 to 1979, and for several years I Was on the

board of directors of the American Judicature Society, which has long been concerned with judicial selection in this country.

The Miller Center of Public Affairs is a semi-autonomous entity affiliated with the University of Virginia. Its research, publications, and educational activities focus mainly on the American presidency and related matters of governance. From time to time the Center establishes independent, non-partisan commissions to address particular problems in the federal government and to make recommendations for improvements. Past commissions have dealt with, among other subjects, presidential press conferences, presidential disability and the 25th Amendment, and the nomination of vice-presidential candidates.

The Commission on the selection of Federal Judges was created in the fall of 1994. Its co-chairmen are Nicholas Katzenbach, Attorney General in the Johnson Administration, and Harold Tyler, Deputy Attorney General in the Ford Administration and a former federal district judge. Its membership includes former Senators Howard Baker and Birch Bayh, former federal judges Leon Higginbotham and Fred Lacey, former counsels to the President Lloyd Cutler and Fred Fielding, Federal District Judge Kimba Wood, and attorney Lovida Coleman. The Commission met numerous times and received testimony from representatives of the White House staff, the Department of Justice (including the FBI), the ABA Committee, and the Senate Judiciary Committee staff. It issued its report, entitled "Improving the Process of Appointing Federal Judges," at a press conference in Washington, D. C. on May 15, 1996.

The concern that prompted the creation of the Commission, and that is the focus of its report, is the inordinate delay encountered over the last decade or so in filling vacancies on the federal district courts and courts of appeals. The text of the report describes the causes of the delays identified by the Commission and suggests some of the adverse impacts of the delays on the administration of justice. The report makes sixteen specific recommendations concerning the nominating and confirming process, all designed to simplify and expedite the filling of judicial vacancies. The three recommendations most directly concerning the ABA Committee are as follows:

Recommendation A–8:

> The ABA Standing Committee on Federal Judiciary should provide the administration and the Senate Judiciary Committee with a brief statement of the reasons for its rating.

Recommendation A–9:

> The American Bar Association should expand the size of its Standing Committee on Federal Judiciary and have more than one representative for each circuit.

Recommendation C–1:

> Prospective nominees for judicial office should be required to complete only a single questionnaire which supplies all information sought by the Department of Justice, the White House, the ABA Standing Committee on Federal Judiciary, and the Senate Judiciary Committee.

Although not the subject of a specific recommendation, the role of the ABA Committee in the appointing process is implicitly endorsed in the report. The report proceeds on the assumption that the ABA Committee can make a useful contribution to the selection of qualified persons For the federal bench if it confines its work to its announced purpose: to provide an independent, non-partisan professional evaluation of the professional competence, integrity, and judicial temperament of persons proposed for judicial appointment. Given that assumption, the Commission developed the foregoing recommendations with a view toward ameliorating some of the difficulties encountered in that committee's work and making its ratings more helpful.

As Recommendation A–8 indicates, the Commission believes that it would be desirable for the ABA Committee to accompany its rating with at least a brick explanation Stating reasons for a rating would do three things. It would give the nominating and confirming authorities an additional basis for assessing the fitness of the nominee to be a federal judge. It would help focus the committee's attention on the professional competence that it is charged with evaluating and would constrain it from taking into account improper considerations. Finally, a statement of reasons would also reduce apprehensions and appearances that the committee might be improperly considering political or ideological factors.

Recommendation A–9 is made on the basis of evidence received by the Commission that the ABA Committee has on occasion had difficulty in meeting the thirty day timetable for an investigation which it has set for itself (a timetable the Commission endorses) because of the press of business and shortage of committed personnel. In most judicial circuits there is only one committee member. It is difficult for that one member to complete investigations within thirty days when several potential nominees must be investigated simultaneously or when special problems are encountered. Increasing the size of the committee so that there is more than one member from each circuit should do much to overcome this difficulty.

Recommendation C–1 is made because the Commission found that the three questionnaires that nominees must now complete are duplicative and unduly burdensome, and they delay the process. The Commission sees no reason why a single questionnaire would not suffice for all concerned entities. In Appendix D of its report, the Commission sets out a proposed consolidated questionnaire that includes all information currently sought by the three separate questionnaires. We hope that the ABA Committee and all others concerned, including the Senate Judiciary Committee, will agree to the use of this one questionnaire or some version of it that can be mutually agreed upon.

From this point on in this statement, I speak only for myself, and not for other Miller Center Commission members. My overall conclusion is this: Considering the four decades of the ABA Committee's work in evaluating hundreds of judicial nominees, I believe that in the main it has done what it purports to do and has not, with a few possible exceptions, let political or partisan or ideological considerations influence its ratings. Everyone who has observed the committee's work over the years can probably identify at least a few instances in which, in the view or the observer, the committee has made a mistake or been Influenced by improper factors. But I submit that those instances are relatively few and are outweighed by the constructive contribution the committee has made and can make to the selection of qualified persons to be federal judges.

It is possible, of course, to create a variety of bodies to evaluate judicial nominees from various perspectives. These would not necessarily be mutually exclusive. But the one perspective that the ABA Committee provides that is of great importance and that cannot likely be provided otherwise is the independent evaluation of lawyers by lawyers, an evaluation of a nominee's legal ability by a group of able lawyers drawn from 8 large nationwide organization spanning the full range of the law and legal work. It is difficult to imagine any entity doing a better job of this than the ABA Committee can do. In other words, there does not appear to be a reasonable alternative for obtaining such an independent professional evaluation—and without any cost to the taxpayers.

ABA presidents have a solemn and important responsibility to appoint to this committee only able lawyers, widely respected in the legal profession, who will objectively and fairly evaluate judicial prospects, adhering strictly to the committee's criteria. Moreover, the committee members must be faithful to this charge and resist any temptation to let other factors influence their ratings.

In my view, it is entirely appropriate for the Senate Judiciary Committee, as well as officials in the Justice Department and White House, to insist that the foregoing conditions exist, if the ABA Committee is to continue in its present role. Moreover, it is appropriate to review the committee's work from time to time to satisfy the public that the required conditions do in fact exist. The ABA Committee's advisory role in the appointing process should be discontinued only if it is clear that the membership of the committee is skewed or that the committee is not adhering to its announced criteria.

[EDITOR'S NOTE: Report of 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,* Copyright 1996, retained in committee files.]

The CHAIRMAN. Thank you, Professor Meador. Let me just say I would like to thank you for presenting the conclusions of the Miller Center Commission report, and I am happy to finally see the finished product, as my staff and I provided as much assistance and information as we could to help. I would like to make the record clear, though, that for the last 2 years the committee has moved at an expeditious rate to confirm judicial nominees and that the vacancy rate in the Federal courts today is so low right now that it is close to what some economists would call full employment. Anytime you get below 60 vacancies, you are really basically full employment, but I welcome your commission's recommendations to improve the process.