

QUESTIONS AND ANSWERS

The Standing Committee on the Federal Judiciary
American Bar Association

Responses to Written Questions
Regarding
The Nomination Hearing of Judge Sonia Sotomayor
July 17, 2009

Responses Submitted on July 22, 2009

A. Responses to Questions Submitted by Senator Charles E. Grassley

1. As a general rule, does the ABA keep confidential the names of the people it has interviewed, as well as its materials dealing with deliberations and analysis of the nominee? This information is not available to the Judiciary Committee, right?

Confidential materials dealing with deliberations and analysis of the nominee are not available to the Senate Judiciary Committee. These materials are not disclosed to any persons other than the 15 members of the Standing Committee on the Federal Judiciary. A linchpin of the Standing Committee's nonpartisan peer review that the Committee conducts on each nominee is the pledge of confidentiality. For the entire 60 years during which the Standing Committee has conducted these peer reviews, it has promised to maintain -- and has maintained -- the identities of all persons who provide information regarding the professional qualifications of a nominee.

The assurance of confidentiality is critical to the peer evaluation because it allows the Standing Committee to obtain candid and sensitive assessments of a nominee's professional qualifications from lawyers, judges and others. Absent such an assurance, the Standing Committee would not be able to obtain this essential information and perform a meaningful, thorough and objective evaluation of the professional qualifications of a nominee. Over the years, and as recent as the evaluation of Judge Sotomayor, members were informed by individuals interviewed that they were willing to provide the detailed and candid assessments of a nominee's professional qualifications only because of the assurance of confidentiality.

Confidentiality is so critical to our process that it is discussed throughout the *Backgrounder*, the Standing Committee's explanatory booklet setting forth the policies and procedures under which the Standing Committee conducts its evaluations. As we state in the *Backgrounder*:

A cornerstone of the Committee's peer review process is confidentiality. The Committee strictly maintains the confidentiality of its internal evaluation materials and reports, which are not disclosed to anyone other than Committee members.

* * *

The Committee maintains the strict confidentiality of the identity of all judges, lawyers and other individuals who provide information the professional qualifications of a prospective nominee unless the interviewee agrees to waive confidentiality. Confidentiality is essential to its ability to obtain candid assessments of a prospective nominee's professional qualifications.

Even with the pre-nomination evaluation process used for nominations to the lower federal courts, all information is maintained in the strictest of confidence. The Standing Committee never publicly discloses this information.

The Standing Committee recently updated its Backgrounder, which is posted on our website at: <http://www.abanet.org/scfedjud/>. We have mailed you a printed copy for your ready reference.

2. How do we know that the interviews are not stacked for or against a particular nominee?

The Standing Committee's peer evaluations do not take into consideration the philosophy, political affiliation or ideology of the prospective nominee or any person interviewed regarding the nominee's professional qualifications. Information regarding the nominee's professional qualifications is obtained from a variety of sources, starting with the Personal Data Questionnaire ("PDQ") completed by the nominee and submitted to the Senate Judiciary Committee. The PDQ requires the nominee to provide background information such as past employment and to identify significant cases presided over as a judge or significant litigation handled as a lawyer or judge. In connection with each case or transaction, the nominee also provides the name and contact information for the counsel or lawyers.

Members also obtain information on cases handled or presided over from PACER (federal cases), LEXIS-NEXIS, news articles, GOOGLE, or other public sources. Lawyers and judges interviewed often provide the names of other lawyers and judges involved in cases and transactions and our outreach is to persons identified. Finally, we ask the nominee to identify persons they wish for us to interview who may have knowledge of the nominee's qualifications.

We do not know anything about the personal backgrounds of the lawyers or judges except through the interviews. We do not inquire into an interviewee's ideology or political policy. The sole basis on which we decide to conduct an interview is whether the individuals appear to have relevant information of the nominee's qualifications. If it becomes apparent during the course of an interview that an interviewee does not have personal knowledge of the nominee's professional qualifications and instead is simply trying to influence the Standing Committee's decision, we do not include that interview in the final Formal Report.

Before the Formal Report of an evaluator is sent to the Standing Committee for a rating on a nominee, the Chair reviews each report to determine that all lawyers and judges listed in Question 13 (b) and (c) and Question 17 have been contacted. Question 13, directed to nominees who have held a judicial office, asks for the identity of counsel involved in the ten most significant cases over which the nominee has presided and attorneys who played a significant

role in the ten most significant opinions written by the nominee. Question 17 seeks the identity of judges, principle counsel, and co-counsel in the ten most significant litigated matters by the lawyer nominee. The very nature of the inquiry under these questions precludes "stacking." If an evaluator is unable to contact the lawyers and judges, and sometimes they are unavailable because of death or retirement, the report will be not submitted to the Standing Committee for a rating until the contacts are made or a full explanation is given as to why the contact was not successful.

That the Standing Committee's interviews are not "stacked" also is demonstrated by the feedback we receive from the interviewees themselves. In providing a positive rating, some interviewees will state that they share a different political philosophy from the nominee or the nominating President or that they lost a case with or before the nominee. Others will state they are of the same political belief as the nominee or have won a case and will still raise issues regarding the professional qualifications of the nominee.

Finally, members of the Standing Committee represent the 13 federal circuits. Members interview lawyers, judges and community and bar representatives in circuits across the United States in conducting our peer review evaluations. The comments we receive are as diverse as the lawyers and judges who practice in those circuits. The interviews on which the Standing Committee bases its ratings reflect the diversity and uniqueness of practice in every federal circuit. In this regard, it would be virtually impossible to "stack" interviews for or against a nominee.

3. Shouldn't the Judiciary Committee have an opportunity to draw its own conclusions from all the ABA's materials, interviews and findings? Why so much secrecy? Shouldn't the ABA process be more transparent?

The ABA process is transparent. The *Backgrounder* fully outlines the ABA process so that lawyers, judges, and all members of the public have knowledge of how the Standing Committee's evaluations are conducted.

As noted earlier, confidentiality is the linchpin of the peer review evaluations. The Standing Committee is able to obtain the detailed assessments of nominees because we can assure those interviewed that our process is confidential. Indeed, the Standing Committee's unique contribution to the vetting process is its extensive, confidential, unbiased peer review of each potential nominee's professional qualifications. Lawyers and judges often tell Standing Committee members that they are willing to give full, frank assessments of the nominee's professional qualifications because of the assurance of confidentiality. While Members always raise confidentiality in the interview process, often the interviewee first raises the confidentiality issue. In the absence of this assurance, interviewees would likely remain silent or refrain from being completely candid, rather than risk public exposure or strain professional relations with the judges and lawyers of the circuits in which they practice. This chilling effect on participation in the peer evaluation process would substantially impede the Standing Committee's ability to perform thorough and candid evaluations of nominees' professional qualifications.

While we do not provide the Formal Report or the background materials to anyone outside the Standing Committee, we work to ensure that our process is as transparent as possible. The *Backgrounder* explains in detail every aspect of our procedures. The Standing Committee sends the *Backgrounder* to every nominee and the lead evaluator on every investigation fully explains our process to the nominee. The *Backgrounder* is available to the public and posted at all times on our website.

Moreover, the Standing Committee takes seriously all comments from nominees, the Senate Judiciary Committee and others on how our process can be improved. We work continuously to improve our process. As you may recall, we updated our procedures in 2006 because of comments from members of the Senate Judiciary Committee. The newly published *Backgrounder* reflects the Standing Committee's commitment to providing transparency through an in-depth explanation of its evaluation process.

B. Responses to Questions Submitted to Kim Askew, Chair, by Senator Jeff Sessions

In 2006 you gave a "not qualified" rating to judicial nominee Michael B. Wallace, claiming that he lacked "judicial temperament" because his representation of a state Republican party in a redistricting case shows that he was not committed to equal justice. Plaintiffs' counsel in that case was the Lawyers' Committee for Civil Rights. You served on the board of trustees of the Lawyers' Committee for Civil Rights.

1. Shouldn't you have recused yourself from the evaluation of Mr. Wallace given your clear conflict of interest?

The Standing Committee generally responds only to questions related to the nominee that is before the Senate Judiciary Committee for hearing. The Standing Committee follows this practice because we evaluate each nominee on the record presented by that nominee, not on the record presented by any other nominee. However, because your question raises an issue under the Standing Committee's conflict of interest policy, it is important that our position be presented.

In 2006 when the evaluation of Michael B. Wallace took place, my association with the Lawyers' Committee for Civil Rights did not present a conflict of interest and did not require recusal. I did not know the nominee, never participated in any decision of the Lawyers for Civil Rights Committee related to Mr. Wallace, and had never taken a position on any case or policy of the Lawyers' Committee as it related to Mr. Wallace or any entity with which he was affiliated. Finally, the events concerning Mr. Wallace and the Lawyers' Committee took place long before my association with the Lawyers' Committee.

2. Doesn't your conduct call into question the objectivity of the ABA ratings?

For the reasons set forth above, it does not. As set forth in the *Backgrounder*, the Chair and each member of the Standing Committee strictly enforce the conflict of interest policies and will recuse themselves if a conflict or appearance of impropriety is presented.