

So we have done what we think is our part, which is to bring before you, bring before the administration, individuals whom we think are qualified.

We do not know what that next step is that we need to do to get somebody on, but we are trying.

Senator KENNEDY. OK.

Ms. ROBINSON. Senator, may I just add that I do think that our association is eager to encourage judicial service of qualified people, particularly minorities and women, and feel we have an educational outreach function to actually have programs at our association in New York to invite people who might be intimidated by the process, to encourage them, to educate them, as to the possibilities both on the Federal level, but it is also important on the State and local levels.

So I think all the organized bars can do more to help not only their members, but those people who are not members, to try.

Senator KENNEDY. I am going to ask the Attorney General to meet with all of you and try to work out some processes and procedures so at least we can get it to that level, and you can hear some of the suggestions and think a little bit about it. I think the comments have been very constructive, but I think it is important that the Attorney General, in a way that just does not go out at the time when you have these vacancies, but has a built-in, continuing and working kind of relationship and understanding. I think that is the only way that any of these suggestions will work. I will follow up with her and with you and see if there are some additional ways that we can establish better kinds of both input and communication. I think it is very important, and I am convinced that the President feels very strongly about it. I have talked with him about it, and I know he does, and I know that Attorney General Reno does as well. It is very legitimate. I have spoken with them about this question. And President Carter had a very good record on it. We went through the period of the 1980's, and I think you are familiar with the statistics, and I am not interested at this time in going all the way back through that. But I think if we look at the record on this—and as you pointed out, the pool now is so much greater than it was a number of years ago—there is a very, very important responsibility that all of the faces at Justice, not only at the Department, but every aspect of the judicial system be responsive to the kinds of excellence that exist out there in our diversity. We all need to think about that more carefully.

I thank all of you very much for being here. I appreciate your patience with us. We will follow up with you and find out what additional suggestions you might have.

We will include in the record at this point a statement submitted by Nicholas Katzenbach.

[The prepared statement of Mr. Katzenbach follows:]

PREPARED STATEMENT OF NICHOLAS DEB. KATZENBACH

Mr. Chairman and Members of the Committee: My name is Nicholas Katzenbach and I presently practice law in New Jersey. From 1961 to 1966 I served in the Department of Justice in various capacities including Attorney General. It was in this capacity that I first had the privilege of knowing Judge Stephen Breyer. I am delighted to testify in support of his nomination as a Justice of the Supreme Court.

Judge Breyer had been an outstanding student at Harvard Law School with a particular interest in competition law and its economics. In 1965 I had persuaded one of his professors at Harvard, Donald Turner, to head the Antitrust Division. Don, in turn, was able to persuade a young Steve Breyer to join the Division at the conclusion of his clerkship with Justice Goldberg. It was then, as you know, that he brought even the Antitrust Division into the struggle for civil rights with his imaginative use of competition law to compel the showing of homes in white neighborhoods to African-American buyers. That position, which he both developed and successfully defended, is illustrative, I believe, of his ability as even a young lawyer to use scholarship in the service of human values—a capacity that has served him well throughout his career.

The Committee is aware of Judge Breyer's very distinguished record as a lawyer, law professor, Counsel to this Committee, and judge. There is no question as to his intellectual and experiential qualifications to be a Justice. What I would like to do very briefly is to relate that experience and his personal qualities to the job of a Justice.

I think in recent years there has been a change in the way both Presidents and the Senate have looked at judicial appointments, and particularly those to the Supreme Court. The focus has been, in my opinion, too much on efforts to predict how a putative Justice will vote on the immediate political issues and too little on how he will perform over many years as a Member of our unique and important third branch of government. Assuming a nominee has the requisite intelligence and integrity what else should the President and the Senate look for?

First, I think it is useful to weigh the candidate's experience against the job. The Court in our political system is a political entity with a political role—note a partisan one but undeniably a political one, albeit a limited one. It is obviously useful if the nominee can bring from personal experience an understanding of government and the proper roles of the branches of the federal government as well as that of the States to the Court. Few candidates can bring, as Judge Breyer does, valuable experience in all three branches and the mature understanding of roles which he has demonstrated in all his governmental capacities.

Second, Justices must be particularly sensitive to the long view of law and relatively immune, as the President and the Congress cannot be, to the passions of the moment. It is, after all, very often the Constitution which they are expounding. I may be prejudiced but I think one value of teaching is that it encourages—almost compels—a broad understanding of trends in our changing society relevant to the long view the Court must take when interpreting the Constitution.

Finally—and most important of all although too rarely discussed—is judicial temperament. The Supreme Court is composed of nine Members with varying backgrounds and experience. It is a collegial institution which operates best when it makes its decisions in a spirit of mutual respect. It is not a question of counting votes for particular positions. It is most effective when each Member is prepared to listen to and be persuaded by the views of colleagues. In this manner both the views of a majority and dissenters are developed and shaped. Much more than the particular result is at stake.

Judge Breyer is often described in terms of his pragmatism and practicality. I think he is a man of principle with deeply held values—but one who is not so sure he is right than he has no need to listen to the differing views of others. He is an able advocate. But, in my opinion more importantly, he is a good listener, respectful of the views of others and always prepared to reconsider his own. Perhaps that is pragmatic and practical. I think it shows the temperament of a wise and intelligent judge.

If confirmed, Judge Breyer will undoubtedly prove to be an excellent Justice. I believe that he has the intelligence, experience and temperament to be one of the great ones.

CURRICULUM VITAE

Born: January 17, 1922.

Military Service: USAF: 1942–1945; Air Medal with 3 clusters.

Education: Princeton, BA *cum laude*, 1945; Yale Law School, LL.B. *cum laude*, 1947; Editor in Chief, *Yale Law Journal*, 1947; Rhodes Scholar, Balliol College, Oxford, 1947–1949.

Legal experience:

Associate, Katzenbach, Gildea & Rudner, Trenton, NJ, 1949–1950.

Office of General Counsel, Department of the Air Force, 1950–1952.

Associate Professor, Yale Law School, 1952-1956.

Professor, University of Chicago Law School, 1956-1960.

Subjects: Contracts, Conflict of Laws, Secured; Commercial Transactions, International; Business Transactions, Inter'l Law.

Ford Foundation Fellow, 1960-1961.

United States Department of Justice: Assistant Attorney General, 1961-1962; Deputy Attorney General, 1962-1964; Acting Attorney General, 1964-1965; U.S. Attorney General, 1965-1966; Under Secretary of State, 1966-1969.

V.P. (later Senior V.P.) & General Counsel, IBM Corporation, 1969-1986.

Herman Phleger Distinguished Professor of Law, Stanford Law School, 1986.

Partner, Riker, Danzig, Scherer, Hyland & Perretti, 1986-Present.

Member: New Jersey Bar (1950), Connecticut Bar (1956), New York Bar (1972). Admitted to Practice before the United States Supreme Court; Second Circuit Court of Appeals; Third Circuit Court of Appeals; Eighth Circuit Court of Appeals; Ninth Circuit Court of Appeals.

Author: Kaplan and Katzenbach, *Legal Foundations of International Law* (1961); Numerous Law Review Articles.

Organizations: Council, American Law Institute; Board of Director—IBM Corporation, Washington Post Corporation, Southeast Banking Corporation, NAACP Legal Defense Fund; American Bar Association; Association of the Bar Association; American Judicature Society; American Society of International Law.

Senator KENNEDY. We will also insert in the record a statement from Charles Mueller of the Antitrust Law and Economics Review. [The prepared statement of Mr. Mueller follows:]