ask you, as well as all the public witnesses, to attempt to limit your comments to 5 minutes, if you would.

Mr. Watkins, welcome.

PANEL CONSISTING OF ROBERT P. WATKINS, CHAIR, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, DC; AND MICHAEL S. GRECO, FIRST CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, DC

Mr. WATKINS. Thank you, Mr. Chairman.

Members of the committee, my name is Robert Watkins. As you heard, I practice law in the District of Columbia, and I am chairman of the American Bar Association's Standing Committee on the Federal Judiciary. With me today is Michael S. Greco of Boston, MA, the committee's first circuit representative and the principal investigator in this investigation.

We appear here today to present views of the American Bar Association on the nomination of Stephen G. Breyer, Chief Judge of the U.S. Court of Appeals for the First Circuit, to be an Associate Justice of the Supreme Court of the United States.

At the request of the administration, our committee investigated Judge Breyer's professional qualifications. Our investigation assessed Judge Breyer's integrity, his judicial temperament, and professional competence. Our work involved discussion with more than 500 persons, including Supreme Court Justices, Federal and State court judges from all over the country, and practicing lawyers throughout the United States. The committee members also interviewed law school professors, including constitutional law and Supreme Court scholars.

In addition, Judge Breyer's opinions were read by two reading groups. One group consisted of Supreme Court practitioners. It was chaired by Rex E. Lee, former Solicitor General of the United States and currently the president of Brigham Young University. The other group was made up of law professors on the faculty at Vanderbilt University School of Law. This group was chaired by Prof. Nicholas S. Zeppos of the Vanderbilt Law School. Their reports were evaluated by members of our committee who also read Judge Breyer's opinions and his published writings on various legal subjects. Finally, Judge Breyer was interviewed by two members of our committee.

The committee began its investigation of Chief Judge Breyer on May 17, 1994, and completed its work on June 30, 1994. Based on our evaluation, we reported to the White House and to this committee that the standing committee is unanimously of the opinion that Judge Breyer is well qualified, the highest rating for a nominee to the Supreme Court of the United States.

That rating is reserved for those who are at the top of the legal profession, have outstanding legal ability and wide experience, and meet the highest standards of integrity, professional competence, and judicial temperament. The well-qualified rating merits our committee's strongest affirmative endorsement.

I have filed with the Judiciary Committee a letter describing the results of our investigation and shall not repeat those results in de-

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tail here. I request that the letter be included in the record of these proceedings.

To summarize our findings, the committee is satisfied that Judge Breyer's academic training, his broad experience in the Federal Government, his service on the faculty of a distinguished law school, his scholarly writings, and his distinguished service for 14 years, 4 as chief judge, on the court of appeals establish his professional competence. His integrity is above reproach, and he possesses and exhibits the highest level of judicial temperament.

We are pleased to have the opportunity to appear here today to present the committee's findings, and we will respond to questions about our investigation and evaluation of Chief Judge Breyer.

The CHAIRMAN. Thank you very much.

Mr. Watkins, I really only have one question, and it is a question often raised to me as the chairman of this committee by my Republican and Democratic colleagues. That is the elements you look at in considering your evaluation, while evaluating and considering your recommendation.

With regard to lower court judges, district court judges, and circuit court judges—obviously both very important, but particularly district court judges—we often find ourselves in the circumstance in this committee, particularly when we are attempting to find—not we, but when the President, this President or former Presidents recommend minorities, or recommend people who have had distinguished legal careers but have had legal careers that either have been confined to academia or confined to commercial practices where they did not do any trial work. You often withhold—not you personally, the ABA often withholds recommendations, and occasionally withholds the most positive recommendation and occasionally recommends "unqualified" based upon the fact that the particular nominee did not have trial experience or has not practiced the law in the sense that they have been in a law firm and handling the cases of individual clients and conflicts and controversies.

That has created some difficulty, depending on the President and the nominee, difficulty with Republican Senators or Democratic Senators as to whether or not the ABA is doing the job as it should be done from their perspective.

My question is this: Judge Breyer, who has incredible credentials, to the best of my knowledge, if he were coming here for the district court judgeship in the State of Massachusetts, someone would say, well, he has no trial experience. He has not practiced law. He has been a brilliant professor, a significant legal scholar, handled the job that your former associate, Cynthia Hogan, who runs my staff on this committee and who will not go back to your firm, if I have anything to do with it. You cannot have her back at Williams & Connolly.

All kidding aside, he has done that job, but he has not, to the best of my knowledge, gone out there and practiced law like both of you do. Explain to the committee, will you, if that is a consideration in the Supreme Court, and if it is a consideration for district courts, and why in one and not the other?

Mr. WATKINS. Senator, you are correct in your portraying the approach that the ABA takes to evaluating judges, nominees to the various courts. And I think that we cannot use gross terms, and

we have to separate those in the district court from those from the court of appeals and those from the Supreme Court.

In the courts of appeals and in the Supreme Court, it is vitally important for us to have people who have the academic, analytical ability to take complex controversies and resolve them through analysis and writing.

Oftentimes, people that have those characteristics do not come from the trial bar. They come from the ranks of academia. And if you will recall, since I have been chairman of the committee, I believe that there have been at least three law school deans or professors who have been approved, not for the district court but for the courts of appeal.

The CHAIRMAN. Correct.

Mr. WATKINS. The district courts provide a somewhat different situation. Our committee believes that some of the most important issues of our time are first presented in the U.S. district courts of the United States. And we also believe that lawyers who are going to be district court judges ought to have been involved in the trial process, not necessarily in the Federal courts but in some courts where they understand the trial process, not only understand it from a reading-books point of view, but actually have been involved in the trial process, have tried cases, have taken depositions, have argued motions. And on those candidates, our committee uses as one of the criteria—not the only criteria—one of the criteria the ability and the experience of having tried cases.

Now, let me turn to Judge Breyer. Judge Breyer, I believe it is true that he has not tried any cases. However, he has been a distinguished professor at the Harvard Law School. He has been a Chief Judge for the Court of Appeals for the First Circuit for 4 years, and 10 years before that, he was a judge on the court of appeals.

He in that capacity has taken those difficult controversies that come from the district court and analyzed them, resolved them, written about them, and some of those controversies are similar and, indeed, may be identical to the kinds of issues that he will be called on to resolve in the Supreme Court of the United States.

So I think a short answer to you would be that the district courts pose a slightly different problem than the courts of appeals and the U.S. Supreme Court. And since Judge Breyer is a nominee for the U.S. Supreme Court, our emphasis on trial experience is somewhat less than it would be if he were being considered for the U.S. district court in Boston.

The CHAIRMAN. Well, I appreciate the answer. My question was not meant as a criticism. It was meant to lay in the record what I just told you so you understand this committee, because occasionally—I do not think there has been much conflict between the Chair and the committee, but occasionally there has been conflict between the committee and the ABA. And I just would want the record to show that there is that distinction, and the rationale for the distinction is as you have stated it.

As you well know, under the law, under precedent, we are not bound in any way to accept your recommendations. I can say up to this point my support for Judge Breyer is enthusiastic—I have not heard all the witnesses today, so I will withhold final judgment

until I hear everyone. And I think he is a fine man who will potentially make a great Justice. I for one think we should have people like you on the bench. I mean "you" in the editorial sense. I do not know you well enough to know whether you should be on the bench, but I think there should be people like you gentlemen. This is the first Court that I am aware of in over 200 years that has no practitioners of any consequence on it, and that is a serious problem, in my view. That is a serious problem.

I want Justice Powells on that bench. I want Hugo Blacks on that bench. I want Earl Warrens on that bench. If I want that, the only way to get that is have Orrin Hatch appoint me President. But, I do not get to choose that.

Senator HATCH. I am thinking about it. [Laughter.]

The CHAIRMAN. But, seriously, I think it is a very important point because we are going to have some conflicts as we go on, we, this committee and the bar. We are probably going to reject the recommendation of the bar with regard to an unqualified recommendation for a district court judge in Maryland because the person had not had trial experience. We happen to think, looking at all the other factors you consider, my guess is we will say that person should be confirmed.

So I do not want people to misunderstand that the differences relate to any fundamental character questions. They relate to what you weigh as the most important factors and having the best guess that we will have a good judge, and to what we relate to it. In this case, I do not think there is much of a disagreement at all, and I am not suggesting Judge Breyer has to have trial experience, because I, quite frankly, think his experience in working in public matters, working in the political fora, gives him the same kinds of exposure one would get in court.

This is not a case against academics. I do not mean that at all. But I would like to see a Court made up of people who have actually, to use the trite phrase, been in the trenches, had to stand before clients and say, well, I do not know whether we are going to win this one, we have a settlement offer, I cannot guarantee you, we could get more, or not get more, I cannot guarantee you would be found guilty or innocent, but here is my best judgment.

They are hard decisions for lawyers to make, hard decisions, and I would like to have a few people on the Supreme Court who have had to make those kinds of hard decisions in addition to the very difficult decisions academics and scholars make as well.

So that is the reason I have raised the question, because we have not had much of a chance to talk about the entirety of the process, and I will refrain from doing that any more now. But I wanted the record to reflect the basis upon which you legitimately look to trial experience for the district court, and ironically, weigh that more. In the minds of the average person, they would say, well, gee, why would a person for the lowest court have to have that experience. Well, there is a good reason why, and you have stated it.

Mr. Greco, you look like you want to say something.

Mr. GRECO. Senator, just for the record, in the case of Chief Judge Breyer, I found during my interviews of the outstanding members of the trial bar in the first circuit that Judge Breyer enjoys tremendous respect on the part of the trial bar.

The CHAIRMAN. Absolutely.

Mr. GRECO. And I think this is so because, in addition to what you were saying, which is true—it is important to have a balanced court, especially at the Supreme Court level—what is equally or more important is to have an individual who has the respect of the trial bar and who is respected, among other things, for his fairness and open-mindedness and his concern for resolving disputes involving ordinary people. And Judge Breyer has that respect, and I just wanted to point that out for the record.

The CHAIRMAN. He clearly does, and Judge Breyer has one of those unique abilities to seem to be able to master the subject matter before him that impacts upon the people who are before him. He not only has the sympathy of the trial bar; I have no doubt that he understands the trial practice as well as anyone could who has not had a trial practice.

So I do not have any doubt about that ability. I just thought it was important that it be in the record, because people, my colleagues—this is basically a "get out of jail free" card for me a little bit, Mr. Watkins—because my colleagues constantly say to me, Joe, why do you listen to the ABA when they review this guy that the President sent up or this woman the President sent up in my district, who has practiced law for 21 years and is a fine person and give him or her a partially unqualified, you know, a mixed rating. And I say, well, why did they get the rating? They say, well, look at it. The rating says because they have not had a trial practice. So this discussion here is in part to explain that process as well.

I thank you for your answer. And, again, I do not have any doubt about Judge Breyer's ability to handle anything that comes before the Supreme Court, but I now yield to a trial lawyer, at least a former trial lawyer, Senator Hatch.

Senator HATCH. Mr. Watkins and Mr. Greco, I just want to personally thank you for the efforts that you have put forth here. You have done a very good job. It has been thorough. It has been professional. It is the type of a job we would like to see all ABA investigations conduct. So I want to compliment both of you, and I agree with your conclusions.

Mr. WATKINS. Thank you, Senator.

Mr. GRECO. Thank you.

The CHAIRMAN. Thank you, Senator.

Senator Metzenbaum.

Senator METZENBAUM. Well, Mr. Chairman, I appreciate the fact that you got into this matter of the Bar Association saying that a lower court judge up for approval has to have trial experience. As a matter of fact, you go much further than that. You go to the point of saying that a district court judge has to have practiced within the last 10 years in the trial court. And I must say that that is—you are making a face, Mr. Watkins, but I can tell you that in connection with a nomination that I have made, that is exactly what has been stated; that is, he has not been in the district court or in a trial court in the last 10 years.

I do not have any quarrel about Judge Breyer's nomination and confirmation as far as his not having been in the lower court trying cases. I have more difficulty with the Bar Association somehow concluding that you do not need that experience if you are on the

appellate bench or you are on the Supreme Court, but you do need it if you are a district court judge. I think, frankly, that is a distinction without a difference, and I think that in one matter that I am familiar with, that is the only basis on which the Bar Association is coming forward and saying that a district court nominee is not qualified because he has not practiced, tried cases within the last 10 years. Everybody else says everything is wonderful about him.

I just say that I do not think that you are wrong in indicating that Judge Breyer is an appropriate person to be confirmed as a Supreme Court Justice. But I think you are terribly wrong, I think you are totally inconsistent in saying that a lower court judge needs that experience but an appellate court judge or a Supreme Court Justice does not. And, basically, I think the original point is I think you are totally wrong that in order to be a judge you have to have practiced in the trial courts in the last 10 years.

I would think that Senator Biden or Senator Hatch might very well make good Federal court judges. I think I would even be willing to vote for both of them. They have not been in the trial court——

The CHAIRMAN. Do not get carried away, now. [Laughter.]

Senator SIMON. It might be a close vote on the committee.

Senator METZENBAUM. Well, since I have included you both, you can see how far I am prepared to go. [Laughter.]

Senator HATCH. You can see how radical Howard really is.

Senator METZENBAUM. Yes; but I have great difficulty in the position that you have established as a rule of thumb that a nominee for the district court has to have practiced in—been at trial in the courts during the previous 10 years.

Mr. WATKINS. Well, Senator, I know the matter to which you refer is a very difficult matter for the committee. We looked at it long and hard, and we had several people evaluate that particular person. And the committee came out the way it did, not without great anguish and thought before the results were put together.

Senator HATCH. Would Senator Metzenbaum yield for just a second?

Senator METZENBAUM. Surely.

Senator HATCH. I reviewed that whole file, and I think there is room for question here. I do think I would just caution the Bar Association that you should look at the total record. And it is certainly a factor to be considered. But the person that Senator Metzenbaum has recommended appears to have widespread support in his community. The person that Senator Biden mentioned, as far as I am concerned, has played the game the way it should be played, is a very good person, and frankly, deserves the opportunity to serve. So I hope the bar will reconsider its position in this.

I agree it is a factor. Anybody who is concerned about getting good judges certainly will have to consider that as a factor. But I would consider the totality of the person's experience, and in the case of Senator Metzenbaum's and this other, I personally believe that they are both very qualified to serve as judges.

The CHAIRMAN. Put another way, Mr. Watkins, do not be insulted when we disregard your recommendation on those, because we will disregard your recommendation on Mr. Williams of Mary-

land, we will disregard your recommendation on the Senator Ohio's recommendation, unless there is some other reason that see. I do not want to discourage you from factoring that in a. more than I want to discourage you from factoring in the differen factors you do in the Supreme Court.

I just want the record to indicate that we truly appreciate the effort; we appreciate your recommendations——

Senator HATCH. We sure do.

The CHAIRMAN [continuing]. And hopefully, you appreciate the fact we are not going to pay attention to some of them.

Mr. WATKINS. Well, Senator Biden, there are a couple of things. We recognize that the committee only provides a recommendation. We are not of the view that we have the right to block any particular candidate. However, we think that over a period of time, we have developed the kind of expertise that will give us an ability to give guidance to this committee and the President that will be helpful in both venues by the President and by this committee about making a decision on someone who is going to be a district court judge or a court of appeals judge or a Supreme Court Justice.

The CHAIRMAN. As long as I am chairman of this committee—which could only last another couple months, possibly—I look at no other recommendation more closely; I value no other recommendation more highly; and I think in my 22 years of working with you, you have found that out. And so I do not mean this as an overall criticism. It is just something you should be aware of, because as we broaden the nature of the courts, as this President has become—and others have as well—committed to having the courts reflect society more, we are necessarily going to go through changes. I remember when President Carter was President. He was the first President to my knowledge who made a concerted effort to find women to go on the bench. The problem was when you and I graduated law school, we had about 2 percent women in our class—do not hold me to that number, but it was very small. In my class, there were 2 women out of 85 that I graduated with. My son graduated from the same law school, and out of a couple hundred graduating, I believe there were more women than men.

But there used to be a rule, a rule of thumb, that you in fact would not consider someone for the bench without 10 years' experience in the legal community. There were not as many women having had 10 years' experience in 1976 and 1977—as there are now. Now every bar association in the Nation, thank God, has a bevy of qualified women that is equally almost as large, a pool that is close to as large as men, and we have no trouble—none. The ABA has no trouble finding women "qualified."

But we did go through that period where we had the ABA coming, necessarily, based on their rule, saying, well, this person only has 6 years' experience. And it is generally a good rule. It is generally a good rule.

My criticism to the extent there is a criticism is that sometimes the rule is cast in a way that it is hard and fast, and it overcomes in and of itself all the other factors, as opposed to it being stated, "otherwise qualified, but we believe that the lack of trial experience is enough not to recommend." That is usually not how it is stated.

So we are going through that period now with black Americans, Hispanic Americans, and interestingly enough, we are having some difficulty getting young, successful lawyers to look to the bench now, and we are finding that some of the people who have had experience of 20, 25 years at the bar, but who have not had trial practices, are willing to go on the bench.

So it is an interesting dilemma. It reflects the times. You get caught up in that crosscurrent—you, the ABA. I think you have done an admirable job on this and all the other ones that we have had, but I knew that this issue would be raised. I think it is appropriate it be raised. And what I would like to consider doing—and I will yield now to my friend from Maine—and I know you are willing to do this—I think I would like to, not in a formal hearing, although it may take that form—I have spoken to the president of the ABA about this—to invite my colleagues on the committee and any other of my colleagues, and invite you and other members of the ABA who are involved in this just to come to my office and sit down and have a long lunch and discuss some of these things; tell us your thinking about where you see all of this going—not to discuss any particular candidate—because there is a little bit, as you could detect, there is sort of a rising level of confusion—I will put it that way—on the part of Members of the Congress as to motivation. I do not question the motivation at all. I think it is a useful thing for us to discuss because it is a slightly different time and a different cadre of people to whom we are looking to go to the bench.

I yield to the Senator from Maine.

Senator COHEN. Thank you, Mr. Chairman.

I think the discussion has been very helpful. I would like to go back and just say that I think it is important that they do give due consideration to trial experience when we are talking about——

The CHAIRMAN. Absolutely.

Senator COHEN [continuing]. U.S. district court judges. I think trial lawyers are an entirely different breed from corporate lawyers or real estate lawyers or estate lawyers. A trial lawyer——

The CHAIRMAN. I agree.

Senator COHEN [continuing]. Is someone who has, obviously, a strong sense of ego, has a——

The CHAIRMAN. Well, I do not subscribe to that.

Senator COHEN [continuing]. A good memory——

The CHAIRMAN. I subscribe to that.

Senator COHEN [continuing]. Capable of attacking the jugular, but basically is an intuitive type of individual—and highly intelligent. The intuitive part of it is critically important in terms of how one conducts a trial. And I think the trial judge, a U.S. district court judge or an estate court, for that matter, has to have those same characteristics. He or she is called upon to make snap decisions based upon experience, ruling on evidence.

All of those issues, I think, pertain to what type of individual that person is. So I think that they do give importance and should give importance to trial experience when you are looking at the trial court level. But as Senator Biden has said, we ought not to adopt a rule of thumb in each case instead of a rule of reason. There may be reasonable factors involved which would cause the

bar to take into consideration that it does not have to be a 10-year period; it could be an 8 or 7 or 6, depending upon the qualifications of that individual, his or her demonstrable abilities while practicing law, while going before the court as a litigator.

So I think that Senator Biden makes a good recommendation to see if there is not some flexibility that cannot be adopted so that we do not find ourselves in the position of simply thumbing our nose at the ABA, saying, thanks, ladies and gentlemen, but we disagree fundamentally with what you have recommended and just dismiss it.

It is a good rule for the most part; and given some flexibility, I think it would be a really highly workable rule, and I would recommend that you sit down with committee members and see if we cannot find a way to take into account some additional flexibility when we do get candidates who seem extremely well-qualified and yet have not had the requisite number of years before the trial bar.

Mr. WATKINS. May I respond, Senator?

The CHAIRMAN. Please.

Mr. WATKINS. Our committee has semiannual meetings, and we try to review what has happened in the past and what is happening—what will be happening—in the future. And issues are raised and discussed at the committee level to try and respond to concerns that people involved in the process have.

We are constantly looking at our criteria and making sure they are followed in a fair but flexible way. We have these issues that have been raised during my tenure as chairman, and you can be assured that we will try, and we will be raising the question of flexibility in the application of the standards that we apply, particularly to district court judges.

Senator COHEN. I would take just a little bit of issue with my colleague from Ohio, who indicated that it is a distinction without a difference between whether or not you have experience at the district court level and whether or not you have it at the appellate court level. I think there is a major distinction to be made. I think anyone who sits at the appellate court level has a good deal more time to be reflective; does not have to make those kinds of snap decisions in the heat of battle, so to speak; who brings to bear an entirely different type of intelligence that might be much more analytical as opposed to intuitive at that case——

The CHAIRMAN. And has two law clerks sitting with him.

Senator COHEN [continuing]. And has two law clerks sitting with him—and has time to reflect upon whether or not the evidence and the facts that were turned by the district court were consistent with the rulings made at the time as the law applied to them.

So I think you have two entirely different types of qualifications for district court and appellate court, and the ABA is correct in approaching it on that basis. But to the extent that you can have more flexibility, I think that is something that would be worthwhile exploring.

The CHAIRMAN. Let me make it clear, Mr. Watkins, we are not attempting to write your rules. The biggest thing I want to do—and we have talked about this—is that there is a little uprising in the making in the Senate, and I think if you just are able to explain the rationale, it would be a very helpful thing.

Now, we have 5 minutes left in the vote. I am going to yield to the Senator from Illinois to start.

Senator SIMON. I am just going to take 1 minute and make a request of Mr. Watkins and Mr. Greco. Yesterday, in response to Senator Metzenbaum, because of his Lloyd's of London investment, Judge Breyer indicated where he would recuse himself, sitting on the Court. I would like to get the copy of that transcript to you yet this afternoon. I would like you to discuss it with some of your colleagues, and I would like to call you on Monday afternoon, if I could, to get your evaluation.

I think Judge Breyer is going to be a great U.S. Supreme Court Justice. I am concerned that he may recuse himself more than is good for the Court. And I would like to have you take a look at that, and we will get that to you this afternoon. I will call you on Monday afternoon.

Mr. WATKINS. Thank you, Senator. We would be happy to look at that and see if it would make any difference with regard to Judge Breyer. I cannot think that it—I do not think that it would——

Senator SIMON. Oh, I do not think it makes a difference in terms of our vote. I think we should clarify this, if it needs clarification, before he takes the oath.

Mr. WATKINS. Fine.

The CHAIRMAN. Put another way, Mr. Watkins, one of the dilemmas that we have had here is that we do not want you—or, at least, I do not think the Senator from Illinois is suggesting—we do not want you, the ABA, to tell us whether or not that would change your view about Judge Breyer. Obviously, it will not and should not.

What I think we are all groping for here—and I am not sure this is the forum in which to do it—is I think the ABA in its subcommittees that deal with the canons of ethics, I think the Judicial Conference in its appropriate method of dealing with the canons of ethics, and I think we who write legislation who can amend the existing law, should all look together at what is in a sense a case of first instance, but we are going to have more things like this—to look and see whether or not there should be additional circumstances under which a judge should recuse himself.

But your opinion—I think what the Senator of Illinois is saying is he respects your personal, individual opinions; we are not looking for a corporate decision from the ABA at this moment.

Let me suggest to you—and apologize to you for doing this—but we are going to have to go vote. Senator Grassley has questions. He is on his way back. I would now authorize Senator Grassley or whomever arrives back at the podium before I do to take the committee out of recess and begin their questioning, whoever shows up first, so we do not slow this process up.

But let me say again, I truly appreciate the incredible amount of work that you all do and the good faith with which you do it. In the 22 years I have been here, I have disagreed on occasion, but I have never questioned the motivation, nor have I questioned the scholarship or the intensity of the effort put in by the ABA.

But these are changing times, and I think it is time to sort of run the flag back up the pole, make it clear why you do what you

do, and give the rationale so we can make a judgment here as to whether or not we wish to continue to afford you, in effect, you the ABA, the first seat in the process.

Now, I see some of my colleagues are here. I would yield to Senator Specter and keep the hearing going. I am going to go vote, and I will be back.

Thank you.

Mr. WATKINS. Thank you, Senator.

The CHAIRMAN. I thank you for your presence here today, and I look forward to meeting with you soon.

Mr. WATKINS. Thank you for allowing us to appear.

Mr. GRECO. Thank you, Senator.

Senator SPECTER [presiding]. Thank you very much, Mr. Chairman.

I regret that other commitments prevented my hearing your opening testimony, but I would join in what Senator Biden said in thanking you for your work in the judicial evaluation process.

There has been some interest on our committee and by other Senators in broadening the array of possible nominees which I understand is not precisely within the purview of the American Bar Association, but I would be interested in what you think about it. I have expressed concern, which is shared by others, that so many of the Supreme Court Justices—eight of the nine—were appellate judges elsewhere, seven of those eight from Federal courts of appeals, and one, Justice O'Connor, from the intermediate appellate court in Arizona.

Judge Breyer's credentials are excellent, and I think he made a very good impression on the committee as a whole and on others during his testimony here.

But I have been concerned that the same names seem to resurface—the great line from "Casablanca," "Round up the usual suspects." Last year, we had a small group under consideration that included Bruce Babbitt and Steve Breyer, and this year, we had a small group under consideration that again included Steve Breyer and Bruce Babbitt.

And a thought which has been on my mind is to have the Judiciary Committee solicit from the chief justices of the State supreme courts, the chief judges of the courts of appeals, the Federal district courts, the presidents of the bar associations, and presidents of the minority bar associations, recommendations to try to broaden the field, to look for more people who have extraordinary credentials and perhaps have a broader background in everyday life.

We had—not to go to a controversial note—Alexander Williams, who was turned down by the American Bar Association. One of my staffers, Charity Wilson, made a comment that so many of the nominees we see are silk-stocking, and Alexander Williams was with wool socks that had a hole in them, and perhaps had some diversity which would be helpful. And I expressed my view that it was unfortunate that Mr. Babbitt was not nominated in the sense that he is a former Governor, Secretary of the Interior, former Presidential candidate. Governor Cuomo would have been an excellent prospect.

And while I understand that you do not pick nominees—nor do I—what is your thinking about the desirability of having a broader

pool to bring to the attention of the President, to give him some suggestions? We do have an advice function, constitutionally, which we do not exercise very much. We do too much consenting, perhaps, and not enough advising. We dissent very infrequently, probably do not do enough of that.

What do you think, Mr. Watkins?

Mr. WATKINS. I would like to comment first about the question of silk-stocking versus wool stockings. In preparation for that other hearing to which you referred, we looked at the kinds or the types of practices of some of our nominees, of the nominees that we evaluated, and I think it is not accurate to say that we only give qualified or better ratings to those from silk-stocking firms. Many of the nominees that we have evaluated are not from silk-stocking firms. I believe that in the last year since I have been chairman, at least 27 of the candidates that we have found qualified have been minorities, and not all of them have been from silk-stocking firms. So I wanted to try and straighten that—make that point.

Second, I think with regard to giving the President a wider view, a larger list of nominees, I think that is a very good idea. I think that our committee cannot be involved in that. Our committee is insulated in that we only evaluate; we do not participate in the selection process, and I do not think that this committee should participate in the selection process, because it will make it difficult for us to fairly and objectively evaluate somebody.

So I believe that our committee, whatever function it has, should be limited to the evaluation. Now, if there are other sources from which the President can obtain a wider group of candidates for him to select, I think that is a terrific idea, but I do not think that our committee should be involved in that.

Senator SPECTER. Well, Mr. Watkins, I am not saying your committee should be, but I do not know that because you pass on qualifications, that disqualifies you from making recommendations. The Senate might be in the same position where you say the Senate has to vote, or this committee has to vote and make the preliminary determination, but of course, we have an explicit affirmative constitutional duty to advise as well as to consent. But there are plenty of sources for suggestions even if they do not come from the committee itself.

I know that there have been minorities evaluated by your committee and recommended, and Senator Heinz and I established a judicial nominating panel, and we have had very extensive outreach for minorities, for African-Americans and for women. And you are not responsible for those who are sent to you, but I believe that, notwithstanding the efforts of many people, including President Clinton and Presidents Bush and Reagan, to broaden the base, that there is still a very, very heavy proportion of silk-stocking representation in the Federal judiciary. I think we have a long way to go on that, and when I saw the memo with Charity Wilson and the reference to the wool stockings, and the wool stocking with a hole in it, it struck a chord with me.

And Judge Breyer went to some length to point out his associations as a ditch-digger, which I thought was a little thin, and his contacts with the people, which candidly, I thought was a little thin, too. I think Judge Breyer has a phenomenal background, com-

ing from middle America, with a great education; he clerked for a Supreme Court Justice and worked for this committee and was a Harvard law professor and a first circuit judge. Those are extraordinary qualifications, but I do not think it really comes down to the level of being with the people.

And the nomination of Justice Thomas I think posed that kind of a quality, and I might say we are still looking for those qualities to come forward from Justice Thomas that we do look for—and I think there is time yet on a career which has decades to span, only 3 years into the career—but those are qualities which we look for, and we are going to be pressing hard from the committee to try to give that diversity.

I think back to the famous story of Senator Borah, who was chairman of the Judiciary Committee in 1930 and was asked by President Hoover to look at a list of 10 people. Senator Borah looked at it and said, "I like number 10." It turned out to be Cardozo, and I think that was quite a selection.

Let me yield to my colleague, Senator Brown.

Senator BROWN. I have no questions.

Senator SPECTER. Let me yield to my colleague, Senator Grassley.

Senator GRASSLEY. Mr. Watkins, we had a chance to speak a few weeks ago, during the confirmation hearing of Alexander Williams.

I want to follow up on some things that we discussed at that time. You testified that the ABA interviews various lawyers in the community about the nominee, but you do not disclose the names of the people that are interviewed. Of course, that means that the nominee does not know who might be making allegations against them. And, of course, you do not tell the judiciary the identity of people who have participated in your investigation.

Is that a fair characterization of how the ABA investigates?

Mr. WATKINS. That is not quite fair, Senator.

Senator GRASSLEY. OK; I will listen to your——

Mr. WATKINS. If there are negative matters that arise during the course of our investigation, we raise those matters with the candidate in a general way so that he has an opportunity to respond to them.

There are times when raising a particular matter will identify to the candidate the person who made the comment. In those cases, we go back to the interviewee and say to him, well, we have to raise this issue with the candidate, and if we raise it, your identity will be revealed. Will you allow us to reveal your identity to the candidate? Sometimes the interviewees say yes; sometimes they say no.

If they say no, then we do not use that interviewee's information.

Senator GRASSLEY. But as a general rule, then, the idea is that you will keep the names of the people you have interviewed confidential?

Mr. WATKINS. We keep the names confidential. We have found that we get information that sometimes the FBI does not get, and we can follow up on it. Many times we are able to verify the information that is given to us confidentially from other sources that are public, and if we can do that, then it makes it easy for us to reveal that information to the candidate.

Senator GRASSLEY. And, obviously, those names are not available to us on the Judiciary Committee.

Now, the reason that I ask this is to compare it to the way the FBI does an investigation of a nominee. The nominee is advised of any adverse information, is given a chance to respond, and then we get that entire file for our review, and we look it over, and it is our responsibility to draw our conclusions.

In addition, this committee has, of course, an investigative staff, and as I understand it, an individual must be willing to put his or her allegation on the record before this committee will act upon it. And a specific reference to that would be that that was part of Senator Biden's difficulty with Prof. Anita Hill's allegation in the first instance. I just use that as an example, not to bring that up again, but the point is that we want to know who is making allegations.

It seems to me that as far as this committee is concerned, I guess maybe as far as Justice and the White House are concerned, the ABA is given a very special consideration to do those investigations, keep the names a secret, and then at least as a practical matter—and I know that as we were discussing last time, you took exception to my use of the word "veto." I accept that you do not see your role that way, but as a practical matter, at least during the Reagan-Bush years, the ABA was given a virtual veto over judicial nominees.

If the lawyer will not speak on the record about a nominee, why would the ABA even pay attention to such secret charges? And I heard what you said, that you may get some information you would not otherwise get. But is that such an overriding consideration that you keep everybody's name secret, keep it from the committee, and let us draw our conclusions?

Mr. WATKINS. Let me see if I can respond to that, Senator. We have found that lawyers talking to lawyers is a process whereby they speak the same language and they will share things with one another. That is the first thing.

It seems to us that it is not unfair to keep the names secret, if there is any negative information that comes up, that we share that with the candidate. We do. That is our process. If any negative information arises and we can share it with the candidate, we do. And if the negative information comes from a source that the candidate will be able to identify, we go back to that source of information and say we have to reveal this to the candidate so he can respond.

If that source says, I do not want you to reveal my name or I do not want you to indicate this negative information if it would reveal my identity, then we do not use that information. That information is discarded. We do not use it. We do not put it in our report that is circulated to the committee.

So I think that the candidate is, in effect, given an opportunity to rebut any negative information that this committee gets and considers.

Now, if the candidate is not given that opportunity, I agree with you, that would be unfair. But that is not the way our committee works. If there is any negative information, it is shared with the committee; and if the negative information cannot be shared with

the committee—with the candidate, our committee does not consider it.

Senator GRASSLEY. Well, if the information is not correlated to a particular source that the candidate can identify, then he cannot rebut it because the name is not known. So does he really have a chance to clarify?

Mr. WATKINS. Well, let me give you an example. There are times when there is a quality that comes through that we hear from two or three sources; for instance, discovery disputes. Those are things that go on between lawyers about whether documents should be revealed or whether documents should be produced. Over a period of time, if an individual is known or has been known in the legal community as someone who hides hot documents or you have to go to court all the time to get hot documents or documents that should be produced, if that comes from two or three sources, we can say to the candidate, Candidate, this issue has arisen in our contacts about you. What do you have to say about that? And the candidate can respond, and we will consider what the candidate says; therefore, the candidate knows that that is an issue to be dealt with. But we do not reveal the names.

Senator GRASSLEY. Let me just say something in conclusion. You may want to react. If you want to, I will listen to you. If you do not want to, it is okay as well. I kind of take off from what I think is a sincere belief on your part and your committee's part and probably a historical view that you have. I think over my tenure on this committee—I did not start out this way, but after some experiences I think have not been good, I question the special role that the ABA serves and whether or not it serves any purpose whatsoever. I think the words you used that expressed your view is that you feel you have developed some expertise, and out of that expertise, through this very important process of selecting people for a lifetime tenure on our courts, you can add something to the process.

I would just use some examples, and maybe I went over this with you before, but I want to go over it again. I took the Carter administration as an example. There were four nominees rated not qualified; three were confirmed and one, I believe, served with distinction because I know how he served—Judge O'Brien in my State. He is now going to go to senior status, and we are now going through the process of picking a person to succeed him. But that would have been 15 or 16 years he served, I believe.

Now, during later years, we have impeached two Carter era judges, and another one resigned after conviction, and none of these were the same individuals that the ABA committee had rated not qualified. So an ABA evaluation apparently does not bear any relationship to the likelihood that a judge will have a successful tenure. And so that is why I continue—I mean, those are just some examples. There are lots of reasons beyond those examples that I am going to continue to question the role of the ABA.

Mr. WATKINS. May I respond?

Senator GRASSLEY. You can. I said I would listen to you. I owe you that courtesy.

Mr. WATKINS. I believe that those judges that resigned or were impeached, there were questions of integrity that caused their resignation or impeachment.

Senator GRASSLEY. That is probably very true, but they still were rated qualified.

Mr. WATKINS. Right; and I would suggest, although I was not on the committee when those persons were evaluated, I suggest that at the time those people were nominated, there was no indication of their having problems with integrity. That is one of the areas that I think our committee is almost inflexible about. If there are integrity problems with a candidate and they are established, I would believe that our committee would not bend very much.

One can argue about the question of whether a candidate has sufficient trial experience or has the appropriate judicial temperament. On issues of integrity, however, our committee, I would like to characterize it as firm in that, if there is any question of integrity and it is investigated and our committee is of the opinion that there is some problem here, I can assure you, Senator, that that candidate will not be confirmed.

Now, for those three people that you have referred to, I think this issue of integrity came after they came on the bench, and it was their activities while they were on the bench that caused them to be impeached or resign.

Senator GRASSLEY. Well, as important as a nominee's reputation in his or her legal community might be—and it is very important, I believe—I hope that in the not too distant future that we will be able to obtain that information by our own Department of Justice and our own committee investigative staff.

Mr. Chairman, I yield the floor.

Senator METZENBAUM [presiding]. Thank you, Senator Grassley.

Senator Cohen.

Senator COHEN. I have already had questions.

Mr. WATKINS. Mr. Greco, I believe, has something to add to what I said, Senator.

Senator METZENBAUM. I just want to add something along the line of what Senator Grassley is questioning. You talked about the fact that if there is a question of integrity, you can be certain that the person will not be approved.

Mr. WATKINS. I think if we find that there is a question of integrity, that we can have a basis for questioning a person's integrity, I would be very surprised if our committee would approve or find anybody qualified.

Senator METZENBAUM. What concerns me, Mr. Watkins, is you are dealing with human beings, and there are reasons at times to question the integrity of some who are the inquirers themselves, who are on the committee. And that integrity, we have no way of assuring ourselves about that, but I personally have concerns about the integrity of some who have been the inquirers in some of the cases that have come before this committee. So I think that your committee ought to give some little thought to that question of not only judging others but those who are judging being judged themselves.

With that, I think, Mr. Greco, if you have a statement?

Mr. GRECO. Thank you, Senator. On your point and on the point that was raised earlier by Senator Grassley, I want to point out that the American Bar Association is really the messenger. It is not this committee that makes the final judgments as to whether some-

one in a legal community should or should not be given a lifetime appointment.

I would hate to see the messenger shot for delivering the message from that individual's legal community.

Senator METZENBAUM. Unless the messenger is tainted in his inquiry, then perhaps he deserves to be shot.

Mr. GRECO. Well, that is an assumption that is a very serious assumption that you are suggesting, Senator. And until that assumption is demonstrated, I think my point is that if you assume that this committee, which has been in existence for many, many years and since the early 1950's has been looked to by both the White House and the Senate for its evaluation, what we do as a committee is to try to ensure that someone who is appointed for life, someone who cannot be removed from judicial office except by a cumbersome impeachment process, that that person is qualified, at least qualified if not well qualified, to be a Federal judge.

And what concerns me is that criticism of the work of the committee, the ABA Standing Committee on the Federal Judiciary, is really slightly off the mark because if—going back to Senator Cohen's question, if the committee finds that the nominee of the President is totally lacking in trial experience and the appointment is for the trial court, for the Federal district court, we are doing no one a favor. We are not doing the public a favor, we are not doing trial lawyers a favor, we are not doing the nominee a favor by putting that person in the cauldron of having to act as a trial judge. In fact, we are doing just the opposite. Instead of ensuring justice, perhaps we are creating a situation where injustice will result.

The committee standards, the ABA committee standards, are very broad. We do not have a rigid 10-year rule that if someone has not been a trial lawyer for 10 years that person will not be considered. We do not have a rigid rule that says that if a person has not tried so many cases he or she will not be considered. On the contrary, our standards are broad enough that where that situation exists, not enough years at the bar, not enough trials, we look at other compensating factors, other similar kinds of activities of a trial nature, other service in the profession.

So that while we welcome the opportunity to meet with Senator Biden and others to talk about the standards of the committee, we believe that the standards are broad enough. And I am getting a sense from what Senator Biden said earlier that the messenger—when we deliver a message to your committee that the individual, the nominee's community, legal community, is of the view that the person is lacking in one way or another, that it is the messenger being shot rather than the message being heard that we try to communicate from that nominee's legal community.

The CHAIRMAN. We are not going to shoot anybody. We just want to keep this dialog going. I thank you both very, very much for being here. Again, thank you for the extraordinary amount of effort you have put into this in taking the time out of your practices.

Mr. GRECO. Thank you, Senator.

Mr. WATKINS. Thank you for having us.

The CHAIRMAN. I look forward to seeing you very soon, Mr. Watkins.

Mr. WATKINS. You are very kind, Senator.

The CHAIRMAN. No, I am serious. I do want to talk to you about this.

[The letter of Mr. Watkins follows:]

AMERICAN BAR ASSOCIATION,
STANDING COMMITTEE ON FEDERAL JUDICIARY,
Washington, DC, July 11, 1994.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary, Dirksen Senate Office Bldg., Washington, DC.

DEAR MR. CHAIRMAN: This letter I submitted in response to the invitation from the Senate Committee on the Judiciary to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to present its report regarding the nomination of the Honorable Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Chief Judge Breyer is based on an investigation of his professional qualifications, that is, his integrity, judicial temperament and professional competence. Consistent with long standing policy, the Committee did not undertake any examination or consideration of Chief Judge Breyer's political ideology or his views on any issues that might come before the Supreme Court.

To merit the Committee's evaluation of *Qualified* or *Well Qualified* the Supreme Court nominee must be at the top of the legal profession, have outstanding legal ability and wide experience and meet the highest standards of integrity, professional competence and judicial temperament. The evaluation of *Well Qualified* is reserved for those found to merit the Committee's strongest affirmative endorsement.

I am pleased to report that the Committee finds Chief Judge Breyer to be *Well Qualified* for appointment as an Associate Justice of the Supreme Court of the United States. This determination was unanimous.

In conducting the investigation, members of the Committee personally interviewed more than 300 federal judges, including present and retired members of the Supreme Court of the United States, members of the Federal Courts of Appeals, members of the Federal District Courts, Federal Magistrate Judges, Federal Bankruptcy Judges, and members of State Courts. The investigation included all colleagues of Chief Judge Breyer on the United States Court of Appeals for the First Circuit, all Federal District Court Judges from the District of Massachusetts, and all the justices on the Supreme Judicial Court of Massachusetts. Numerous federal and state court judges from the other states in the First Circuit were also interviewed.

Members of the Committee personally questioned several hundred other individuals, including practicing lawyers throughout the United States, former law clerks and lawyers who have appeared before Chief Judge Breyer. Committee members also interviewed law school deans, faculty members of law schools and constitutional scholars throughout the United States, including professors at Harvard Law School, where Chief Judge Breyer has served on the faculty since 1967.

The Committee also had available the report prepared in 1980 by the Committee in connection with the investigation of Chief Judge Breyer for appointment to the United States Court of Appeals for the First Circuit. He was at that time found by a majority of the Committee to be *Qualified* and by a substantial minority *Well Qualified* for appointment to that Court.

It has been the practice of the Committee to ask groups of distinguished legal scholars and Supreme Court practitioners to review independently all of the opinions written by nominees for the Supreme Court. This practice was followed again here and Chief Judge Breyer's opinions were reviewed by: (1) a Reading Group of distinguished lawyers chaired by Rex E. Lee, formerly Solicitor General of the United States and presently President of Brigham Young University, consisting of a diverse group of 10 lawyers, all of whom have practices and argued cases in the Supreme Court; and (2) a reading Group chaired by Professor Nicholas S. Zeppos of Vanderbilt University School of Law, consisting of 26 members of that law school's faculty. Members of the two Reading Groups who participated are listed on Exhibit A to this letter.

The two Reading Groups reported to the Committee their independent analyses of Chief Judge Breyer's opinions and other writings. These reports were evaluated by the members of our Committee, who also read opinions of Chief Judge Breyer and his published writings on a variety of legal subjects.