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THE AMERICAN BAR ASSOCIATION AND THE SUPREME COURT—OLD WINE IN A NEW BOTTLE?

MANLY FLEISCHMANN* AND RONALD H. JENSEN**

I. INTRODUCTION

ON July 27, 1970, the American Bar Association announced that Attorney General John N. Mitchell had agreed to an important change in the procedure which he had previously followed in the selection of persons to be recommended to the President as nominees for the United States Supreme Court.¹ Until the announcement, there had been, during the present administration, no consultation of any kind with respect to selection of Supreme Court Justices between the Justice Department or the President on the one hand, and the American Bar Association or any other bar association, on the other.

The Attorney General stated that in the future he would submit the names of persons under consideration for appointment to the high court to the ABA's Committee on the Federal Judiciary, since he had concluded that it would be "useful" for the Committee to report to him on a possible court nominee before he made a recommendation to Mr. Nixon.

The Chairman of the ABA Committee on the Federal Judiciary, former Federal Judge Lawrence E. Walsh, accepted the new assignment for his Committee with obvious enthusiasm, hailing the arrangement as "the most important innovation in the procedure for selecting Supreme Court nominees which any recent Attorney General has undertaken."²

It will come as no surprise to seasoned Washington-watchers that the new plan announced by Attorney General Mitchell did not meet with unanimous approval, even on the part of the nation's lawyers. One of the first to level rhetorical guns at the new arrangement was a longtime critic of the present and previous

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1. Press release of Lawrence E. Walsh, Chairman of the Standing Committee on Federal Judiciary of the American Bar Association, July 27, 1970.

2. Letter from Lawrence E. Walsh to John N. Mitchell, July 27, 1970, in reply to letter from John N. Mitchell to Bernard G. Segal and Lawrence E. Walsh, July 23, 1970.

Republican administrations and also of the ABA. This was Vice Chairman Joseph L. Rauh, Jr., of the Americans for Democratic Action. With the occasional hyperbole which marks Mr. Rauh's public utterances, he referred to the new clearance arrangement as "weak-kneed capitulation to one of the most reactionary forces in America."

Mr. Rauh continued:

Instead of broadening the jurisdiction of the American Bar Association, he [the President] should exclude it from the judge-selection process entirely, After all, the American Bar Association cleared both Clement Haynsworth and G. Harrold Carswell for their lower court appointments and kept clearing them for the Supreme Court even after the worst was known.³

On the other hand, Judge Walsh's satisfaction with the new understanding was predictable. In a report made by his Committee to Bernard G. Segal, President of the ABA, on May 13, 1970, it had been specifically recommended that "the Attorney General should be requested to give the profession an adequate opportunity to comment on a prospective nominee before the nomination is announced."⁴ Thus, an article in the *New York Times* (July 28, 1970) was headlined "Mitchell Yields On Court Choices" and went on to state correctly that "the decision represented a complete turnabout for the Nixon Administration."⁵ None of the President's first four selections had been submitted by the Administration to the ABA for clearance in advance of nomination.

Early editorial comment on the prospective clearance procedure was generally favorable, though later comment has raised questions as to its efficacy.⁶ As will be discussed later, there is no reason to believe that the clearance procedure now envisioned can insure its objective, which we assume is to bring about appointments from the ranks of those having the highest qualifications of mind, character and achievement, while making certain the elimination of those who, by the application of similar high

3. N.Y. Times, July 28, 1970, at 23, col. 1.

4. *Report of the American Bar Association Standing Committee on Federal Judiciary to the Board of Governors*, at 23 (May 13, 1970) [hereinafter cited as *Report of the ABA Committee on Federal Judiciary*].

5. N.Y. Times, *supra* note 3, at 1, col. 5.

6. Oelsner, *A Plan for Avoiding 'More Haynsworths'*, N.Y. Times, Aug. 2, 1970, §4, at 9, cols. 7-8; TIME, Aug. 10, 1970, at 43.

standards, would be considered unfit for the high court. Nonetheless, we conclude that the new arrangement will contribute to that objective and will be more effective than the procedure it replaces.

In any event, the action of the Attorney General culminated many months of heated public debate concerning the proper role of the President, the Attorney General, the Senate, interested groups (including bar associations) and individuals in the nomination and confirmation process; the debate waxed and waned during the successive nominations of Judges Haynsworth, Carswell and Blackmun. During the same period an equally important, but less publicized controversy arose as to the matters to be considered by any bar association in rating nominees for the Supreme Court. The ABA adhered to its traditional view that it would take into account only the professional qualifications of the nominee—"integrity, judicial temperament and professional competence."⁷ A different view was espoused by the nationally prestigious Bar Association of the City of New York which we will refer to as The City Bar. A subcommittee of its governing Executive Committee recommended on April 30, 1970, that the ABA should expand its investigation "to include a review of the nominee's social and economic philosophy. . . ."⁸ This report was adopted by the full Executive Committee on May 6, 1970, though not unanimously.⁹

Preparation of this article was commenced shortly after the emergence of this difference of opinion between the ABA and the City Bar. We believed this to be a sufficiently important issue to deserve a thorough review, particularly because of a paucity of legal commentary on the subject. Our major attention is still directed to that issue, but the recent action of the Attorney General necessarily requires some expansion of the scope of this inquiry.

We confine this study to the matter of selection of Supreme Court Justices because that Court, as many others have pointed out, is in fact unique in the frequency and importance of the

7. *Report of the ABA Committee on Federal Judiciary*, at 16.

8. Association of the Bar of the City of New York, *Report of the Sub-Committee on Nominations for the Supreme Court of the United States*, at 3 (Apr. 30, 1970).

9. It should be noted that one of the present writers was a member of the Executive Committee at that time; he voted against that part of the report of the sub-committee just referred to.

constitutional, political, social, moral and economic problems which come before it. Such questions arise in lower federal courts and state courts too, but not with the same urgency and not with the same consequences for the American public. We do not intimate that distinguished legal ability should not be a prerequisite to appointment to the Court—quite the contrary—but only that a consideration of other qualifications may be of equal importance as a basis for selection of great judges for this great tribunal.

II. SELECTION OF SUPREME COURT JUSTICES AND THE AMERICAN BAR ASSOCIATION: HISTORICAL SUMMARY

"All that's past is prologue." That is certainly true of the new clearance procedure about to be embarked upon. What is different in the proposed arrangement is not the substance of the planned review, but its official sanction and the consequent public scrutiny which will now more than ever be leveled at ABA's deliberations in this field. The history of ABA's activity with respect to Supreme Court appointments is meager, but in its course some cautionary signals appear. These alone would justify a recital of that history; in Santayana's words, "those who cannot remember the past are condemned to repeat it."¹⁰ For similar reasons, we shall refer in a subsequent section (*infra* III) to examples of activities of groups of lawyers not officially organized into associations, but put together to influence judicial selection, or in some cases judicial determinations or legislative action, and, by design or otherwise, publicizing the relationship of members of their group with organized bar associations.

The ABA from the time of its organization was naturally and intensely interested in the process by which judges were selected, both at the state and federal levels. Nevertheless, "the activities of the American Bar Association in the area of judicial selection prior to 1946 fluctuated from intense effort and participation to passive comment. Its initial efforts consisted mainly of exhorting state and local bar groups to take a more active part in the selection process at their own levels."¹¹ Thus, the Bar Association took no official position with respect to the then controversial

10. G. SANTAYANA, *THE LIFE OF REASON* 284 (1903).

11. J. GROSSMAN, *LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION* 52 (1965) [hereinafter cited as GROSSMAN].

nomination of Louis D. Brandeis to the Supreme Court in 1916, as it did not then have any formal mechanism to evaluate candidates for the federal bench.¹² At the same time, many distinguished lawyers who were past and present officers of the ABA became deeply involved in the controversy that raged over his confirmation (*infra* III).

Herbert Hoover's Attorney General, William D. Mitchell, was himself a lawyer of great distinction and the ABA was much encouraged by his public statement that an "overwhelming sentiment by the Bar for or against a particular man makes a deep impression upon the public mind, upon the Senators especially interested, and on the appointing power"—this because of the "realization that a lawyer's qualities are most clearly discerned by the members of his own profession."¹³ Shortly thereafter, in 1930, lawyers were generally disturbed by the Senate's rejection of the nomination of Judge John Parker of North Carolina to the Supreme Court; it was widely believed that a principal reason for the rejection of this distinguished judge was the opposition of organized labor.¹⁴

Spurred into activity by this and other considerations, the ABA in 1932 established a Special Committee on federal appointments whose specific function was to advise the Senate Judiciary Committee. It had a short and uneventful life until the advent of the Roosevelt Administration in 1933. Thereafter, the "Committee's services were never once requested by either the new Attorney General or Senate Judiciary Committee, and at its own request the Committee was discontinued in 1934."¹⁵

There followed a twelve year period of *dolce far niente* for the ABA in the field of judicial selection. It next became actively and officially involved in the appointment of federal judges in 1946, when its House of Delegates established a Special Committee on the Judiciary, later renamed the Standing Committee on Federal Judiciary.¹⁶ The Committee was able to develop good

12. *Id.* at 54-55.

13. *Appointment of Federal Judges*, 17 A.B.A.J. 572 (1931).

14. Labor was incensed at Judge Parker's decision in *United Mine Workers v. Red Jacket Consolidated Coal and Coke Co.*, 18 F.2d 839 (4th Cir. 1927), which had affirmed a district court's order enjoining, under the authority of the Sherman Act, the United Mine Workers from engaging in certain organizational activities, including the inducement of employees to violate their "yellow dog" contracts.

15. GROSSMAN, at 58.

16. *Id.* at 60-62.

liaison with the Senate Judiciary Committee, possibly because Republican victories in 1946 had elevated Senator Alexander Wiley of Wisconsin to the chairmanship of that Committee. Wiley announced that so long as he was chairman "full weight will be given to the recommendation of recognized legal groups which have not been accorded the weight and respect which are their just due."¹⁷ However, despite the good rapport with the Senate Judiciary Committee, the ABA Committee had difficulty establishing a working relationship with the Justice Department. President Truman characteristically stated that "he had appointed plenty of good judges opposed by the bar associations" and that such opposition did not upset him. It would be fair to say that he was glad to have bar association approval of judicial appointments, but he made it clear that the failure to receive such approval would not deter him from making any appointment.¹⁸ Despite this dim view from the command post, a significant advance was in fact made during the last six months of the Truman Administration. An arrangement was worked out between Deputy Attorney General Ross Malone and the ABA, with the cooperation of Attorney General James McGranery, whereby all persons under serious consideration for appointment as federal judges were to have their names submitted to the Standing Committee on Federal Judiciary for a report on their professional qualifications. This agreement was in fact never put into operation during the balance of President Truman's term because the administration decided not to make any interim appointments.¹⁹

President Eisenhower's appointees, Attorney General Herbert Brownell and Deputy Attorney General William Rogers, agreed to continue the arrangement worked out by Malone, except that they requested the Committee not to suggest any names but to limit its evaluation to candidates submitted to it by the Attorney General.²⁰ Moreover, it was made clear at an early date that this procedure would not extend to appointments to the Supreme Court. When Chief Justice Vinson died, the Committee offered its services to the Attorney General. The Administration,

17. Quoted in *Report of the Special Committee on Judiciary*, 72 A.B.A. REP. 411 (1947).

18. N.Y. Times, June 29, 1951, at 23, col. 5.

19. See Fox, *The Selection of Federal Judges: The Work of the Federal Judiciary Committee*, 43 A.B.A.J. 685, 686 (1957); GROSSMAN, at 70-71.

20. Fox, *supra* note 19, at 686; GROSSMAN, at 71.

however, declined the offer on the ground that appointment of a Supreme Court Justice was a personal appointment of the President. The Committee was not consulted on the next appointment either, but its chairman was later invited by Deputy Attorney General Rogers to testify before the Senate Committee in favor of the Administration's nominee, Judge Harlan.²¹

An interesting anecdote is related concerning the appointment of Justice Brennan. President Eisenhower asked what the ABA Committee on the Federal Judiciary thought about him. When he was told that the Committee had not been asked for its opinion, he directed that the nomination be held up until the Committee could report. For the duration of the Eisenhower Administration, the names of all prospective nominees to the Supreme Court (as well as to the inferior federal courts) were submitted to the ABA Committee for investigation prior to being made public.²² The practice was largely ritualistic, however, with respect to Supreme Court nominees, by reason of the fact that the Committee was given only about 24 hours notice of the name of the nominee; during that period the Committee was apparently expected to make its investigation and report to the Attorney General on the nominee's professional qualification. Fortunately for the Committee, history records no breakdown of the long distance telephone system during the operation of this type of clearance such as the nation has recently undergone.

This just-better-than-nothing arrangement worked out in the Eisenhower Administration continued through the administrations of Presidents Kennedy and Johnson.

President Nixon departed from the practice of his predecessors and decided not to consult the Committee in advance of Supreme Court nominations. No names of such nominees have ever been submitted to the Committee by the present Administration. Thus, the ABA investigations undertaken in connection with the nominations of Judges Burger, Haynsworth, Carswell and Blackmun were not requested by the President or the Attorney General but rather by the Chairman of the Senate Committee on the Judiciary.²³

21. Fox, *supra* note 19, at 688, 761.

22. *Id.*

23. Walsh, *Selection of Supreme Court Justices*, 56 A.B.A.J. 555, 556 (1970).

III. GAMES LAWYERS PLAY

The activity of lawyers with respect to the selection of judicial officers, including justices of the Supreme Court, has by no means been confined to organized bar associations. As we have pointed out, bar association intervention is a relatively new development, largely because bar associations generally lacked any apparatus for formulating and presenting their views to the appointing or confirming authority. However, individual lawyers, and lawyers grouped together for one or more specific purposes, have taken part in the judicial selection process and in comparable activities at the federal level on more than one occasion. It has become somewhat characteristic of such efforts that the participants, whether they intend to or not, give the impression that they are really speaking for the American Bar Association or for other leading bar associations, even though no official action to authorize such intervention has ever been taken. For this reason we find it convenient to refer to groups organized in this manner as "quasi-bar associations."

The first example in recent years of this type of activity occurred in 1916 in connection with the nomination of Louis D. Brandeis to the Supreme Court.²⁴ Brandeis had attained national reputation because of his work as the "people's lawyer" in Boston. While, according to Walter Lippman, the opposition at the outset came from "the powerful but limited community which dominated the business and social life of Boston," the controversy soon expanded.²⁵ By the time of the hearing there was produced in opposition to the nomination a memorial signed by seven former presidents of the ABA, including former President Taft, who described the nomination as "a fearful shock . . . [I]t is one of the deepest wounds that I have had as an American and a lover of the Constitution and a believer in progressive conservatism that such a man as Brandeis would be put on the Court. He is a muckraker, an emotionalist for his own purposes, a socialist."²⁶

Apparently, no opponent of the nomination ever seriously attempted to demonstrate lack of professional competence, since

24. A full account of the matter can be found in J. HARRIS, *ADVICE AND CONSENT OF THE SENATE* (1953).

25. *Id.* at 100.

26. *Id.* at 102.

Brandeis was certainly one of the ablest lawyers in the country. The former presidents of the ABA contented themselves with a blank condemnation in the following language:

To the Senate Committee on the Judiciary: The undersigned feel under the painful duty to say to you that in their opinion, taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States.²⁷

An attempt was made during the course of the hearings to demonstrate that Brandeis had at some time been guilty of unprofessional conduct. The Senate subcommittee examined these charges and found that Brandeis' conduct had been not only ethical and correct, but indeed it was indicated that he had extraordinarily high professional standards.²⁸

With the question of professional competence never at issue and the question of integrity eliminated, the debate at the hearings and in the press appeared in its true light, namely, a protest by a small group of conservatively oriented leaders of the ABA against the appointment of a liberal who had spent his professional career championing the rights of the people against the entrenched wealth and economic power of the leaders of the Boston community.

Unbelievable as it may seem, the ethnic issue was raised both for and against the appointment. Jewish supporters of Brandeis claimed that much of the opposition arose because of his race. Opponents of Brandeis took just the opposite position. For example, Senator Lodge wrote Taft as follows:

As you say, there has not been the slightest opposition to him because of his race. That has been brought forward only by those who favor him.²⁹

We cite this example as indicating some of the perils of opposition to a judicial appointment based solely on the supposed economic and social views of the candidate. The Brandeis episode is generally regarded as one of the low points in the history of

27. *Hearings on the Nomination of Louis D. Brandeis Before the Subcomm. of the Senate Comm. on the Judiciary*, 64th Cong., 1st Sess., I, at 1226 (1916).

28. J. HARRIS, *ADVICE AND CONSENT OF THE SENATE* 113 (1953).

29. A. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* 182 (1964).

the involvement of the ABA with judicial appointments, even though no official action was ever taken by it. It has been pointed out that the seven former presidents in all probability accurately reflected the views of the membership:

That the opposition of the A.B.A. to Brandeis did not come through 'channels,' but was articulated as the personal views of seven former presidents, should not be interpreted as something less than the accurate views of the then small membership of the A.B.A. At that stage in its development it was still primarily a closely knit group of successful lawyers whose views probably coincided with those expressed by the seven presidents. Yet the near success that the campaign against Brandeis had could be attributed in part to the personal prestige of the seven presidents, and their ability to mobilize other forces in support of their case. The A.B.A. had not yet developed any formal mechanism for the scrutiny of the federal judicial selection process.³⁰

Even Taft later appears to have modified his views about the Brandeis appointment. During the period when they served together on the Supreme Court their relations were quite friendly although they continued their differences on social and economic questions and were often on opposite sides. However, Taft once said of Brandeis:

He brought to us all sorts of information as to economic conditions and other matters of the greatest value which we did not have before and would never have acquired otherwise.³¹

During the period of the New Deal, groups of conservative lawyers were organized more than once for similar purposes. The American Liberty League was founded in 1934 by wealthy businessmen and immediately became the spokesman for the opposition to the New Deal. One of the most active groups organized by it was the "National Lawyers Committee" consisting of approximately 58 members, all leading corporate lawyers. Wide publicity was given to the fact that 55 of the 58 members were also members of the ABA. Included were three past presidents and also, as it turned out, three future presidents, nine members of the ABA's first House of Delegates, seven members of the Executive Committee, etc. The task of the Committee was to draw up and publicize "briefs" on the constitutionality of various New

30. GROSSMAN, at 55.

31. A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 629 (1956).

Deal proposals, carefully claiming that it did not attempt to judge the economic merits of the legislation. It did not come as a shock to observers of the effort when the Committee solemnly opined that every piece of New Deal legislation that it investigated was unconstitutional—nor when the Supreme Court subsequently upheld most of them.³²

These activities identified the ABA so closely with the enemies of the New Deal, liberalism and social progress that it developed a series of internal and public relations problems. In 1937 some of the more liberal members of the Association resigned and organized the National Lawyers Guild. The Guild was not important as a political force for very long, and when the ABA adopted a policy of non-alignment on political issues during the second World War, the Guild in effect passed from the national scene.

By 1938 more liberal leaders began to appear in the ABA. In particular during the presidency of Arthur T. Vanderbilt (1938), the Association dropped its preoccupation with political issues. Judge John Parker summarized Vanderbilt's attitude as follows:

He saw that the Association had been losing prestige by engaging in controversies over economic and political matters and that its real field of usefulness lay in bringing the administration of justice abreast of modern conditions.³³

The most recent incident of the same kind shows that "quasi-bar associations" can be organized as readily for "liberal" as for "reactionary" purposes. During the Carswell confirmation hearings, certain leading New York lawyers became convinced that what they considered the pro-segregationist views of Judge Carswell required his defeat. A group of 458 practicing lawyers and legal educators, including many past and present officers of bar associations, was organized to combat the nomination. Many of the lawyers who signed the letter of protest³⁴ identified themselves in terms of the offices now or previously held in leading bar

32. See B. BROCKMAN, *THE POLITICS OF THE AMERICAN BAR ASSOCIATION* 112 (1963). See also A. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL* 488 (1958); National Lawyers Committee of the American Liberty League, *Report on the Constitutionality of the National Labor Relations Act* (Sept. 1935).

33. Quoted in B. BROCKMAN, *supra* note 32, at 116.

34. Letter of Bruce Bromley, Francis T. P. Plimpton, Samuel I. Rosenman, Bethuel M. Webster, et al., printed in 116 CONG. REC. 1607-08 (daily ed. Mar. 4, 1970).

associations; this at the request of the organizing group. Thus, under the name "Francis T. P. Plimpton" appeared the following: "President, The Association of the Bar of the City of New York;" Samuel I. Rosenman is described as "Former President, The Association of the Bar of the City of New York" and so on. As a footnote to the descriptions, the following somewhat disingenuous statement appeared:

The mention of an organization is purely for descriptive purposes, and not to indicate an expression of the views of the organization.

It should be added that the negative portion of the statement was true when made, since very few bar associations had at that time taken a position in opposition to the nomination. Shortly thereafter, several bar associations did take such official action, including the Association of the Bar of the City of New York,³⁵ the Bar Association of San Francisco³⁶ and the Philadelphia Bar Association.³⁷ We suppose, however, that prior to the official action of these groups, a member of one of the designated associations who happened to support the nomination of Judge Carswell would have a justifiable complaint against the inferred opposition of his organization without official action having been taken on the subject.³⁸

When a group is organized for the avowed purpose of presenting one side of a case, any thoughts of soliciting membership from those holding an opposite view disappears, and the opinion expressed can hardly be considered an impartial or representative appraisal of legal opinion. Opposition of this group to the Carswell nomination was avowedly based primarily on the Judge's supposed racist views. The following excerpt from a press conference held by Judge Samuel I. Rosenman (the moving spirit in this enterprise) is instructive in this respect:

Judge Rosenman, a former New York Supreme Court justice, acknowledged that the drive to solicit signatures to the anti-Carswell statement had been hurried after it was suggested in a telephone call to him by Irving M. Engel, also a New York attorney.

35. N.Y. Times, Mar. 31, 1970, at 22, col. 5.

36. N.Y. Times, Mar. 25, 1970, at 20, col. 6.

37. N.Y. Times, Mar. 24, 1970, at 20, col. 6.

38. It should be confessed that one of the writers was also one of the signers of this letter, identifying himself as a member of the Executive Committee of a particular bar association. With the virtue of hindsight, he now believes the identification of the group with bar associations to have been a mistake.

He said the statement had been sent to firms listed in the Bar Register and restricted to those in cities with populations of more than 100,000 'except in the South.'

'Why was the South excluded?' a reporter asked.

'Frankly, we didn't want to waste the postage,' Judge Rosenman replied. 'We thought there would be Southern prejudice. But we will welcome with open arms any who will join us.'

'What about Northern prejudice the other way?' asked another reporter.

'I thought we would get a fair representation from the North,' Judge Rosenman said.³⁹

IV. A CHOICE BETWEEN CONFLICTING VIEWS

The question of the proper role of the ABA in the selection of Supreme Court justices, as has been discussed, is indeed controversial. At one extreme is the view taken by the Vice Chairman of the Americans for Democratic Action and shared by many responsible lawyers, that the ABA by its nature should have no role at all. At the other extreme is the position taken by the City Bar that the ABA should specifically include in its review of a nominee's qualifications a consideration of his social and economic views. A middle course is represented by the traditional and current view of the ABA that its only proper role is that of advisor as to professional qualifications. In this section we will state and analyze each of these positions and indicate our reasons for preferring the ABA view. In our concluding section we will make suggestions for improving the role of the ABA which we think worthy of consideration.

A. Thunder on the Left: the Position that the ABA Has No Proper Role

A view shared by veterans of the National Lawyers Guild and a substantial number of law professors throughout the country is essentially that an appraisal by any bar association, and particularly by the ABA, ought to be entirely eliminated; this because such an appraisal is at best superficial and not representative of practicing lawyers as a whole, and at worst is a usurpation of a public function by an irresponsible private group inherently prejudiced and reactionary. In addition to the fiery denunciation

39. 163 N.Y.L.J. 1 (Mar. 13, 1970).

by the Vice Chairman of the A.D.A. quoted at the opening of this article, a more temperate statement of this position is that of Professor Schmidhauser:

The realistic possibility that the leaders of the bar may attempt in the future to enforce their private brand of ideological conformity under the guise of selecting 'good' judges and justices represents but one aspect of the problem, for any shift, whether formal or informal, of the authority to select judicial personnel from publicly responsible officials to a private group such as the American Bar Association involves additional dangers. First, the control of judicial selection within the private group very likely would fall into the hands of an active minority. Consequently, in the long run, an elite within an already politically irresponsible private group could determine the ideological prerequisites of membership in the Supreme Court and inferior federal courts. Secondly, the procedures by which candidates for judicial posts would be screened might, since they would be adopted outside the arena of public control and scrutiny, be manifestly unfair or prone to abuses of various kinds.

Concerning the first possibility, it has become virtually a tradition of the American Bar Association that its leaders comprise those who achieved high economic success in the profession and who entertained deeply conservative viewpoints on economic and social questions. These leaders manage the affairs of the Association and set the tone and temper of its activities.⁴⁰

In like vein, Father Drinan, S.J., Dean of the Boston College Law School, has written as follows:

The second suggestion that has been made by which the selection of judges can allegedly be improved is to obtain recommendations from Bar Associations. President Eisenhower is quoted as stating: 'We must never appoint a man who doesn't have the recognition of the American Bar Association.' Again the idea is appealing until its implications are analyzed.

1. If all nominees to important judgeships needed clearance from the American Bar Association, would not this system in the long run tend to favor only those appointees who happened to agree with the rather conservative positions taken by the American Bar Association—a private organization which enrolls as members less than one-third of our 240,000 lawyers?

40. J. SCHMIDHAUSER, *THE SUPREME COURT: ITS POLITICS, PERSONALITIES AND PROCEDURES* 19 (1961).

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2. Does a private organization whose officials tend to be middle-aged successful attorneys possess such special wisdom that it should be able to veto the appointment of a man by presumably a simple majority vote of a small committee?

....

One cannot forget when treating of this matter that seven past presidents of the American Bar Association testified against the appointment of Justice Brandeis to the nation's highest tribunal!⁴¹

If we examine these objections closely, they seem to be basically devoid of merit, not because the past and proposed review by the ABA is ideal, but because, quite simply, it is surely better than no review at all. We state below the various justifications advanced for the view that no appraisal by the ABA is in the public interest, and our view of the merits of each point:

1. It is urged to be wrong in theory and in practice for a public official having an important appointive power to delegate any control over that power to an undemocratic private organization. Answer: It is perfectly clear that the limited arrangement between the Attorney General and the ABA, like its earlier version, does not confer any appointive or veto power upon the ABA at all. Any question on this subject is eliminated by the specific understanding that the Attorney General will not consider any individuals suggested by the ABA. The function of the latter is simply to comment on the "professional qualifications" of nominees designated by the Attorney General. This type of advice has a long and successful history in our Government. In the present case it rests on the self-evident proposition that lawyers are better able to appraise the professional qualifications of other lawyers than are laymen. This is a principle applied throughout the professions and in nearly every other walk of life. For example, during World Wars I and II and the Korean War, industrial advisory committees were regularly assembled to express industry's viewpoints on important matters of government policy, including appointments.⁴² Such committees were never given the appointing power nor any veto. It is generally believed that the results of this government-industry exchange were beneficial.

41. Drinan, *How Not to Select Judges*, 98 AMERICA 683 (1958).

42. See O'Brian and Fleischmann, *The War Production Board, Administrative Policies and Procedures*, 13 GEO. WASH. L. REV. 1, 38 (1944).

2. It is pointed out that the actual advice to be obtained comes not from the membership of the ABA as a whole, but rather from an "elite within an already politically irresponsible private group."⁴³ Answer: It is true that the opinion in every case is solely that of the Committee on the Federal Judiciary. However, this is a familiar and inescapable aspect of representative government. It is obviously not possible to poll the entire membership of the ABA, particularly since the confidential nature of the inquiry ought to be preserved as long as possible. The membership of the Committee on the Federal Judiciary may well be confined to successful lawyers, but it is rotated on occasion, is diversified geographically and, in fact, represents more than one shade of philosophical and experienced opinion. Until a better method is suggested, the delegation within the ABA of this important function to a small carefully chosen group seems the only feasible way to carry out the assignment.

3. The basic objections of all of those whose views have been quoted and of many others who have taken the same position, is that the American Bar Association is not representative of lawyers generally and, in fact, represents only the views of its leaders who comprise "those who achieve high economic success in the profession and who entertain deeply conservative viewpoints on economic and social questions."⁴⁴ Answer: Assuming that this were true at one time, it is no longer an accurate statement of the present situation. Beginning with the term of President Vanderbilt, the general position of the ABA went through a substantial reorientation. It is doubtless true that the leadership is drawn from the ranks of successful lawyers who perhaps share some of the economic views of their wealthy clients. On the other hand, generalizations of this kind simply are no longer true with respect to the whole membership, as a reference to the Rosenman letter (*supra* III) will demonstrate. Here was a transmission from hundreds of individuals who can only be described as leaders of the bar and the law faculties of the country. Included within the roster were scores of lawyers who held or had held high positions in the ABA and in powerful local associations. Whatever may have been their economic views, their social views, as evidenced by the communication itself, were certainly not conservative at all.

43. J. SCHMIDHAUSER, *supra* note 40, at 19.

44. *Id.*

Again, it is highly significant that all of the nominations for the Supreme Court made by Presidents Eisenhower, Kennedy and Johnson were approved by the ABA, although most of them would have to be classified as liberal rather than conservative.

Finally on this point, we need to be continually reminded that the choice here is between having the views of the only active national association of lawyers or none at all, since the National Lawyers Guild is no longer operative. So viewed, the preferable course seems to be to welcome the advice of ABA's Committee without an understanding of any kind that it will necessarily be accepted.

B. *Right On! The City Bar's Call for a Consideration of Economic and Social Views*

Ironically, the Haynsworth-Carswell affairs produced two radically different reactions concerning the proper role of the ABA. There was, as we have seen, the position taken by Mr. Rauh that the ABA should be excluded "from the judge selection process entirely."⁴⁵ But the prevalent reaction appeared to be just the opposite—that the failing of the ABA had not been that it was overly involved in the selection process, but that it was not sufficiently aggressive in trying to secure the appointment and confirmation of good candidates (and conversely the rejection of bad candidates). Among those urging a more "activist" role upon the ABA was the Bar Association of the City of New York. A subcommittee of the City Bar recommended, among other reforms, that the Committee on the Federal Judiciary "expand its investigation of all nominees for the Supreme Court to include a review of the nominee's social and economic philosophy."⁴⁶ This recommendation, along with the others made by the subcommittee, was subsequently adopted by the Executive Committee of the City Bar. However, the ABA declined this invitation to expand its jurisdiction. In rejecting this recommendation, the ABA used different words: "We, nevertheless, have concluded that, as in the past, the Committee should endeavor to avoid considerations of these factors [*i.e.*, political and ideological factors] except as those factors might affect judicial temperament."⁴⁷

45. N.Y. Times, *supra* note 3.

46. Association of the Bar of the City of New York, *Report of the Sub-Committee on Nominations for the Supreme Court of the United States*, at 3 (Apr. 30, 1970).

47. *Report of the ABA Committee on Federal Judiciary*, at 17.

We thus have a controversy where the issue is not precisely joined. The City Bar advocates that the nominee's "social and economic philosophy" should be reviewed, while the ABA says that it will avoid consideration of "political and ideological factors" except as these factors might affect judicial temperament.

A great difficulty about analyzing the proposal of the City Bar is that there is no internal evidence in its report to assist in determining, first, what is meant by "social and economic philosophy" or, second, what weight is intended to be given such factors in passing upon the qualification of Supreme Court Justices. However, some light is thrown on the subject by the fact that the report was made in the midst of and in order to influence the debate on the confirmation of Judge Carswell. It is clear that by social philosophy, the City Bar intends as a minimum to comprehend the type of racist views attributed to the nominee. We assume that social philosophy would also include such matters as views on civil rights. We hazard the guess that in selecting the term, the Subcommittee had in mind approximately the same "political and ideological factors" referred to by the ABA.

What is meant by "economic philosophy" is much less clear. We find it hard to believe that those who voted for inclusion of this factor really intended to review what the nominee might believe about our present economic system including such controversial subjects as fiscal and monetary policy, distribution of wealth, taxing methods and the like, although all of these matters are clearly matters of economic philosophy. We do not suppose that it would be seriously contended that a nominee who happens to be a "single taxer" in the Henry George tradition should thereby be considered qualified (or disqualified) for appointment to the Supreme Court.

The difficulty of understanding such terms is further compounded by the failure of the City Bar to state what effect or weight is to be given such views when they are established. They are to be included in the "review" and obviously, unless the recommendation is meaningless, this conveys the impression that on occasion the holding of such views might act as a disqualification or even as a particular qualification, depending on the views of the person applying such amorphous standards. We think it too clear to require extended argument that such language lacks the

precision which ought to be found in a charter for the ABA or any other association engaged in such a delicate activity.

What can be said in support of the proposal?

By reason of the unique role of the Supreme Court, it is true that the political, social and economic views of a Supreme Court Justice may influence his decision in the vital controversies which come before him more than his legal ability and judicial temperament in the conventional sense. This being true, it might also be urged that a failure to appraise these factors renders a recommendation such as is contemplated by the ABA incomplete and on occasion misleading. In support of this position, it can also be argued that such views, when known, inevitably affect the ultimate recommendation in many cases, consciously or otherwise. Even the ABA concedes that this is sometimes so when it says that political and ideological factors may be considered when they "might affect judicial temperament."⁴⁸

In our opinion, however, the ABA should be extremely hesitant to become involved in a general evaluation of the candidate's ideological position. We recognize, as does the ABA, that there are certain situations in which a consideration of the candidate's political and social views might be relevant, and in the latter part of this paper we will attempt to define in greater detail what those situations might be, but in general it is our position that the seemingly broad approach of the City Bar should be rejected. Our reasoning is as follows:

1. Lawyers can claim an expertise only with respect to matters involving their own profession. All of us claim to be able to appraise the legal competence of our fellow lawyers and judges. Few of us can justly claim any particular expertise as economists or sociologists. For this reason, we have no special claim to the confidence of the American public when we espouse views in these fields.

2. Even if lawyers were knowledgeable in the areas of economics, sociology, and politics, it would still be inappropriate, in our view, for the ABA to evaluate a candidate on the basis of his economic, social and political philosophy. Economic, social, and political philosophies are not primarily matters of *fact* but rather of *value*. And in a democracy, value judgments concerning the

48. *Id.*

nature of society should be made by the people through their duly elected representatives. It, therefore, follows that if anyone is to judge a nominee on the basis of his political, economic or social philosophy, it should be the country's political leaders (the President and the Senate)—not an unrepresentative private group. For the ABA to exploit its pivotal position in order to achieve a judiciary sympathetic with the political and economic predilections of its members would be an abuse of power and inconsistent with democratic principles.

3. Any overt attempt by the ABA to influence the selection of Supreme Court Justices on the basis of their political or social views would result in a loss of its influence in the judicial selection process and would, therefore, preclude the Association from contributing in the area where it does have expertise, namely, the evaluation of professional competence. The relationship between the ABA's influence in the judicial selection process and its position of political neutrality has been acutely analyzed by Grossman:

By agreement with the Attorney General, the Committee ostensibly limits its inquiries to those factors that have a bearing on the professional qualifications of prospective candidates. It is with respect to just such factors that the Committee claims specialized knowledge and the 'right' to be consulted. If it were to recognizably deal with political factors such as party affiliation and the views of the candidates on contemporary social issues, it would almost certainly lose the coating of legitimacy which now supports its operations. And the benefits of its work to the Attorney General would be seriously diluted. Furthermore, any evidence of a particular political orientation influencing the Committee's recommendations would completely destroy its usefulness to the Attorney General, and the relationship would be shattered. The pre-Committee history of the American Bar Association's involvement in the judicial-selection process in behalf of very conservative interests, and the present ideological orientation of the Association, are prejudices from which the Committee must dissociate itself.⁴⁹

One need not speculate as to the probable consequences of the ABA's involvement in politics. The sorry history of its loss of prestige after the political activities of its leaders in the 1930s (*supra* III) proves the wisdom of its present non-political stance. The fact that these earlier actions were not official ABA posi-

49. GROSSMAN, at 125.

tions is of no importance since they were designedly publicized as though they were.

4. Basing an official position of ABA primarily upon a nominee's social or economic views is bound to be divisive and inimical to the proper objectives of the Association. This is true, first, because the stated objectives of the ABA are to improve the administration of justice and not to forward a particular social or economic (or, *a fortiori* political) viewpoint. Within the membership of the ABA (currently 144,446)⁵⁰ will be found every shade of political, social and economic view. By the nature of the Association, there has never been, and cannot be a delegation of any general authority to any committee to speak on non-legal matters for the membership. If the president wishes to appoint to the Supreme Court a lawyer who is convinced that an entirely changed basis of taxation based on a new economic policy ought to be adopted, it seems clear to us that this is his prerogative, and that the ABA has no views of sufficient expertise to warrant their acceptance by the president or the public. This is not to say that individual lawyers, or groups of lawyers not professing sponsorship of bar associations, should not formulate and express their own view on such a candidacy with all vigor, just as all other citizens. A similar expression by the ABA would lead it once more into "the political thicket." It is our view that such an expression of opinion would be as repugnant to the objectives of the Association as would a poll of the membership on the national policy reflected in the Vietnam War. (We do not refer, of course, to the unquestioned right of any bar association to express an opinion on the *legality* of this or any other war.) The consequences of such ill-considered action have been serious in the past and they could certainly be disastrous if adopted again in the future.

It should also be noted that the ABA or its Committee on the Federal Judiciary may be dominated at any particular time by a fortuitous and temporary combination of political, economic or social liberals or conservatives in any mix. Under such circumstances, historical consistency in such areas is impossible to achieve.

At this point, we would like to emphasize that vigorous criticism of the philosophy and the related views of any aspirant for

50. As of June 30, 1970. The information was secured from the American Bar Association on August 18, 1970.

judicial office is always the prerogative and sometimes the duty of the individual lawyer. Groups of like-thinking lawyers may properly be organized for similar purposes providing they reveal the true basis of their association. The effectiveness of the group of individual lawyers which was formed to oppose the confirmation of Judge Carswell should dispel any fear that action taken outside the organized bar will inevitably be futile.⁵¹ And since effective alternative means of expressing opinion concerning the confirmation of Supreme Court justices exist for concerned lawyers, there seems to us little reason for bar associations to take stands on such appointments which are based on the ideological or political beliefs of the candidate.

C. *The Present Position of the American Bar Association—
Advice Confined to Professional Qualifications*

Much of the justification for the new arrangement between the Attorney General and the American Bar Association has already been stated. If we accept the premise that it is better to secure the advice of lawyers with respect at least to the professional qualifications of judges, we are necessarily drawn to the further conclusion that the ABA Committee's procedure is the only available means of obtaining such advice at the present time. We should then consider whether the new official robe which has been draped about the ABA's shoulders will itself tend to produce a better product. If all we can expect is a recurrence in the future of the sequence of events in the review by the ABA of the Haynsworth and Carswell candidacies (where both were found unfit by the Senate despite a finding of qualification by the ABA Committee after a full review of the record), we may well consider dubious the characterization by Chairman Walsh of the new arrangement as "the most important innovation in the procedure for selecting Supreme Court nominees. . . ."⁵² Doubters may well think such an observation more reminiscent of Samuel Johnson's characteriza-

51. As stated above, the authors disapprove of ad-hoc groups (such as the group formed to oppose the confirmation of Judge Carswell) trying to claim the prestige of bar associations by identifying the offices which their members or signatories hold or have held in the different bar associations. However, we believe that the anti-Carswell group would have been almost as effective had it not so designated its signatories.

52. Letter from Lawrence E. Walsh to John N. Mitchell, July 27, 1970.

tion of an early remarriage of one of his friends as "the triumph of hope over experience."⁵³

So far as we are aware, there has never been an official attempt to define the three elements of "professional qualifications" to which the ABA has limited itself. At a later point we suggest what we consider appropriate and necessary definitions which ought to be adopted and publicized by the ABA. In addition, we attempt to show that there are certain instances, even under the ABA's test, where political and ideological factors should be deemed relevant in the evaluation of a nominee and we further attempt to establish some guidelines for determining when these factors should be considered.

Before doing this we wish to record our preference for the ABA test, even without the clarification and expansion which we consider necessary and express the view that the new arrangement will in fact function more effectively than the old. Our reasons for preferring the ABA position have been set forth in detail in our consideration of the City Bar position. Our reasons for predicting that the new process will be more effective are as follows:

1. In practice, as well as in theory, the same basic system has worked well when applied to the selection of judges of other federal courts where it has official recognition and adequate time for investigation. In its new guise it may repeat some of its successes at the Supreme Court level. Those lawyers who have participated in the intercontinental telethon that constitutes a major feature of the present system of assembling the views of the ABA on nominees for the district courts and the courts of appeals know that the system has permitted the administration to avoid many mistakes. We believe that a consensus of lawyers active in the courts of the United States would conclude that the caliber of the federal court judges, appointed by the President, has on the whole been higher than that of state court judges chosen by popular election. Some part of the credit for this must go to the work of the ABA's Committee on the Federal Judiciary. Again, its proposed role in an inquiry about "professional qualification," specifically including the questions of "integrity" and "judicial temperament" has proved broad enough in the past to invite information about almost any aspect of the nominee's career. As a result, it is a happy fact that

53. 2 J. BOSWELL, *LIFE OF JOHNSON* 128 (1770), taken from L. F. Powell's revision of G. B. Hill's edition.

many persons who might now be serving on the federal bench have instead found themselves continuing otherwise undistinguished professional or legislative careers.

2. The new categories of classification set forth in Judge Walsh's letter to President Segal is also a marked improvement over earlier procedures. Thus, persons considered for the Supreme Court will be rated as meeting "high standards of integrity, judicial temperament and professional competence;" or "not opposed;" or "not qualified." Judge Walsh adds hopefully: "It will make clear that although a minimally qualified person is not opposed he is not endorsed."⁵⁴ If these hopes come to fruition, they will eliminate a chief cause of complaint against the earlier system, where a rating of "qualified" (no longer to be used) was urged by the nominee's supporters and misunderstood by the public as equivalent to an ABA endorsement. Under the new system, the rating "not opposed" will logically compel the inference that the nominee is considered to lack "high standards of integrity, judicial temperament and professional competence"—in other words, a virtual damnation with the faintest possible praise.

3. The presumed abolition of the "24-hour period" for investigation has advantages almost too obvious to mention. Such abolition was apparently accomplished *sub silentio*, since the subject was not mentioned in the exchange of correspondence between Attorney General Mitchell and Judge Walsh. However, the report of the Committee on the Federal Judiciary, which generated the exchange, complains specifically of the "limited period" for investigation,⁵⁵ and Judge Walsh's letter of acceptance speaks of a preliminary informal investigation and report prior to "undertaking broader inquiries."⁵⁶ It thus seems clear that one of the new rules of the game will be the allowance of adequate time for investigation and, what is almost as desirable as investigation, informal discussion between the Committee and the Department of Justice.

4. Finally, the issuance of an official commission to the Committee by the Attorney General is perhaps the most important advantage of the new procedure. Heretofore the Committee has occupied the nervous status of the wallflower at the ball—eager to

54. Letter from Lawrence E. Walsh to Bernard G. Segal, May 13, 1970.

55. *Report of the ABA Committee on Federal Judiciary*, at 4.

56. Letter from Lawrence E. Walsh to John N. Mitchell, July 27, 1970.

dance but seldom invited. In all walks of life, responsibility begets performance, and we confidently predict the development by the Committee of higher standards, more intensive investigation procedures, and ultimately a far more effective role in the selection of candidates for the high court. Contributing to this progression, of course, will be the increased public scrutiny which will now attend the Committee's deliberations and reports.

V. SLICING THE GORDIAN KNOT

The bare bones of the dilemma which we have outlined may be summarized thus:

1. An appraisal of a nominee's political (in the broadest sense), philosophic, economic and social views is a legitimate and essential activity for the public, including lawyers and groups of lawyers organized for that purpose.

2. In some cases, but by no means all, such views are relevant to and may in a particular case even be decisive of a finding with respect to a nominee's professional qualifications.

3. Lawyers can claim no special expertise in appraising political, social and economic views, beyond that of the general public, unless such views are properly found relevant in a particular case to the question of professional qualifications. In our judgment, the City Bar errs in assuming an expertise for the ABA Committee in all such questions, regardless of their relevance to the matter of professional qualifications.

We prefer the ABA approach though we believe it to be inadequate in failing to define exactly when and for what purpose a nominee's views on such subjects may be considered to infringe upon his professional qualifications and thus a proper subject for consideration.

Is there a better way? We believe there is, and with some trepidation now propose it.

As a first step we think it necessary to attempt to define the proper meaning of professional qualifications which we think ought to be publicly adopted by the ABA as guidelines for the Committee.

Of the tripod of qualifications listed but not so far further defined by the ABA or the Committee, we consider first the meaning of "professional competence." We think this comprehends at least

two qualities: (1) a basic understanding of our constitutional and legal system and the way in which that system permits and encourages social progress in an orderly and peaceful manner in accordance with the will of the majority of voters; (2) a background knowledge of substantive and procedural legal principles, sufficient to permit the application of legal and practical reason to the solution of the complex and unique problems, many in unfamiliar areas, which must be passed upon by the Supreme Court.

As to "integrity" we suggest that the meaning of this term ought not to be confined to an absence of dishonesty or the assurance of incorruptibility in the conventional sense. Rather, it should clearly encompass intellectual integrity, *i.e.*, a passion for justice and a willingness to follow the dictates of a judge's reasoning power in the decision of cases without regard to the popularity or general acceptability of the conclusion to which he is led. The greatest judges have this quality and this is one reason why predicting judicial performance in advance is so difficult. The listing of Supreme Court Justices is replete with examples of supposedly conservative advocates winding up as liberal justices, and vice versa; this, we believe, primarily because their integrity so dictated.

"Judicial temperament" is a more elusive concept. The words mean simply that a man's demonstrated mental and moral qualities, together with a habit of self discipline, lead us to believe that he will in fact act as we all believe judges should act; that he will be firm, but not overbearing; courteous and patient; unprejudiced or at least aware of his prejudices and determined to eliminate them as decisional factors; that he should not only do justice, but should give the appearance of doing justice.

It is both interesting and significant that the Committee conceived of cases where "political and ideological factors" would have to be considered when they "might affect judicial temperament." Among other things, this is a somewhat reluctant concession that philosophical and social views must occasionally be taken into account at least for limited purposes. In our view this is a rather disingenuous approach since it involves a distortion of the ordinary concept of "judicial temperament." Nonetheless, it cannot be denied that the saving clause may prove a useful escape hatch in the future.

It might be pertinent to inquire what the recommendation of the ABA would have been had the 1948 racist remarks of Candi-

date Carswell been repeated by Judge Carswell in 1968.⁵⁷ Suppose, too, that his activities in incorporating the "all-white" club in 1958 had been known to the Committee.⁵⁸ We have no doubt that under such circumstances the Committee would have bravely stretched the meaning of the term "judicial temperament" and would have held the nominee disqualified.

We consider such an approach to be lacking in essential candor. Instead, we would prefer a test which would openly recognize that political and ideological factors might be relevant and which would give some guidance as to the occasions on which such factors should and should not be considered. The test which we propose is as follows: The ABA should consider those beliefs of the nominee (whether they be denominated political, social, or economic beliefs) which bear upon the nominee's commitment to those basic values which are implicit in the concept of the rule of law. Judges and lawyers in our society (and in every society) operate within a context of a legal system which has its own implicit values. For example, the ideal of equality before the law regardless of economic, racial or social status, a belief that change should be effected through orderly processes, and the belief that truth is most likely to emerge when each side is given a fair opportunity to present its position are among the basic assumptions of our system. Indeed, these values are so basic in our system of jurisprudence, that one who lacks a strong and vigorous commitment to them is not likely to perform his role either as a judge or a lawyer satisfactorily. Note that one's commitment to these values constitutes in the most fundamental sense a political viewpoint—a view as to how society should be structured and operated. Notwithstanding the authors' position that the ABA ought to generally abstain from considering a nominee's political and social views, they do believe that the ABA should consider the nominee's commitment to these basic values. In this context, the very factors which militate against ABA consideration of a nominee's political and social views in the normal case argue for an examination of his commitment to these values.

First, the ABA as representative of the nation's lawyers can claim, if not an expertise, at least a developed sensitivity to the

57. 1948 campaign speech by Carswell, *printed in* 116 CONG. REC. 3939-40 (daily ed. Mar. 18, 1970).

58. Letter of Bruce Bromley, Francis T. P. Plimpton, Samuel I. Rosenman, Bethuel M. Webster, *et al.*, *printed in* 116 CONG. REC. 1607 (daily ed. Mar. 4, 1970).

importance of these values in our national life. By education, training, experience and daily practice, the lawyer is made acutely aware of the importance of such values. The ordinary citizen only rarely has occasion to reflect upon the importance of fair procedures in the resolution of disputes. Yet almost every lawyer, whether he be a trial lawyer trying a case before a jury, an administrative lawyer representing his client before the Federal Trade Commission, or a tax lawyer seeking a favorable ruling from the Internal Revenue Service, is impressed constantly with the importance of having an impartial tribunal willing to listen to every side with an open mind and a willingness to judge the issues involved objectively without regard to its personal views. Because of his focal role in the peaceful resolution of disputes, the lawyer is uniquely aware of the importance of such values and becomes to a large extent society's guardian of these values.

Secondly, the danger of divisiveness which is a serious concern where the ABA attempts to pass upon a nominee on the basis of his social and political views (in the conventional sense) is substantially less where it judges a nominee on the basis of his commitments to the fundamental values which are implicit in the rule of law. Indeed, because these values are so commonly shared by the members of the legal profession, a judgment on a nominee which is grounded on such considerations may serve as a reaffirmation of the Bar's ultimate ideals and hence may serve to unify and consolidate the members of the organization. On the other hand, it must be recognized that the application of such broad principles in a specific factual context may be highly controversial and may appear to be a guise under which a candidate is actually reviewed on the basis of his political and social views. Nevertheless, to the extent that the ABA can convincingly demonstrate that its decision was made on the basis of the nominee's commitment to the values of the legal system, the decision should unify rather than divide the profession.

Finally, the danger that the ABA will lose its favored position in the appointment and confirmatory process (and hence its ability to influence that process in the area where it has greatest claim to special expertise, namely, the question of professional competence) will be substantially less where it bases its decisions on the nominee's commitment to the legal process than where it bases the decision on the nominee's political and social views (in the con-

ventional sense). Application of the criterion suggested by the authors would be politically neutral, that is, there is no reason to suppose *a priori* that it will favor Republican over Democratic nominees (or vice versa), or liberals over conservatives (or vice versa). Accordingly, the danger that the ABA will be viewed as a political partisan will be relatively slight. Moreover, the public probably does recognize the Bar's special concern with these values and hence will tolerate a judgment which is grounded upon such considerations. Of course, as stated above, there is a danger that the application of such general criteria to a specific factual situation may be subject to bitter dispute and may be viewed by some as a guise under which a candidate is in fact illegitimately judged on the basis of his economic, social and political philosophy. Because of this danger, the authors recommend that if a candidate is to be disapproved because of a lack of commitment to the basic values of the legal system (rather than because of his lack of technical competence), the reason for his disapproval should be set forth explicitly in a written report which details the nominee's alleged lack of commitment. A candid recognition by the ABA of the quasi-political nature of its decision should go a long way towards dispelling the fear that the organization is abusing its position by making its decision under the cover of objective criteria on the basis of its own political and economic predilections. Furthermore, because political factors are legitimately considered by the President and the Senate in the appointment and confirmatory process, a report detailing the quasi-political nature of the Bar Association's recommendation will enable the political leaders to properly evaluate the deference which it should be given.

A few examples may explain what the authors have in mind by the phrase "commitment to the basic values implicit in the rule of law." A lawyer whose professional career has been marked by repeated attempts to disrupt trials of his client should be disapproved by the ABA for appointment to the Supreme Court since his actions evince a lack of commitment to the concept of resolving disputes in accordance with the orderly process of the law. A nominee who has advocated widespread violence as a means of achieving certain political and social objectives should likewise be rejected because of his lack of commitment to the rule of law. And if the ABA found that Judge Carswell displayed a bias and hostility towards black litigants and black lawyers on the basis of their

race, as was alleged, it should have disapproved him because such actions would have reflected a rejection of the ideal of equality before the law regardless of race, creed or economic status.

It need hardly be added that we by no means would disqualify a nominee who has reasoned convictions as to the need for change in many aspects of our constitutional, legal and judicial system. For example, reasonable men differ today on whether recent decisions of the Supreme Court give too much protection to persons accused of crime as opposed to the needs of society, and no such opinion should act as a disqualification. Again, we would not suppose that a nominee should be disqualified because he believes that all qualifications of every kind on the right to vote, including literacy and language tests, ought to be abolished.

What we have attempted to describe is a commitment to principles so basic to the operation of a judicial system that it is difficult to imagine a judge performing his duties properly without their guidance. No political, social or economic views which do not affect that ability ought to be considered.

This brings us to the final and most difficult part of our task—to formulate such a standard for the guidance of the ABA and its Committee on the Federal Judiciary. We suggest the following:

The responsibility of the Committee is to express its opinion on the professional qualifications of the nominee for service on the Supreme Court. In formulating such opinion, the Committee should seek information and take into account the following factors:

1. Integrity.
2. Judicial temperament.
3. Professional competence.

4. The nominee's record, public and private, as indicating his qualifications, or lack of qualifications, for high judicial office. In weighing this factor, the Committee should consider the whole career of the nominee, including expressions of his views with respect to the American judicial system, the rule of law and the rights of man. It should then reach a determination, if possible, as to whether anything known about the nominee casts substantial doubt on his ability to follow the rule of law and to render justice without regard to a litigant's race, color, ethnic background or economic status.

We think that only a brief explanation and justification is required for our proposal. In our view, philosophical and social (hardly ever economic) views of a nominee become relevant to an ABA inquiry only if of a kind and held with such determination that they become informative as to his probable performance as a judge. The ABA believes that such a test may be correctly viewed as a method of determining his "judicial temperament." We prefer to phrase the test in terms of the probable effect of such views on the specific performance of his most important judicial responsibility. We consider such an inquiry as more relevant in establishing what we earlier described as a judge's intellectual integrity—his basic commitment to doing justice among men.

In the hope that this proposal, intended as a more precise formulation of the weight to be given certain views of nominees for the Supreme Court, may contribute something to the current debate on this vital subject, we submit these views to the profession for its consideration.

