



AMERICAN BAR ASSOCIATION

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STATEMENT

of

STEPHEN L. TOBER

on behalf of the

STANDING COMMITTEE ON FEDERAL JUDICIARY

of the

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF BRETT MICHAEL KAVANAUGH

TO BE JUDGE OF THE UNITED STATES COURT OF APPEALS

for the

THE DISTRICT OF COLUMBIA CIRCUIT

before the

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

May 8, 2006

I. Statement of Stephen L. Tober

Mr. Chairman and Members of the Committee:

My name is Stephen L. Tober. I am a practicing lawyer in Portsmouth, New Hampshire, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. I am submitting this written statement for the hearing record to present the Standing Committee's supplemental peer review evaluation of the nomination of Brett Michael Kavanaugh to serve on the United States Court of Appeals for the District of Columbia Circuit. This statement is divided into two sections. In this first section, I am pleased to summarize the Standing Committee's general investigative procedures and present an overview of the investigation of the nominee. In the second section, I will explain the process in this particular matter and the reasons for the Standing Committee's rating.

After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is "Qualified" for the appointment. A minority found him to be "Well Qualified."

A. Procedures Followed By the Standing Committee

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures. A more detailed description of the Committee's procedures is

contained in the Committee's booklet (commonly described as our *Backgrounder*), *Standing Committee on Federal Judiciary: What It Is and How It Works (2005)*.

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee -- his or her competence, integrity and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, knowledge of the law, breadth of professional experience, courtroom experience, character, integrity, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Pamela Bresnahan conducted the original formal investigation in 2003, and updated her report in 2005, as the District of Columbia Circuit representative on the Standing Committee. Marna Tucker, who succeeded Attorney Bresnahan as the District of Columbia Circuit representative on the Standing Committee in August 2005, subsequently conducted a further supplemental evaluation of the nominee.¹

The investigator starts his or her investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications,

¹ Marna Tucker was joined by Federal Circuit representative John Payton for the interview of the nominee.

including professional experience, significant cases handled and major writings. The investigator makes extensive use of the questionnaire during the course of the investigation. In addition, the investigator examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer-review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the investigator will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the Standing Committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the investigator takes whatever additional steps are necessary to reach a fair and accurate assessment of the

nominee.

Upon completion of the investigation, the investigator submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the investigator then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications. This formal report, together with the public portion of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire committee, composed of fourteen "circuit" members and the Chair. After carefully considering the formal report and its attachments, each member independently submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified" or "Not Qualified." An investigator who is not a current member of the Standing Committee would not vote.

I would like to re-emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the Committee members by multiple sources. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given a full opportunity to explain the matter and to provide any additional information

bearing on it. If the information cannot be shared with the nominee, it is not included in the formal report and is not considered by the Committee in reaching its evaluation.

B. The Investigation of the Nominee

The Standing Committee has issued three evaluations on the nomination of Brett Kavanaugh. This is due to the fact that Mr. Kavanaugh has been nominated once (2003) and re-nominated twice (2005 and 2006). It is the established practice of the Standing Committee to conduct a further investigation on any nominee who is re-nominated, and the extent and scope of that further investigation is often influenced by the length of time that has passed from the date of the original evaluation and rating. Whenever a supplemental evaluation is performed, copies of all previous confidential formal reports on the nominee are reproduced, and presented to every member of the Standing Committee for review before they vote, alongside the new formal report. Thus, it is important that every supplemental evaluation performed goes back to the end-date of the original formal report, and brings the investigation forward from that point. That is what occurred here.

Concern has been raised that the most recent rating from the Standing Committee somehow results solely from a “change in personnel” on the Committee. In fact, such is not the case. Indeed, no less than six members who served on the Standing Committee before August, 2005,² and who continue to serve today, changed their votes on this nominee from “Well Qualified” to “Qualified” between the rating issued on February 16,

² Appointments to the Standing Committee are made by the incoming ABA President, and according to the ABA Constitution, all new appointments to this committee begin their service at the conclusion of the ABA Annual Meeting, which is generally in August of each year.

2005, and the rating issued April 3, 2006.

There are at least three general reasons to support the most recent rating given to this nominee. First, there was a wider universe of individuals contacted during the supplemental evaluation, than during the initial formal report or its update. The Standing Committee generally requires, at a minimum, 40 to 60 contacts with judges, lawyers and others in any nomination it is reviewing, although an evaluator is certainly free to do more. In 2003 there were 55 such contacts regarding Mr. Kavanaugh. In 2006, there were 91 such contacts. Nineteen more judges and seventeen more lawyers with potential knowledge about Mr. Kavanaugh were contacted, and not all of the original 55 contacts were summarily repeated. Thus, in 2006 a larger group of individuals was given the opportunity to share with the Standing Committee knowledge of the nominee's integrity, professional competence, and potential for judicial temperament.

Second, some individuals who may have had no contact with the nominee in 2003 were now individuals who had crossed paths with him. Some in public service or in the practice of law in 2003 were now no longer active, having been replaced in some measure by others. And, simply put, events and times had moved on, creating new and different developments and landscapes in which the professional qualifications of the nominee could be viewed, that were not present in 2003 or even 2005.

Third, it should be pointed out that with both earlier ratings issued by the Standing Committee, there was a "minority Qualified" as part of the vote. The official rating by the Standing Committee has always been and remains the majority rating, yet nonetheless it is important to underscore that some members of the 2003 and 2005 Standing Committee considered this nominee to be "Qualified."

The Standing Committee takes most seriously its responsibility to conduct an independent, non-political, non-ideological examination of the professional qualifications of judicial nominees. There is no bright-line litmus test as to whether a nominee is “Well Qualified” or “Qualified.” The *Backgrounder* makes clear that “(t)o merit a rating of ‘Well-Qualified,’ the nominee must be at the top of the legal profession in his or her legal community; have outstanding legal ability, breadth of experience and the highest reputation for integrity; and either demonstrate or exhibit the capacity for judicial temperament.”

The *Backgrounder* also makes clear that “(t)he rating of ‘Qualified’ means that the nominee meets the Committee’s very high standards with respect to integrity, professional competence and judicial temperament and that the Committee believes that the nominee will be able to perform satisfactorily all of the duties and responsibilities required by the high office of a federal judge.”

It is, at its most basic, the difference between the “highest standard” and a “very high standard.” Our rating is not the result of tallying the comments - pro and con - about a particular nominee. Nor is it about politics or ideology or empirical data. Rather, in making our evaluation, we draw upon our previous experiences, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment.

From the outset in 2003, even with an earlier rating of “Well Qualified” for this nominee, there were considerations arising from confidential interviews and other background information that act to explain the thread of “Qualified” running through the Standing Committee evaluations. The 2003 confidential record makes it clear that there

were then-present concerns regarding this nominee's breadth of professional experience. It was noted that he had never tried a case to verdict or judgment; that his litigation experience over the years was always in the company of senior counsel; and that he had very little experience with criminal cases. Indeed, it is the circumstance of courtroom experience that fills the transcripts that make the record before the Court of Appeals, and concerns were expressed about the nominee's insight into that very process. Nonetheless, a substantial majority saw other overriding factors that supported a rating of "Well Qualified."

The additional interviews conducted in 2006 expanded upon those earlier concerns. One judge who witnessed the nominee's oral presentation in court commented that the nominee was "less than adequate" before the court, had been "sanctimonious," and demonstrated "experience on the level of an associate." A lawyer who had observed him during a different court proceeding stated: "Mr. Kavanaugh did not handle the case well as an advocate and dissembled." Other lawyers expressed similar concerns, repeating in substance that the nominee was young and inexperienced in the practice of law.

Further, the 2006 interviews raised a new concern involving his potential for judicial temperament. Unlike the earlier 2003 final report and 2005 updated report, the recent supplemental evaluation contained comments from several interviewees with more recent experience with the nominee, which caused them to characterize the nominee as "insulated." One interviewee suggested that much of his concern about the nominee being insulated was due, understandably, to the nominee's current position as Staff Secretary to the President. However, this interviewee remained concerned about the

nominee's ability to be balanced and fair should he assume a federal judgeship. And another interviewee echoed essentially the same thoughts: "(He is) immovable and very stubborn and frustrating to deal with on some issues." Both issues—his professional experience and the question of his freedom from bias and open-mindedness—were brought up (along with others) with the nominee during his 2006 interview, and he was provided a full opportunity to address them in detail as part of our supplemental evaluation material.

This nominee enjoys a solid reputation for integrity, intellectual capacity, and writing and analytical ability. The concern has been and remains focused on the breadth of his professional experience, and the most recent supplemental evaluation has enhanced that concern. When taken in combination with the additional concern over whether this nominee is so insulated that he will be unable to judge fairly in the future, and placed alongside the consistently praiseworthy statements about the nominee in many other areas, the 2006 rating can be seen in context. A substantial majority of the Standing Committee believes that Mr. Kavanaugh is indeed qualified to serve on the federal bench.

Thank you for the rather unique opportunity to present these remarks.