

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20516-6276

JOSEPH E. BADEL, JR., DEL., CHAIRMAN

EDWARD M. KENNEDY, MASS.  
ROBERT C. BYRD, W. VA.  
HOWARD M. METZENBAUM, OHIO  
DENNIS DECONCINI, ANZ.  
PATRICK J. LEAHY, VT.  
HOWELL HERRIM, ALA.  
PAUL SIMON, ILL.

STROM THURMOND, S.C.  
OSBORN G. HATCH, UTAH  
ALAN E. SIMPSON, WYO.  
CHARLES E. GRASSLEY, IOWA  
ARLEN SPECTER, PA.  
GORDON J. HUMPHREYS, N.H.

MARK H. SPENTZER, CHIEF COUNSEL  
DAVID ROYSHAM, STAFF DIRECTOR  
DENNIS W. SHEDD, IDENTITY CHIEF COUNSEL

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

HOWARD M. METZENBAUM, OHIO, CHAIRMAN  
DENNIS DECONCINI, ANZ.  
HOWELL HERRIM, ALA.  
PAUL SIMON, ILL.  
EDWARD M. KENNEDY, MASS.

STROM THURMOND, S.C.  
ARLEN SPECTER, PA.  
GORDON J. HUMPHREYS, N.H.  
OSBORN G. HATCH, UTAH

ROSE CORNIA, CHIEF COUNSEL AND STAFF DIRECTOR  
KENNETH S. STAVLAK, IDENTITY CHIEF COUNSEL

August 26, 1987

Harold R. Tyler, Jr.  
Chairman, Standing Committee on Federal Judiciary  
of the American Bar Association  
Patterson, Belknap, Webb and Tyler  
30 Rockefeller Plaza  
New York, New York 10112

Dear Mr. Tyler:

The Senate Committee on the Judiciary will soon consider the nomination of Judge Robert H. Bork to be Associate Justice of the Supreme Court. Because of the importance of the nomination, I believe it is useful to clarify the role of the American Bar Association in reviewing this nomination and in submitting a report to the Committee.

Traditionally, the ABA's Standing Committee on Federal Judiciary has submitted a report on the qualifications of a judicial nominee to the Committee. For example, in the case of the nomination of William Rehnquist to be Chief Justice, the ABA sent a letter dated July 29, 1986, to the Committee and representatives of the ABA testified before the Committee.

The July 29 letter contains this statement: "Consistent with its long standing tradition, the Committee has not concerned itself with Justice Rehnquist's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament and integrity." The identical statement was included in the August 5, 1986, letter to the Committee regarding the nomination of Judge Antonin Scalia to be Associate Justice. Both these letters concluded with the statement that the nominees met the ABA standards for "professional competence, judicial temperament and integrity" and were well qualified.

In testifying before the Committee regarding the nomination of Judge Scalia, the representative of the ABA stated: "I think we make it very clear in the second paragraph of our letter that the committee's evaluation of Judge Scalia is based on its investigation of his professional competence, judicial temperament, and integrity. We go on to say consistent with its long standing tradition, the committee's

investigation did not cover Judge Scalia's general political ideology or his views on issues except to the extent that such matters might bear on judicial temperament or integrity." (Hearings before the Judiciary Committee regarding the nomination of Judge Scalia, August 5-6, 1987, pp. 125-6.)

These statements indicate that the ABA Committee's report and findings in the case of judicial nominees, including nominees to the Supreme Court, are limited to issues of professional qualifications, judicial temperament and integrity. The ABA's findings necessarily do not include all issues possibly relevant to confirmation. Thus, the committee does not and could not take a position on the ultimate issue of whether the nominee should be confirmed. Nevertheless, the representative of the American Bar Association in testifying about the nomination of Justice Rehnquist stated that the Committee recommended that the nominee be confirmed. Senator Thurmond asked: "Do you gentlemen of the Committee recommend him to the Senate Judiciary Committee to be approved by this Committee and the Senate?" Mr. Lafitte on behalf of the ABA replied: "That is our recommendation, sir." (See Hearings regarding the nomination of Justice Rehnquist, July 29-August 1, 1987, p. 129.)

Please clarify the position of the American Bar Association as to whether its report and findings are limited to qualifications, judicial temperament and integrity or whether they encompass other issues that may be relevant to confirmation, including the views the nominee holds on basic questions of Constitutional interpretation. Also, please state whether the American Bar Association nevertheless takes a position on the ultimate issue of confirmation.

I would appreciate your reply at your earliest convenience. Thank you for your assistance and cooperation.

  
Sincerely,  
Howard W. Getzenbaum  
United States Senator