Senator SPECTER. I understand you cannot give a precise number. Can you give an approximation?

Mr. FISKE. I would say more than 10 percent. That is a rough judgment.

Senator SPECTER. The report that you have submitted speaks very glowingly of Judge Scalia, as does your summary here this morning. There is one comment at the bottom of page 3, "There were isolated expressions of concern, or objections, about a lack of openmindedness or the reasoning in his opinions."

In order to give as full a picture as possible with any qualification being limited, would you please expand upon that sentence and focus particularly on, first, how isolated were the expressions of concern?

Mr. FISKE. Yes. Well, first of all, Senator, as you probably noted, that sentence appears in the section of our letter that is headed interviews with lawyers. This does refer to isolated expressions of concern that came from people within the group of about 80 lawyers that we interviewed.

I would say, again, it is a handful, probably not more than five at the most. And it came primarily from people who had argued cases before Judge Scalia who felt—I remember one or two comments to this effect—that during the argument they felt that he had a position that he was expressing through questions that he was asking, and these were people who had lost the case and who felt that perhaps he made up his mind and did not really come with a full openmindedness to the issue.

I really should emphasize, though, that we used the word "isolated" very carefully. We searched for a word that we thought was appropriate to try to quantify that type of objection. And really, I think "isolated" is the best word we could come up with because overwhelmingly the sentiment of lawyers was to the contrary.

Senator SPECTER. As to those isolated expressions, was their conclusion that Judge Scalia was qualified to be a Supreme Court Justice nonetheless? Or were their objections sufficiently strong, at least in their own minds, to oppose his confirmation?

Mr. FISKE. I do not remember any lawyer that said he felt so strongly about it that he did not think Judge Scalia should be on the Supreme Court.

Mr. LAFITTE. Senator, if I may supplement Mr. Fiske's remarks. I think there were a couple of lawyers who did indicate objection to the appointment based on one case that I recall, judicial philosophy; another case because of prior opinions without any explanation as to what in the prior opinions was the problem.

But I do recall those in response to the Senator's question. I certainly share Mr. Fiske's comments concerning the isolated nature of these objections or concerns.

Senator SPECTER. Continuing to the top of the next page where you have a category of interviews with deans and professors of law, you say, "Again, there were isolated expressions of concern about his strong conservatism or lack of openmindedness."

Can you quantify the number of those who expressed those concerns?

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Mr. FISKE. Again, I would say it is less than 5, Senator, out of 60. Out of the more than 60 that we interviewed, it is less than 5. Probably two or three.

Senator SPECTER. I think it would be helpful to the committee, Mr. Fiske, if you would be a little more specific on that. If you could give us precise numbers, I think there are some who would be interested in it. And as a matter for future report writing, at least speaking for myself, where you have some expression of concern, the more specific you can be, the more helpful it is.

Mr. FISKE. I will try to get you the exact number, but I am quite confident it is in the vicinity of two or three.

Senator SPECTER. As to those isolated expressions of concern, did any rise to the height of objecting to the confirmation of Judge Scalia?

Mr. FISKE. Again, I do not recall anyone that would have opposed his confirmation on that basis.

Senator SPECTER. Thus, what you are saying is that on the total of these 340 persons interviewed, although there were some isolated expressions of concern, no one opposed his nomination to the Supreme Court?

Mr. FISKE. Well, I would qualify that only to the extent that Mr. Lafitte did a moment ago, that there were perhaps two or three of the 340 who felt that because of positions he had taken in some of his prior opinions or because of his judicial philosophy, he should not be appointed to the Supreme Court. But as you well know, our analysis does not really get into the question of judicial philosophy.

On the issues that we look at—integrity, professional competence and temperament—I would say that there are, again, less than a handful of the 340 that would have opposed the confirmation.

Senator SPECTER. Your analysis does not get into the issue of philosophy, but that is brought up by others on their own.

Mr. FISKE. Yes; it is quite often gratuitously volunteered.

Senator SPECTER. All right. Thank you very much, Mr. Fiske, Mr. Lafitte, and Mr. Lane.

Senator Heflin had arrived first, and I think the Chairman has announced the policy of moving through the sequence in order of arrival of the Senators. We will turn to Senator Heflin at this time.

Senator HEFLIN. I suppose, Mr. Lafitte and Mr. Lane, I would like to know about your interview with Judge Scalia. How long did your interview last with him?

Mr. LAFITTE. I think about an hour and a half, Senator.

Senator HEFLIN. What was the scope of your interview? What did you cover in your interview?

Mr. LAFITTE. Well, we discussed some of his ways of proceeding on the court, how he functions in the appellate court that he now serves, how he uses law clerks, how he writes opinions, that kind of thing.

Actually, the discussion—as is usually the case—was rather wide ranging. We discussed something briefly about his personal life. We talked about, of course, the concerns that we had heard and received his responses to those matters.

I think we talked some about his early life. Those are the things that come to my mind, Senator Heflin.

And as I say, this is usually the kind of discussion we have with a candidate for the Federal Judiciary.

Senator HEFLIN. Did you go into issues like federalism or civil rights or women's rights, or did you discuss any of the contemporary issues of the day, judicial issues?

Mr. LAFITTE. Well, I certainly would encourage Mr. Lane to amplify my remarks, but we did raise generally those issues because they had been suggested to us as matters that might affect his judicial temperament because there had been expressions of concern about his openmindedness with respect to such matters. So we talked in general terms about them.

Senator HEFLIN. Did you talk, covering the issue of freedom of press, some of his decisions in those types of issues?

Mr. LAFITTE. I do not think we discussed them specifically. I think we raised the first amendment cases as a matter of some concern that had been voiced, but just in general terms.

Mr. LANE. I would merely add the fact that we did mention first amendment concerns that had been raised with us. One of the purposes of this type of interview is to give the candidate an opportunity to explain to us his or her side of any issue that may come up in the course of the investigation.

Senator HEFLIN. Well, was he open and candid with you? Did he discuss these issues, going into some detail and explaining his position?

Mr. LANE. As best I can recall, none of this discussion was very lengthy. He was open. He was very relaxed and very friendly, and I think readily responded to any of the questions that we put to him.

Senator HEFLIN. Was he elusive or evasive?

Mr. LANE. Not at all, Senator. Not at all.

Senator HEFLIN. Did he attempt to, in your discussions with him, decline to answer any questions on the basis of the fact that it might interfere with his future as a potential member of the Supreme Court, that his discussion of the issues with you might, in effect, be considered as some sort of prejudging or prejudicing his mind or something to discuss it?

Mr. LANE. No; I am trying to recall. I do not recall, Senator, questions that were so specific as to give rise to that kind of a problem in his mind. But he was very open with us and responsive to us as we talked about these concerns.

And I think it is fair to say that his reaction was that one can always understand how there are people that will differ with one's decisions on issues of this kind, but that, in effect, he just does his best as a judge to come out where he thinks the law takes him.

Senator HEFLIN. I think Judge Scalia, of course, from everything I know about him, is a very fine individual, fine jurist, brilliant mind; but yesterday in our discussions and as the various questions were asked of him, I ended the day with a sense and feeling that he had been elusive, evasive, and had perhaps overly hidden behind some concepts of separation of powers or on the fact that he might have prejudiced himself in answering questions.

Now, I do not want to be unfair to him in any way, but I did come away with somewwhat of a feeling that he did not answer things that I thought he should have answered. I did not think that the potential of being positioned on the Court necessitated his pro-

tective attitude over future writings or future decisionmaking that he might have.

Was there any of that feeling relative to your discussions with him or was he completely open?

Mr. LAFITTE. Senator, I will let Mr. Lane answer for himself, but I found him completely responsive. I do not recall any question that we asked him that he indicated he would rather not answer or he thought he should not answer. My sense certainly was that he was completely open with us and forthright and very articulate in responding to our questions.

Mr. LANE. I think, so the record will be clear here, we did not try to press him on important issues of the day. We did not try to find out how this man would vote on these important and difficult issues. I think we were sensitive to the problem, and I think we also understand and sympathize with the problem you have in making your judgment in the process of confirmation.

I think it is a difficult problem for the committee, and it is a difficult problem for the candidate. We really did not try to press him in these areas as the committee did yesterday.

Senator HEFLIN. Well, it is very difficult and it is a task I could not help but compare Associate Justice Rehnquist's responses and his answers. I thought Justice Rehnquist was much more open and gave more answers relative to the matters than Judge Scalia did.

But it is a task. Of course, we have a line to draw and maybe we are more protective of our role in advice and consent and maybe he is more protective of his role, but I did have that feeling. I just did not know whether it might have been or whether from the Rehnquist hearings to the Scalia hearings there might have been some coaching.

That is all.

Senator SPECTER. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I would just note that after hearing of Judge Scalia's many significant virtues, the lawyers, the deans and professors, and the students all list this one concern they have; lack of openmindedness.

We can all learn from our critics, and if Judge Scalia is viewing this or reads the transcript, I hope perhaps he will note that.

I would just lobby Mr. Fiske, whom I have lobbied before on this, but I would like to do it publicly. This has nothing to do with the Supreme Court nominees now but goes back to our earlier conversations. I would encourage the Bar Association to raise its standards for approval for Federal judges.

It is something I think we can do in this Nation. We have 640,000 lawyers. I think we can find some of the very finest for the Federal judiciary, and I think the American Bar Association committee can play a very important part in accomplishing this goal.

Mr. FISKE. Senator, I would respond publicly as I have to you privately in our earlier discussions. We believe this committee has high standards. They are set forth in the public document that we call our "Backgrounder." The individual members of the committee do not always agree on every candidate with respect to how that candidate measures against those standards.

We get divided votes among our committee with respect to the qualifications of the candidates, but one of the reasons we have

separate ratings, exceptionally well qualified and well qualified in addition to a basic rating of qualified, is that we hope that the administration will propose as many people as possible who fall into those higher categories or ratings which, by our own definition, means that we, the committee, find them to be among the best available for appointment.

We rejoice, as you would rejoice, when we are able to find a candidate well qualified. We would like to see all the candidates well qualified or exceptionally well qualified.

Senator SIMON. Let me just say in response that I think you have to be not too sophisticated in dealing with Members of the U.S. Senate. We should be getting a message when someone does not come in extremely well qualified or well qualified, but rather with a mixed qualified-not qualified rating.

I think somehow you have to devise a system whereby you send a clearer and stronger signal to the members of this committee and to the full Senate. We have carried on this conversation before, but I would simply urge you once again to review how you handle judicial nominees to see if we cannot do a better job.

Mr. FISKE. We will, Senator.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. Thank you, Mr. Chairman.

Mr. Fiske, I want to underline what Senator Simon has just outlined here. I think all of us find useful the kinds of evaluation that the Bar Association does in terms of professional competency and the judicial temperament, the basic integrity of the various nominees. But quite frankly, you were up here with regard to Justice Rehnquist talking about those qualities, and you did not really comment about the whole question to the *Laird* v. *Tatum* and the judicial ethics about ruling on that type of case, whether you people felt that was important, whether you thought we ought to explore that issue. You did not come to our committee and indicate that it would be important for us in making our judgment that we gain certain information in terms of his work in the Office of Legal Counsel, or helpful.

I did not hear anything from you people with regard to the whole question of executive privilege, whether you felt in terms of our function and the availability to provide good information to the U.S. Senate and the American people in meeting our responsibilities, whether we should have that information or not have that information.

I was here when the Bar Association came up here and recommended Carswell, and that would have been a travesty to the Supreme Court of the United States. Yet you recommended him as qualified. He met the particular standards. You know, he could write a good legal brief. Nobody was complaining too much about him in the back room.

And I think in terms of the relevancy of the ABA, and the American people have to put a good deal of confidence in the organization. I quite frankly felt that we all knew that Justice Rehnquist could write a good legal brief. He was No. 1 in his class at Stanford Law School. And you reiterated that.

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But we went through 2 hard, difficult days trying to help this institution help the American people to understand better what this whole process was about. And in looking back on the testimony that the people gave with regards to Rehnquist, I do not think that you really helped one bit on that issue, to be perfectly blunt about it.

And now we have it with regard to Judge Scalia, and I am quite prepared to, you know, get on with other kinds of witnesses. I do not think anybody has doubted or questioned that he is enormously able and gifted and a talented person on it, but on the kinds of issues that Senator Heflin was talking about, the kind of criteria, what we ought to be able to expect in terms of responsiveness of a witness, I think you ought to be helping us, helping the American people, trying to help establish what should be able to be asked. The American people then understand that we are probing into his mind in terms of potential future cases or whether we have a legitimate right to understand these questions.

You people have professors, access to people who could have the luxury of spending some time and can help us on these kinds of issues. And I think you probably gather, at least from some members of it, the fact that, you know, I for one am glad to have you come by here and make these statements, but I think as others have expressed, if you are going to be relevant at all with regard to various appointments, I think that you have to be able to be a good deal more comprehensive in terms of what you are going to observe and what you are going to comment on.

Mr. FISKE. Well, Senator, I would just like to make an initial response, and then Mr. Lafitte, who was here last week presenting the committee's position with respect to Justice Rehnquist, will, I am sure, have something further to say.

I think it is important, and I am sure you do understand the basic function of the American Bar Association when it comes to passing on the qualifications of judges. We view our principal responsibility to bring first to the Justice Department for their consideration, and then second to the Senate for its consideration, the result of our analysis which is basically going out and getting the views of the persons, the peers at the bar and on the bench, people who have practiced with the particular candidate, judges before whom the candidate has appeared, lawyers that have litigated with or against the candidate. In the case of someone going to the Supreme Court who is a sitting judge, what law professors in a leading law school think, as professors, of the quality of the candidate's or the judge's writing skills.

We basically look, Senator, as I believe you know, at professional qualifications as reflected through the views of the people that we think know the candidate best.

Senator KENNEDY. Let me ask a question. Do you still say that Carswell was qualified?

Mr. FISKE. Senator, none of us were on the committee at that time. I think——

Senator KENNEDY. Well, I mean, he wrote well. You know, evidently he had gone through the various process. I have not read anything from anybody that is saying that we missed one on that particular case, and I see nothing on the ABA that says we missed

it, we ought to review our process, we ought to review our system so that we can be more helpful to the Senate Judiciary Committee where we have 1,000 different issues—on copyright, on judicial nominees, on civil rights, civil liberty issues and questions—and say, look, we missed one on that. What has been wrong? Why can we not have a different criteria? How can we review our whole recommendation?

Mr. FISKE. Senator, I would disagree with you to this extent. My understanding in reviewing the history of the committee is that the committee did go through a major restructuring of its procedures for investigating Supreme Court nominees following the Haynsworth and Carswell incidents back in the late 1960's or early 1970's. And the type of process that we have gone through that is reflected in the letter that we submitted here where we talked to more than 340 people around the country, was specifically designed to try to uncover or have a procedure that would be designed to uncover some of the things that apparently were not uncovered in the case of Justice Carswell.

But I am talking secondhand on this. I am just talking about what I have been able to learn from my review.

Senator KENNEDY. One of the things that you missed was the membership, for example, of Carswell in various clubs that were not open and that were restricted.

And now we have had those same kinds of things right back here with Justice Rehnquist. You missed it last time and you missed it this time.

Mr. LAFITTE. Senator, may I——

Senator KENNEDY. And the only thing in what I just mentioned, you give a very broad recommendation that has to impact the American people. It does the Members of the Senate. We have all heard the last time a broad recommendation, and it seems to me that the areas in which you examine are limited. You know, the total kind of requirement that we have meeting our responsibility. It is always of some use.

Mr. FISKE. Well, I think, Senator, some of the things that you put to us a minute ago may be beyond the proper scope of our committee's function.

Senator KENNEDY. Well, do you not think that that would be useful to mention when you say we find well qualified that we are talking about just very, very limited areas on this. You do not find a distinction, but you are saying that the American Bar Association which has a very profound and significant reputation, and in many instances well deserved, among lawyers and among the American people. And you come in with a broad kind of mandate, and you are only looking at a rather limited area. I think it is something that in terms of a responsible organization you ought to distinguish.

Mr. FISKE. Well, Senator, 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 longstanding 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.

And I would say that the question you raised that relates back to what Senator Heflin was asking about the extent to which Judge Scalia should or should not have taken positions, yesterday here before this committee on matters that may come before the Supreme Court, are covered by ABA canons and there are ABA canons that say that a judge should not publicly take positions. And we have made that clear to this committee in the past.

Senator KENNEDY. The question, I suppose, is when you come down hard on the issues of integrity, I suppose there were some questions here—certainly Mr. Brosnahan with regards to Rehnquist, Mr. Smith and other persons in that old voter-harassment situation—would raise serious questions about that nominee on that very issue.

Mr. LAFITTE. Senator, I have been trying to—I think those are legitimate questions, but I do think you need to understand the circumstances.

You mentioned two incidents; one was the *Tatum* v. *Laird* case and the other was the Phoenix voting situation and the executive privilege issue.

Now, our investigation was completed many days and our report was made to the Department of Justice many days before the issue of the Phoenix voting matter ever was raised in the media.

Now, I understand it was raised in the first hearings, of course, but the coming forward of additional witnesses occurred after our report was completed.

Now, our feeling was that those people, we understood, were going to be here to testify. If there was something else, of course, that this committee wanted us to do in terms of integrity or temperament, naturally we would be happy to help in any way we could in that respect.

The other thing——

Senator KENNEDY. The point is——

Mr. LAFITTE. May I just finish, Senator?

The other thing is the *Tatum* v. *Laird* issue which, so far as I know, came to light on the Monday morning of the week that I came up here. It certainly was not in anything in light of the investigation we did, and that was the case also of the Phoenix voting matter. There, again, Justice Rehnquist's position was as stated in his opinion denying the motion to disqualify. There, again, we are pleased to provide any service we can if this committee wants us to do additional work.

But the point is that those matters arose after our investigation was completed and we had reported.

Senator KENNEDY. I think that comment really indicts your whole kind of investigation, the whole question about the harassment of voters was a part of the record the last time, that Justice Rehnquist appeared before this committee, and it only came up after that.

Mr. LAFITTE. I said that.

Senator KENNEDY. So this is not any surprise. This is a question that reaches the issue of integrity and no mention was made about that. You were really of no help to this committee on that issue, as

I understand it. It was not even referenced in your statement. I may be wrong, but you did not raise that.

Mr. LAFITTE. It was never raised to us in our investigation either.

Senator KENNEDY. Now *Laird* v. *Tatum*. Someone in that bar association ought to read McKenzie's book on that, and the chapter on that very case that was printed in the 1970's. We all had the chapter on that. Why did not the bar association have it?

That is not revolutionary, for pete's sakes. McKenzie is a distinguished writer for the New York Times who writes about the Supreme Court. And I have got one staffer who was able to find that. It seems to me, with all of the team that you have got, you ought to be able to raise that, at least bring that matter—it is a subject of a good deal of inquiry here. And for you to say, well, you did not know about that until you came before this committee is difficult——

Mr. LAFITTE. What I am saying, Senator, is it was not raised in our investigation. It was not raised to us as an issue, and therefore, not something we really reviewed before we came here.

Senator KENNEDY. Well, I would take the time, but you are not the nominee, on the whole question of whether it should have been or should not be an issue in terms of recusing, but that is not what we are about here. Thank you.

Mr. LANE. Senator, if I may add—may I further respond to Senator Kennedy?

The CHAIRMAN. You may respond. Go ahead.

Mr. LANE. Just briefly.

The CHAIRMAN. Speak louder now so we can hear you.

Mr. LANE. I think that once we saw the voter rights thing coming up again in these proceedings, it was at least my judgment, that this committee had subpoena power, and had the ability to get these witnesses, and has access to FBI reports. We really do not have the capability of getting as deeply into an issue like that as you can. And furthermore we are not perfect.

You know, we cannot do all of the work of this committee, and although I have been on this committee for only 3 years, I want to tell you, that I have been impressed with the dedication and the hard work of the members of the committee, and I have enjoyed serving with them. I think they do make an effort to help. We have no role in the selection of who is to be nominated. They just give us a name, and we go forward, and we do the best we can.

Senator KENNEDY. You have been a great help to our committee.

Mr. LANE. Thank you, Senator. I appreciate that.

The CHAIRMAN. In addition to your investigation, the FBI investigates these personal points. The Judiciary Committee also has majority and minority investigators investigate the man. For the record, I just thought that ought to be shown.

The distinguished Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman.

It should be shown, that both the majority and minority have every right to investigate here. That is our job. We are paid for that.

How much are you fellows paid for doing your job?

Mr. FISKE. We put it in negative terms.

Senator HATCH. You are paid in negative terms. This costs you time.

Senator KENNEDY. Are you asking them their salaries, or——

Senator HATCH. No. I am asking them how much they are paid for performing this public service. That is what I would like to know.

Senator KENNEDY. Is that pro bono?

Senator HATCH. Why don't I ask the questions. I did not interrupt you, Senator.

The CHAIRMAN. Senator Hatch has the floor.

Senator HATCH. I have a feeling that all of you have given pro bono services, as most attorneys do for the poor, and those who are afflicted.

Now I am asking you, just for the benefit of the public at large, so everybody understands what is going on here?

Mr. FISKE. I think you should know, Senator, that all of us volunteer our time.

Senator HATCH. I know that. I want the public to know that. And I want them to know how much time it takes to do something like this, then come here and get attacked for doing it.

Because you are not into every case that is involved in this matter. They have the right to ask any questions they want. We can keep these hearings going, I guess forever, if we want too.

But the fact of the matter is, you have a particular responsibility. You do it voluntarily. You take time from your business and your office. It costs you money to do it. And you are doing it because of a love of the law, a love of the bar association a love of integrity and justice in this country. Would that be a fair summarization?

Mr. FISKE. I think you put it very well, Senator.

Senator HATCH. I thought so, too. [Laughter.]

Mr. LAFITTE. We could not do better, Senator.

Senator KENNEDY. I would even agree with that, Orrin.

Senator HATCH. I knew I would get Kennedy to agree with me on something. Now if you will just agree on Rehnquist and Scalia, it would show what a great man you really are.

Mr. FISKE. I think to quantify it, I think it perhaps would be of interest to this committee to know, that in a typical investigation that is done by one of our circuit members on a candidate, that investigation can take as much as 2 weeks of the committee member's time to complete.

As chairman of the committee, I can tell you that I have spent 300 to 400 hours a year on the work of this committee.

Senator HATCH. I am not asking what your hourly billings are, but I know they are worth a lot of money. It is a loss for your own business to do it for these purposes. You deserve commendation.

I have to admit I have been fairly critical of some of the evaluation process in the past. It has been a wonderful experience for me to hear you three gentlemen testify and to learn how exhaustively you go into these matters. And how you do it for the right reasons.

I cannot say I have always agreed, but on the other hand, I have a lot of respect for what you do. Let me just ask you some questions. Is it correct, Mr. Fiske, that well qualified is the ABA's highest rating for a Supreme Court nominee?

Mr. FISKE. Yes, it is, Senator.

Senator HATCH. And that is the rating that you have given to Judge Scalia here?

Mr. FISKE. Yes, sir.

Senator HATCH. There is no higher rating that he could get for this nomination. Is that right?

Mr. FISKE. That is correct.

Senator HATCH. Now could you tell us how many deans, and law professors, your group interviewed, in your evaluation of Judge Scalia?

Mr. FISKE. More than 60.

Senator HATCH. You went to more than 60 deans of law schools and law professors. Is that correct?

Mr. FISKE. Yes. The procedure, Senator, was that within each circuit—we, as you know, we have a member from each circuit.

Senator HATCH. Yes.

Mr. FISKE. That circuit member went to the dean and prominent faculty members in each of the leading law schools in his or her circuit to obtain their views on Judge Scalia.

Senator HATCH. Am I correct that they were virtually unanimous in support of Judge Scalia?

Mr. FISKE. Yes, sir.

Senator HATCH. These are the academically learned in the law in this country. Is that right?

Mr. FISKE. Yes. We also had his opinions reviewed by the dean and a group of professors at the University of Michigan Law School.

Senator HATCH. How many opinions did they review?

Mr. FISKE. Well, he had 107 published opinions. They reviewed all of them. And I believe there were another maybe 60 or 70 unpublished, and I believe they reviewed a representative cross-section.

Senator HATCH. They virtually reviewed all of his opinions. I take it you then subreviewed those opinions as well, or at least members of your committee did in your review?

Mr. FISKE. We had two separate reviews. We had one by the University of Michigan dean and law professors, and we had a separate review conducted by practicing attorneys in a major law firm, and they both came to the same conclusion.

Senator HATCH. What conclusion was that?

Mr. FISKE. That they both spoke very highly of Judge Scalia's writing ability, his intellectual capacity, his ability to analyze legal issues, his ability to clearly and lucidly state the issues in the case, and the reasoning process by which he arrived at a decision.

Senator HATCH. It sounds like he might make a terrific Justice, based upon those qualifications.

Mr. FISKE. Well, that is the conclusion our committee came to; yes, sir.

Senator HATCH. How many Federal and State judges did you interview?

Mr. FISKE. Approximately 240.

Senator HATCH. 240 Federal and State judges?

Mr. FISKE. I am sorry. About 200. There were 340 persons interviewed; all together, about 200 of those were Federal and State judges.

What we tried to do was, again, on this nationwide basis, circuit by circuit, we tried to go to the chief judge of the highest court in every State in the country. And in addition to the chief judge of the Federal circuit courts——

Senator HATCH. In other words, you went to the chief justice of every State in the country, or tried to?

Mr. FISKE. Yes. Every one that we were able to——

Senator HATCH. The top justice at the State courts in every State of this Union?

Mr. FISKE. Every one that we were able to reach in the State courts and in the Federal courts. We went to the chief judge of each of the circuit courts of appeals, and each of the Federal district courts throughout the country, and also, representative other circuit judges throughout the country.

Senator HATCH. And they were virtually unanimous in supporting your opinion?

Mr. FISKE. Yes, sir.

Senator HATCH. How many practicing lawyers did you interview?

Mr. FISKE. A little more than approximately 80.

Senator HATCH. Eighty practicing lawyers, a lot of whom are practitioners before the Supreme Court?

Mr. FISKE. Yes. And another thing we did: we picked what we considered to be a group of 25, of Judge Scalia's leading opinions, and we made a list of the lawyers that had appeared——

Senator HATCH. You went to both sides; those who won and those who lost?

Mr. FISKE. Yes. In all of our investigations, one of the important things we do with respect to any sitting judge is, we always go to lawyers who have lost cases before that judge.

Senator HATCH. And what was the consensus of the lawyers?

Mr. FISKE. Well, the consensus of the lawyers was again, they had the highest praise for Judge Scalia's judicial competence, his temperament and his integrity.

Senator HATCH. As I see it, you have made an exhaustive study. You have done it for the good of our country. It was a nationwide study. You interviewed 380 people from every State in the Union and virtually everybody said he would make a terrific Supreme Court Justice?

Mr. FISKE. Yes. As our letter indicates, and as I said earlier, there were isolated expressions of concern, but the overwhelming consensus was a high degree of enthusiasm for Judge Scalia.

Senator HATCH. I do not know who could be nominated that there would not be some modest expressions of concern, no matter how great the reputation.

Your report places Judge Scalia in very good shape. I want to tell you that I have been critical of this process from time to time. But having sat through Justice Rehnquist and now, Judge Scalia's hearings, and listening to you, I have changed my opinion.

You deserve the highest praise, especially in these two instances, for what you have done. I cannot see any way that there was any politics or partisanship, or preferences, or any other kind of an ap-

proach that could be critcizable under the circumstances. You are not the U.S. Senate. It is not your job to go into every last detail concerning his life, nor do you have investigators to do this with.

You do this voluntarily. I want to compliment you. You have done this committee, the U.S. Senate, and the country a great service.

Mr. LANE. Thank you, Senator.

Mr. FISKE. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. It is nice to see the members of the bar association here again, and I do not want you to go away feeling too good about those praises that our distinguished friend on the far right was talking about. The far right was saying that the American Bar Association really was not anything to be particularly paid attention to, when you gave a rating, and the very lowest possible rating to Judge Manion when he was up for confirmation.

Senator HATCH. That was not the lowest rating at all.

Senator METZENBAUM. Oh, yes.

Senator HATCH. He got a qualified rating. He could have had an unqualified rating.

Senator METZENBAUM. They gave him the lowest possible rating that could be affirmative, which was a majority qualified and a minority unqualified, but it is just a question, I suppose, of which day of the week it is, whether you love, or hate, the American Bar Association rating system.

Senator HATCH. Would the Senator yield for just one comment?

Senator METZENBAUM. Are you going to let me go ahead? Are you going to let me go ahead?

Senator HATCH. Under President Carter we approved three who had unqualified ratings from the ABA.

The CHAIRMAN. Senator Metzenbaum has the floor.

Senator LEAHY. Regular order.

Senator METZENBAUM. One of the things that particularly concerns me about your report—thank you, Mr. Chairman—is this emphasis about a lack of openmindedness.

And it has not been discussed here today, although I did not get in to the opening session. But when you had interviews with lawyers, you said, "There were isolated expressions of concern, or objections, about a lack of openmindedness, or the reasoning in his opinions."

When you had interviews with the deans and professors of law, again there were isolated expressions of concern about his strong conservatism, or a lack of openmindedness. And when you took a survey of Judge Scalia's opinions and I quote your report—"three summer law students who also reviewed his opinions expressed concern about his openmindedness." Now that is about all you say about it. Now did you inquire further? Did that concern you, that that same word seemed to come up in each instance, regardless of which group you were speaking to?

Mr. FISKE. Senator Metzenbaum, Senator Specter asked questions earlier with respect to the very issue that you have just raised, and I would like to respond again.

First of all, I think the word "isolated" was a word, as I told Senator Specter, that we arrived at with some care, after trying to

quantify the number of expressions of concern that we had. And in each category—that is, from the deans and the law professors, and also from the lawyers, the number of such expressions of concern, in each case was, I would say, less than five out of the total.

So the overwhelming number of people who commented on Judge Scalia, both from the academic side, as deans and professors, and from the practicing side, the lawyers, the overwhelming number of those were strongly enthusiastic about Judge Scalia and did not have a concern about openmindedness.

But in order to present the complete picture, we wanted to make it clear, that there were in each case, a few lawyers, and a few members of academia who had expressed that type of concern.

With the lawyers, one or two comments were made to that effect by lawyers who had argued cases before Judge Scalia, and who had formed the impression during the oral argument from the way Judge Scalia was asking questions, that Judge Scalia had come into the argument with a preconceived position, that to them reflected a lack of openmindedness.

And I think as Mr. Lafitte——

Senator METZENBAUM. Well, what concerns me is, did you—I have asked this in previous hearings and I did not get a satisfactory answer, and I am concerned that I am not going to get a satisfactory answer now.

There are other bar associations in this country. The Justice Department used to be willing to hear and did inquire of the other bar associations when there was a confirmation process occurring.

This Justice Department has closed doors to those other opinions. But the American Bar Assocation, I believe, therefore, has a special responsibility to find out what the Federal bar says, what the national bar association says, what the legal aide societies of the country say, what the women's bar association says.

Did you make inquiry of any of the other bar associations?

Mr. FISKE. We did, Senator, without—we did make inquiries of minority bar associations and women's groups. We told them we were doing this investigation and in each case we were told that that particular organization was in the process of making its own investigation. They had not reached a conclusion at that point, and they both said if they reached a conclusion, they would get back to us.

And at the time that we rendered our report, which we felt we were under some time constraints to do, we had not received an answer back from those groups.

Senator METZENBAUM. Well, I have some real concerns. I have been a member of the American Bar for many years myself, and I have some real concerns as to whether or not you are not letting the membership down, as well as your responsibility to this committee when you appear, in that you only make inquiries of law professors, lawyers, and judges.

And I am not at all impressed about the question of whether or not you have the resources, because there is no doubt in my mind that you do.

You all come from major law firms. Your law firms have no problem about making available investigators, or your own time, or junior members, to go out and do the investigating.

My real question is, Is it right, is it the correct thing to do? You do not actually say in your comments here. You say the committee's evaluation, based on its investigation of his professional competence, judicial temperament and integrity. You do not indicate, although through the report you say what groups say, but you do not say that our investigation is only limited to his peers at the bar and those on the bench. Now it would not have taken too much investigation, on your part, to find out some of the facts concerning Judge Scalia or Justice Rehnquist. But you did not do that.

I wonder if that is really appropriate, or do you think you only limit your activities to that having to do with lawyers?

Mr. FISKE. Well, Senator, first of all let me respond to one thing you said. To make it clear, the way this committee functions, because I think it is important that you understand.

We have, as I said before, one member in each circuit. Mr. Lafitte is the member of the fifth circuit.

Senator METZENBAUM. I understand that.

Mr. FISKE. It is a very important part of our process that that committee member personally does all of the interviews with the lawyers, judges, or whoever is being contacted in that circuit.

He does not delegate to junior members of his firm, or her firm. And the reason for that is very important. The members of this committee across the country are selected for their diversity, but also for their standing at the bar in their particular communities.

And across the country, these are men and women that——

Senator METZENBAUM. I understand all that.

Mr. FISKE. But it is important that you understand, Senator, by the reason of the fact that they do this personally, and they are people who are trusted in their communities, they get access to information on a confidential basis that we do not think we would get if we delegated a bunch of junior investigators to go out and do it.

Senator METZENBAUM. Mr. Fiske, I am talking about investigating facts. Investigating factual information does not have to be done by a lawyer. When you are talking to somebody, a judge, another lawyer, I understand it.

But let me pass on to something else that is very much within your area.

You say you do all this work, you are the bar association, the ethics committee of the American Bar Association had a proposed commentary, in their canon, which was adopted in August 1984, that no member—no member of the judiciary should belong to a club that practices invidious discrimination.

And the judicial conference passed a resolution indicating that a judge should not belong to a club that practices discrimination.

Now, when I inquired of Judge Scalia yesterday on this subject, I thought he sort of tried to make a distinction between invidious discrimination and discrimination.

It is a fact that the Cosmos Club does not admit women. Now, if you want to say, that is not invidious, then you probably ought to ask the women of this country.

But the question I am asking you is: How come there is nothing in your report about this issue that has to do with judges, has to do with the ABA canons, has to do with the judicial conference. And I

looked through it, unless I overlooked it, you do not even mention the fact. Why?

Mr. LAFITTE. Well, Senator——

Senator METZENBAUM. That was very smart to give the question to him.

Mr. LAFITTE. The reason I took it, Senator, is that I did interview him.

Senator METZENBAUM. Excuse me?

Mr. LAFITTE. I did interview Judge Scalia along with Mr. Lane. And I think the answer, I guess the best answer to the question is: We did not ask him that questions, in that interview.

Senator METZENBAUM. My question to you, Mr. Lafitte, is, why didn't you? That is a judicial conference ruling. Why did you not? And therefore, can we expect that your whole report is that incomplete?

Mr. LAFITTE. Well, I do not think that is a fair conclusion, Senator.

Normally, when we conduct these investigations, we do have the benefit of responses to personnel data questionnaires, in which the judicial candidate does list the clubs and organizations he belongs to.

In this instance, Judge Scalia had updated his prior PDQ, personal data questionnaire response, to us; but quite frankly, I simply do not recall whether that information was in there. We did not ask the question that you are now raising to us. Of course it is true—if we had, I think the question would have been, do you belong to an organization that does exclude women or minorities from membership. And I believe, as I understand the response, it is that the Judge does not now belong to such an organization.

Senator METZENBAUM. Mr. Fiske, as chairman, I would hope that in your future investigations you will ask these questions and you will report back to this committee when you make your recommendations as to the fact.

Is that agreeable with you?

Mr. FISKE. Yes, it is, Senator. Mr. Lafitte indicated, I think, if the question had been asked, as I understood Judge Scalia's answer yesterday, he would have said he was not a member.

Senator METZENBAUM. I am not sure whether the judicial conference report calls for invidious discrimination. Let me say——

Mr. FISKE. We will ask the question.

Senator METZENBAUM. Ask the question, belonging to a club that discriminates.

Mr. LAFITTE. I normally do, Senator.

Mr. LANE. In this particular case, if I might add, his questionnaire showed that he was formerly a member of that club. And from my own personal knowledge, I know that there has been a battle going on within the club on that very question. And there are some members that feel that they should stay in that club and continue the fight to open it up.

Senator METZENBAUM. Did you check to see if Judge Scalia was involved in the fight?

Mr. LANE. No, I did not.

Senator METZENBAUM. And is it not the fact that he did not resign until December 1985?

Mr. LANE. I do not know the date.

Senator METZENBAUM. He was there about 5 or 6 years, as I recollect.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to ask you this: I have before me the American Bar Association Standing Committee on the Federal Judiciary, what it is and how it works.

And on appointments to the Supreme Court, I want to quote here. Evaluation criterion ratings.

The committee's investigation of prospective nominees to the Supreme Court is limited to their professional qualifications, their professional competence, judicial temperament, and integrity.

So, I had never heard of the American Bar making a detailed investigation of everything about a nominee. And I was always under the impression it was just what you got in this book here.

Is it true your investigation is limited to the professional competence?

Mr. FISKE. That is correct, Senator.

The CHAIRMAN. What ability they have as a lawyer, their professional competence, their judicial temperament, whether or not they possess the personality and temperament to be a fair and a reasonable and a just judge; and integrity, as to their honesty, their lack of corruptness, their character.

Is that the basis of your investigation, what I just stated?

Mr. FISKE. Yes; it is, Senator. And as I indicated before, that is what I believe what we tried to make clear in the second paragraph of our letter to you, regarding——

The CHAIRMAN. These questions about all these little details—as I understand it, you do not investigate all those. That is the FBI's job and the Judiciary Committee's job, is it not? Is that the way you construe it?

Mr. FISKE. Well, there certainly are matters, Senator, that we feel the FBI is more able to investigate than we are. And there are other matters where you have the subpoena power and can place people under oath.

The CHAIRMAN. Of course, if you picked up anything detrimental, you would report it. But as I mentioned, those are the qualifications that a professional organization, as I understand, would be interested in presenting to the committee.

Other details would be gone into by the administration, the FBI, the Judiciary Committee in the Senate.

Is that your understanding?

Mr. FISKE. Yes, we recognize, Senator, that our function is, principal function is, professional competence, integrity and temperament. And we certainly recognize that there are matters which the FBI and this committee are better equipped to investigate than we are.

The CHAIRMAN. Three things: Professional competence, judicial temperament, and integrity?

Mr. FISKE. Yes, sir.

The CHAIRMAN. The distinguished Senator from Iowa?

Senator GRASSLEY. Mr. Chairman, I have no questions of this panel.

The CHAIRMAN. Distinguished Senator from Maryland.

Senator MATHIAS. Thank you, Mr Chairman.

I would just like to thank the members of the American Bar Association for their continuing interest and help to this committee.

Mr. FISKE. Thank you, Senator.

The CHAIRMAN. The distinguished Senator from Vermont?

Senator LEAHY. I have no questions of this panel, Mr. Chairman. I have read their report. The questions that I would ask them are in their report. Other questions would go outside their report, and they would not be the ones to ask the questions of.

Senator KENNEDY. I would just submit a question——

The CHAIRMAN. Well, let me see. Are you through, you say?

Senator LEAHY. Yes.

Senator KENNEDY. I would just submit it for a written response, if that is all right? Can I just submit a question?

The CHAIRMAN. The distinguished Senator from Massachusetts.

Senator KENNEDY. I will just submit a question for writing—I will just submit a written question if I could. I would like to clear up a factual issue in question that I would like to get straightened out for the record.

I will submit it so that we can move on, Mr. Chairman.

The CHAIRMAN. As I understand—now everybody has asked questions. Are you through?

As I understand, the committee investigation included interviews with Justices of the U.S. Supreme Court, other Federal and State judges, practicing attorneys, deans and faculty members of law schools, a review of their opinions, and then two members of your committee interviewed Judge Scalia personally, I believe.

Mr. FISKE. Yes, sir.

The CHAIRMAN. And as to the judges, you say many judges who do not personally know Judge Scalia have a favorable impression of him based on his reputation and by reading the opinions that he has written.

The judicial community was strong in its praise of Judge Scalia's qualifications. The judicial community. Is that correct?

Mr. FISKE. Yes; it is, Senator.

The CHAIRMAN. That is an excerpt here that I had.

Now, you interviewed lawyers. Lawyers have commented that he is always well prepared. He asks the right questions and writes exceedingly well. Arguing before Judge Scalia is an exhilarating experience. That he has strong intellectual capabilities. That he is very fair. And that he has a warm and friendly personality. That is an excerpt. Is that correct?

Mr. FISKE. That is correct, Senator.

The CHAIRMAN. Deans and professors of law, including specialists in constitutional law and scholars of the Supreme Court, he is uniformly praised by those who know him for his ability, writing skills, and keen intellect; is that correct?

Mr. FISKE. Yes, Senator.

The CHAIRMAN. Now, a survey of his opinions. High praise for his intellectual capacity, his powers of expression, his ability to analyze complex legal issues, and his organization and articulation of ideas. He is regarded as a splendid legal writer; is that correct?

Mr. FISKE. Yes; it is.

The CHAIRMAN. In the statement I believe you made and gave out from your letter to the press is a short summary.

To summarize our findings, Judge Scalia had an outstanding academic record, and has demonstrated strong abilities in his service as a practicing lawyer, a teacher of law, as an appellate judge.

Our investigation has shown him to be extremely intelligent, analytical, thorough, hard working, and devoted to the legal profession. His writing and analytical skills are widely acclaimed. The diversity of his experience as a practicing lawyer, as a law teacher in four of the outstanding law schools of this country, and as a Federal appellate judge, provides a valuable background for a Justice of the Supreme Court.

Notwithstanding isolated expressions of concern, our investigation revealed that Judge Scalia has an outstanding judicial temperament, and that he is well suited for service on the Supreme Court from that standpoint. He enjoys the respect of his colleagues both on and off the bench for the soundness of his judgment and his congeniality.

His integrity is above reproach.

In conclusion, the committee, by a unanimous vote, has found Judge Scalia to be well qualified to serve as an Associate Justice of the Supreme Court of the United States.

Is that correct?

Mr. FISKE. Yes; it is, Senator.

The CHAIRMAN. And that is your recommendation?

Mr. FISKE. Yes; it is, Senator.

The CHAIRMAN. That is your finding?

Mr. FISKE. Yes, sir.

The CHAIRMAN. You stand by it now, all of you?

Mr. FISKE. Yes; we do.

Mr. LAFITTE. Yes.

Mr. LANE. Yes, sir.

The CHAIRMAN. No more questions. You are now excused. Thank you for your appearance.

[Prepared statement follows:]