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William G. Ross

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Participation by the Public in the Federal Judicial Selection Process

*William G. Ross**

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I. INTRODUCTION

The firestorm ignited by the 1987 nomination of Robert H. Bork provided a vivid reminder that public opinion and organized interest groups can have a potent and even decisive impact upon the selection of United States Supreme Court Justices and other federal judges. Although the Constitution vests the prerogative of nomination in the President and the power of confirmation in the Senate, the public also is a partner in the selection process in ways that often extend far beyond the citizenry's election of its President and representatives in the Senate.

Public opinion has influenced the judicial selection process throughout the history of the Republic, although public participation in that process has been sporadic. The sharp contrast between the public controversy over the recent Rehnquist and Bork nominations and the widespread public silence concerning the Scalia and Kennedy nominations suggests that organized interest groups are not likely to have a significant role in every nomination. A clear trend, however, exists toward an increased public awareness of the importance of federal judicial nominations and a growing public participation in the selection process.

Several recent and pending developments are likely to influence the scope of future public participation in the federal judicial selection process. For example, the procedures and role of the American Bar Association (ABA) in both the nomination and confirmation of federal judges may change as a result of criticisms by both liberals and conservatives. Although in June 1989 the Supreme Court rejected an attempt to require the ABA's Committee on Judicial Selection to open some of its meetings and records to the public,¹ the Committee's practices have attracted the scrutiny of both the Bush Administration and the Senate. The Department of Justice has insisted that the ABA refrain from using ideology in its ranking of judicial candidates, and the Senate Committee on the Judiciary is reassessing its own reliance upon the ABA.

Recent tax developments also are likely to affect the scope and na-

1. *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989). This case was consolidated with *Washington Legal Foundation v. United States Department of Justice*.

ture of public participation in the judicial selection process. The Internal Revenue Service (IRS) has promulgated a new rule, proposed regulation, and announcement that will affect the tax status of certain nonprofit organizations that lobby for and against judicial nominations.² Congress may enact legislation to override at least part of these actions. Meanwhile, the Second Circuit has held that the Association of the Bar of the City of New York is ineligible for full tax exempt status because it rates candidates for elective judicial office.³

The controversy over the ABA's participation in the judicial selection process and the recent, potentially restrictive tax developments demonstrate a growing awareness of the significance of public participation in the judicial selection process. Accordingly, it is useful to analyze the appropriate scope and functions of such participation.

In analyzing the role of the public in the federal judicial selection process, Part II of this Article first will explore the historical development of public participation in the nomination and confirmation processes. Part III will demonstrate that the increasing importance of public participation is consistent with the growth of participatory democracy, and it will explain why the excesses of the campaigns for and against Bork should not discredit the need for a broad public role in the judicial selection process. Part IV of the Article will argue that the Supreme Court's decision in the *Association of the Bar* case (ABA case) was decided wrongly because the application of the Federal Advisory Committee Act was consistent with the language and intention of that statute and would not have violated the doctrine of separation of powers. In Part V the Article also will contend that the ABA should continue to have an important role in the judicial selection process but that the ABA needs to reform some of its rating procedures for judicial candidates. Finally, Part VI of the Article will assert that the internal revenue laws should not be designed to discourage public participation in the federal judicial selection process. Accordingly, the Article will argue that the recent IRS actions misinterpret the Internal Revenue Code and represent bad public policy and that the Code should be amended to eliminate the restrictions created by the ABA case.

II. HISTORICAL BACKGROUND

A. *Early History*

From the Republic's earliest history, public opinion has influenced the Supreme Court appointment process. President George Washing-

2. See *infra* notes 305-73 and accompanying text.

3. *Association of the Bar v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989).

ton's unsuccessful nomination of John Rutledge for Chief Justice in 1795 created an uproar that extended far beyond the chambers of the United States Senate.⁴ The Federalist press in the North denounced the nomination with particular vehemence.⁵ The press also vigorously encouraged the defeat of James Madison's nomination of Alexander Wolcott in 1811.⁶ On a number of other occasions during the nineteenth century, the Senate's highly partisan opposition to Supreme Court nominees was accompanied by free-wheeling attacks on the nominees in the newspapers. In opposing the nomination of Roger B. Taney to be Chief Justice, for example, one Whig newspaper proclaimed that "[t]he pure ermine of the Supreme Court is sullied by the appointment of that political hack. . . ."⁷ The press's role in opposing nominations during the late eighteenth and early nineteenth centuries is especially significant because at that time newspapers had a potent impact on shaping public opinion.⁸ In the absence of any significant political activity by voluntary organizations—labor unions, for example, did not exist yet—the press represented the major intermediary between private citizens and their government.

During the nineteenth century, political parties and private citizens also had a significant impact upon presidential selections and Senate confirmations of Supreme Court Justices.⁹ Voluntary organizations also had a role.¹⁰ Private citizens, elected officials, and organizations regularly petitioned the Department of Justice for the nomination of particular individuals for vacant seats on the Court. The petitioners usually resided in the candidate's home state or had professional or school ties with the candidate. In 1853, for example, a number of prominent Alabama citizens petitioned President Franklin Pierce to nominate John A. Campbell to the Supreme Court.¹¹

4. See, e.g., 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 127-39 (1937). Rutledge was lambasted widely for his vigorous opposition to the Jay Treaty with Great Britain, and his foes spread the rumor that he was insane. His nomination was defeated by a vote of 14 to 10. *Id.*

5. See Middleton, *The Partisan Press and the Rejection of a Chief Justice*, 53 *JOURNALISM Q.* 106 (1976); see also D. STEWART, *THE OPPOSITION PRESS OF THE FEDERALIST PERIOD* 221 (1969).

6. H. ABRAHAM, *JUSTICES AND PRESIDENTS* 41 (2d ed. 1985); 1 C. WARREN, *supra* note 4, at 410-13.

7. 2 C. WARREN, *supra* note 4, at 16. Newspapers were notorious during the nineteenth century for their intense partisanship.

8. See, e.g., D. STEWART, *supra* note 5, at 3-32.

9. See generally Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 *WIS. L. REV.* 172, 343, 461; Friedman, *The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond*, 5 *CARDOZO L. REV.* 1 (1983).

10. Frank, *supra* note 9, at 461; Friedman, *supra* note 9, at 1.

11. See National Archives, Record Group 60 (General Records of the Department of Justice) [hereinafter Department of Justice Records], File 348 (Records Relating to Members of the Su-

When a President was trying to achieve geographic balance with an appointment to the Court, local support from unrepresented areas may have influenced the presidential choice. Although vigorous letter writing campaigns obviously demonstrated that candidates enjoyed support among local elites, such campaigns did not prove that the candidates enjoyed widespread support. As one opponent of the elevation of Court of Appeals Judge Edward Sanford explained to President Warren Harding in 1922, "It is very natural for the lawyers in his judicial district to commend him to you[;] most . . . feel he will not be appointed, but know that they will have to continue to practice their profession before him."¹² Presidents regularly passed over persons who had received strong support from their home states and nominated individuals who had not been the subject of any major lobbying campaign.¹³

preme Court, 1853-1932), Box 1 (Campbell folder). President Pierce received two petitions: one signed by all seven members of the Alabama Supreme Court and thirty-one members of the Alabama Bar, and another petition signed by seven congressional representatives from Alabama and four from Mississippi. Pierce also received a letter from the Governor of Alabama. *See id.*

12. Letter from J.D. Council to Warren G. Harding (Dec. 26, 1922) (available in Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 3 (Sanford folder)). The name "J.D. Council" may be fictitious. No record exists of an attorney by that name anywhere in Tennessee in 1922. *See* S. Cook, *Path to the High Bench: The Pre-Supreme Court Career of Justice Edward Terry Sanford* (unpublished doctoral thesis, University of Tennessee, 1977)(available from The McClung Collection, East Tennessee Historical Center, Knoxville, TN). Even the signature itself on the letter is somewhat illegible.

13. For example, President Benjamin Harrison received substantial unsolicited advice about how to fill the four vacancies that occurred during his term, but he did not appoint the individuals who had received the most vociferous support.

In 1889 approximately 100 prominent residents of Michigan recommended Alfred Russell for the seat that became vacant when Stanley Matthews died. Russell also enjoyed the support of former President Rutherford B. Hayes, Senator William M. Evarts of New York, General William Tecumseh Sherman, and the historian George Ticknor Curtis. Russell, an 1850 graduate of Dartmouth College, also received recommendations from 10 Dartmouth professors. Petitions on Russell's behalf were signed by nearly all members of both houses of the Michigan legislature, all five Michigan Supreme Court justices, the Michigan attorney general, and various lower state officials. *See* Department of Justice Records, *supra* note 11, File 349 (Appointment File for United States Supreme Court Candidates Who Were Not Commissioned, 1853-1924), Tray 1309. Supporters of several other aspirants, including the young William Howard Taft, also launched movements for their favorites. *See id.*; *see also id.* File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 5 (Taft folder); Frank, *supra* note 9, at 360-65. Despite the outpouring of support on behalf of Russell and other potential nominees, Harrison nominated David J. Brewer of Kansas, who had received some organized support but less than several of his rivals. *See* Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 1 (Brewer folder).

In 1892 hundreds of Pennsylvanians urged the Justice Department and President Harrison to appoint Henry W. Williams to succeed the recently deceased Joseph Bradley on the Supreme Court. The petitioners included more than 300 attorneys, 14 Pennsylvania members of the House of Representatives, several members of the clergy, two professors, nearly two dozen present and former state judges, two bank presidents, and various other prominent citizens. Williams also received scattered recommendations from New York and Ohio. *See* Department of Justice Records, *supra* note 11, File 349 (Appointment File for United States Supreme Court Candidates Who

B. *The Early Twentieth Century*

Public interest in the Supreme Court nomination process increased somewhat during the early years of the present century, when the Court's invalidation of various state and federal social welfare statutes aroused the ire of trade unionists and Progressives. In 1911, for example, the nomination of Horace H. Lurton encountered opposition from organized labor. Prior to Lurton's nomination, representatives of several railroad unions wrote to President William H. Taft in a futile effort to prevent him from nominating Lurton.¹⁴ Following Lurton's nomination, Samuel Gompers, president of the American Federation of Labor (AFL), expressed his opposition. In 1912 liberals and trade unions strongly opposed the nomination of Mahlon Pitney and delayed his confirmation.¹⁵ Between 1914 and 1916, many trade union leaders and Progressives wrote to President Woodrow Wilson to discourage him from nominating Taft to the Court.¹⁶ Wilson received additional pro-

Were Not Commissioned, 1853-1924), Tray 1311. Although Harrison nominated a Pennsylvanian to replace Bradley, he chose George Shiras Jr., not Williams. Although the number of Shiras's endorsements might have been less than the number of endorsements registered for Williams, Shiras received the enthusiastic endorsements of prominent politicians, lawyers, members of the clergy, and industrialists. See Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 3 (Shiras folder); Frank, *supra* note 9, at 368-69.

The following year, Harrison again disappointed a substantial number of petitioners when he appointed Howell E. Jackson of Tennessee rather than Fifth Circuit Judge Don A. Pardee, a Louisianan who had received bipartisan and biracial support from prominent citizens in several Southern states. Petitioners for Pardee included 23 Alabama Republicans; the chair of the Republican State Central Committee of Georgia; 24 members of the Florida Bar; 10 members of the bar and citizens of Decatur, Alabama; several dozen black citizens of Louisiana; and the members of the all-Democratic committee on the judiciary of the Alabama House of Representatives. See Department of Justice Records, *supra* note 11, File 349 (Appointment File for United States Supreme Court Candidates Who Were Not Commissioned, 1853-1924), Tray 1309. Although Jackson's support may have been based less broadly than Pardee's, a few attorneys in Tennessee vouched for his good character. See Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 2 (Jackson folder).

14. The unions included the Order of Railroad Telegraphers, the Order of Railway Conductors of America, and the Brotherhood of Locomotive Firemen and Enginemen. See Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 2 (Lurton folder).

15. See, e.g., A. BICKEL & B. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921*, at 326-32 (1984) (Oliver Wendell Holmes Devise *History of the Supreme Court of the United States* vol. 9).

16. See Letter from Samuel Gompers to Woodrow Wilson (Jan. 7, 1916) (available in Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 5 (Taft folder)). In January 1916, for example, AFL president Samuel Gompers wrote to Wilson to complain that Taft's record as a federal judge, President of the United States, Yale Law School professor, and ABA president demonstrated that Taft's view of the law was unduly narrow and abstract and that Taft failed to appreciate that "[j]ustice and law are for the protection of human life and human rights." *Id.*

tests from various other unions and AFL affiliates.¹⁷ Wilson never had any intention of naming Taft to the Court; therefore, Wilson needed no persuading.¹⁸

Woodrow Wilson's controversial nomination of Louis D. Brandeis to the Supreme Court in 1916 was probably the first nomination to inspire both highly organized opposition and support outside of the Senate.¹⁹ Powerful forces in the business, legal, and political communities opposed Brandeis. The tone of much of the opposition was characterized by the now-famous comment of the *New York Sun* that Brandeis was "utterly and even ridiculously unfit."²⁰ Fifty-five prominent Bostonians, including the president of Harvard, signed a petition opposing the nomination on the ground that Brandeis lacked "judicial temperament."²¹ During the lengthy hearings on the nomination, the Committee on the Judiciary received testimony from a broad spectrum of Brandeis's opponents. For example, Clarence W. Barren, whose *Boston News Bureau* received financial support from a major railroad, appeared before the Subcommittee armed with a file of court records, newspaper clippings, and official reports that allegedly demonstrated Brandeis's radicalism and questionable ethics.²² Brandeis was attacked from the left by Clifford Thorne, the chairman of Iowa's board of railroad commissioners, who contended that Brandeis had betrayed the interests of shippers.²³ An official of the Anti-Saloon League of America testified against the nomination on the ground that Brandeis had testified before the Massachusetts legislature a quarter of a century earlier in support of the Massachusetts Liquor Dealers' Association.²⁴ Wit-

17. Wilson received protests from various other unions and AFL affiliates, including the United Mine Workers of America, the Central Federated Union of Greater New York and Vicinity, at least one lodge of the International Association of Machinists, the Brotherhood of Railway Car-men of America, the Detroit Federation of Labor, and the Chattanooga Central Labor Union. The Anti-Saloon League of America also opposed Taft's appointment, as did a number of individual attorneys. See Department of Justice Records, *supra* note 11, File 348 (Records Relating to Mem-bers of the Supreme Court, 1853-1932), Box 5 (Taft folder).

18. Accordingly, Wilson ignored numerous letters urging Taft's appointment, including a pe-tition signed by a number of prominent New York attorneys, including Elihu Root and Alton B. Parker, a similar petition from the Tennessee Bar, and a letter from the president of the New York State Bar Association. See *id.*

19. See *Hearings on the Nomination of Louis D. Brandeis to Be an Associate Justice of the Supreme Court of the United States Before the Subcomm. of the Senate Comm. on the Judici-ary*, 65th Cong., 1st Sess. (1916) [hereinafter *Brandeis Hearings*]. For accounts of the five-month fight over the Brandeis nomination, see A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 465-508 (1946); A. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964).

20. See A. MASON, *supra* note 19, at 465.

21. *Id.*

22. *Brandeis Hearings*, *supra* note 19, at 116-34; see A. MASON, *supra* note 19, at 471-72.

23. See *Brandeis Hearings*, *supra* note 19, at 5-62; A. MASON, *supra* note 19, at 470-71, 477, 479.

24. *Brandeis Hearings*, *supra* note 19, at 1054-72 (statement of Dr. James Cannon, Jr.).

nesses in favor of Brandeis included a member of the Municipal Civil Service Commission of New York²⁵ and the president of the National Consumers League.²⁶ A number of other leaders of liberal organizations signed a petition supporting the nomination.²⁷ Although those persons signed as individuals rather than in their official capacity, their support of Brandeis was likely to influence the rank and file of their organizations. Accordingly, their petitions represent an early form of interest group lobbying in favor of a Supreme Court nomination.

Meanwhile, Brandeis's opponents launched a well-financed campaign to defeat the nomination. Two Wall Street attorneys, Austen G. Fox and Kenneth M. Spence, organized a particularly aggressive effort. They sent letters to a number of ABA members, urging them to write to their senators stating their opposition to the nomination. Under separate cover, they sent a "brief" in opposition to the nomination.²⁸ Another Wall Street attorney, Thomas C. Spelling, also circulated an anti-Brandeis pamphlet and urged his colleagues at the bar to write to their senators.²⁹ In addition to letters prompted by Brandeis's opponents, a number of persons wrote to members of the Senate to support or op-

25. *Id.* at 763-64 (testimony of Henry Moscowitz); *see also id.* at 759-60.

26. *Id.* at 759-63 (testimony of Newton D. Baker).

27. *Id.* at 760-62. The signers included the secretary of the Federal Council of Churches of Christ of America, the president and secretary of the American Association for Labor Legislation, the chair of the National Committee on Prisons and Prison Labor, the secretary of the National Child Labor Committee, and various labor leaders from the state of New York. Officials of manufacturing organizations and arbitration boards also signed the petition.

28. *See* Letter from Austen G. Fox and Kenneth M. Spence to Charles F. Amidon, Esq. (Apr. 20, 1916); Letter from United States Attorney General Thomas W. Gregory to Senator Thomas J. Walsh (Apr. 27, 1916) (available in Papers of Thomas J. Walsh, Box 311, Manuscript Division, Library of Congress [hereinafter Walsh Papers]); Letter from Melvin A. Hildreth and John Carmody to Senator Thomas J. Walsh (Apr. 26, 1916) (available in Walsh Papers, *supra*); *see also* A. MASON, *supra* note 19, at 494. Fox and Spence had coordinated anti-Brandeis testimony before the Committee, much of which backfired. *See id.* at 473, 433-89. It is unlikely that the letter writing campaign had any significant impact. In reply to a letter from Attorney General Gregory, Senator Walsh, the chair of the Judiciary subcommittee, declared that "[t]he fact that the brief is going out is important chiefly as it indicates that there is a well-financed campaign on." Letter from Senator Thomas J. Walsh to United States Attorney General Thomas W. Gregory (Apr. 28, 1916) (available in Walsh Papers, *supra*). Walsh noted that both Senator Albert B. Cummins of Iowa and Senator John D. Works of California, the two subcommittee members who voted to oppose Brandeis's nomination, had "declared before the committee with ill disguised contempt that the thing is utterly worthless." *Id.*

29. *See* Letter from Samuel J. Graham to Senator Thomas J. Walsh (Apr. 12, 1916) (available in Walsh Papers, *supra* note 28); Letter from W.M. Johnston to Senator Thomas J. Walsh (Apr. 4, 1916) (available in Walsh Papers, *supra* note 28); Letter from Clarence L. Reames to S.J. Graham (Apr. 5, 1916) (available in Walsh Papers, *supra* note 28); Letter from Thomas C. Spelling (Mar. 28, 1916) (form letter) (available in Walsh Papers, *supra* note 28). Noting that "[c]opies of the Spelling outbursts have been sent to me by a number of lawyers," Senator Walsh assured the assistant United States Attorney General that "I do not deem them worthy of notice and an sure no member of the Committee does or will." Letter from Senator Thomas J. Walsh to Attorney General Samuel J. Graham (Apr. 17, 1916) (available in Walsh Papers, *supra* note 28).

pose the nomination.³⁰ Meanwhile, in an effort to counter the effects of the pamphlets and the unfounded and unsavory rumors that Brandeis's opponents circulated throughout the nation, Brandeis's supporters launched an aggressive publicity campaign in the nation's press.³¹

Although none of the five Supreme Court nominees between Brandeis in 1916 and Charles Evans Hughes in 1930 inspired intense public controversy,³² private individuals and special interest groups continued to influence the process by which those nominees were selected and confirmed. In 1921 a number of persons urged the Harding Administration to nominate William Howard Taft to be Chief Justice. A number of private individuals, however, objected to Taft's nomination because he had supported United States membership in the League of Nations.³³ The Boston branch of the National Equal Rights League opposed Taft because of Taft's alleged acquiescence to racial injustice.³⁴ Other opponents of Taft's nomination objected to the quality of his presidential appointments, his relatively advanced age, and his rejection by the voters in 1912.³⁵

In his study of the nomination of Pierce Butler in 1922, Professor David Danelski demonstrated that special interest groups had a fairly prominent role in Butler's ascension to the Court.³⁶ Prior to Butler's

30. For example, the Committee on the Judiciary received 620 letters from Massachusetts lawyers endorsing the nomination. An overwhelming majority of the 198 letters from Massachusetts lawyers in opposition to the nomination were written by Boston attorneys. Letter from Senator Thomas J. Walsh to E.A. Purdy (June 15, 1916) (available in Walsh Papers, *supra* note 28).

31. A. MASON, *supra* note 19, at 495-97.

32. The nomination of Harlan Fiske Stone in 1925 encountered significant opposition in the Senate, but this controversy was confined largely to the Senate chambers. Although Stone's nomination inspired widespread public interest and lively editorial comment, it did not inspire large-scale activity by many private individuals or organized interest groups. See A. MASON, *HARLAN FISKE STONE: PILLAR OF LAW* 181-200 (1956).

33. See, e.g., Letter from L.H. Wheeler to United States Attorney General H. Daugherty (June 15, 1921) (available in Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 5 (Taft folder)).

34. Letter from National Equal Rights League, Greater Boston Branch, Office of the Secretary to Warren G. Harding (June 11, 1921) (available in Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 5 (Taft folder)).

35. Among liberals, the nomination was opposed by AFL president Samuel Gompers; the People's Legislative Service; several prominent members of the National Association of Railroad Commissioners; the Chicago Federation of Labor; the Wisconsin Women's Progressive Association of Superior, Wisconsin; the Working People's Nonpartisan Political League of Ramsey County, Minnesota, Butler's home county; and the powerful Farmer-Labor Party of Minnesota. Department of Justice Records, *supra* note 11, File 348 (Records Relating to Members of the Supreme Court, 1853-1932), Box 1 (Butler folder). On the right, Butler was opposed by a number of groups, including the Ku Klux Klan, then at the zenith of its power, and the Women's Auxiliary of the Ohio State Good Government Association. D. DANELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* 92, 105 (1964).

36. See D. DANELSKI, *supra* note 35, at 56-72.

nomination, Chief Justice Taft orchestrated a campaign in support of Butler, enlisting the support of prominent laypersons and clergy in the Roman Catholic Church, prestigious attorneys, and leaders of the business and academic communities.³⁷ After Butler's nomination to the Supreme Court, his record as a corporate attorney inspired considerable opposition among members of the public and organized groups of various political persuasions. Support for Butler's nomination came from prominent attorneys, judges, and business persons, as well as the leader of a farmer's cooperative and leaders of veterans' organizations.³⁸

C. *Hughes and Parker*

Although the nomination of Charles Evans Hughes in 1930 encountered considerable opposition in the Senate,³⁹ the Senate's prompt action on the nomination prevented public opinion from galvanizing. Yet even in the few days between the nomination of Hughes and his confirmation, senators received numerous letters and telegrams from opponents of the nomination.⁴⁰ Only one month after Hughes's confirmation, a broad spectrum of the public became deeply involved in the controversy over President Herbert Hoover's nomination of John J. Parker. Roger S. Baldwin, the founder of the American Civil Liberties Union (ACLU), even observed after Parker's defeat that "[o]nly a few of us realize how far reaching the appointive power of the President in the matter of . . . selection of judges of the highest Court . . . is in determining the social life of future generations."⁴¹ The uproar over the Parker nomination demonstrated that the importance of Supreme Court nominations was understood very well by many individuals and organizations. While Parker's nomination originally received highly favorable press comment,⁴² the AFL and the National Association for

37. *Id.* Meanwhile, supporters of other possible nominees campaigned for their choices. For example, a number of members of the Roman Catholic hierarchy endorsed a Sixth Circuit judge, while other prominent Roman Catholics supported another Roman Catholic judge. *Id.* at 74-76, 87. Supporters of a prominent Georgia attorney barraged the White House with a torrent of letters and petitions, as did advocates of a prominent Texas attorney. *Id.* at 76, 78-79. In an early example of black participation in the nomination process, the National Association for the Advancement of Colored People (NAACP) and other black organizations publicly opposed the nomination of Tennessee Senator John K. Shields, and the leader of at least one black organization wrote to President Harding to urge the nomination of United States District Court Judge William I. Grubb.

38. *See supra* note 35.

39. M. PUSEY, CHARLES EVAN HUGHES II 648-62 (1951).

40. *See* Papers of William E. Borah, Box 300, Manuscript Division, Library of Congress [hereinafter Borah Papers]; Papers of George W. Norris, Box 41, Manuscript Division, Library of Congress.

41. Letter from Roger S. Baldwin to Senator William E. Borah (May 13, 1930) (available in Borah Papers, *supra* note 40).

42. *See* Mendelsohn, *Senate Confirmation of Supreme Court Appointments: The Nomina-*

the Advancement of Colored People (NAACP) soon announced their opposition.⁴³ The AFL contended that one of Parker's decisions as a Fourth Circuit judge⁴⁴ demonstrated an antilabor philosophy.⁴⁵ The NAACP opposed Parker because he had delivered a racist speech as a gubernatorial candidate in North Carolina in 1920 and he had failed to question the North Carolina Constitution's abridgment of black voting rights.⁴⁶ Opposition to Parker by the prominent labor and civil rights groups led to opposition by other organizations and private citizens. The Subcommittee on the Judiciary received more than a thousand letters opposing the appointment and only seventy-five in its favor.⁴⁷ Opponents of the nomination likewise inundated individual senators with letters objecting to Parker's confirmation.⁴⁸ As public opposition to the nomination burgeoned, increasingly large numbers of

tion and Rejection of John J. Parker, 14 How. L.J. 105, 120-21 (1968).

43. *Id.* at 121-25; Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics*, 50 MISS. VALLEY HIST. REV. 213, 217-18 (1963).

44. *United Mine Workers v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927).

45. *Hearings Before the Subcomm. of the Senate Comm. on Judiciary on the Confirmation of Hon. John J. Parker to Be an Associate Justice of the Supreme Court of the United States*, 71st Cong., 2d Sess. (1930) [hereinafter *Parker Hearings*]. In *Red Jacket* Parker had ruled that union efforts to organize workers against mine owners who enforced an open shop pursuant to "yellow dog" agreements constituted a combination and conspiracy in restraint of trade. *Red Jacket*, 18 F.2d at 844. Parker's defenders contended that the issue in *Red Jacket* was merely jurisdictional and that Parker simply had followed precedent. *Parker Hearings, supra*, at 19-23.

46. *Parker Hearings, supra* note 45, at 74-79 (testimony of Walter White, secretary).

47. Mendelsohn, *supra* note 42, at 125, 127. Opponents of the nomination included Norman Thomas, then chair of the Socialist Committee on Public Affairs, *Parker Hearings, supra* note 45, at 59, and 19 Dartmouth College professors, *N.Y. Times*, Apr. 25, 1930, at 16, col. 7. Like Thomas and many other liberal opponents of Parker, the Dartmouth professors based their opposition largely upon Parker's alleged attitudes concerning race and labor.

48. For example, Senator Henry J. Allen of Kansas received letters from more than two dozen organizations that opposed the nomination. Civil rights and religious groups that urged Allen to vote against confirmation included several Kansas branches of the NAACP, the Colored Ministerial Alliance of Wichita, the Interdenominational Ministerial Alliance of Kansas City, the Baptist Alliance of Kansas City, the Committee on Race Relations of the Society of Friends, the Equal Rights League of Topeka, and the Colored Republican Club of Butler County. Allen likewise received messages from at least 15 labor groups, many of which were affiliated with the AFL. Allen also received a personal letter from John L. Lewis, UMW president, urging him to oppose the nomination. The Oakleaf Art Club and the Monrovia Club of Kansas City urged Allen to vote against Parker's confirmation. See Papers of Henry J. Allen, Series C, Box 58, Manuscript Division, Library of Congress.

The widespread public opposition to the nomination similarly was reflected in the mail of Senator William E. Borah of Idaho. Opponents of the nomination who contacted Borah included many of the organizations that contacted Allen, as well as the International Ladies Garment Workers Union, the Veterans' Political Association, the National League of Republican Colored Women, the Yale University chapter of the American Federation of Teachers, the Conference for Progressive Labor Action, the Improved Benevolent Order of Elks, the Order of Railway Conductors, the International Photo-Engravers Union of North America, and the Colored International Ministers Alliance of Washington and Vicinity. See Borah Papers, *supra* note 40.

senators began to doubt the wisdom of the nomination.⁴⁹ As prospects for Parker's confirmation grew dimmer, the AFL and the NAACP stepped up their pressure against the nomination. Alleging that white North Carolinians had harassed blacks who refused to sign a pro-Parker petition, the NAACP held mass protest meetings in Detroit and Cleveland.⁵⁰ When Parker's nomination finally reached the floor of the Senate, an acrimonious debate raged for several days before the Senate finally rejected the nomination by the vote of forty-one to thirty-nine. In view of the intensity of Senate opposition to the previous Hughes nomination,⁵¹ widespread opposition to Parker might have arisen without the campaigns organized by the AFL and the NAACP. Those campaigns, however, certainly intensified the debate and galvanized large segments of the public. Moreover, the closeness of the vote suggests that fears of electoral reprisals from organized labor and blacks tipped the scale against Parker, even though Parker's views on race and labor offended the bedrock principles of many senators who needed no prompting from either group.⁵² Senators were more vulnerable to such reprisals than they had been in nominations prior to the second Hughes nomination because the Senate in 1929 had changed its rules to provide for open debates and votes on appointments; prior to 1929, such proceedings had been conducted in executive session.⁵³ One need not mourn Parker's defeat to agree with President Herbert Hoover's comment that some Republican senators "ran like white mice" rather than face the wrath of the AFL and the NAACP "lobbies."⁵⁴ Hoover drafted, but did not release, a statement that acknowledged "the vital impor-

49. See Mendelsohn, *supra* note 42, at 127-30.

50. *Charges Parker Men Threaten Negroes*, N.Y. Times, Apr. 25, 1930, at 16, col. 7.

51. See *supra* note 39 and accompanying text.

52. Fear of reprisal was probably particularly significant among northern senators whose constituencies included large numbers of black voters. As the result of public meetings sponsored by the NAACP in Chicago and Detroit shortly before the vote on the nomination, several hundred telegrams in opposition to the nomination were sent to Senators Charles Deneen and Otis Glenn of Illinois, and Senators Arthur Vandenberg and James Couzens of Michigan. Watson, *supra* note 43, at 232. All four of those Republican senators defied their Republican President to vote in opposition to the nomination. Black pressure in Indiana may have persuaded another Republican senator, Arthur R. Robinson, to oppose the nomination. *Id.* Professor William Burris has concluded that "[a]lthough we do not know exactly which senators changed their votes because of pressure from the NAACP, there can be no doubt that the opposition of this organization was an important factor in changing the odds against Judge Parker." W. BURRIS, *DUTY AND THE LAW: JUDGE JOHN PARKER AND THE CONSTITUTION* 97 (1987). Professor Burris believes that the impact of organized labor may have been less significant, but that labor opposition gave Progressives a pretext for opposing Parker and that labor actually influenced the votes of Senators Hugo Black of Alabama, Park Trammell of Florida, and Thaddeus Caraway of Arkansas. *Id.* at 95-96.

53. See J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY IN THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 253-55 (1953).

54. H. HOOVER, *THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY, 1920-1933*, at 269 (1952).

tance of public opinion" but warned that such mobilization of mass opinion as occurred during the Parker confirmation threatened to alter fundamentally the structural balance of the nation's institutions.⁵⁵ In another draft of the same statement, Hoover declared that "[n]o man fit for the position of a Supreme Court Justice can or will organize counter-propaganda against mistaken impressions or strive for the weighting of public opinion in his own favor. . . ."⁵⁶

D. Black, Frankfurter, and Clark

After Parker, the next nominee to inspire widespread public opposition was Hugo Black in 1937. Although no major organized group lobbied for or against Black, major newspapers and magazines criticized the nomination because of Black's alleged lack of legal expertise, his liberal politics, and his alleged association with the Ku Klux Klan.⁵⁷ Individual citizens urged senators to oppose the nomination for those reasons, and because of Black's support for President Roosevelt's plan to pack the Supreme Court and his alleged use of illegally seized evidence and harassment of witnesses during a Senate investigation.⁵⁸ The leaders of the fight against the Parker nomination also surfaced again, albeit in different roles. William Green of the AFL and John L. Lewis of the United Mine Workers (UMW) endorsed the nomination;⁵⁹ Walter White of the NAACP demanded an open hearing on Black but privately expressed confidence in him.⁶⁰

Franklin Roosevelt's eight other nominations following Black engendered less controversy in both the Senate and the nation.⁶¹ The only nomination that aroused more than a scintilla of public opposition was that of Felix Frankfurter, who encountered hostility from an exiguous but vehement assortment of right-wing activists. Frankfurter's foes discerned evidence of left-wing or "un-American" tendencies in Frankfurter's foreign birth; his defenses of Sacco and Vanzetti and the copper mine strikers in Bisbee, Arizona in 1916; and his membership on the

55. Fish, *Spite Nominations to the United States Supreme Court: Herbert C. Hoover, Owen J. Roberts, and the Politics of Presidential Vengeance in Retrospect*, 77 Ky. L.J. 545, 559 (1988-1989).

56. *Id.* at 560.

57. See H. ABRAHAM, *supra* note 6, at 212; G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 51-52 (1977); W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932-1968, at 83-84 (1970).

58. See Borah Papers, *supra* note 40.

59. G. DUNNE, *supra* note 57, at 51.

60. *Id.* at 56.

61. After Black, who was confirmed by a vote of 63 to 16, no other Roosevelt nominee except William O. Douglas, who was confirmed by a vote of 62 to 4, received any negative votes in the Senate.

Civil Liberties Union's national committee.⁶² While a number of members of the public testified in opposition to Frankfurter's nomination,⁶³ Frankfurter's opponents do not appear to have represented any major organization or to have reflected widespread public opinion.

Although all four of the Justices nominated by President Harry S. Truman have been criticized for their alleged mediocrity,⁶⁴ only Tom Clark's nomination in 1949 precipitated any sustained and widespread public protest.⁶⁵ Clark received unfavorable ratings from the press, members of the legal profession, and influential public figures.⁶⁶ He became the first nominee since Parker to encounter significant opposition from organized groups. Moreover, Clark was the first nominee in history to face opposition from a substantial number of organizations, although the campaigns waged by those organizations were far more limited than the campaigns waged against Brandeis and Parker. Clark's nomination was opposed by a wide range of left-leaning groups.⁶⁷ Although most persons and organizations opposing Clark may have lacked significant political clout, their representatives blasted Clark with volleys of histrionic rhetoric during the confirmation hearings⁶⁸ similar to the apocalyptic terms in which Robert Bork's most vehement opponents decried the prospect of Bork's confirmation.

62. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Felix Frankfurter to Be an Associate Justice of the Supreme Court of the United States*, 76th Cong., 1st Sess. 8, 29, 65, 74-75, 95, 96 (1939).

63. See *id.*

64. H. ABRAHAM, *supra* note 6, at 238.

65. See *id.* at 229; F. RUDKO, *TRUMAN'S COURT: A STUDY IN JUDICIAL RESTRAINT* 33-34 (1988).

66. H. ABRAHAM, *supra* note 6, at 243.

67. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Tom C. Clark, of Texas, to Be an Associate Justice of the Supreme Court of the United States*, 81st Cong., 1st Sess. (1949). These groups included the American Committee for Protection of Foreign Born, *see id.* at 32 (testimony of Carol King, general counsel); the Progressive Party, *see id.* at 39 (testimony of O. John Rogge, party representative); the National Lawyers' Guild, *see id.* at 72 (testimony of Fowler V. Harper, prof. of Law, Yale Univ.); at least one local of the Union of Electrical, Radio, and Machine Workers of America, CIO, *see id.* at 79 (testimony of Marshall White, Local 301); the Communist Party, USA, *see id.* at 85 (testimony of Elizabeth Gurley Flynn, party member); the United Negro and Allied Veterans of America, *see id.* at 92 (testimony of George B. Murphy, Jr., national commander); the International Fur and Leather Workers Union, CIO, *see id.* at 163 (testimony of George Kleinman, union representative); and the National Council of the Arts, Sciences, and Professions, *see id.* at 100 (testimony of Bernard Rosen, representative).

68. For example, a member of the board of directors of a bookstore that was blacklisted by Clark while Clark was United States Attorney General predicted that Clark would make "a Roman Carnival" of the Constitution, *id.* at 129 (testimony of Alfred Henley, Washington Cooperative Bookshop), and a representative of the National Council of the Arts, Sciences, and Professions proclaimed that Clark's nomination was "tragic," *id.* at 102 (testimony of Bernard Rosen, representative). A member of the Civil Rights Congress described Clark's blacklist as "a wicked thing." *Id.* at 144 (testimony of Rev. Clarence Parker).

E. Haynsworth and Carswell

For two decades following Clark's nomination, the public was not involved significantly in the confirmation process and had little impact on Supreme Court nominations. Although some conservatives in the Senate expressed severe misgivings over the nominations of John Marshall Harlan,⁶⁹ Potter Stewart,⁷⁰ and Thurgood Marshall,⁷¹ the principal opposition to those nominees outside the Senate came from individuals who had private grievances against the nominees.⁷² The only other unfavorable public comment emanated primarily from right-wing organizations.⁷³ Even the firestorm over the Fortas and Thornberry nominations in 1968 was confined largely to the chamber of the Senate and the editorial pages of newspapers.⁷⁴ Activity on behalf of Supreme

69. Harlan's internationalism troubled a number of senators. See, e.g., *Hearings Before the Senate Comm. on the Judiciary on the Nomination of John Marshall Harlan, of New York, to Be an Associate Justice of the Supreme Court of the United States*, 84th Cong., 1st Sess. 166-67 (1955) [hereinafter *Harlan Hearings*] (statement of Sen. Herman Welker); *id.* at 174-76 (statement of Sen. William Jenner); see also 101 CONG. REC. 3015-19 (1955) (statement of Sen. James Eastland); *id.* at 3035-36 (statement of Sen. Olin D. Johnston).

70. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Potter Stewart to Be an Associate Justice of the Supreme Court of the United States*, 86th Cong., 1st Sess. *passim* (1959).

71. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Thurgood Marshall, of New York, to Be an Associate Justice of the Supreme Court of the United States*, 90th Cong., 1st Sess. *passim* (1967).

72. See, e.g., *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Abe Fortas, of Tennessee, to Be an Associate Justice of the Supreme Court of the United States*, 89th Cong., 1st Sess. 23-31 (1965) [hereinafter *Fortas Hearings*] (testimony of Charles Callas); *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Arthur J. Goldberg, of Illinois, to Be an Associate Justice of the Supreme Court of the United States*, 87th Cong., 2d Sess. 83 (1962) [hereinafter *Goldberg Hearings*] (testimony of David Walsh); *Harlan Hearings*, *supra* note 69, at 4-30, 55-61, 67-68 (testimony of Herman Methfessel).

73. For example, spokespersons for such groups as the American Anti-Communist League, the Christian National Crusade, and the American Rally testified against Earl Warren at Senate hearings, alleging variously that he was a Communist or Marxist and that he was corrupt. See J. POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 170-71 (1979). Harlan's internationalism inspired opposition from the National Economic Council, Inc., see *Harlan Hearings*, *supra* note 69, at 77 (testimony of Merwin K. Hart, president); the American Coalition of New York, see *id.* at 95 (testimony of George Racey Jordan, executive director); and the Wheel of Progress, see *id.* at 124 (testimony of Mrs. Ernest W. Howard, legislative representative). The Maryland State Society of the Daughters of the American Revolution also opposed Harlan. See *id.* at 2-3 (prepared statement of Mrs. Joseph S. Huxley, regent). At least one senator received a number of letters suggesting that Goldberg was a Communist. See *Goldberg Hearings*, *supra* note 72, at 43 (statement of Sen. Alexander Wiley).

74. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Abe Fortas, of Tennessee, to Be Chief Justice of the United States and the Nomination of Homer Thornberry, of Texas, to Be an Associate Justice of the Supreme Court of the United States*, 90th Cong., 2d Sess. *passim* (1968) [hereinafter *Fortas and Thornberry Hearings*]; R. SHOGAN, *A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT* 148-82 (1972). Like other nominees during the 1950s and 1960s, Fortas in 1968 was opposed by right-wing groups, including the Conservative Society of America, see *Fortas and Thornberry Hearings*,

Court nominees during the 1950s and 1960s was confined primarily to endorsements of nominations from bar associations and prominent attorneys.⁷⁵

Widespread public participation in the nomination process was revived during 1969 and 1970, when Richard Nixon's controversial nominations of Clement F. Haynsworth, Jr. and George Harrold Carswell galvanized opposition among liberals throughout the nation. For the first time since the Parker nomination in 1930, major labor and civil rights groups mounted a campaign against a nominee. As in 1930, the opposition of those groups appears to have been crucial in defeating a nomination because the Senate narrowly rejected Haynsworth's nomination by the margin of forty-five to fifty-five and Carswell's by a vote of forty-five to fifty-one.

Contending that Haynsworth's decisions as a Fourth Circuit judge were antilabor, the AFL-CIO attempted to dissuade the White House from nominating Haynsworth when it became clear that he was a leading contender for the vacant seat on the High Bench.⁷⁶ Three days after the nomination of Haynsworth in August 1969, the AFL-CIO announced that it actively would oppose confirmation of Haynsworth.⁷⁷ The union's national leadership urged all fifty state federations of the AFL-CIO and its 120 affiliated unions to contact senators and to make clear that their vote on the nomination would be used in deciding how the union would ask its members to vote in the 1970 and 1972 elections. Labor unions also warned Democratic senators, and even some Republi-

supra, at 75 (testimony of Kent Courtney, national chairman); the Council Against Communist Aggression, *see id.* at 77 (testimony of Marx Lewis, chairman); Liberty Lobby, *see id.* at 283 (testimony of W.B. Hicks, Jr., executive secretary); and the National Organization Citizens for Decent Literature, *see id.* at 291 (testimony of James J. Clancy, executive board attorney). For a recent and lively account of the protracted struggle over the Fortas nomination, see B. MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 360-526 (1988).

75. *See, e.g., Fortas and Thornberry Hearings, supra* note 74, *passim*; *Fortas Hearings, supra* note 72, *passim*; *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Byron R. White, of Colorado, to Be an Associate Justice of the Supreme Court of the United States*, 87th Cong., 2d Sess. 5-17 (1962).

76. *See A Nomination Rejected: Why, How and by Whom*, U.S. NEWS AND WORLD REP., Dec. 1, 1969, at 32; Weaver, *Rights and Labor Leaders Oppose Court Nomination*, N.Y. Times, Aug. 19, 1969, at 27, col. 3. After an AFL-CIO official had conferred with Administration officials, AFL-CIO president George Meany sent a telegram to President Nixon opposing the nomination of Haynsworth. *A Nomination Rejected: Why, How and by Whom, supra*. The AFL-CIO particularly objected to Haynsworth's opinion in *Deering Milliken v. Johnson*, 295 F.2d 856 (4th Cir. 1961), which upheld the right of a manufacturing company to close a textile mill after the Textile Workers Union won an election to represent workers at the plant. *See Hearings Before the Senate Comm. on the Judiciary on the Nomination of Clement F. Haynsworth, Jr., of South Carolina, to Be an Associate Justice of the Supreme Court of the United States*, 91st Cong., 1st Sess. 162-208 (1969) [hereinafter *Haynsworth Hearings*] (testimony of George Meany, president).

77. *See Labor to Oppose Senate Confirmation of Judge Haynsworth*, N.Y. Times, Aug. 21, 1969, at 24, col. 4.

cans, that rich union coffers might snap shut if they voted in favor of the nomination.⁷⁸ Moreover, the union asked its millions of members to contact their senators.⁷⁹ At the apex of its campaign against Haynsworth, the AFL-CIO deployed forty full-time lobbyists in the cause.⁸⁰

Meanwhile, major civil rights groups, including the NAACP and the Leadership Conference on Civil Rights, a group of 125 welfare, labor, religious, and civil rights groups, announced their opposition to Haynsworth on the ground that his decisions as a Fourth Circuit judge were insensitive to blacks.⁸¹ Like the labor groups, the civil rights organizations conducted their campaign at the grassroots level in addition to lobbying on Capitol Hill. For example, Republican Senator Roman Hruska of Nebraska reported that an NAACP official traveled to Nebraska to build up sentiment against Haynsworth among Hruska's constituents.⁸² Nebraska clergy members and women's church groups joined in the NAACP effort.⁸³ The Nixon Administration attempted to counter the grassroots drive against Haynsworth by mounting its own grassroots drive in support of his confirmation.⁸⁴ Republican Party machinery in states throughout the nation began to apply blunt pressure to uncommitted Republican senators.⁸⁵

78. See *The Judge Comes to Judgment*, NEWSWEEK, Nov. 24, 1969, at 36.

79. See *id.*

80. See "The Nomination Is Rejected," NEWSWEEK, Dec. 1, 1969, at 21, 22.

81. See, e.g., *Haynsworth Hearings*, *supra* note 76, at 423 (testimony of Clarence Mitchell, legislative chair, and Joseph L. Rauh, Jr., counsel, Leadership Conference on Civil Rights); *id.* at 520 (statement of Samuel W. Tucker, legal staff chair, Virginia State Conference of NAACP); Kenworthy, *The Haynsworth Issue: A Study in Pressure Politics*, N.Y. Times, Nov. 21, 1969, at 20, col. 1. Several Jewish organizations opposed Haynsworth on the basis of his civil rights record; the chair of the American Jewish Congress explained that it had found that Haynsworth consistently opposed desegregation rulings that the Supreme Court later validated. See *Jewish Groups Oppose Bid*, N.Y. Times, Oct. 13, 1969, at 24, col. 5. The National Catholic Conference for Interracial Justice also announced its opposition to the nomination. *Catholic Racial Group Opposes Haynsworth Seat*, N.Y. Times, Aug. 25, 1969, at 32, col. 3.

82. See *A Nomination Rejected: Why, How and by Whom*, *supra* note 76, at 33.

83. See *id.*

84. See Maltese, *The Selling of Clement Haynsworth: Politics and the Confirmation of Supreme Court Justices*, 72 JUDICATURE 338, 342-43 (1989).

85. L. KOHLMEIER, JR., "GOD SAVE THIS HONORABLE COURT" 138 (1972). The Nixon Administration's efforts were reflected in the mail of Republican Senator William Saxbe of Ohio, whose mail shifted from 40 to 1 against confirmation in October to 5 to 4 in favor during the days preceding the vote. Kenworthy, *supra* note 81, at 20, col. 1. Likewise, the mail sent to Republican Senator Charles Percy of Illinois in opposition to the nomination fell from more than 80% to about 50%. *A Nomination Rejected: Why, How and by Whom*, *supra* note 76, at 33. Similarly, Republican Senator Len Jordan of Idaho told the Senate that "[d]uring my more than [seven] years of service in the [United States] Senate few issues have generated more pressure on my office. . . . Support of the President is urged as if it were a personal matter rather than an issue of grave constitutional importance." 115 CONG. REC. 34,288 (1969). Republican Senator Richard Schweiker of Pennsylvania received telephone calls from a Cabinet officer and three major campaign contributors, all apparently acting under prodding from the Administration. Weaver, *Rejection of Haynsworth*

The intense public involvement in the controversy over the nomination was particularly evident at the Senate Judiciary Committee hearings when testimony was received from an unprecedented number of persons and groups. Labor's opposition to Haynsworth was presented by representatives of an array of powerful organizations.⁸⁶ Representatives of virtually every significant civil rights group testified against Haynsworth.⁸⁷ A number of liberal organizations, including Americans for Democratic Action; the Committee for a Fair, Honest, and Impartial Judiciary; and the National Lawyers Guild also offered testimony in opposition to Haynsworth.⁸⁸ An assortment of other persons, including seven members of the United States House of Representatives,⁸⁹ an academic,⁹⁰ and a representative of a major religious denomination⁹¹ testified in opposition to the nomination. Testimony in favor of the nomination was provided by leading members of the bar and distinguished law school professors.⁹² Haynsworth, however, failed to receive

Indicated in Senate Tallies, N.Y. Times, Nov. 1, 1969, at 1, col. 2. Similarly, Senator Mark O. Hatfield of Oregon received letters from campaign contributors in his home state. *Id.* Both senators also received some threats, open or veiled, of opposition in their next primary campaign. Weaver, *Senate Bars Haynsworth*, 55-45; *17 Republicans Vote Against Him; Nixon to Press Court "Balance"*, N.Y. Times, Nov. 22, 1969, at 1, col. 5. Despite the pressure, Hatfield and Schweiker voted in opposition to the nomination. 115 CONG. REC. 35,396 (1969). In contrast, Senator Ralph T. Smith of Illinois was said to have voted in support of the nomination because of threats of nonsupport by party leaders in his home state. Weaver, *supra* note 76.

86. These labor organizations included the AFL-CIO, whose arguments were presented by its president, George Meany, *see Haynsworth Hearings, supra* note 76, at 162; three unions affiliated with the AFL-CIO (the International Union of Electricians, *see id.* at 391 (testimony of Irving Abramson, general counsel); the Textile Workers Union of America, *see id.* at 481 (testimony of William Pollock, general president); and the American Federation of Teachers, *see id.* at 621 (testimony of Carl J. Megel, director of legislation)); the United Automobile Workers of America, *see id.* at 353 (testimony of Stephen I. Schlossberg, general counsel); and the Ladies Garment Workers Union, *see id.* at 622 (testimony of Louis Stulberg, president).

87. The Committee heard from leaders of the NAACP, *see id.* at 520 (testimony of Samuel W. Tucker, legal staff chair, Virginia State Conference of NAACP); the Leadership Conference on Civil Rights, *see id.* at 423 (testimony of Clarence Mitchell, legislative chair, and Joseph L. Rauh, Jr., counsel); the Black American Law Students Association, *see id.* at 580 (testimony of J. Otis Cochran, national chair); and the National Conference of Black Lawyers, *see id.* at 612 (testimony of Floyd B. McKissick).

88. *See id.* at 530 (testimony of Nils R. Douglas); *id.* at 541 (testimony of Randolph Phillips); *id.* at 614 (statement by Victor Rabinowitz).

89. *See id.* at 314 (testimony of William F. Ryan, D-N.Y.); *id.* at 473 (testimony of John Conyers, Jr., D-Mich., Charles C. Diggs, Jr., D-Mich., Shirley Chisholm, D-N.Y., Louis Stokes, D-Ohio, and William Clay, D-Mo.); *id.* at 537 (testimony of Willie G. Lipscomb, Jr., Republican District Chairman of the 13th Congressional District of Detroit, Mich.).

90. *See id.* at 554 (testimony of Prof. Gary Orfield).

91. An official of the United Church of Christ's Council for Christian Social Action opposed Haynsworth, alleging that he was insensitive to the needs of racial minorities. *See id.* at 590 (statement of Tilford E. Dudley).

92. *See id.* at 591 (statement of Charles Alan Wright); *id.* at 602 (statement by G.W. Foster, Jr.); *id.* at 611 (statement by William Van Alstyne).

the overwhelming support from the bar that a nominee for the Supreme Court customarily receives. In addition to three bar groups that testified at the hearings in opposition to the nomination, the governing boards of the 2400-member National Bar Association, an organization of black lawyers, the 24,000-member American Trial Lawyers Association,⁹³ and the New York State Trial Lawyers' Association announced their opposition to the Haynsworth nomination.⁹⁴ Although the ABA unanimously endorsed the nomination after an intensive investigation and affirmed its endorsement after another investigation following allegations of improper financial conduct, the second vote lacked unanimity.⁹⁵ The lack of unanimity was believed to have blighted Haynsworth's prospects, although the announcement that a "substantial majority" of the Committee favored the endorsement and the dissenters' failure to issue any public criticism may have minimized the negative impact of the divided vote.⁹⁶

In view of the narrowness of the vote, it seems likely that the opposition of labor, civil rights, and sundry other liberal groups was decisive in defeating Haynsworth's nomination, even though the senators' own convictions and questions concerning Haynsworth's ethical propriety clearly also may have been a necessary, although not sufficient, cause. For example, it is difficult to believe that the dramatic decision of Hugh Scott, the Senate Republican leader, to oppose the nomination was not influenced by the strength of labor and civil rights groups among Scott's constituents in Pennsylvania.⁹⁷ On the other hand, Republican Senator William Saxbe of Ohio probably was honest when he said that his decision to vote in opposition to the nomination was based upon his own convictions, notwithstanding the fact that labor was strong and blacks were fairly numerous in his state.⁹⁸

Organized opposition to the nomination of Carswell in 1970 resembled the campaign against Haynsworth, but with some important differences. While the AFL-CIO and other major unions actively opposed the Carswell nomination,⁹⁹ organized labor seems to have taken less interest

93. See Fenton, *Trial Lawyers' Board Opposes Judge Haynsworth's Approval*, N.Y. Times, Oct. 27, 1969, at 35, col. 1. The resolution of the American Trial Lawyers Association was based upon an extended discussion of the case and a questionnaire poll of 1204 members, of whom 73.29% of the 715 who replied opposed the nomination. *Id.*

94. See Weaver, *Haynsworth Backers in Senate Hold Preview of Floor Debate*, N.Y. Times, Oct. 14, 1969, at 40, col. 2.

95. See Graham, *Bar Unit Endorses Haynsworth Again, but Vote Is Divided*, N.Y. Times, Oct. 13, 1969, at 1, col. 2.

96. See *id.*

97. See Graham, *Haynsworth Confirmation Faces Little Opposition in the Senate*, N.Y. Times, Sept. 4, 1969, at 34, col. 4.

98. Kenworthy, *supra* note 81, at 20, col. 3.

99. In addition to the AFL-CIO, the United Automobile Workers opposed the nomination,

in the struggle over the Carswell nomination than in the fight over Haynsworth.¹⁰⁰ Although AFL-CIO president George Meany publicly opposed the nomination,¹⁰¹ he did not testify personally at the Senate Judiciary Committee hearings on the nomination. Moreover, in testimony to the Committee, the AFL-CIO explained that its opposition to the Carswell nomination was based primarily upon Carswell's civil rights record rather than on his labor record.¹⁰² Because Carswell's record on civil rights may have been more questionable than Haynsworth's, civil rights groups may have been more prominent in the opposition to Carswell. But while the NAACP opposed Carswell, it did not testify in opposition to the nomination before the Senate Judiciary Committee. The Leadership Conference on Civil Rights was the primary civil rights group to testify against Carswell.¹⁰³ Americans for Democratic Action (ADA) also actively opposed Carswell,¹⁰⁴ although none of its representatives testified against him at the hearings. Another prominent group opposing the nomination was the National Organization for Women (NOW).¹⁰⁵

The major difference between the public response to the Haynsworth and Carswell nominations was the widespread hostility to Carswell among prominent attorneys. Testimony against Carswell by three prominent academicians at the Senate Judiciary Committee hearings¹⁰⁶ presaged a later torrent of opposition to the nomination among members of the elite bar. During the weeks following the hearings, Francis T. Plimpton, president of the Association of the Bar of the City of New York, called a press conference to release a petition signed by more than 300 prominent lawyers throughout the nation.¹⁰⁷ Meanwhile, more

see *Hearings Before the Senate Comm. on the Judiciary on the Nomination of George Harrold Carswell, of Florida, to Be an Associate Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 212 (1970) [hereinafter *Carswell Hearings*] (testimony of Stephen I. Schlossberg, general counsel), as did the American Federation of Teachers, R. HARRIS, DECISION 36-37, 60, 114 (1971).

100. See R. HARRIS, *supra* note 99, at 36-37, 60, 114.

101. See *id.* at 60.

102. See *Carswell Hearings*, *supra* note 99, at 233-37 (testimony of Thomas E. Harris, associate general counsel, AFL-CIO, accompanied by Laurence Gold, attorney, AFL-CIO).

103. See *Carswell Hearings*, *supra* note 99, at 267 (testimony of Clarence Mitchell, legislative chairman, Leadership Conference on Civil Rights); *id.* at 278 (testimony of Joseph L. Raub, Jr., general counsel, Leadership Conference on Civil Rights).

104. See R. HARRIS, *supra* note 99, at 35, 64, 91, 104, 172.

105. See *Carswell Hearings*, *supra* note 99, at 88 (testimony of Betty Friedan). NOW was making one of its initial forays into national politics.

106. *Id.* at 133 (testimony of William Van Alstyne, professor of law, Duke University); *id.* at 139 (testimony of John Lowenthal, professor of law, Rutgers University); *id.* at 238 (testimony of Louis H. Pollak, dean, Yale Law School). Testimony in favor of the nomination was provided by Yale Law School Professor James William Moore. *Id.* at 111.

107. L. KOHLMEIER, *supra* note 85, at 156; see also R. HARRIS, *supra* note 99, at 89-93.

than 500 lawyers employed by various federal agencies signed a letter of opposition that was sent to every member of the United States Senate.¹⁰⁸ Hundreds of law professors also registered their opposition to the nomination.¹⁰⁹

Meanwhile, a number of anti-Carswell lobbying groups were organized at the grassroots level. In Michigan a United Automobile Workers of America (UAW) official and Representative John Conyers formed the Michigan Committee Against Racism in the Supreme Court.¹¹⁰ The Michigan group distributed hundreds of thousands of broadsides headlined, "We Call on Senator Griffin to Oppose Carswell," along with letters to members of the committee's component organizations urging them to "write, wire or visit Senator Griffin in an effort to prevent the confirmation of George Harrold Carswell."¹¹¹ In Washington, D.C., an anti-Carswell organization, led by a civil rights activist, and ADA and UAW officials, coordinated mail campaigns through civil rights and labor groups in states represented by senators who might be swayed by such activities.¹¹²

The organized campaign of opposition may have made a critical difference because the Carswell nomination was defeated by a margin of only a few votes. The actual effect, however, is impossible to gauge.¹¹³

F. Rehnquist Nomination: 1971

Although liberal activists acquiesced to the nomination of Harry A. Blackmun later in 1970 and mounted no serious campaign of opposition to Lewis F. Powell in 1971, the nomination of William H. Rehnquist, at

108. L. KOHLMEIER, *supra* note 85, at 156.

109. *Id.*; see R. HARRIS, *supra* note 99, at 114. Derek C. Bok, dean of Harvard Law School, publicly opposed the nomination, L. KOHLMEIER, *supra* note 85, at 156; as did 21 law professors from Stanford, R. HARRIS, *supra* note 99, at 114; 19 from the University of Virginia, 35 from UCLA, and the entire law faculty at the University of Iowa, which sent a letter to President Nixon urging him to withdraw the nomination, L. KOHLMEIER, *supra* note 85, at 156. See R. HARRIS, *supra* note 99, at 185. At Florida State University, where Carswell had helped to found a law school, 9 of the 19 law faculty members urged President Nixon to withdraw the nomination, and 450 students and faculty members held a rally to protest the nomination. *Id.*

110. This group included such disparate individuals and organizations as the president of the Interdenominational Ministerial Alliance, a member of the National Council of Catholic Women, the executive director of the Metropolitan Detroit Jewish Community Council, a district chair of the Republican Party, and a vice president of the International Amalgamated Clothing Workers Union. R. HARRIS, *supra* note 99, at 75.

111. *Id.* at 75-76.

112. *Id.* at 91.

113. One anti-Carswell activist suggested, for example, that a mail campaign helped to persuade Democratic Senator Thomas E. Eagleton of Missouri to vote in opposition to the nomination. R. HARRIS, *supra* note 99, at 92. On the other hand, Republican Senator William Saxbe of Ohio reluctantly voted for Carswell even though labor and civil rights groups in Ohio had deluged him with anti-Carswell mail. *Id.* at 158-59.

the same time as Powell's nomination, stirred a modest revival of the loose alliance of forces that had lobbied against the nominations of Haynsworth and Carswell. The NAACP, the AFL-CIO, the UAW, and NOW opposed Rehnquist and sent representatives to the Senate Judiciary Committee hearings to oppose the nomination,¹¹⁴ as did various other groups, including the National Alliance of Postal and Federal Employees, the National Lawyers Guild, and an ad hoc committee of Brown University students.¹¹⁵ But the opposition to Rehnquist was generally less intense and less organized at the grassroots level than the campaign against Haynsworth and Carswell.

G. Recent Nominations

Even though the nominations of John Paul Stevens in 1975 and Sandra Day O'Connor in 1981 stirred some organized opposition, the public reaction to those nominations generally was muted. Nevertheless, a much greater number of groups registered approval or disapproval of those nominations than had voiced an opinion about similarly noncontroversial nominations in the past.¹¹⁶ The participation of such groups even in the confirmation process of noncontroversial nominees suggested that special interest groups would be increasingly prominent in the confirmation process. This trend reflected a growing public interest in the selection of Supreme Court Justices and a more intense scrutiny of nominees. Unlike any previous nominees who had no vocal opponents in the Senate, Stevens and O'Connor were questioned at length during their appearances before the Senate Judiciary Committee on a broader range of subjects than at any previous confirmation hearings.

The importance of groups was illustrated again in 1986, when op-

114. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices of the Supreme Court of the United States*, 92d Cong., 1st Sess. 289 (1971) [hereinafter *Rehnquist and Powell Hearings*] (testimony of Clarence Mitchell, Washington Bureau, NAACP, and legislative chair, Leadership Conference on Civil Rights); *id.* at 400 (testimony of Andrew J. Biemiller, legislative director, AFL-CIO); *id.* at 419 (testimony of William Dodds, political action director, UA Aerospace and Agriculture Implement Workers of America, UAW); *id.* at 423 (testimony of Wilma Scott Heide, president, NOW).

115. See *id.* at 452 (testimony of Barbara Hurst and Jonathan Rogers, Ad Hoc Committee of Brown Students); *id.* at 456 (statement of Catherine G. Roraback, president, National Lawyers Guild); *id.* at 470 (testimony of John W. White, legislative director, National Alliance of Postal and Federal Employees).

116. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Sandra Day O'Connor, of Arizona, to Be an Associate Justice of the Supreme Court of the United States*, 97th Cong., 1st Sess. (1981); *Hearings Before the Senate Comm. on the Judiciary on the Nomination of John Paul Stevens, of Illinois, to Be an Associate Justice of the Supreme Court of the United States*, 94th Cong., 1st Sess. (1975).

ponents of Rehnquist's nomination as Chief Justice, especially civil rights and women's groups, organized what probably was the most extensive campaign waged against any nominee since Rehnquist's nomination to the Court in 1971. A number of groups, including NOW, the Leadership Conference on Civil Rights, and the NAACP,¹¹⁷ that had opposed nominations in the past, sent representatives to testify against Rehnquist's nomination. Many additional groups made an initial appearance in the fray against the nomination.¹¹⁸

The fight over the Rehnquist nomination deflected attention from Antonin Scalia's nomination. Although his confirmation was opposed by ADA and NOW,¹¹⁹ those groups did not organize any extensive campaign against the nomination. Similarly, the struggle over the Bork nomination in 1987 probably explains why public interest groups took little interest in the nomination of Anthony Kennedy.¹²⁰

The magnitude of the extra-senatorial campaigns for and against the nomination of Robert Bork in 1987 probably was unprecedented, as was the virulence of the anti-Bork campaign. An unprecedented number of witnesses testified before the Senate Judiciary Committee,¹²¹ and opponents and proponents of the nomination introduced a novel feature into public discourse when they paid for a significant number of newspaper and television advertisements to influence public opinion.¹²²

117. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the United States*, 99th Cong., 2d Sess. 780 (1986) (testimony of a panel including Eleanor Smeal, NOW, and Althea Simmons, NAACP); *id.* at 881 (testimony of a panel consisting of Clarence Mitchell, III, National Black Caucus of State Legislators, Elaine Jones, Legal Defense Fund, Estelle Rogers, Legal Defense and Education Fund, NOW, Benjamin L. Hooks, Leadership Conference on Civil Rights, and Joseph Rauh, Leadership Conference on Civil Rights).

118. These groups included Americans United for Separation of Church and State, *see id.* at 479 (statement of Dr. Robert L. Maddox, executive director); the National Gay and Lesbian Task Force, *see id.* at 568 (statement of Jeffrey Levi, executive director); the National Abortion Rights Action League, *see id.* at 573 (testimony of Karen Shields, board chair); People for the American Way, *see id.* at 605 (testimony of panel including Melanie Verveer, public policy director); the National Black Caucus of State Legislators, *see id.* at 881 (testimony of Clarence Mitchell, III, president); and the Center for Constitutional Rights, *see id.* at 470 (testimony of William Kunstler).

119. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Antonin Scalia to Be an Associate Justice of the Supreme Court of the United States*, 99th Cong., 2d Sess. 170 (1986) (testimony of Eleanor Smeal, president, NOW); *id.* at 204 (testimony of Thomas Kerr, executive committee chairperson, ADA).

120. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Anthony M. Kennedy to Be an Associate Justice of the Supreme Court*, 100th Cong., 1st Sess. (1987) [hereinafter *Kennedy Hearings*].

121. See *Hearings Before the Senate Comm. on the Judiciary on the Nomination of Robert H. Bork to Be an Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. (1987) [hereinafter *Bork Hearings*].

122. See, e.g., Taylor, *Of Bork and Tactics*, N.Y. Times, Oct. 21, 1987, at A23, col. 1; Taylor, *Ads Against Bork Still Hotly Disputed*, N.Y. Times, Oct. 21, 1987, at A23, col. 4.

Many of the advertisements were notable for their apocalyptic tone¹²³ or misleading content.¹²⁴ Many persons expressed concern that such media razzle-dazzle might unduly politicize the judiciary by creating a nomination process in which there is an excessive emphasis upon the political philosophy of the nominee. As Lloyd N. Cutler observed, "We're getting perilously close to electing a Supreme Court justice."¹²⁵ The ads also led to concern that the politicization of the nomination process might diminish respect for the Supreme Court or undermine the independence of judges and law professors by discouraging aspirants to the High Bench from advancing controversial positions that might offend powerful lobbies. For example, Senator Alan Simpson alleged that "the independence of the judiciary has been placed in jeopardy by a confirmation process that has, in too many respects, resembled a no-holds-barred political campaign, complete with high-powered lobbying activities and questionable radio and TV ads."¹²⁶

123. For example, an advertisement by the National Abortion Rights Action League began with a warning that Bork might seek "to wipe out every advance women have made in the 20th century." Taylor, *Of Bork and Tactics*, *supra* note 122, at A23, col. 1. The leader of the Moral Majority told his followers that "the future of America may be at stake." Taylor, *Ads Against Bork Still Hotly Disputed*, *supra* note 122, at A23, col. 4.

124. For example, a *Washington Post* ad sponsored by Planned Parenthood alleged that Bork "upheld a local zoning board's power to prevent a grandmother from living with her grandchildren because she didn't belong to the 'nuclear family'" and asked, "Is this the sort of closed-minded extremism we want on the Supreme Court?" Wash. Post, Sept. 14, 1987, at A9, col. 1. As Judge Ruth Bader Ginsburg has pointed out, the ad referred to *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), a case that was decided five years before Bork became a judge and about which Bork does not appear to have written or made public remarks. Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 U. ILL. L. REV. 101, 115. In one particularly controversial 60-second television ad sponsored by People for the American Way, actor Gregory Peck charged, among other things, that Judge Bork "defended poll taxes and literacy tests which kept many Americans from voting. He opposed the civil rights law that ended 'whites only' signs at lunch counters. He doesn't believe the Constitution protects your right to privacy." Taylor, *Ads Against Bork Still Hotly Disputed*, *supra* note 122, at A23, col. 4. Bork's opponents contended that the ad was accurate because Bork had opposed the Civil Rights Act of 1964 that desegregated lunch counters; criticized the Supreme Court's rulings on the poll tax, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1967); and literacy tests, *Katzenbach v. Morgan*, 384 U.S. 641 (1966); and assailed the Supreme Court's "creation" of a general right to privacy. Judge Bork's supporters pointed out, however, that Bork's comments on the poll tax and literacy tests were based upon jurisprudential grounds; that Bork never had said that he personally favored such restrictions on voting; that Bork had stated publicly that he had changed his mind about the Civil Rights Act; and that Bork had testified at the confirmation hearings that individual provisions of the Bill of Rights protect some aspects of privacy. Taylor, *Ads Against Bork Still Hotly Disputed*, *supra* note 122, at A23, col. 4.

125. Taylor, *Politics in the Bork Battle*, N.Y. Times, Sept. 28, 1987, at 1, col. 5. Similarly, Suzanne Garment observed in an article highly critical of the tactics of Bork's opponents that "judges are not supposed to be chosen by popular election. This does not mean that judges are to be fully insulated from democratic pressures But the insulation must be substantial." Garment, *The War Against Robert H. Bork*, 85 COMMENTARY 17, 26 (1988).

126. 133 CONG. REC. S14,997 (daily ed. Oct. 23, 1987).

III. DEFINING THE ROLE OF THE PUBLIC

The shameful dishonesty and meretriciousness of some of the public appeals for and against the Bork nomination have tended to discredit the very idea of vigorous or widespread public participation in the federal judicial selection process. This development is unfortunate. The uglier aspects of the Bork confirmation fight should not obscure the obvious fact that public interest groups have a right to make known their views concerning judicial selection. Moreover, the excesses of the Bork episode do not prove that such public participation cannot be an intelligent and fair process that complements rather than impedes the performance of the constitutional duties of the President and the Senate.

Critics of public participation in the judicial selection process base their arguments on a number of faulty premises. The first assumption is that public interest groups profane the sacred process of judicial selection. The excesses of public interest groups during the Bork nomination process lend superficial credence to this view. But while many of Bork's supporters and detractors may have engaged in tasteless or unwholesome tactics, the partisan character of their opposition did not unduly "politicize" the nomination process. In large measure, the process already was highly political. The President often selects a nominee on criteria that largely are political or ideological—Bork's nomination is a prime example—and there is widespread agreement that the Senate may allow at least broad political considerations to influence its decision.¹²⁷

127. As Professor Charles Black has argued:

[Political considerations] play (and always have played) a large, often a crucial, role in the President's choice of his nominee; the assertion . . . that they should play no part in the Senator's decision amounts to an assertion that the authority that must "advise and consent" to a nomination ought not to be guided by considerations which are hugely important in the making of the nomination.

Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 *YALE L.J.* 657, 658 (1970). Similarly, Senator Alan Cranston observed during a Senate debate on the Bork nomination:

By all accounts, Judge Bork was selected by this administration on the basis of his commitment to a certain judicial ideology. It is naive to think otherwise and deceptive to pretend otherwise.

This President, like Presidents before him, obviously took his nominee's judicial ideology into account before deciding to name him. This Senate, like Senates before us, has an obligation to examine that judicial philosophy in deciding whether to confirm the President's nominee.

133 *CONG. REC.* S13,117 (daily ed. Sept. 30, 1987).

A recognition or acceptance of the presence of political considerations in the nomination or confirmation process does not compel the conclusion that the process is or should be wholly political. See Yackle, *Choosing Judges the Democratic Way*, 69 *BOSTON U.L. REV.* 273, 276-83 (1989). For an argument in favor of the view that the Senate should limit its role to determining whether

Accordingly, there is no apparent reason why organized groups should not oppose a nominee for partisan reasons. Organized groups not only have the constitutional right to make known their views; they have a virtual obligation to speak out concerning issues of interest to their members. Although many of Bork's opponents exaggerated the extremity of Bork's views or the impact that his confirmation would have had on the Court, there is no doubt that many organizations, especially civil rights groups, profoundly disagreed with Bork's judicial philosophy and contemplated with genuine alarm the prospect of his confirmation. Such organizations, therefore, would have shirked their duty as advocates of their own causes if they had not campaigned against a nomination they believed would jeopardize the hard-won advances that they had helped win for their members and lessen the likelihood of future gains.

Broad public participation in the federal judicial selection process is particularly compelling because judges are not elected and serve a lifetime tenure. The federal judiciary has remained isolated from a trend toward expansion of popular democracy. Citizens may not select federal judges and have no means of removing them from office for any reason other than treason, bribery, or other high crimes and misdemeanors,¹²⁸ thus, the process of judicial selection is the most undemocratic feature of American government. Retention of an unelected federal judiciary contrasts sharply with the increasing democratization of other aspects of American government since the beginning of the Republic. The Constitution has been amended to require the direct election of senators,¹²⁹ who were chosen originally by the state legislatures. Presidential electors, who originally were selected by the legislatures in many states, have long been chosen by the voters in every state. The use of primary elections for the nomination of candidates for most political offices has become universal. Suffrage has been expanded to eliminate voting restrictions based upon property ownership, race, gender, and poll tax payment, and to narrow restrictions based upon age. On the state level, popular selection of judges or ratification of their tenure has become the norm.¹³⁰ Although critics of the federal judiciary have advocated the election of federal judges and the abolition of lifetime

the nominee is intellectually competent and whether his nomination was tainted by cronyism, corruption, or crass political partisanship, see Fein, *Commentary: A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

128. U.S. CONST. art. II, § 4.

129. U.S. CONST. amend. XVII.

130. See L. BERKSON, S. BELLER & M. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1980).

tenure,¹³¹ and a number of proposals for limitations on judicial tenure have been made again during the past few years,¹³² there does not appear to be any significant likelihood that such measures will be enacted. Although there are good reasons for retaining an appointive judiciary, the exclusion of public participation in a process that has so vast an impact upon the lives of virtually all Americans would contravene the democratic character of American government. Accordingly, individuals and special interest groups should be encouraged to make their views known to the President prior to the nomination and to the Senate during the confirmation process. A robust participation by the public in the prenomination and confirmation processes assures that the judicial selection process will take proper account of the public will.

Opponents of broad public participation in the judicial selection process also have expressed fears that narrow special interest groups will coerce senators into rejecting the nominations of highly capable men and women whose selection is acceptable to a broad spectrum of the American public. The Senate's rejection of the Bork nomination in the wake of a well-organized, histrionic, and allegedly unfair campaign by Bork's foes ostensibly confirmed the worst fears of those who advocate a circumscribed role for the public.¹³³ The widespread perception that the Senate acquiesced to public pressure was given credence by

131. During the early twentieth century, for example, a number of Populists and Progressives advocated election of federal judges for limited terms. Chief Justice Walter Clark was the most vocal proponent of an elective federal judiciary. *See, e.g.,* Clark, *Law and Human Progress*, 37 AM. L. REV. 512 (1903); Clark, *Some Defects in the Constitution of the United States*, 54 AM. L. REV. 263 (1906). A raft of bills was introduced in Congress during the late nineteenth and early twentieth centuries to provide for election of federal judges or to impose limitations on the length of tenure of federal judges. *See, e.g.,* S.J. Res. 109, 62d Cong., 2d Sess. (1912) (proposing amendment providing that Supreme Court Justices shall hold office "during good behavior" and that judges of inferior courts shall hold office for terms of ten years); S. 3112, 62d Cong., 1st Sess. (1911) (providing for election of district and court of appeals judges for four-year terms); H.J. Res. 226, 59th Cong., 2d Sess. (1907) (proposing amendment to provide eight-year terms for federal court judges); H.J. Res. 93, 58th Cong., 2d Sess. (1904) (bill for constitutional amendment to provide twelve-year terms for Justices of the Supreme Court, eight-year terms for judges of the courts of appeals, and six-year terms for district court judges); S. Res. 47, 56th Cong., 1st Sess. (1899) (bill to amend the Constitution to provide for election of federal judges for eight-year terms).

132. *Cf.* Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211-12 (1988) (tentatively suggesting the possibility of imposing age and length of tenure limitations on Supreme Court Justices); Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986) (proposing system of fixed, staggered, 18-year terms for Supreme Court Justices); *see also* A. O'CONNOR & M. HENZE, *DURING GOOD BEHAVIOR: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: A GUIDE FOR DISCUSSION OF PROPOSALS TO ESTABLISH TERMS OF OFFICE FOR THE FEDERAL JUDICIARY* (1984) (discussion guide on constitutional reform issues published by the Jefferson Foundation); Bandow, *End Life Tenure for Judges*, N.Y. Times, Sept. 6, 1986, at 27, col. 4.

133. The *Wall Street Journal*, for example, concluded that the campaign against Bork "intimidated not only Senators who spin like weather vanes, but also Senators made of sterner stuff." *Bogeyman Fund-Raising*, Wall St. J., Oct. 15, 1987, at 32, col. 1.

senators who accused their anti-Bork colleagues of succumbing to the virulent campaign against the Bork nomination.¹³⁴

Senators who voted against the nomination resentfully denied that the public campaign opposing the nomination unduly influenced their votes.¹³⁵ Several senators pointed out that the Senate Judiciary Committee had accorded Judge Bork a full hearing, which elicited thirty-two hours of testimony from Bork and permitted testimony by sixty-two pro-Bork witnesses, who outnumbered the forty-eight anti-Bork witnesses.¹³⁶ Senator Joseph Biden observed that "[a]ll the money spent by all the interest groups on both sides could not have paid for [one] day of the television coverage Judge Bork received in the hearings."¹³⁷ Senators who opposed the nomination argued that Bork had defeated himself through his own extensive writings, opinions, speeches, interviews, public record, and testimony before the Senate Judiciary Committee.¹³⁸

134. See, e.g., 133 CONG. REC. S14,915 (daily ed. Oct. 23, 1987) (remarks of Sen. Pete Domenici).

135. For example, Senator Dale Bumpers declared that "[t]he suggestion that the opposition to Judge Bork in the Senate is the result of some kind of powerful public relations campaign is an insult to every Member of this body." 133 CONG. REC. S13,806 (daily ed. Oct. 8, 1987). Similarly, Senator Joseph Biden observed that "[t]o suggest that the . . . colleagues here today who are going to vote against Judge Bork are doing so because they have succumbed to the raw pressure, from wherever it was generated . . . is one heck of an indictment of your colleagues." *Id.* at S14,946 (daily ed. Oct. 23, 1987). Senator Alan Dixon protested that "I do not believe that the votes of Senators can be so easily swayed." *Id.* at S14,862 (daily ed. Oct. 22, 1987). In a gentler vein, Senator William Proxmire averred that public advertisements in opposition to the nomination "had about the same impact on this Senator as a butterfly's hiccup. That is absolutely none." *Id.* at S14,766 (daily ed. Oct. 22, 1987). Senator Proxmire likewise contended that the ads were "directed primarily" at 10 or 15 undecided senators and that the ads "very likely had no effect." *Id.*

136. See, e.g., *id.* at S14,862 (daily ed. Oct. 22, 1987) (remarks of Sen. Alan Dixon); *id.* at S13,806 (daily ed. Oct. 8, 1987) (remarks of Sen. Dale Bumpers); *id.* at S14,793 (daily ed. Oct. 22, 1987) (remarks of Sen. Patrick Leahy). As Senator Dixon observed, "Judge Bork clearly had an ample time to make sure the Senate had a thorough and accurate record of his views." *Id.* at S14,862 (daily ed. Oct. 22, 1987).

137. *Id.* at S14,917 (daily ed. Oct. 23, 1987). Senator David Durenburger, however, alleged that "[t]he hearings were deliberately delayed to allow the public relations campaign to gear to." *Id.* at S14,951.

138. See *id.* at S14,916-17 (daily ed. Oct. 23, 1987) (remarks of Sen. Joseph Biden); *id.* at S14,862 (daily ed. Oct. 22, 1987) (remarks of Sen. Alan Dixon). Senator Biden argued that the Senate was not swayed ultimately "by advertising, fair or unfair, pro or con Notwithstanding all of the charges thrown about Senators' motives in this matter, the verdict of history will be made on the same basis as the verdict in the Senate: On the merits." *Id.* at S14,917 (daily ed. Oct. 23, 1987). Similarly, Senator Dixon observed:

Both supporters and opponents of Judge Bork organized emotional, simplified appeals to mobilize public support and raise money for their position. In those appeals there have been excesses and exaggerations on both sides. That cannot be denied. However, it was not the efforts of grassroots citizens groups, or media ads, that defeated the nomination, it was Judge Bork himself!

Id. at S14,862 (daily ed. Oct. 22, 1987).

The extensive hearings on Bork do not demonstrate that the campaign against Bork did not unduly influence the Senate. The Senate's critics have charged that senators were loath to defy the pressures of the special interest groups that waged the anti-Bork campaign, not that the anti-Bork propaganda actually misinformed the senators.¹³⁹ Moreover, selective media coverage of the Bork hearings may have misled the public about Bork's views and contributed to anti-Bork agitation by persons who misunderstood Bork's views.¹⁴⁰ While the question of whether voter pressures were responsible for Bork's defeat must remain problematical, it is unlikely that the Senate's rejection of the nomination represented a blatant capitulation to the demands of special interest groups. Although the anti-Bork forces may have tried to intimidate some senators,¹⁴¹ the force of the anti-Bork lobby was diluted, at least partially, by the lobbying activities of Bork's supporters.¹⁴² The anti-Bork campaign may have caused senators to take a closer look at the nomination, but it seems unlikely that many would have voted against it unless they had grave doubts about the candidate. As Senator Howell Heflin observed during the final debate on the nomination:

[M]any factors influence how a Senator votes. Among these are: How his or her constituents feel, the views of outside groups, and the opinions of colleagues. But while these factors may influence how a Senator votes, they do not dictate how a Senator votes. My vote is mine alone. I made the ultimate decision and I stand behind it. I have to live with my conscience.¹⁴³

If the anti-Bork campaign intimidated any senators into voting against the nomination, the impropriety lies with the senators themselves rather than with the special interest groups.

To the extent that senators were influenced, rather than pressured, by their constituents and organized groups, they simply were performing their proper role as elected representatives of the people. Although senators obviously should not have accorded weight to public opinion

139. While the *Wall Street Journal*, for example, admitted that the hyperbolic presentations of Bork's record had not influenced senators directly, the *Journal* contended that "the hyperbole was needed to raise the money to persuade Senators." *Bogeyman Fund-Raising*, *supra* note 133.

140. See Garment, *supra* note 125, at 23.

141. Senator Ernest Hollings of South Carolina, for example, reported that the executive director of the South Carolina NAACP said that Hollings "might as well forget the black vote" if Hollings supported Bork. 133 CONG. REC. S13,859 (daily ed. Oct. 8, 1987).

142. For example, the Moral Majority sent a pro-Bork letter to its members and solicited funds for efforts on Bork's behalf. See *id.* at S14,825 (daily ed. Oct. 22, 1987) (remarks of Sen. Dennis DeConcini). Senator Howell Heflin observed that "the process has been politicized. . . . [I]t has been politicized by both Democrats and Republicans and outside right-wing groups and left-wing groups. Neither side or group can cast blame without first accepting it." *Id.* at S14,918 (daily ed. Oct. 23, 1987). Similarly, Senator Robert Byrd pointed out that pressure "has come from both sides." *Id.* at S14,999 (daily ed. Oct. 23, 1987); see also *id.* at S14,765-66 (daily ed. Oct. 22, 1987) (remarks of Sen. William Proxmire).

143. *Id.* at S14,918 (daily ed. Oct. 23, 1987).

that was based on the misinformation disseminated by Bork's opponents or appeals from uninformed participants in mass letter writing campaigns, such appeals do not appear to have had much influence. But senators properly listened to the more thoughtful comments of their constituents and other persons who had formed opinions about the nomination.¹⁴⁴ As Senator Patrick Leahy noted:

[Senators] took time to hear from the people, the people of the [fifty] states who elected the [one hundred] Members of the Senate who count on us to do our duty under the Constitution. Two hundred [f]orty million Americans are going to be affected by our decision on the Bork nomination. . . . That makes it all the more important that the Senate look at the nomination seriously and carefully. . . .¹⁴⁵

Allegations that public interest groups unduly influence the Senate also tend to overlook the fact that senators may induce participation by public interest groups. For example, one study of the Bork controversy has indicated that a group of liberal senators opposed Bork from the moment he was nominated and actively encouraged public interest groups to mobilize their forces in opposition to the nomination.¹⁴⁶ Senator Edward Kennedy delivered perhaps the most scathingly unfair attack on Bork immediately after the nomination, before any interest groups had an opportunity to enter the fray.¹⁴⁷ Although critics of public participation in the judicial appointment process might argue that senatorial ability to manipulate public interest groups demonstrates that the influence of such groups can be baneful, the existence of such manipulation further demonstrates that the Senate is not a helpless captive of public interest groups. It also demonstrates the fallacy of the argument that public participation in the process should be discouraged because it can be irresponsible. The same logic might lead one to conclude that the power of appointment should be vested solely in the

144. Senator Patrick Leahy, for example, said that he paid little attention to an avalanche of preposted postcards and letters, but that he considered the views expressed in the "hundreds and thousands of thoughtful and thought-provoking letters and telephone calls from the people of my State on both sides of the issues" and the many comments that his constituents made to him personally during his visits to Vermont. *Id.* at S14,792 (daily ed. Oct. 22, 1987). "[W]hatever I was doing in Vermont, somebody would come up and talk to me about this nomination. Whether it was in small towns or on city sidewalks, the people of Vermont let me know what they thought about Judge Bork." *Id.*

145. *Id.*

146. *Boston Globe*, Oct. 11, 1987, at 1, col. 6; see Garment, *supra* note 125, at 19-20.

147. In his now famous philippic against Bork, Senator Kennedy declared:

Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, . . . and the doors of the Federal courts would be shut on the fingers of millions of citizens. . . .

133 *CONG. REC.* S9188 (daily ed. July 1, 1987). For a thoughtful critique of the Senate's consideration of the Bork nomination, see Myers, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 *DEN. U.L. REV.* 1 (1988).

President because senators can be unfair to nominees. Indeed, the existence of bias among senators provides further support for encouragement of participation by public interest groups because such groups can help to counteract such biases.

Although critics of public participation in the judicial selection process correctly point out that no one can predict accurately a nominee's performance on the bench, the impossibility of making such predictions does not justify public apathy.¹⁴⁸ Even though judges often confound the hopes and fears that their nominations arouse, there is likely to be at least a rough correlation between their public records prior to their ascension to the bench and their performances on the court. The exceptions are many, but it is absurd to suggest that they swallow the rule. Accordingly, it makes no sense to suggest that a civil rights group, for example, should sit back and blithely acquiesce to the nomination of an outspoken opponent of laws or programs it supports. Although the restrictions of judicial precedent, the olympian perspective of the bench, the independence afforded by life tenure, and a host of other circumstances might cause the nominee to compile a more moderate judicial record than the organization might have predicted, the philosophies of the nominee are still very likely to find expression in the decisions of the judge.

During the fight over the Bork nomination, public interest groups also served a salubrious role by gathering information, making more reasoned presentations before the Senate Judiciary Committee, and educating and mobilizing their members. The investigatory role of the groups can be especially useful. The Department of Justice's own investigations of the candidates prior to the nomination sometimes have been deficient.¹⁴⁹ The Senate's investigations of the nominees tradition-

148. The judicial record of Judge John J. Parker after the Senate's rejection of his nomination provides an example. Many scholars have contended that Parker's subsequent record demonstrates that Parker would have been a more liberal Justice than his critics contended. See, e.g., H. ABRAHAM, *supra* note 6, at 189; Mendelsohn, *supra* note 42, at 122. A recent evaluation of Parker's record as a Fourth Circuit judge during the 28 years following his defeat in the Senate has concluded, however, that critics of his nomination to the Supreme Court were quite prescient. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 567-72 (1986).

149. In 1970, for example, the Nixon Administration failed to discover that G. Harrold Carswell in 1948 had made a public speech in which he had expressed a belief in white supremacy; records of the speech were uncovered by an enterprising radio reporter. R. HARRIS, *supra* note 99, at 26-27. In 1988 the Reagan Administration was surprised by information that was revealed about Douglas Ginsburg's background after his nomination to the Supreme Court. See Taylor, *Haste and Ideological Fights Set Nomination on Course Ending in Its Doom*, N.Y. Times, Nov. 8, 1987, at 34, col. 1. Although the revelations concerning Ginsburg and Carswell were made primarily by journalists, individual citizens often have assisted the Senate in its investigation into charges against nominees. See, e.g., *Carswell Hearings*, *supra* note 99, at 149-95, 197; *Rehnquist and Powell Hearings*, *supra* note 114, at 101-06.

ally have relied heavily upon information provided by private individuals and organized interest groups. Most particularly, the Senate traditionally has relied upon the ABA to provide an assessment of nominees' professional qualifications and until fairly recently has not even made a pretense of conducting its own investigation.

The useful role that public interest organizations perform cannot obscure the excesses that occurred during the fight over the Bork nomination. As one observer pointed out, some of the advertisements placed by Bork's opponents "seemed at least as likely to provoke simplistic fears as to spread real understanding."¹⁵⁰ Even though there is evidence that the advertisements had little impact upon public opinion,¹⁵¹ Judge Ruth Bader Ginsburg has observed rightly that "campaigns against judges that spread misinformation, turn complex issues into slogans, and play on our fears are worrisome."¹⁵²

The antidote to uninformed or fickle public opinion is not, however, to banish the public from the process but rather to encourage a wiser form of public participation. The need to encourage a form of public participation that is robust yet prudent obviously presents a challenge, especially because the growing public interest in the judicial selection process that culminated in the fight over the Bork nomination demonstrates that the activities of organized interest groups and private individuals have become a permanent feature of the judicial selection process.¹⁵³

The worst features of the Bork battle are not likely to recur again soon because few nominations are likely to be so controversial. The ease of Anthony Kennedy's confirmation after the uproar over Bork, and the lack of controversy inspired by the nomination of Harry Blackmun after the fights over Haynsworth and Carswell, demonstrated that most public interest groups have neither the resources nor the inclination to initiate a crusade against every nominee whose judicial philosophy is at odds with their own. A high degree of deference must be accorded to the President, who has the sole power to select a nominee. Even if quer-

150. Taylor, *Of Bork and Tactics*, *supra* note 122.

151. The results of public opinion polls showed that the sharpest swing against Bork resulted from his five days of televised testimony. *Id.* While it is disturbing that much of the unfavorable reaction to Bork's testimony appears to have been attributable to form rather than to substance, it is encouraging to suppose that the public reaction to Bork at least appears to have been formed in part from Bork's own testimony rather than from hysterical or misleading advertisements.

152. Ginsburg, *supra* note 124, at 117.

153. Professor Gregory Caldeira has concluded that "organized group mobilization and pressure on controversial judicial nominations has become a permanent feature of our political landscape" and "[t]his conflict has been institutionalized." Caldeira, *Commentary on Senate Confirmation of Supreme Court Justices: The Roles of Organized and Unorganized Interests*, 77 *KY. L. REV.* 531, 538 (1988-1989).

ulous groups financed major campaigns against every nominee whose political persuasion differed from their own, it is unlikely that such efforts would have much impact on the Senate. Alexander Hamilton observed that senators will not reject the President's candidate merely because they prefer someone else because they could not be certain "that the subsequent nomination would fall upon their favorite, or upon any other person in their estimation more meritorious than the one rejected."¹⁵⁴ Accordingly, while the intense public participation in the Bork nomination process is part of a salubrious trend toward heightened public interest in the judicial selection process, the excesses of that participation probably represent an aberration. Nevertheless, the danger of a recurrence of the unfair tactics that characterized the Bork struggle remains present, especially in the event of a controversial nomination. As Professor Ronald Rotunda has warned, "At a future confirmation, there will always be waiting in the sidelines the possibility of a media blitz of innuendo and false statement, converting complex theories of jurisprudence into snappy slogans."¹⁵⁵

Meanwhile, the benefits of public participation in the federal judicial selection process appear to outweigh the abuses. In the unlikely event that the excesses seen during the Bork fight become a common feature of the judicial selection process, means for curbing such abuses will need to be developed. The search for such means will not be simple. As Judge Ginsburg has observed, there is "no magic formula for making the interest groups involved act more responsibly, for keeping their comment fair."¹⁵⁶ The most obvious ameliorative, a limit on spending, raises obvious first amendment problems. At the present time, however, discussion of such measures would be premature.

While the time has not come yet for the government to impose restrictions on public participation in the judicial selection process, the time is surely ripe for public interest groups to consider how they might make such participation more responsible. The techniques that groups should use in supporting or opposing a nomination should vary according to the nature of the group. An organization, such as the ABA, that has a politically diverse constituency and purports to base its recom-

154. THE FEDERALIST No. 66, at 449 (A. Hamilton) (J. Cooke ed. 1961). Hamilton argued that the Senate's "sanction would [not] often be refused, where there were not special and strong reasons for the refusal." THE FEDERALIST No. 76, at 513 (A. Hamilton) (J. Cooke ed. 1961).

155. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 585 (1988). Similarly, Professor Rotunda has expressed the not unreasonable fear that "[w]hat may become a legacy of the nomination of Robert Bork is the tendency to treat a confirmation as if it were an election campaign, a media event complete with an avalanche of stump speeches and a bombardment of negative advertising, all accompanied by extensive direct mail advertising, campaign buttons, and solicitation of funds." *Id.*

156. Ginsburg, *supra* note 124, at 117.

mendations on nonpolitical criteria should ensure that its advocacy avoids a partisan cast. Because the avowed purpose of the ABA's ratings procedure is to ensure the selection of temperate, honest, and competent judges, the ABA should make certain that it polls a broad segment of the bar and that its ratings reflect their stated objectives. The difficulty in applying such "objective" criteria is that ideological and political considerations may influence evaluations of competence and temperament. For example, only one of the five members of the ABA Standing Committee which concluded that Judge Bork's temperament should have precluded him from receiving a rating of "Qualified" based his dissent in part upon a relatively "objective" factor: reservations about what that member termed Bork's inconsistent and possibly misleading recollections of the events surrounding the resignations of Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus during the investigation of the Watergate scandal.¹⁵⁷ The dissents of the other members were based solely upon concerns about Judge Bork's "compassion, open-mindedness, his sensitivity to the rights of women and minority groups and comparatively extreme views respecting constitutional principles or their application, particularly within the ambit of the Fourteenth Amendment."¹⁵⁸ Such an evaluation appears to have been colored by relatively subjective political considerations. In contrast, an organization that promotes a specific political objective need not make any pretense of representing the public interest or presenting a balanced view of the candidate. Barring any knowing or negligent misrepresentation of the nominee's record, the group zealously may oppose or support a nomination for the narrowest of reasons. Senators are not likely to mistake the nature of such a narrow-interest group's lobbying activities.

A group properly may attempt to define and advocate a public interest that transcends its own narrow interests and may draw parallels between its own members' interests and the interests of various other persons, but special interest groups should avoid hypocrisy. For example, a labor union properly may oppose a nomination on the ground that the nominee's views on civil liberties are antithetical to ideals of personal freedom that affect union members but that also go far beyond issues of trade unionism. The union should not pretend, however, that its principal concern is civil liberties or racial equality if its real quarrel with the nominee is his or her attitude toward trade unions.

157. SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. DOC. NO. 7, 100th Cong., 2d Sess. 5-6 (1988) [hereinafter BORK REPORT].

158. *Id.* at 5.

IV. THE ROLE OF THE AMERICAN BAR ASSOCIATION

A. *Procedures and Practices*

The ABA has lobbied more pervasively, and perhaps more persuasively, with respect to judicial nominations than any other private interest group. The opinions of the 328,000-member ABA would be significant under any circumstances because the ABA is the largest and most significant bar group in the country. Not content, however, merely to influence the process from outside the government, the ABA meticulously has developed a special institutionalized relationship with the executive branch. Since the formation in 1946 of what now is called its Standing Committee on Federal Judiciary,¹⁵⁹ the ABA regularly has made recommendations to the Department of Justice based upon its review of the professional qualifications of persons identified by the Department as potential nominees for the federal judiciary.¹⁶⁰ The Standing Committee was particularly thorough in its investigation of Judge Bork.¹⁶¹

Throughout its history the fifteen member Standing Committee¹⁶² has purported to rank prospective nominees on the basis of integrity,

159. For a discussion of the formation of the Committee, see Grossman, *The Role of the American Bar Association in the Selection of Federal Judges: Episodic Involvement to Institutionalized Power*, 17 VAND. L. REV. 785, 793-96 (1964). Even before 1946, the ABA hardly had been a passive observer of the judicial selection process. During the first decades after its formation, the ABA had concerned itself primarily with the systems for selecting and retaining judges at the state level because the ABA regarded the state courts, in contrast to the federal courts, as centers of radical thought. *Id.* at 791. Although the ABA did not comment formally upon judicial nominees, seven former presidents opposed the nomination of Brandeis in 1916. *Id.* at 790-91. By 1932 the ABA had established a Special Committee to advise the Senate Judiciary Committee on judicial nominations. *Id.* at 792-93.

160. For a history of the Standing Committee during its first 15 years, see J. GROSSMAN, *LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION* 58-80 (1965). Professor Joel Grossman's book also provides a thorough discussion of the procedures followed by the Committee as of 1965 and offers a sound critique of its role in the judicial selection process.

161. In its investigation of Judge Bork, for example, the Committee interviewed Judge Bork, five members of the United States Supreme Court, many of his colleagues on the D.C. Circuit Court of Appeals, and approximately 170 other federal and state court judges throughout the United States. *Bork Hearings*, *supra* note 121, at 5. The Committee also conducted interviews with approximately 150 practicing lawyers, 79 law school deans and professors, 11 of Judge Bork's former law clerks, and a number of attorneys who served under Bork when he was Solicitor General. *Id.* The dean and 10 professors at the University of Michigan Law School examined Judge Bork's opinions for the Committee, which also received submissions from a number of institutions and groups. *Id.*

162. The president of the ABA appoints members of the Standing Committee, which consists of two members from the Ninth Circuit, one member from each of the other twelve federal judicial circuits, and one member-at-large. ABA, *STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS* 1 (1988) [hereinafter 1988 *STANDING COMMITTEE ON FEDERAL JUDICIARY*]. The members are appointed for staggered three-year terms and may not serve for more than two terms. *Id.* As a condition of appointment, each member agrees not to seek or accept federal judicial appointment while on the committee and for at least one year thereafter. *Id.*

competence, and judicial temperament.¹⁶³ A 1977 ABA brochure stated that “[t]he Committee does not attempt to investigate or report on political or ideological matters” with respect to the prospective nominee.¹⁶⁴ In 1980, however, the Standing Committee acknowledged that its evaluations would not exclude ideological considerations entirely: the evaluation of prospective nominees would be directed “primarily” to the professional qualifications of competence, integrity, and judicial temperament, and “[t]he Committee does not investigate the prospective nominee’s political or ideological philosophy except to the extent that extreme views on such matters might bear upon judicial temperament or integrity.”¹⁶⁵ Following criticisms of its role in the judicial selection process, the Standing Committee in June 1988 deleted the word “primarily” from the language quoted above and declared that “[p]olitical or ideological philosophy are not considered except to the extent that they may bear upon other factors.”¹⁶⁶ This change, however, did not satisfy the Standing Committee’s critics; some critics alleged that the change actually increased the ABA’s latitude in considering political and ideological philosophies.¹⁶⁷ After criticism by the Reagan Administration, the ABA has agreed to delete this language and to add a sentence stating that the ABA does not consider political or ideological philosophy.¹⁶⁸

In their evaluations of prospective Supreme Court nominees, Standing Committee members interview persons who are knowledgeable-

163. According to the Standing Committee’s official handbook, the Committee “considers circumstances and factors which range so widely that it would be difficult to provide a comprehensive catalogue.” *Id.* at 3. The handbook nevertheless attempts to explain the general guidelines that the Committee considers. “Integrity” includes the prospective nominee’s character, general reputation in the legal community, industry, and diligence. “Professional competence” is defined as embracing “such qualities as intellectual capacity, judgment, writing and analytical ability, industry, diligence, knowledge of the law and professional experience.” In evaluating competence, the Committee prefers prospective nominees who have been admitted to the bar for at least 12 years and have had “[s]ubstantial trial experience.” The Committee states that it considers that political activity and public service are valuable experiences, but that such activity and service are not a substitute for significant experience in the practice of law. “Judicial temperament” includes “the prospective nominee’s compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice.” *Id.* at 3-4.

164. ABA, *STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS* 2 (1977).

165. ABA, *STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS* 4 (1980).

166. 1988 *STANDING COMMITTEE ON FEDERAL JUDICIARY*, *supra* note 162, at 3.

167. In its brief in the ABA case, the Washington Legal Foundation pointed out that “[i]t now seems that the ABA believes that even the *non*-extreme political or ideological views of a candidate can be considered in evaluating the qualifications of candidates.” Brief for Appellant at 7 n.5, *Washington Legal Found. v. ABA Standing Comm. on the Fed. Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986) (No. 85-3918) (emphasis in original).

168. See *infra* notes 194-200 and accompanying text.

ble about the prospective nominee's qualifications, and they receive reports from specially commissioned teams of law school professors and practicing lawyers. According to the Committee, its investigation "is intended to weigh professional competence, not to assess the ideology of the prospective nominee."¹⁶⁹ The Committee frequently has changed the categories of rankings that it gives to prospective nominees.¹⁷⁰ Currently, the ABA ranks candidates for the lower federal courts as "Exceptionally Well Qualified," "Well Qualified," "Qualified," and "Not Qualified."¹⁷¹ Supreme Court nominees are ranked as "Well Qualified," "Qualified," and "Not Qualified."¹⁷² The rating and the report remain confidential.¹⁷³ The Standing Committee's rating, together with such other information as Federal Bureau of Investigation reports, the prospective nominee's financial declaration, and reports on medical background, are considered in the Attorney General's recommendation to the President.¹⁷⁴

Different Presidents have accorded different levels of deference to the ABA's opinions. Since 1956, attorneys general usually have permitted the ABA to comment on prospective nominations to the lower fed-

169. 1988 STANDING COMMITTEE ON FEDERAL JUDICIARY, *supra* note 162, at 8.

170. See S. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 107-12 (3d ed. 1988).

171. 1988 STANDING COMMITTEE ON FEDERAL JUDICIARY, *supra* note 162, at 7. The ABA's handbook explains that the rating of "Exceptionally Well Qualified" is "sparingly awarded" and indicates that the nominee stands "at the top of the legal profession in the community" and has "outstanding legal ability, wide experience and the highest reputation for integrity and temperament." To merit this rating, a candidate also "should have a reputation as an outstanding citizen who has made important community and professional contributions." *Id.* An award of the "Well Qualified" ranking requires a nominee to "have the Committee's strong affirmative endorsement and be regarded as one of the best available for the vacancy from the standpoint of integrity, competence, and temperament." *Id.* The evaluation of "Qualified" indicates that the prospective nominee would appear to "be able to perform satisfactorily as a federal judge with respect to integrity, competence, and temperament." *Id.* A ranking of "Not Qualified" means that the Committee's investigation indicates that the candidate "is not adequate from the standpoint of integrity, competence, or temperament." *Id.*

172. *Id.* at 9. The explanations of the categories for Supreme Court nominees are more amorphous than are the definitions of the rankings for lower federal nominees. The Standing Committee's handbook explains that the designation of "Well Qualified" is reserved for persons "who meet the highest standards of integrity, professional competence, and judicial temperament." Such persons "must be among the best available for appointment to the Supreme Court." *Id.* A person who is in the second category, "while not deemed unqualified by the Committee, is not among the best available for the appointment." *Id.* The handbook does not explain the Committee's criteria for the "Unqualified" designation, except to suggest that such persons simply lack Supreme Court caliber. *Id.*

173. *Washington Legal Found. v. ABA Standing Comm. on Fed. Judiciary*, 648 F. Supp. 1353, 1355 (D.D.C. 1986).

174. *Washington Legal Found. v. United States Dep't of Justice*, 691 F. Supp. 483, 487 (D.D.C. 1988), *aff'd sub nom. Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989).

eral courts.¹⁷⁵ Beginning with the nomination of William Brennan in 1956, the Justice Department also has notified the ABA of most prospective Supreme Court nominations twenty-four hours prior to their transmission to the Senate.¹⁷⁶ In view of the ABA's conservative political leanings, it is not surprising that the Standing Committee has had more influence upon Republican administrations.¹⁷⁷ No President can afford to ignore the influence of the Standing Committee; even Democratic Presidents have listened carefully to its opinions.¹⁷⁸ For example, a study of President Lyndon Johnson's court appointments concluded that the Standing Committee exercised the greatest continuing influence over the judicial selection process of any nonfederal government actor.¹⁷⁹

A major structural change in the judicial selection process threatened the influence of the Standing Committee when the Carter Administration established the United States Circuit Judge Nominat-

175. L. KOHLMEIER, *supra* note 85, at 221. The ABA's review of candidates for lower court positions usually is conducted by the member of the Standing Committee who resides in the judicial circuit in which the vacancy exists. The member examines a Personal Data Questionnaire that the candidate completes; studies the available legal writings of the prospective nominee; and conducts a large number of confidential interviews with a representative sampling of attorneys and various persons who have knowledge of the candidate's competence, integrity, and temperament. A personal interview with the candidate also is conducted. The member then prepares a report for the Committee.

176. J. GROSSMAN, *supra* note 160, at 806. For a brief but eventful period during the Nixon Administration, the ABA was given an opportunity to take a closer look at prospective nominees. Following the defeat of the Haynsworth and Carswell nominations, the Department of Justice under John Mitchell arranged to submit to the ABA for its private comment the names of persons whom the President was considering for nomination. The arrangement turned into a contretemps when the ABA took a dim view of the six persons that the Nixon Administration proposed as successors for Justices Hugo Black and John Harlan in 1971. See L. KOHLMEIER, *supra* note 85, at 219-41.

177. For example, President Harry S. Truman's attitude toward the Committee seemed to range from indifference to contempt. J. GROSSMAN, *supra* note 160, at 64-69. During the Eisenhower Administration, however, the Standing Committee appears to have achieved "a degree of access to the judicial-selection process not theretofore attained by any private association." *Id.* at 69. The Kennedy Administration, in turn, was less amenable to the Standing Committee's suggestions. *Id.* at 78-80. Similarly, President Lyndon Johnson had a stormy relationship with the Standing Committee during the first half of his tenure, although relations improved after he came to recognize the political advantages of cooperation with the ABA. See N. McFEELEY, APPOINTMENT OF JUDGES: THE JOHNSON PRESIDENCY 60-65 (1987). During the Nixon and Ford Administrations, the position of the ABA appears to have strengthened. See S. WASBY, *supra* note 170, at 108. A study of judicial selection during the Carter Administration concluded that "[t]he Committee's evaluation still carries great weight, but it is likely that the Standing Committee does not exercise the influence it will have during a Republican Administration . . ." A. NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES, AND CANDIDATES 44 (1981) (assessing federal judicial selection during the Carter Administration).

178. See *supra* note 177 and accompanying text.

179. N. McFEELEY, *supra* note 177, at 60.

ing Commission in 1977¹⁸⁰ and encouraged senators to establish similar screening commissions in their states.¹⁸¹ As one observer pointed out, "one could argue that the nominating panels cut at the heart of the ABA Committee's credibility" if the Standing Committee opposed a nominee approved by the commissions, because the President could rely upon the commission's recommendation and "remain insulated from the negative impact of a poor ABA rating."¹⁸² The Carter Administration also may have diluted the influence of the Standing Committee when it solicited evaluations of the candidates' views concerning racial, religious, and gender discrimination from the National Bar Association and the Federation of Women Lawyers.¹⁸³ Reliance upon the Standing Committee also may have diminished since the Senate Judiciary Committee began to undertake its own independent investigation of nominees.¹⁸⁴ Despite these changes, however, the Standing Committee contended that it maintained its influence during the Carter Administration to the extent that it improved its relations with the Senate Judiciary Committee and remained the principal source of information concerning nominees and potential nominees.¹⁸⁵ The Standing Committee also shifted its focus from screening potential nominees to reviewing the qualifications of actual nominees.¹⁸⁶

Although the Reagan Administration did not continue the circuit court panels¹⁸⁷ and did not have direct contact with the National Bar Association or the Federation of Women Lawyers, it did not rely entirely upon the ABA in assessing the quality of judicial candidates. As part of its emphasis upon the ideology of nominees, the Reagan Administration internally conducted much of the judicial screening process. The center of this process, the Office of Legal Policy, was systematized

180. Exec. Order No. 11,972, 3 C.F.R. 96 (1978). The order later was superceded by Exec. Order No. 12,059, 3 C.F.R. 180 (1979).

181. Exec. Order No. 12,097, 3 C.F.R. 254 (1979).

182. Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment* (pt. 1), 66 JUDICATURE 349, 353 (1983). Professor Elliot Slotnick pointed out that "[t]he president held an advantage in any disagreement with the ABA's findings since his panels were representative and included several attorneys from the region where an appointment was being made while the ABA's depended on an investigation predominately [sic] run by a single attorney from the region." *Id.*

183. A. NEFF, *supra* note 177, at 45.

184. *Id.* at 42. The Judiciary Committee "hired investigators for this purpose and developed a personal information questionnaire similar to those used by many individual senators and commissions, the Standing Committee, and [various] other organizations . . ." *Id.*

185. See Slotnick, *supra* note 182, at 352-53. An ABA Standing Committee co-chairperson, Brooksley Born, has contended that during the Carter Administration the Committee continued to enjoy a "most favored status" because of the depth of its investigations. *Id.*

186. *Id.* at 353.

187. Exec. Order No. 12,305, 3 C.F.R. 150 (1982).

to an unprecedented degree.¹⁸⁸ As another major innovation, the Reagan Administration established the President's Committee on Federal Judicial Selection, which conducted its own investigation of candidates, independent of the Department of Justice's investigations.¹⁸⁹ At the district court level, senators in some states continued to consult nominating commissions in making recommendations to the President.¹⁹⁰ One study of the judicial selection process at the end of President Ronald Reagan's first term in office, concluded that the Reagan Administration was "the first Republican Administration in 30 years in which the American Bar Association Standing Committee on Federal Judiciary was not actively utilized and consulted in the pre-nomination stage."¹⁹¹ A follow-up study at the end of Reagan's second term concluded that the Reagan Administration had a more distant relationship with the Standing Committee than previous Republican administrations.¹⁹² In contrast to earlier practice, the Reagan Administration gave the Standing Committee only one name to evaluate for each vacancy, and there were no close relations between Department of Justice officials and the

188. See S. WASBY, *supra* note 170, at 103-04; Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319 (1989) (stating that "for the first time in the history of judicial selection, all leading candidates for judicial positions were brought to Washington for extensive interview[s] by Justice Department [staff]"). The Reagan Administration also carefully scrutinized the candidate's prior judicial record, writings, and speeches. S. WASBY, *supra* note 170, at 103-04. For an analysis of the Reagan Administration's use of ideology in the selection of judges, see H. SCHWARTZ, *PACKING THE COURTS* (1988).

189. See S. WASBY, *supra* note 170, at 199; Goldman, *Reorganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313, 315-16 (1985); Slotnick, *Federal Judicial Recruitment and Selection Research: A Review Essay*, 71 JUDICATURE 317, 319 (1988). The committee "was chaired by the counsel to the president and included the assistant to the president for personnel, the assistant to the president for legislative affairs, the attorney general, the deputy attorney general, the deputy assistant attorney general, and the assistant attorney general for legal policy." Goldman, *supra* note 188, at 320. Professor Sheldon Goldman concluded that at the end of Reagan's first term "[i]t is perhaps not an overstatement to observe that the formal mechanism of the Committee has resulted in the most consistent ideologic or policy-orientation screening of judicial candidates since the first term of Franklin Roosevelt." *Id.* at 315. Professor Goldman concluded at the end of Reagan's second term that "[a]rguably, the Reagan administration was engaged in the most systematic judicial philosophical screening of judicial candidates ever seen in the nation's history." *Id.* at 319-20.

190. See Fowler, *Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures*, 67 JUDICATURE 265, 269-73 (1984); S. WASBY, *supra* note 170, at 103.

191. Goldman, *supra* note 189, at 316. Professor Goldman has cautioned, however, that the Reagan Administration's exclusion of the ABA from the prenomination process does not necessarily "suggest that relations were cool with the ABA Committee." *Id.* Goldman has found that the Administration appears to have had a close working relationship with the Standing Committee after the selection of nominees and that the Reagan Administration was concerned that its nominees receive high ABA ratings even if it was not willing to give the Committee "an opportunity to influence the selection during the more fluid pre-nomination stage." *Id.*

192. Goldman, *supra* note 188, at 320.

Committee chairperson.¹⁹³

Although it is too early to assess the Bush Administration's relationship with the Standing Committee, several significant events already have occurred. Attorney General Richard Thornburgh asked the ABA to agree categorically to refrain from undertaking any consideration of a candidate's political or ideological views.¹⁹⁴ In testimony before the Senate Judiciary Committee on June 2, 1989, Thornburgh indicated that he was troubled particularly by the language of the June 1988 version of the Standing Committee's *Brochure*, which stated that "[p]olitical or ideological philosophy are not considered, except to the extent that they may bear upon other factors."¹⁹⁵ Thornburgh told the Senate Judiciary Committee that the Standing Committee had complied with the Administration's request and had "seen fit to withdraw from an area that was not only contentious, but in my view improper for their consideration."¹⁹⁶ Shortly after Thornburgh testified before the Senate Committee, ABA president Robert Raven declared that "[w]e have never gotten into political ideology, so there is no change."¹⁹⁷ In a May 8, 1989, letter to Thornburgh, Raven similarly indicated that the Standing Committee had not considered the politics or ideology of candidates.¹⁹⁸ Thornburgh, however, continued to contend that the language of the Standing Committee's *Brochure* indicated that the Standing Committee was willing to make improper inquiries concerning political and ideological philosophy.¹⁹⁹ Raven announced in June 1989 that the Committee, in order to correct misperceptions, would delete the offending passage and add a sentence declaring that "[p]olitical or ideological philosophy are not considered."²⁰⁰

Despite the controversy between the ABA and the Department of Justice concerning the *Brochure*, the Standing Committee was expected

193. *Id.*

194. Attorney General Thornburgh explained to the Senate Judiciary Committee during testimony on June 2, 1989, that "I and others have been disturbed that during this decade the [Standing] Committee has extended its inquiry in[to] areas which I believe are more properly left to the administration and the legislative branch." *American Bar Association Nomination Process: Hearings Before the Senate Judiciary Comm.*, 101st Cong., 1st Sess. (1989) [hereinafter *ABA Hearings*] (official printing not yet available; unofficial copy of testimony on file with Author) (statement of Richard Thornburgh, United States Attorney General).

195. See *supra* note 166 and accompanying text.

196. *ABA Hearings*, *supra* note 194.

197. *Id.*, quoted in *A.B.A. to Resume Rating of Judicial Nominees*, N.Y. Times, June 3, 1989, at 9, col. 1.

198. Letter from Robert Raven to Attorney General Richard Thornburgh (May 8, 1989) (provided to Author by Senate Judiciary Committee).

199. *ABA Hearings*, *supra* note 194.

200. Raven stated that "[a]ny implication that the change we have agreed upon is to correct improper activity, rather than misperceptions, would do a grave injustice to the committee." *Id.*, quoted in *A.B.A. to Resume Rating Judicial Nominees*, *supra* note 197.

to enjoy a more prominent role in the Bush Administration when Thornburgh chose Robert B. Fiske, a former chairman of the Standing Committee, to be Deputy Attorney General. Fiske's association with the Standing Committee, however, led conservatives to oppose Fiske's nomination. On July 6, 1989, Fiske withdrew from consideration because of the likelihood of a "prolonged controversy" concerning his role on the Standing Committee.²⁰¹ Earlier, at the Senate hearings on June 2, 1989, Thornburgh explained that "[w]e seek the input, under appropriate circumstances, of the American Bar Association particularly on professional qualifications. But our doors are open to any individual or group that wants to express an opinion."²⁰²

B. *The ABA Case*

1. Antecedents

The high level of influence that professional organizations have exercised in the judicial selection process has long assured the emergence of critics who allege that such influence is excessive. In 1912, for example, Theodore Roosevelt made the following observation regarding state judicial nominations:

If a judge were only to deal with lawyers, then it would be right to consider primarily the view that the various Bar Associations may take of [a judicial nomination]. But judges deal not only with individual rights of men and women, but under the American system of government they deal with the fundamental rights of men and women in masses, with the right of the people to secure social justice. From this standpoint the interest of the local Bar Association or the local Chamber of Commerce is no more important than the interest of the labor union or the grange, than the interest of the individual clerk, or retail trader, or wage-worker, or small farmer.²⁰³

The ABA's immense influence in the judicial selection process has made it a particular target of criticism. In 1979, for example, the Judicial Selection Project, a broadly based interest group that monitored judicial recruitment procedures, declared that it objected "to the quasi-official status that is sometimes given to that committee and to its recommendations."²⁰⁴ A popular study of the federal judiciary earlier in

201. Wines, *Thornburgh Abandons Choice for Top Justice Post*, N.Y. Times, July 7, 1989, at A1, col. 2 (nat'l ed.).

202. *ABA Hearings*, *supra* note 194.

203. Roosevelt, *The Judges, the Lawyers, and the People*, 101 OUTLOOK 1003, 1004 (Aug. 31, 1912).

204. See *Selection and Confirmation of Federal Judges: Hearing Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., pt. 1, at 71 (1979) (testimony of Charles Halpern). At the same hearings, Senator Patrick Leahy of Vermont remarked that "[w]ith all due respect to the American Bar Association, there have been some who have suggested that their very significant role in determining the qualification of judges has been on some occasions like Jack the Ripper determining the qualifications of surgeons . . ." *Id.* at 10.

the 1970s had alleged that "the ABA wants to exercise professional birth control over the judiciary, but not take full responsibility for doing so."²⁰⁵

The Standing Committee's harshest critics traditionally have been liberals, who have contended that the ABA's views on judicial selection reflect the conservative biases of the elite corporate practitioners who allegedly dominate the ABA.²⁰⁶ During the Reagan Administration, however, the Standing Committee began to attract the ire of conservatives. The emergence of conservative hostility toward the ABA is attributable to the ascendancy of ideological conservatism during the Reagan Administration and also may be related to changes within the ABA itself. The political views of the judicial candidates favored by the government shifted toward the right at the very time that the political tone of the ABA may have grown more liberal.²⁰⁷ In contrast to previous administrations, the Reagan Administration favored judicial candidates whose political and judicial views often were even more conservative than the views that traditionally have prevailed among the ABA leadership. Meanwhile, the ABA's apparent attempts to diversify the political complexion of the membership of the ABA Standing Committee may have made the Standing Committee more sympathetic to liberal judicial candidates. By the middle years of the Reagan Administration, conservatives had begun to complain that political considerations had motivated the Standing Committee to express reservations about some qualified conservative candidates and to block the nominations of others.²⁰⁸ The Committee members' practice of consulting with repre-

205. J. GOULDEN, *THE BENCHWARMERS* 40 (1972).

206. D. O'BRIEN, *JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION* 93 (1988).

207. Although generalizations about the ABA's political character are highly problematical, many conservatives have alleged that the ABA is increasingly liberal. For example, one recent article stated that "[a]long with many of the large law firms that are still the chief source of its leadership, the ABA has changed from stuffed-shirt conservative to stuffed-shirt liberal." Allen, *Judgment Day for a Judging Panel*, *INSIGHT*, Mar. 20, 1989, at 47.

208. In 1985 conservative activists at the Washington Legal Foundation alleged that the "Committee has successfully blocked the nomination of well-qualified conservative lawyers and delayed the appointment of such leading constitutional scholars as J. Harvie Wilkinson III of the University of Virginia" and "effectively . . . side-tracked" the confirmation of other conservative scholars, including Professors Lino Graglia of the University of Texas and William Harvey of Indiana University. Popeo & Kamenar, *Behind Closed Doors: How the ABA Vetoes Judicial Nominations*, 2 *BENCHMARK* 11 (1986); see also Dwyer, *Picking Federal Judges: Is the ABA Too Powerful?*, *BUS. WK.*, June 9, 1986, at 78. Professor Graglia contends that the ABA blocked his nomination because he was a longtime opponent of affirmative action and forced busing for school integration. See Allen, *supra* note 207, at 47. Similarly, Senator Gordon J. Humphrey of New Hampshire has contended that the ABA appears to have blocked Professor Harvey's nomination to the Seventh Circuit Court of Appeals in 1985 because the ABA disapproved of his leadership of the Legal Services Corp., especially his reduction in funding for the ABA's Fund for Public Education. Harvey withdrew his name from consideration after delays in the ABA's investigation. Humphrey, *End*

sentatives of liberal groups particularly aroused the ire of conservatives. Even prior to promulgation of the controversial 1980 guidelines, Committee members met regularly with representatives of NOW, the ACLU, and other liberal groups.²⁰⁹ After Reagan became President, the Committee began to send names of potential nominees to People for the American Way, a group that had announced its intention to oppose conservative judicial nominees, and the Alliance for Justice, an umbrella group of twenty-six liberal organizations that established its own Judicial Selection Project in 1985.²¹⁰

The tension between the ABA and conservatives intensified when the Standing Committee failed to endorse Bork overwhelmingly. For the first time since the Standing Committee began evaluating Supreme Court nominees, a substantial minority of the Standing Committee found that a nominee was "Not Qualified." Ten members voted that Bork was "Well Qualified," four members declared that he was "Not Qualified," and one member voted "Not Opposed."²¹¹ The ABA's response to the Bork nomination renewed senatorial criticism of the ABA's role. During the hearings on Bork and Kennedy, conservative senators questioned the propriety of the ABA's part in the judicial selection process. Senator Alan Simpson told an ABA representative that "somehow the [ABA] has become a bigger player tha[n] they should be here We do not have a hearing until we have had the word from the ABA, and I don't think it's right" ²¹² Similarly, Senator Gordon Humphrey observed that "[t]he ABA is taken very seriously, perhaps too seriously by the public, and the Senate" in the judicial selection process.²¹³

ABA Role As Hanging Judge, Wall St. J., Mar. 22, 1989, at A14, col. 3. Senator Humphrey also contends that "[t]here is good reason to believe that the ABA's scrutiny of James Graham's religious beliefs was an improper factor in the inexplicably low rating he received in 1986 when he was nominated for the federal district court in Ohio." *Id.* Likewise, Arthur Schwab, an attorney in Philadelphia, has alleged that the ABA blocked his nomination because of hostility toward his conservative political and religious views. Wall St. J., Apr. 11, 1989, at A22, col. 1. Similarly, Senator Charles Grassley has alleged that the Standing Committee's political biases explain why the Committee accorded no better than a "Qualified" ranking to the eminent conservative legal scholars Frank Easterbrook, Richard Posner, and Ralph K. Winter, all of whom were confirmed nevertheless. Grassley, *Judging the Judges: A Memo to the ABA*, CHRISTIAN SCI. MONITOR, Feb. 11, 1988, at 15, col. 1.

209. See Allen, *supra* note 207, at 47.

210. *Id.*

211. BORK REPORT, *supra* note 157, at 4. Prior to the Bork nomination, Rehnquist in 1971 and Haynsworth in 1969 were the only nominees to receive less than unanimous approval from the Standing Committee. Three members declared that they were "not opposed" to Rehnquist, *id.*, and the second vote on Haynsworth was eight to four, *id.*

212. *Kennedy Hearings*, *supra* note 120, at 276. Senator Simpson concluded that the Senate should blame itself for the ABA's excessive role. *Id.*

213. *Bork Hearings*, *supra* note 121, at 943.

In view of the growing conservative hostility toward the Standing Committee, it is not so ironic that the first legal challenge to the ABA's arrangement with the government was brought by a conservative public interest group, the Washington Legal Foundation (WLF). In 1985, prior to the Bork nomination, the WLF commenced an action against the ABA for a judgment declaring that the Standing Committee's procedures violated the Federal Advisory Committee Act (FACA)²¹⁴ and the Freedom of Information Act.²¹⁵ The WLF alleged that the Standing Committee constituted an "advisory committee"²¹⁶ as defined by FACA and that the Committee, therefore, was required to: 1) provide reasonable advance public notice of its meetings; 2) open its meetings to the public; 3) provide the plaintiff and the public with access to the Committee's records; and 4) recompose the membership of the Committee so that it was fairly balanced in terms of points of view represented.²¹⁷ Although the United States District Court for the District of Columbia ruled that the WLF had standing to bring the suit based on allegations that it had been "directly affected" by the Standing Committee's lack of balance, the court dismissed the lawsuit because FACA does not authorize a private party to bring an action against a private, preexisting group that has not been established, appointed, and financed by the government.²¹⁸ Although the WLF lost the suit, it won something of a victory when the ABA Committee agreed in the wake of the lawsuit to discontinue its practice of passing candidates' names to liberal groups.²¹⁹

2. The District Court's Decision

Prior to dismissal of its case, the WLF and a liberal public interest group, the Public Citizen Litigation Group, commenced an action against the Department of Justice in the same court for the same relief sought in the earlier action, except that the plaintiffs did not allege that FACA required a balance of membership. In an August 1988 opinion, the district court held that while the Standing Committee was an "advisory committee" within the meaning of FACA, application of FACA to the Standing Committee would violate the separation of powers doc-

214. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. (1988)).

215. Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

216. 5 U.S.C. app. § 3(2) (1988).

217. Complaint for the Washington Legal Foundation para. 1, *Washington Legal Found. v. ABA Standing Comm. on Fed. Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986) (No. 85-3918).

218. *Washington Legal Found. v. ABA Standing Comm. on Fed. Judiciary (WLF I)*, 648 F. Supp. 1353, 1358, 1361 (D.D.C. 1986).

219. See Allen, *supra* note 207.

trine and the President's constitutional power of appointment.²²⁰

The court first found that the ABA Standing Committee fit squarely within FACA's definition of an "advisory committee":

any committee, board, commission, council, conference, panel, task force, or other similar group . . . which is— . . .

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government²²¹

Although the government obviously did not establish the ABA Standing Committee, the district court had no trouble finding that the Department of Justice clearly "utilized" the Standing Committee "by directly and preferentially soliciting its assistance and recommendation on judicial nominees."²²² The court also found that the ABA Standing Committee fit squarely within the General Services Administration's (GSA) definition of a committee utilized by FACA.²²³ The court explained that the "Committee's historically lengthy, direct, and significant relationship with DOJ in the evaluation process has clearly made it a preferred source of advice in the nomination process." The court observed that the "relationship between DOJ and the ABA Committee is mutual, direct, and to a large extent exclusive" because nominees are directed by the Department of Justice to submit personal information to the ABA on an ABA-designed questionnaire; the ABA Standing Committee is the only nongovernmental entity that routinely receives from the Department of Justice the names of potential nominees in advance of public announcement; and the ABA Standing Committee first reports confidentially to the Department of Justice and reports only later, and publicly, to the Senate.²²⁴ Finally, the court rejected the defendant's

220. *Washington Legal Found. v. United States Dep't of Justice (WLF II)*, 691 F. Supp. 483, 490, 496 (D.D.C. 1988), *aff'd sub nom. Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989).

221. 5 U.S.C. app. § 3(2) (1988).

222. *WLF II*, 691 F. Supp. at 488. The court contended that the statute's legislative history, although not "greatly illuminating," also supported a liberal interpretation of the word "utilized." *Id.*

223. In regulations promulgated by the GSA under FACA, a committee "utilized" under FACA is defined as follows:

a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

41 C.F.R. § 101-6.1003 (1988).

224. *WLF II*, 691 F. Supp. at 488-89.

argument that Congress did not intend FACA to cover the ABA Committee.²²⁵

After concluding that the plain language of FACA, its legislative history, its purpose, and GSA's interpretation of the Act all supported the conclusion that the Standing Committee was subject to the requirements of FACA, the court invoked a balancing test in order to determine whether the application of FACA would disrupt the proper balance between the coordinate branches of government. Affirming that the clear language of the Constitution assigns the President exclusive power over the nomination of federal judges,²²⁶ the court concluded that the "obvious and significant potential" for disruption of the President's constitutional prerogative during the nomination process was not justified by any overriding congressional need to apply FACA. According to the court, "the application of FACA to the ABA Committee would potentially inhibit the President's freedom to investigate, to be informed, to evaluate, and to consult during the nomination process."²²⁷ The court contended that the application of FACA would discourage the Department of Justice from consulting the ABA or would discourage the ABA Standing Committee from continuing to perform the service of investigating and evaluating potential federal judicial nominees.²²⁸ The court explained that public accountability, the purpose for which FACA was intended, was satisfied through the confirmation proceedings, when the Senate Judiciary Committee has the opportunity to question a representative from the ABA Standing Committee and to request additional information. The court further pointed

225. *Id.* at 489-90. The court concluded that the legislative history of the statute evinced a broad purpose "to control the advisory committee process and to open to public scrutiny the manner in which government agencies obtain advice from private individuals and groups." *Id.* at 490 (quoting *HLI Lordship Indus., Inc. v. Committee for Purchase from the Blind*, 615 F. Supp. 970, 978 (E.D. Va. 1985), *rev'd on other grounds*, 791 F.2d 1136 (4th Cir. 1986)). The court also pointed out that FACA itself mentions few exceptions based on the nature of the organization giving the advice and that the statute specifically excludes only groups established or utilized by the Central Intelligence Agency, the Federal Reserve System, and "any local civic groups whose primary function is that of rendering a public service with respect to a Federal program." *Id.* (citing 5 U.S.C. app. § 4(c) (1988)) (emphasis in original).

226. *Id.* at 491. The court explained that the exclusivity of the President's prerogative in this area, as mandated by art. II, § 2, cl. 2 of the Constitution, "is democratically tolerable . . . because of the checking function performed by the Senate." *Id.* at 492.

227. *Id.* at 493.

228. *Id.* The court contended that the "unique need for confidentiality in the initial stages of evaluating the professional qualifications of potential nominees for federal judgeships distinguishes this case from others where the public interest would be served by full disclosure throughout the agency's decisionmaking process." *Id.* at 495. The court explained that investigation of an individual's competence, integrity, and temperament, in contrast to ordinary policy research and analysis, "is inevitably a sensitive undertaking and it would normally evoke forthright, critical comments that would not otherwise be provided to decisionmakers were the comments to be made public." *Id.*

out that other groups and individuals also have an opportunity to present their own views on the nominee and to differ with the ABA Standing Committee concerning the nominee's qualifications and that the Senate is free to reject advice from the ABA and others.²²⁹

3. The Supreme Court's Decision

In a decision on June 21, 1989, the United States Supreme Court affirmed the district court's dismissal of the complaints of the WLF and the Public Citizen Litigation Group.²³⁰ Unlike the district court, however, the Supreme Court held that the ABA Standing Committee is not an "advisory committee" within the meaning of FACA. Accordingly, the Court did not address the separation of powers issue. A concurring opinion by Justice Kennedy joined by Chief Justice Rehnquist and Justice O'Connor vigorously disputed the majority's contention that FACA does not cover the Justice Department's use of the ABA Standing Committee, but concluded that application of FACA would violate the appointments clause of the Constitution.²³¹

In a remarkable exercise of statutory interpretation, Justice Brennan's opinion for the Court took pains to explain why Congress could not have intended the result that the plain language of the statute seemed to compel. Although the Court acknowledged that the plain language of the statute favored FACA's application to the consultations between the Justice Department and the ABA Standing Committee, the Court determined that various clues from the legislative history collectively provided minimally sufficient support for the Court's conclusion that Congress did not intend for FACA to cover such consultations.²³² With a diffidence rarely seen in Supreme Court decisions but richly justified under the circumstances, Justice Brennan concluded that "it seems to us a close question whether FACA should be construed to apply to the ABA Committee, although on the whole we are fairly confident it should not."²³³ Justice Brennan declared, however, that doubts about the constitutionality of applying the statute tipped the scales decisively against its application.²³⁴

229. *Id.* at 495-96.

230. *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989), *aff'g* WLF II, 691 F. Supp. at 483.

231. *Id.* at 2573 (Kennedy, J., concurring). Justice Scalia recused himself, apparently because he had helped to draft a memorandum to the ABA concerning the ABA's duties and responsibilities under FACA in 1974 when he was Assistant Attorney General in charge of the Office of Legal Counsel. Brief for Washington Legal Found. at 5 n.3, *Washington Legal Found. v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989) (No. 88-494).

232. *See Public Citizen*, 109 S. Ct. at 2572.

233. *Id.*

234. *Id.* at 2572-73.

In construing FACA, the Court acknowledged that the executive branch obviously "utilizes" the ABA Standing Committee in one common sense of the word. The Court expressed its belief, however, that "utilize" is "a woolly verb, its contours left undefined by the statute itself."²³⁵ The Court warned that a literal reading of the word would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President seeks advice. FACA, therefore, would require the filing of a charter, the presence of a controlling federal official, and detailed minutes any time the President sought the views of the NAACP before nominating Commissioners to the Equal Employment Opportunity Commission or asked the leader of an American Legion Post for the organization's opinion on some aspect of military policy.²³⁶ The Court likewise declared that "[n]or can Congress have meant—as a straightforward reading of 'utilize' would appear to require—that all of FACA's restrictions apply if a President consults with his own political party before picking his Cabinet."²³⁷ The Court explained:

FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice.²³⁸

Because the Court thought that a literal reading of the statute would "compel an odd result," the Court believed that it was appropriate to probe the intentions of Congress.²³⁹

The Court traced FACA's use of the word "utilize" to a 1962 executive order²⁴⁰ containing provisions similar to those that Congress later incorporated into FACA. The Court could discern no indication that the executive order was intended to apply to the Justice Department's consultations with the ABA Standing Committee. The Court observed

235. *Id.* at 2565.

236. *Id.*

237. *Id.*

238. *Id.* at 2565-66.

239. *Id.* at 2566 (quoting *Green v. Buck Laundry Mach. Co.*, 109 S. Ct. 1981, 1984 (1989)).

The Court explained that "[l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . ." *Id.* The Court stated that close attention to FACA's history particularly was helpful because "FACA did not flare on the legislative scene with the suddenness of a meteor." *Id.* at 2567.

The Court quoted Judge Learned Hand's observation that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Id.* at 2566 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)).

240. Exec. Order No. 11,007, 3 C.F.R. 573 (1962).

that none of the three Presidents who acted under the terms of the executive order between 1962 and 1972 deemed the Standing Committee to be "utilized" by the Department of Justice within the meaning of the order.²⁴¹ Although the Court acknowledged that FACA's legislative history evinces a congressional intent to widen the scope of the executive order's definition of an "advisory committee," there "is scant reason to believe that Congress desired to bring the ABA Committee within FACA's net."²⁴² The Court's review of the House bill on FACA led it to conclude:

There is no indication in the Report that a purely private group like the ABA Committee that was not formed by the Executive, accepted no public funds, and assisted the Executive in performing a constitutionally specified task committed to the Executive was within the terms of Executive Order 11007 or was the type of advisory entity that legislation was urgently needed to address.²⁴³

Similarly, the Court found that while a Senate report manifested a clear intention not to restrict FACA's coverage to advisory committees that are financed by the federal government, it did not indicate any desire to make all private advisory committees subject to FACA.²⁴⁴ The Court also was unpersuaded by the GSA regulations upon which the district court had relied. The Court explained that the definition of "advisory committee" from the GSA regulations was "too sweeping to be read without qualification"; the GSA had failed to list the ABA as an agency covered by FACA in any of the GSA's seventeen annual reports listing advisory committees covered by FACA; the GSA regulations were published only in 1983 and therefore were not contemporaneous with FACA; and the GSA regulations were not entitled to a high level of deference because they were not promulgated pursuant to express

241. See *Public Citizen*, 109 S. Ct. at 2568.

242. *Id.* The Court explained:

FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them. That purpose could be accomplished, however, without expanding the coverage of Executive Order 11007 to include privately organized committees that received no federal funds. Indeed, there is considerable evidence that Congress sought nothing more than stricter compliance with reporting and other requirements—which were made more stringent—by advisory committees already covered by the Order and similar treatment of a small class of publicly funded groups created by the President.

Id. (emphasis in original).

243. *Id.* at 2569.

244. *Id.* (citing S. REP. NO. 1098, 92d Cong., 2d Sess. 8 (1972)). The Court observed that the examples of advisory committees offered by the Senate Report were limited to groups organized by or closely tied to the federal government, and thus enjoying quasi-public status. The Court concluded that "[g]iven the prominence of the ABA Committee's role and its familiarity to Members of Congress, its omission from the list of groups formed and maintained by private initiative to offer advice with respect to the President's nomination of government officials is telling." *Id.* at 2570.

statutory authority.²⁴⁵ The Court concluded that the serious constitutional issues involved in applying FACA to the ABA Committee provided a stronger basis for its decision than the admitted weakness of its statutory exegesis alone would afford.²⁴⁶

4. The Concurring Opinion

In his astringent concurring opinion, Justice Kennedy acknowledged that the Court's decision "seems sensible in the abstract," but he contended that the Court's method of interpreting the application of FACA "does not accord proper respect to the finality and binding effect of legislative enactments" and that he could not "go along with the unhealthy process of amending the statute by judicial interpretation."²⁴⁷ Kennedy asserted that the Court had failed to demonstrate that a plain reading of the statutory language would compel such an absurd result so as to enable the Court under canons of statutory interpretation to disregard the statute's literal language. Because the language of FACA was unambiguous and the application of FACA to the ABA Standing Committee would not be patently absurd, Kennedy contended that "it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable."²⁴⁸ According to Kennedy, the

245. *Id.* at 2571 n.12. Kennedy disputed each of the four reasons that the Court gave for slighting the GSA regulations. He dismissed the Court's concern that the language of the regulations was too sweeping as another example of the Court's failure to adhere to the plain language of a text. Second, Kennedy argued that the GSA's failure to list the ABA Committee among the advisory committees covered by FACA is not determinative because the GSA's awareness of the applicability of the statute is irrelevant. Similarly, Kennedy perceived no relevance in the fact the GSA regulations were not added until 1983, and he stated:

[I]f anything one would think that the GSA's regulation should be entitled to *more* deference than a regulation promulgated immediately after the passage of a bill, for at least in the situation we have here, we can have some assurance that GSA thought long and hard, based upon considerable experience and the benefits of extensive notice and comment, before it promulgated an administrative rule that has the binding force of law.

Id. at 2579 (Kennedy, J., concurring)(emphasis in original). Finally, Kennedy contended that "the Court errs in suggesting that the GSA's regulations are mere nonbinding administrative guidelines" because the GSA has statutory authority to implement FACA. *Id.* at 2580.

246. The Court presented the following explanation:

Where the competing arguments based on FACA's text and legislative history, though both plausible, tend to show that Congress did not desire FACA to apply to the Justice Department's confidential solicitation of the ABA Committee's views on prospective judicial nominees, sound sense counsels adherence to our rule of caution. Our unwillingness to resolve important constitutional questions unnecessarily thus solidifies our conviction that FACA is inapplicable.

Id. at 2573.

247. *Id.* at 2573-74 (Kennedy, J., concurring).

248. *Id.* at 2576. Kennedy observed:

fact that the executive branch utilizes the ABA Committee in the common sense of the word "utilizes" should "end the matter" of any question concerning the facial application of the statute.²⁴⁹

Denouncing the Court's "one-sided" review of legislative history, Kennedy first argued that executive practice prior to the enactment of FACA was of questionable relevance because Congress would have had little reason to enact any statute if it had intended FACA to be nothing more than a codification of the provisions of Executive Order No. 11,007.²⁵⁰ Kennedy also criticized the Court for "its narrow preoccupation with the ABA Committee" because the statute "was intended to provide comprehensive legislation covering a widespread problem in the organization and operation of the Federal Government."²⁵¹ Although the Court noted that Congress did not mention or discuss the ABA Committee specifically in the legislative history of the FACA,²⁵² Kennedy pointed out that this omission hardly was surprising because the FACA was enacted at a time when between 1800 and 3200 target committees existed and the congressional report mentioned few committees by name. Moreover, Kennedy emphasized that Congress usually legislates by setting forth broad principles rather than by specifying examples. Finally, Kennedy concluded that the legislative purpose of FACA as set forth in the Conference Committee Report demonstrates that it should apply to the Standing Committee.²⁵³ Justice Kennedy declared that it was "most striking" that the Court had not mentioned these

It comes as a surprise to no one that the result of the Court's lengthy journey through the legislative history is the discovery of a congressional intent not to include the activities of the ABA Committee within the coverage of FACA. The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.

Id. Kennedy observed that "[r]eluctance to working with the basic meaning of words in a normal manner undermines the legal process. This case demonstrates that reluctance of this sort leads instead to woolly judicial construction that mars the plain face of legislative enactments." *Id.* at 2574.

249. *Id.*

250. *Id.* at 2576-77.

251. *Id.* at 2577.

252. *Id.*

253. *Id.* (citing H.R. CONF. REP. No. 1403, 92d Cong., 2d Sess. 1-2 (1972)). The Report stated that: 1) the need for many existing advisory committees had not adequately been reviewed; 2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary; 3) advisory committees should be terminated when they no longer are carrying out the purposes for which they were established; 4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees; 5) Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and 6) the function of advisory committees should be only advisory, and that all matters under their consideration should be determined, in accordance with law, by the agency or officer involved. *Id.*

stated purposes “on its amble through the legislative history.”²⁵⁴ Kennedy likewise faulted the Court for failing to accord appropriate deference to the GSA’s regulations. Like the district court, Kennedy concluded that the GSA’s definition of a “utilized” advisory committee fit the ABA Standing Committee. Indeed, Kennedy declared that “I cannot imagine a better description of the function of the ABA Committee.”²⁵⁵

Despite Kennedy’s conclusion that the ABA Standing Committee is an advisory committee within the meaning of FACA, he concluded that “the application of FACA in this context would be a plain violation of the [a]ppointments [c]lause of the Constitution.” Kennedy explained that the appointments clause vests the President with the sole power to nominate, leaving the Senate with only the power to grant or withhold its advice and consent. Kennedy averred that neither the Senate nor the Congress as a whole has a role in the nomination process.²⁵⁶ Kennedy contended that recent separation of powers cases in which the Court has weighed the degree of intrusion on the President’s power²⁵⁷ were inapposite because the power at issue in those cases was not explicitly assigned by the text of the Constitution. Kennedy explained that the Court has refused to sanction any intrusion into the Executive domain where “the Constitution by explicit text commits the power at issue to the exclusive control of the President. . . .”²⁵⁸

254. *Public Citizen*, 109 S. Ct. at 2577 (Kennedy, J., concurring).

255. *Id.* at 2578.

256. Kennedy quoted Alexander Hamilton’s observation in *The Federalist* that “[i]n the act of nomination [the President’s] judgment *alone* would be exercised; and as it would be his *sole* duty to point out the man who, with the approbation of the Senate, should fill an office, his responsibility would be as *complete* as if he were to make the final appointment.” *Id.* at 2581 (emphasis added) (quoting THE FEDERALIST No. 76 (A. Hamilton)). Similarly, Kennedy quoted another of Hamilton’s essays, in which Hamilton explained:

It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate.

They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made.

Id. (emphasis in original) (quoting THE FEDERALIST No. 66 (A. Hamilton)).

257. *Id.* (referring to *Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977)).

258. *Public Citizen*, 109 S. Ct. at 2582 (Kennedy, J., concurring) (citing *INS v. Chadha*, 462 U.S. 919 (1983); *Schick v. Reed*, 419 U.S. 256 (1974)); see also *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Kennedy relied in particular upon *Buckley v. Valeo*, 424 U.S. 1 (1976), which he read to recognize the exclusivity of the President’s power to nominate federal officials. *Public Citizen*, 109 S. Ct. at 3583 (Kennedy, J., concurring). In *Buckley* the Court held that the appointment of Federal Election Commissioners through procedures that were inconsistent with those set forth in the appointments clause was unconstitutional. *Buckley*, 424 U.S. at 124-37. Kennedy stated that the Court explicitly had rejected arguments advanced by the Federal Election Commission and various amici that Congress could avoid the strict letter of the appointments clause because Congress had plenary authority to regulate elections and had good reason for not creating a commission entirely composed of presidential appointees.

5. Criticism of the Majority and Concurring Opinions

Although Justice Brennan properly concluded that the question of whether FACA applies on its face to the ABA Standing Committee is not simple, Justice Kennedy's resolution of that issue is a more appropriate method of statutory construction. If one accepts the premise that application of FACA would not compel an absurd result, the plain language of FACA must control its interpretation in the absence of any legislative history or other extrinsic sources that convincingly demonstrate that FACA should not apply. As the majority opinion correctly recognized, the threshold issue of the statute's facial applicability cannot be separated from the separation of powers issue because resolution of the question of whether the application of the statute would unconstitutionally impinge on the President's powers helps to determine whether the prima facie application of the statute would be absurd.

In analyzing the separation of powers questions, the majority and concurring opinions of the Supreme Court and the opinion of the district court adopted an improperly wooden view of the appointments clause and an unnecessarily rigid conception of the practical effects of requiring the ABA Standing Committee to comply with the requirements of FACA. A proper analysis of the appointments clause and the probable impact of the application of FACA demonstrates that neither the formalist view of separation of powers invoked by Justice Kennedy nor the functionalist approach employed by the district court would preclude the application of the statute to the ABA Committee.²⁵⁹

Kennedy explained:

The justification for our refusal to apply a balancing test in these cases, though not always made explicit, is clear enough. Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself. It is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution.

Public Citizen, 109 S. Ct. at 2583 (Kennedy, J., concurring).

259: For a discussion of the competing formalist and functionalist methods of resolving separation of powers issues in the context of the ABA's role, see Note, *The American Bar Association and Judicial Nominees: Advice Without Consent?*, 89 COLUM. L. REV. 550, 566-68 (1989). Formalist analysis adheres to a strict distinction between the functions, powers, and duties of the three branches of government and regards as unconstitutional any incursion of one branch into the powers allocated to another branch. The functionalist view holds that a balancing test may be appropriate in certain instances in which the relations between the branches are fluid. *Id.* The appellants in the ABA case urged the Court to employ a functionalist analysis. See Brief of Appellant Public Citizen at 32-42, *Public Citizen* (No. 88-429); Brief for Washington Legal Foundation at 26-29, *Washington Legal Found. v. ABA Standing Comm. on the Fed. Judiciary*, 648 F. Supp. 1353 (D.D.C. 1986) (No. 85-3918). The appellants relied heavily upon *Mistretta v. United States*, 109 S. Ct. 647 (1989); *Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). In upholding the GSA's statutory power to control the disposition of presidential records, the Court in *Nixon* rejected the "archaic view of the separation of powers as requiring three airtight departments of government." *Nixon*, 433 U.S. at 443 (quoting *Nixon v.*

Justice Kennedy's dichotomy between the President's power to nominate and the Senate's power to advise and consent is unduly stark. His reliance upon Hamilton's observation that the Senate itself has no power of choice is misplaced because Hamilton's observation merely states the obvious. Justice Kennedy ignores the close interaction between the President and the Senate that characterizes the appointment process. Although the Constitution vests the power of nomination in the President, the President is hardly oblivious to the need to select a person whom the Senate will approve. Accordingly, Presidents have sometimes tested the waters on Capitol Hill by consulting senators about their reactions to possible Supreme Court nominees and frequently have admitted that their choice was influenced by the political exigencies of the confirmation process.²⁶⁰ Moreover, the President's selection of lower federal court judges, especially district court judges, and other federal officials long has been dictated by the tradition of senatorial courtesy, which virtually obliges the President to follow the recommendation of the members of Congress in the state or states in which the judge or officer will preside.²⁶¹

Just as the President does not make a selection in isolation, so the Senate takes many factors into account in deciding whether to confirm the President's nominee. Although there is considerable disagreement about the exact parameters of the Senate's role, a fairly broad consen-

Administrator of Gen. Servs., 408 F. Supp. 321, 342 (D.D.C. 1976)). The Court in *Nixon* declared that "in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 443 (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)). In *Morrison* the Court held that Title VI of the Ethics of Government Act, 28 U.S.C. §§ 591-599 (Supp. V 1987), did not violate separation of powers. *Morrison*, 108 S. Ct. 2616-22, and the Court in *Mistretta* upheld the constitutionality of placing the United States Sentencing Commission within the judicial branch and having judges serve on the Commission. *Mistretta*, 109 S. Ct. at 658-73. Justice Kennedy distinguished *Nixon* on the ground that the Executive Branch's power to control the disposition of presidential papers "is not given to exclusive Presidential control by any explicit provision in the Constitution itself." *Public Citizen*, 109 S. Ct. at 2582 (Kennedy, J., concurring). Similarly, Kennedy distinguished *Morrison* on the ground that the President's power to remove executive officers "is not conferred by any explicit provision in the text of the Constitution . . ." *Id.*

260. See, e.g., Boyd, *Bork Nomination to Court Weighed by the President*, N.Y. Times, June 30, 1987, at 1, col. 1.

261. The tradition of senatorial courtesy dates from 1795, when the Senate surprised President Washington by rejecting a highly qualified nominee for a naval position in Savannah because Georgia's two senators preferred a different candidate. In acquiescing to this new protocol, President Washington sent a message to the Senate requesting that it spare him further embarrassment by making its choices known in advance of nominations. J. HARRIS, *supra* note 53, at 40-41. The tradition of senatorial courtesy with respect to judicial nominees dates at least from 1801, when members of the congressional delegations from New York, Connecticut, and Vermont took the initiative in recommending potential nominees for a circuit court judgeship. R. SWANSTROM, *THE UNITED STATES SENATE 1787-1801*, S. Doc. No. 19, 99th Cong., 1st Sess. 111 (1985).

sus exists that the Senate may scrutinize more than a nominee's professional competence and integrity. Accordingly, the roles of the President and the Senate are complementary even though they are distinct.²⁶²

Far from thwarting the intention of the Framers of the appointments clause, applying FACA to the ABA Standing Committee actually would facilitate their vision of the judicial appointment process, so far as we may presume to discern such intentions. It would be a mistake to assign much value to our poor ability to divine any clear legislative intent from the highly ambiguous evidence at the Constitutional Convention and Alexander Hamilton's rather murky discussions of the appointments power in *The Federalist*. Those records, however, do suggest that the Framers expected that the Senate, in Hamilton's words, "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."²⁶³ Because many Framers originally had vested the appointment power in both houses of Congress or the Senate, the Framers may have envisioned a fairly active role for the Senate in giving advice and consent. The application of FACA, therefore, would facilitate the role of the Senate as the Framers envisioned to the extent that it would help the Senate to comprehend the reasons behind the ABA's recommendations. As Public Citizen Litigation Group argued in its brief to the Supreme Court,

[s]ince the ABA Committee's recommendations have become a vital link in the chain of appointment, and are used by the Senate itself in reviewing nominations, a statutory scheme that furthers the Senate's understanding of the role and processes of the ABA Committee will certainly place the Senate in a better position to perform its advice and consent function effectively.²⁶⁴

The debates at the Constitutional Convention also demonstrate that the Framers were concerned that the process would ensure accountability to the public.²⁶⁵ Similarly, Alexander Hamilton in *The*

262. As one observer recently concluded:

Regardless of the proper intensity of Senate scrutiny in its nomination hearings, it seems that the appointments clause does not freeze into place executive or legislative roles, but requires participation from each branch, which indicates that a functional approach is appropriate. The only boundaries that flow from the clause are that the President must name the nominee and the Senate must act as a powerful check on that choice.

Note, *supra* note 259, at 568.

263. THE FEDERALIST No. 76, at 513 (A. Hamilton) (J. Cooke ed. 1961).

264. Brief for Appellant Public Citizen at 31, *Public Citizen* (No. 88-429).

265. For example, Nathaniel Gorham of Massachusetts had favored giving the appointment power to the President because he believed that the President "would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone," J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 316 (1984), and that "[p]ublic bodies feel no personal responsibility, and give full play to intrigue [and] cabal," *id.* at 315. Gunning

Federalist derogated the highly clandestine process by which judges were appointed in a number of the states.²⁶⁶ The application of FACA, therefore, would be consistent with the intention of the Framers because it would help to ensure that the nomination is subject to greater public scrutiny. As the Public Citizen Litigation Group observed in its brief, the Framers' concern for public accountability "certainly coincides with the objectives of FACA, which . . . seek to ensure that governmental advisory bodies, consisting of private individuals who are not otherwise accountable to the public, are held to minimum standards of public access and accountability."²⁶⁷

Just as the language and history of the appointments clause does not warrant an invocation of the formalist view of separation of powers, the functionalist theory of separation of powers also provides no support for the conclusion that FACA should not apply to the ABA Standing Committee. The functionalist arguments against applying the statute, expressed by the district court and the Government's brief to the Supreme Court, and implied by Justice Brennan's opinion, rest upon the unwarranted premise that the application of the statute seriously would impede the President's ability to obtain confidential, accurate, and objective advice that is critical to the ability to select a judge. An examination of the actual nature of the appointments process, the workings of the ABA Standing Committee, and the impact of FACA's application demonstrates that no factual basis exists for such fears.

Functionalist arguments against the application of FACA tend to ignore the fact that the ABA Standing Committee is only one of many sources available to the President in making a selection. The legislative history of FACA demonstrates that any advisory committee that has assumed a quasi-public status in the deliberation of important issues should be subjected to public scrutiny.²⁶⁸ The Department of Justice

Bedford, however, contended that "[t]he responsibility of the Executive so much talked of was chimerical. He could not be punished for mistakes." *Id.* at 316. Charles Pinckney worried that the President would lack the "confidence of the people for so high a trust." *Id.* at 344. The issue of public accountability also arose during the final debate on the appointments clause, when Gouverneur Morris stated that as "the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." *Id.* at 598.

266. Hamilton explained:

The council of appointment consists of from three to five persons, of whom the governor is always one. This small body, shut up in a private apartment, impenetrable to the public eye, proceed[s] to the execution of the trust committed to them. It is known that the governor claims the right of nomination . . . ; but it is not known to what extent, or in what manner he exercises it; nor upon what occasions he is contradicted or opposed And while an unbounded field for cabal and intrigue lies open, all idea of responsibility is lost.

THE FEDERALIST No. 77, at 517-18 (A. Hamilton) (J. Cooke ed. 1961).

267. Brief for Appellant Public Citizen at 30-31, *Public Citizen* (No. 88-429).

268. See *supra* notes 250-55 and accompanying text.

acknowledged that the nomination process involves input from many sources other than the ABA Standing Committee, including senators, presidential advisors, other governmental sources, and private individuals.²⁶⁹ Such individual advisors to the President, whether within or outside the government, obviously are not covered by FACA. Moreover, as the WLF pointed out in its brief, the nomination process functioned quite well and produced many distinguished judges prior to the ABA's formal introduction into the process during the 1950s.²⁷⁰

Furthermore, no evidence suggests that application of the statute would impair the operation of the ABA Standing Committee. As the Public Citizen Litigation Group explained in its brief to the Court, the application of FACA would require the Department of Justice to prepare a charter for the Committee that would inform the public of the Department's position regarding the purpose, function, and method of operation of the Committee; designate a Committee management officer; and provide the public with advance notice of all Committee meetings.²⁷¹ Although the Department of Justice and the ABA tacitly acknowledged that the actual impact of the statute would be no broader, they argued that even these seemingly innocuous events would have a deleterious impact upon the work of the Committee. They stated their concerns about a lack of confidentiality²⁷² and the presence of a

269. Brief for Appellant Washington Legal Foundation at 39, *Washington Legal Found. v. United States Dep't of Justice*, 109 S. Ct. 2558 (1989) (No. 88-494).

270. *Id.*

271. Brief of Appellant Public Citizen at 35, *Public Citizen* (No. 88-429).

272. The Department of Justice argued in its brief that "private parties might be reluctant to express to committee members controversial and unpopular views about potential judges" unless complete confidentiality could be assured. Brief of Appellee Department of Justice at 40, *Washington Legal Found.* (No. 88-494). The precise dangers of a lack of confidentiality are unclear because neither the ABA nor the DOJ was very specific about this potential problem. For example, the WLF pointed out in its Reply Brief that the Mathews Declaration failed to vouchsafe "even a hint . . . as to what, if anything, in the judicial selection process must be kept confidential, or whether FACA would not be able to accommodate whatever confidentiality concerns the Executive may have." Reply Brief for the Washington Legal Foundation at 14, *Washington Legal Found.* (No. 88-494). The WLF contended that "it is not asking too much that, before [the] Court strikes FACA down entirely as unconstitutional, some record evidence be submitted by the Executive indicating that the President requires the ABA's advice in order to carry out his nomination powers, and that FACA would prohibit him from getting it." *Id.* The ABA's sources of information obviously would dry up rapidly if those sources feared that their candidly unfavorable remarks about prominent attorneys who might be their friends, colleagues, employers, relatives, proteges, mentors, clients, or elected officials would not remain confidential. Similarly, a practicing attorney may fear to make damaging public remarks about a judge under consideration for elevation to the federal bench or a higher federal judgeship in the attorney's jurisdiction. Moreover, persons who provide information to the Standing Committee might wish for the information itself, and not merely their identities, to remain confidential because they might wish to spare the potential nominee from public embarrassment. Brief of Appellee Department of Justice at 40, *Washington Legal Found.* (No. 88-494).

government officer²⁷³ at the Standing Committee meetings. Finally, the Department of Justice argued that the application of the FACA would subject the Standing Committee to undue federal control and interfere with its operations.²⁷⁴

Although the fears of the government and the ABA were not unfounded, the dangers they identified could be ameliorated. The problem of confidentiality, the core of the appellant's concern, could be remedied in part by the terms of FACA itself, which adopts some of the privacy and confidentiality exceptions of the Freedom of Information Act (FOIA) and the Government in the Sunshine Act.²⁷⁵ Section 10(d) of FACA provides that the Act's open meetings requirement shall not apply to an advisory committee meeting if the President, or the head of the agency to which the advisory committee reports, determines that the meeting may be closed to the public in accordance with the exceptions set forth in subsection (c) of the Sunshine Act.²⁷⁶ The most obviously relevant exception is subsection (c)(6), which exempts disclosure of "information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy."²⁷⁷ Similarly, the exceptions contained in FOIA are subject to the requirement of section 10(b) of FACA that documents made available to or prepared by each advisory committee shall be available for public inspection or copying.²⁷⁸ The most obviously relevant exception contained in FOIA is the provision in section (b)(6) for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted in-

273. The Department of Justice contended that "requiring a federal official to be present at Committee meetings might deter committee members themselves from expressing their individual opinions about potential nominees." Brief of Appellee Department of Justice at 40-41, *Washington Legal Found.* (No. 88-494).

274. *Id.* at 41.

275. See Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1988)); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (1988)).

276. 5 U.S.C. app. § 10(d) (1988). As originally enacted in 1972, FACA provided that the President or the head of the responsible federal agency could close an advisory committee meeting to the public in accordance with the exceptions set forth in FOIA, including the exception protecting the deliberative process. In 1976 Congress amended FACA to provide that advisory committee meetings could be closed only in accordance with the more limited exemptions set forth in the Sunshine Act. See *id.*, amended by Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1247-48 (1976).

277. 5 U.S.C. § 552b(c)(6) (1988). Section (c)(9)(B), which exempts disclosure of information when premature disclosure would "be likely to significantly frustrate implementation of a proposed agency action," also might apply, even though the ABA is not a government agency and the nomination of a judge is not a Department of Justice action.

278. See *id.* at app. § 10(b). This section defines such documents as "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee. . . ." *Id.*

vasion of personal privacy."²⁷⁹

The appellees' concern about the effect of a federal officer at the ABA Standing Committee meetings raises a more difficult problem than its concerns about protecting sensitive meetings and documents from public assess. Public Citizen argued that the language and purpose of section 10(e) of FACA would permit the ABA to devise a method of deliberation on prospective nominees without exposing the Committee to observation by a Justice Department employee. The Public Citizen Litigation Group suggested that the Department of Justice could appoint as the designated public official a disinterested person such as "an employee of GSA who has expertise in the requirements of FACA, but has no interest in, or knowledge of, the judicial nomination process."²⁸⁰ Such an arrangement, of course, would expose the Standing Committee's deliberations to the danger of embarrassing leaks of information.²⁸¹ Other alternatives, however, might ensure compliance with the statute while providing solid assurance that the Standing Committee's deliberations would remain confidential. For example, Public Citizen proposed that the ABA and the Department of Justice probably could adopt an arrangement by which the federal employee would be present only for the beginning of the meeting, to ensure that the Committee intended to discuss matters that properly could be closed to the public. Under this arrangement, the employee would not be in the room during deliberations on prospective nominees.²⁸²

Unlike the appellants' concerns about confidentiality and the presence of a government officer at meetings, the Department of Justice's contention that FACA would subject the ABA Standing Committee's meetings to undue governmental interference lacks merit. This argument overlooks the plain fact that one of the very purposes of FACA is to ensure governmental supervision of groups, such as the ABA Standing Committee, that act in a quasi-official capacity. To the extent that some of the dangers recognized by the ABA and Justice Department could not be avoided, the remaining threat to the operation of the ABA Standing Committee is outweighed by the countervailing need of the public to have a clearer idea of how the ABA Committee operates.

The appellants' arguments also overlooked the fact that the application of FACA to a broad array of other organizations has not impeded

279. *Id.* § 552(b)(6).

280. Reply Brief of Appellant Public Citizen at 19, *Public Citizen* (No. 88-429).

281. With more naive hope than any foundation in reality, Public Citizen expressed its view that "[t]here is no limit in the record or appellees' briefs that the mere presence of such an employee would interfere with the Committee's deliberations, particularly if the employee made a commitment not to divulge the deliberations to anyone else." *Id.*

282. *Id.* at 19-20.

significantly the effectiveness of such groups. As Public Citizen observed in its Reply Brief:

Appellees simply have no answer to the question of why thousands of advisory committees have found it feasible to both comply with FACA and fulfill their advisory functions, yet application of the Act to the Justice Department's use of the ABA Committee is so fraught with difficulties that it rises to the level of a constitutional invasion.²⁸³

V. CONGRESSIONAL REVIEW OF THE ABA STANDING COMMITTEE

The Supreme Court's decision in the ABA case permits the ABA Standing Committee to continue conducting closed meetings and to maintain the absolute confidentiality of its records. The ongoing controversy, however, concerning the role of the Committee in the judicial selection process will continue. Although the decision permits the Standing Committee's procedures to remain unchanged, the decision does not preclude the Department of Justice from altering the Committee's role in the nomination process nor preclude the Senate from changing the Committee's role in the confirmation process. Although no changes in the relationship between the ABA Standing Committee and the Justice Department seem likely, the Committee may play a less influential role in the confirmation process in the future. During the Bork hearings, the Senate Judiciary Committee began to question the ABA Standing Committee's role in the confirmation process.²⁸⁴

In 1989 the Senate undertook a formal reassessment of its reliance upon the ABA's ratings.²⁸⁵ In June 1989 the Senate Committee conducted a hearing on the ABA's role in the nomination process. As in other discussions of the ABA Standing Committee, arguments for re-

283. *Id.* at 2. Public Citizen argued that the appellees ignored "the fact that thousands of advisory bodies, including many that are directly comparable to the ABA Committee, have managed to comply with FACA without suffering . . . calamities." *Id.* at 16.

284. For a sampling of critical senatorial remarks concerning the ABA during the Bork hearings, see *Bork Hearings*, *supra* note 121, at 1184-1260 (Senate Judiciary Committee questioning of Harold R. Tyler, Jr., chairman, and Robert Fiske, former chairman, ABA Standing Committee on Federal Judiciary).

285. On February 14, 1989, five of the six Republicans on the Senate Judiciary Committee sent a letter to the committee chairperson, Joseph R. Biden, Jr., demanding that the committee "deinstitutionalize" what the letter called the ABA's "preeminent and quasi-public role," which threatened to eclipse the Senate's constitutional role, and asserting that the Standing Committee had not operated in a manner best calculated to assist the Senate. Among other complaints, the members objected to the Standing Committee's alleged consideration of a judicial candidate's political or ideological views; its alleged failure to accord appropriate weight to excellence in academic and scholarly performance; its failure to disclose the names of persons consulted in the evaluation process; and its failure to disclose the votes of individual members and the grounds for such votes. Letter from Senators Strom Thurmond, Alan K. Simpson, Gordon J. Humphrey, Charles E. Grassley, and Orrin G. Hatch to Senator Joseph R. Biden (Feb. 14, 1989) (provided to Author by Senate Judiciary Committee).

form transcended partisan and ideological boundaries. Senator Joseph Biden explained that the hearings provided an opportunity to review what the Senate Committee expects from the ABA, how the ABA's process might be improved to meet those expectations better, and whether the ABA wishes to continue to participate in the process.²⁸⁶ The Committee hearings themselves did not address any of these proposals in any detail. Instead, the hearings provided an opportunity for senators to express their concerns about the ABA's role and to hear the testimony of Attorney General Thornburgh, ABA President Raven, and Standing Committee Chairperson Judge Harold R. Tyler regarding the dispute over the ABA's alleged use of ideology in assessing candidates. The most barbed comments concerning the ABA were made by some of the conservative Republican senators who vehemently have attacked the Committee during recent years.²⁸⁷ The conservative senators particularly blasted the ABA for its alleged use of ideological factors in the selection process and its alleged lack of accountability.²⁸⁸

286. In particular, Senator Biden suggested that the Senate Judiciary Committee might consider the following questions: 1) whether the ABA should make more information on the basis for the Standing Committee's ratings on lower court nominees as well as Supreme Court nominees available to the Committee; 2) whether the ABA rating system for lower court nominations should be simplified; 3) whether the appointment process for the Standing Committee should be reviewed in order to assure that each person is particularly well suited for such service and that a wide variety of points of view are represented on the Committee; and 4) whether the ABA should increase its efforts to talk to leaders in the community in which the nominee works and resides. *ABA Hearings, supra* note 194. Biden expressed his personal opinion that the ABA should submit a report and simply a rating.

Senator Thurmond suggested that the Senate Judiciary Committee might wish to consider the following proposals: 1) disclosure of the factors used by the ABA Standing Committee in making its judgments regarding nominees; 2) disclosure of the general qualifications, backgrounds, and professional affiliations of Committee members; 3) disclosure of the names of the persons consulted in the evaluation process, their recommendations, and their basis for such recommendations; 4) disclosure of the votes of individual Standing Committee members and the basis therefor; 5) disclosure of the weight accorded by the ABA Standing Committee to academic and scholarly performance; 6) disciplinary action against Committee members who violate its rules; 7) adoption of a rating system for nominees that provides for a rating of either Qualified or Not Qualified; and 8) requirement that the ABA make its recommendation to the Senate rather than to the Administration, unless the Administration specifically requests direct communication. *Id.*

287. For example, Senator Hatch declared that "it's time to pull the plug on the American Bar Association's preeminent role in judicial selection, and reclaim for this Committee its full place in the advice and consent function with respect to judges." *Id.* Although Hatch expressed confidence that the Judiciary Committee would "continue to be interested in the views of the ABA, as it should be," he stated that "it is no longer appropriate for this one private organization to be given this special status not accorded to any other group." *Id.* Contending that the Executive Branch has adequate resources with which to conduct its own investigation of potential nominees, Hatch urged the Administration to end the "special relationship" between the Executive Branch and the ABA. *Id.*

288. For example, Senator Hatch contended that the "Committee considers the judicial candidates' political, or ideological philosophy" and that it "fails to accord appropriate weight to excellence in academic and scholarly performance." *Id.* Hatch also criticized the Committee for

The need for reassessment and reform of the ABA's role in the judicial selection process is greater than the ABA appears willing to concede, but the changes advocated by the ABA's most vociferous critics are too sweeping. The ABA's role in the judicial selection process should be placed in its proper perspective, and the ABA's importance in the process should not be exaggerated. Even if one accepts the truth of the allegation that the ABA for political reasons has blocked the nomination of some conservatives, the Reagan Administration certainly succeeded in placing an extraordinary number of conservatives on federal benches.²⁸⁹ Indeed, even the harshest critics of the ABA are able to allege few instances in which the ABA blackballed potential nominees.²⁹⁰ In nearly all instances in which the ABA's reservations about a conservative nominee's politics allegedly precluded the nominee from receiving the highest ABA rating, the nominee, nevertheless, was confirmed.²⁹¹ Although one might argue that the Bork exception swallows the rule, the outcry against the Bork nomination was so widespread that it would be most difficult to blame the ABA for Bork's defeat. Critics of the ABA's role also tend to forget that the ABA's influence during the Reagan era was counterbalanced, at least in part, by groups that lobbied for a more conservative judiciary.²⁹²

The ABA's role in the judicial selection process is no greater than the President and the Senate allow it to be. While the extent to which

failing to disclose the general qualifications, backgrounds, and professional affiliations of its members; the votes of individual members and the basis for such votes; and the names, recommendations, or evaluations of persons consulted in the evaluation process. *Id.* Similarly, Senator Grassley charged that the Standing Committee "operates in complete secrecy" and that "the routine disclosure of information to the press and to select groups by committee members when it suits them" belies the Committee's explanation that the secrecy of its proceedings is justified by the need to maintain confidentiality. *Id.*

Senator Humphrey declared that "the decades-old arrangement under which the ABA enjoys a privileged status of a quasi-official advisory board to the Executive and to the Senate, while operating in perfect secrecy and free of any of the processes of public accountability, is no longer good enough." *Id.* Humphrey denounced the current arrangement as "a moldering, corrupted, malodorous old relic which should be given a quick burial for the sake of public health." *Id.*

289. See, e.g., Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987) (concluding that the Reagan appointees have been conservative in their decision making but not significantly more conservative than the Republican judges appointed by other Republican presidents).

290. See *supra* note 208.

291. *Id.*

292. Senator Howard Metzenbaum exclaimed at the recent Senate hearings on the Standing Committee's role that he was amazed at the furor over the ABA's liberal influence upon judicial selection because "I sat through eight years of the Reagan administration . . . sending us more right-wing judges who had been cleared with the Washington Legal Foundation and the Free Congress Foundation, the Center for Judicial Studies, the National Right to Life Committee, the American Conservative Union—they were all chortling about these 410 judges that came up, and we approved them." *ABA Hearings, supra* note 194. Accordingly, Metzenbaum averred that "[t]his is the most unbelievable hearing I've ever participated in." *Id.*

the President and the Senate should rely upon the ABA Standing Committee obviously is related to the extent to which the ABA's procedures are free from reproach, responsibility for the ABA's role ultimately rests with the government. Even though the government has accorded quasi-governmental functions to the ABA, the ABA remains a private organization free to adopt its own internal procedures; indeed, the Supreme Court has refused to impose upon the Standing Committee even the minimal requirements of FACA. Accordingly, any examination of the ABA's role should focus upon the extent to which the government relies upon the ABA's opinions rather than upon the procedures by which the ABA arrives at those opinions.

In attempting to define the proper limits of the government's reliance upon the ABA, it seems obvious that no single organization ought to have a dispositive role in the selection of judges. No organization, and certainly no committee of fifteen persons, can speak for the entire legal profession, much less for the entire nation. Although the government obviously should accord deference to the ABA's opinions because its constituency includes nearly half the nation's attorneys and its opinions represent the fruits of widespread research, both the President and the Senate should avail themselves of the many other resources available for both opinions and technical information. As we have seen, the President and the Senate always have relied upon other sources of information, even when the ABA's influence was at its peak. During the past decade, the creation of public judicial selection commissions and the growing interest in the judicial selection process among private interest groups have ensured that the ABA's influence will be balanced by other sources of information and influence. Moreover, the continuing growth of staffs at the Department of Justice, the White House, and the Senate Judiciary Committee helps to ensure that decision makers can conduct their own investigations of candidates. The continuing nourishment of such countervailing forces will ensure that the ABA's opinion of candidates need not be dispositive.

Once the ABA's role is placed in its proper perspective, the need for any reform of the ABA's procedures is less urgent and less compelling. Moreover, while some proposed reforms are desirable, other suggested changes are ill-advised. Unfortunately, one of the least desirable reforms is embodied in the only concessions that the ABA made to its critics: the *Brochure's* deletion of its reference to ideology and the ABA's more recent assurances that ideology is not a factor in the evaluation process. Because the ABA Standing Committee's most useful function is its evaluation of the professional qualifications of potential judges, the ABA would be unwise to allow ideology to play a large part in its rating of candidates. Nevertheless, the Committee should not

blind itself completely to ideology because ideology cannot be separated wholly from questions of professional fitness. If a potential judge holds views of judicial or political issues that the Standing Committee believes blatantly would defy generally accepted notions of jurisprudence or undermine constitutional foundations, the Standing Committee would be derelict to recommend even a brilliant and accomplished candidate. Even if the Standing Committee was reduced to a mere register of the statistical qualifications of a candidate, only the naive could suppose that ideological biases never would affect the Committee's calculations.

Accordingly, the Standing Committee should be permitted frankly to confess instances in which ideology makes a difference. While the use of an ideological criterion obviously creates the potential for mischief, that danger is outweighed by the need to minimize hypocrisy. If the presence of ideological considerations is frankly acknowledged, the Senate has a better basis for questioning the validity of the Standing Committee's report. The Standing Committee could keep ideological considerations within proper bounds if it readopted the language of the 1980 *Brochure*, which declared that the Standing Committee's evaluation was based "primarily" upon competence, integrity, and temperament, and likewise restored the language of the 1988 *Brochure*, which provided that "political or ideological philosophy are not considered except to the extent that they bear upon other factors." Although this language is vague, it is difficult to conceive of how so amorphous a criterion could be made more precise.

The importance of retaining a frank acknowledgement of the role of ideology is particularly compelling because the *Brochure* currently contains language that would permit the Standing Committee to introduce ideological considerations through the back door. According to the *Brochure*, "[i]n investigating temperament, the Committee considers, among other factors, the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice."²⁹³ This language obviously invites consideration of ideology under the rubric of "temperament," a word that both liberals and conservatives historically have used as a code word for ideology.²⁹⁴

293. 1988 STANDING COMMITTEE ON FEDERAL JUDICIARY, *supra* note 162, at 4.

294. The likelihood that this provision would encourage the retention of ideological considerations would be even greater if the ABA accepts Senator Biden's suggestion that the *Brochure* strike the word "sensitivity" and add the phrase "and sensitivity to the appearance of equal justice" after the phrase "commitment to equal justice." See Memorandum from Joseph R. Biden, Jr. to Judiciary Committee Members (June 16, 1989) (provided to Author by Senate Judiciary Committee) [hereinafter Biden Memorandum].

The Standing Committee also can function more effectively if the sources of its consultations with persons outside the Committee remain confidential. One former member of the Standing Committee observed that the Committee "might as well quit" if confidentiality is not maintained because "[l]awyers have to appear before judges."²⁹⁵ Moreover, as explained above,²⁹⁶ the ABA's sources naturally are loath to make unfavorable comments concerning present and former colleagues, friends, relatives, clients, or former law professors if such comments are not confidential. Indeed, the web of connections between interviewees and a potential nominee may be spun almost endlessly; the potential for future embarrassment or retribution is similarly broad and intricate. In addition to inhibiting sources from commenting about candidates, publication of the identity of sources could have the even more deleterious result of encouraging sources to make disingenuous remarks.

For the same reasons, the Standing Committee should not reveal how individual members of the Committee ranked the candidates. The revelation of such information would tend to inhibit honest evaluations and could subject Standing Committee members to outside pressures. Publication of such information would have little countervailing benefit; it would not facilitate significantly a nominee's defense of his or her record before the Judiciary Committee or aid an unsuccessful candidate's attempt to persuade the executive branch to reconsider withholding a nomination.

The reasons for maintaining the confidentiality of sources and votes do not extend to the sources of the information that furnished the basis for such votes. The ABA's ratings of nominees would be more useful to the Senate Judiciary Committee if they were accompanied by detailed reports explaining the basis on which evaluations of Supreme Court nominees are made and if the ABA commenced the practice of providing reports concerning lower court nominees.²⁹⁷ Although Senator Biden believes that the information need not be extensive, he rightly contends that it at least should be enough to provide the members of

295. Roberts, *Justices to Decide if ABA Judge-Rating Panel Must Meet in Open*, L.A. Daily J., Dec. 6, 1988, at 9, col. 1. Similarly, former ABA President Eugene C. Thomas has observed that "[c]onfidentiality is essential. It assures candor and shields persons who provide potentially embarrassing or critical information." Thomas, *The ABA and Federal Judicial Selection*, A.B.A. J., Nov. 1, 1986, at 6.

296. See *supra* note 272.

297. At the present time, the Standing Committee provides the Senate Judiciary Committee with explanations of the ratings given to Supreme Court nominees, but it provides only the rating for lower court nominees. Biden Memorandum, *supra* note 294. Biden has discerned a consensus among members of the Senate Judiciary Committee that "the Standing Committee should change its practice with respect to lower court nominees, and provide some statement of the reasoning that led to its rating." *Id.*

the Judiciary Committee and the public at large with an understanding of the rationale of the rating system.²⁹⁸ Detailed reports also would enable a nominee to prepare a more effective defense before the Judiciary Committee.

Similarly, there is no merit to the argument that the ABA should simplify its ratings system and deem each candidate to be merely "Qualified" or "Unqualified." The existing gradations help to distinguish exceptional candidates from marginal ones.²⁹⁹ The use of a four-tier gradation for lower court nominees and a three-tier gradation for Supreme Court nominees should be retained because the range of quality of lower court nominees is likely to be greater and the level of scrutiny by the Senate Judiciary Committee is likely to be less intense.³⁰⁰ It would be helpful, however, if the ABA provided a more precise explanation of the differences between these rankings.

A more difficult question is whether the ABA should compile and publish reports concerning candidates who are not actually nominated and whether the ABA should publish the rankings of such candidates. The ABA needs to be particularly sensitive to claims of unfairness by persons who are not nominated because the ABA's rating appears to be more dispositive in such cases. An unfavorable rating may be more likely to ruin a candidate's chances for nomination than to preclude confirmation if such a candidate is nominated. The compilation and publication of such reports would tend to discourage the type of unfairness and irresponsibility that allegedly has caused the Standing Committee to block the nominations of some conservative candidates.³⁰¹ Such information also might enable a candidate to persuade the Executive Branch to reconsider its decision. At the same time, however, such reports would impose an added administrative burden on the ABA and might embarrass persons who were under consideration but who were

298. *Id.*

299. Senator Biden contends that "there is merit to retaining a rating above 'qualified' because it enables the Standing Committee to identify for the Judiciary Committee those nominees who, based on the Standing Committee's criteria of competence, integrity and temperament, are the most superior candidates for the bench." Letter from Senator Joseph R. Biden, Jr. to Attorney General Richard Thornburgh (June 16, 1989) (provided to Author by Senate Judiciary Committee).

300. Senator Biden has detected a consensus among the Judiciary Committee members for the use of a three-tier rating system for all federal court nominees. *Id.* In a recent letter to Attorney General Richard Thornburgh, however, five Republican members of the Judiciary Committee expressed support for a two-tier rating of "Qualified" or "Unqualified." Letter from Senators Strom Thurmond, Orrin G. Hatch, Charles E. Grassley, Gordon J. Humphrey, and Alan K. Simpson to Attorney General Richard Thornburgh (June 14, 1989) (provided to Author by Senate Judiciary Committee).

301. *See supra* note 208.

not nominated.³⁰² Indeed, the publication of such reports might make the ABA vulnerable to lawsuits brought by unsuccessful candidates alleging that the reports damaged their professional standing.³⁰³ Perhaps the best practice would be for the ABA to prepare abbreviated reports concerning such persons, available for inspection and publication only at the behest of the candidate.

In formulating any changes in its procedures, the ABA should remain mindful of its influential role in the judicial selection process and should make every effort to ensure that its proceedings are thorough and fair. This aspiration, however, does not mean that the ABA needs to conduct its investigations with the same thoroughness and objectivity of a court. No one has a right to become a judge. While an unfavorable recommendation obviously may dash the hopes and aspirations of a candidate for judicial office, a candidate's failure to obtain a judgeship is unlikely to create any stigma that seriously affects the candidate's professional standing.³⁰⁴

302. See, e.g., Thomas, *supra* note 295.

303. Such persons might be able to maintain a lawsuit under 42 U.S.C. § 1983 (1982) if they could persuade a court that the ABA's activities constitute state action. A district court has held that the Chicago Bar Association and its Committee on Evaluation of Candidates were state actors for purposes of § 1983. See *Rouse v. Judges of Circuit Court*, 609 F. Supp. 243, 247-48 (N.D. Ill. 1985). Although the court in that case dismissed the claim of an unsuccessful aspirant for a judicial position, the court's opinion suggested that the plaintiff might have been able to maintain an action if she had been able to demonstrate that the committee's "not recommended" rating damaged her standing in the community. Under the facts of the case, the court held that no such damage occurred because the "not recommended" rating was confidential and was not disclosed to anyone other than select members of the committee and the candidate herself, and the rating did not impugn the plaintiff's ability to perform as a lawyer because it was based merely on a finding that the plaintiff lacked "experience" and "judicial temperament." *Id.* at 247. Because the court found that the rating did not injure significantly the plaintiff's professional standing or foreclose her from employment opportunities, the court held that the rating did not deprive her of any "liberty" under the fourteenth amendment. *Id.* at 248. The court stated, however, that the attorney could not have prevailed in the lawsuit even if she had demonstrated such damage because the committee's evaluation procedures did not deny her due process of law. See *id.* at 249.

304. The *Rouse* court held that the attorney failed to state a claim for denial of due process because she did not allege the deprivation of any liberty or property interest; she did not allege that the rating injured her good name, reputation, honor, or integrity; and she had no entitlement to the judgeship or even any entitlement to be fairly considered for that position. The court also observed that the rating did not stigmatize her or foreclose other employment opportunities. See *id.* at 248-49. The court added that the attorney's complaint also failed to demonstrate that the committee's procedures would have denied her due process even if she had pled the existence of a constitutionally protected liberty or property interest. The court stated:

[T]he C.B.A. is not required to conduct an exhaustive investigation of all the candidate's experiences or alleged qualifications. Investigators with both personal and hearsay knowledge of the candidate's qualifications can properly sit on the hearing panel and vote on the candidate. Attorney members of the C.B.A. are not to be disqualified from the panel because they have opposed the candidate in litigation; in fact, in many ways they are the most useful panelists. There need be no requirement that the hearing panel constitute a cross section of the legal community with full minority representation. All that is required in peer review is that a

VI. INTERNAL REVENUE SERVICE ACTIONS

Any nonprofit organization that interjects itself into a controversy over any judicial nomination acts at its own peril. In the wake of the controversy over the Bork nomination, the IRS adopted new guidelines that would discourage tax exempt organizations from attempting to influence the nomination process.³⁰⁵ Under the new guidelines, a tax exempt organization risks the loss of its tax exempt status if it does not monitor carefully and restrict its lobbying activities.

A. Confirmation Votes Defined As "Legislation"

In a Notice issued in July 1988, the IRS announced that an attempt to influence the Senate's confirmation of a federal judicial nominee constitutes an attempt to influence "legislation" within the meaning of sections 501(c)(3) and 501(h) of the Code, which limit the degree to which certain types of tax exempt organizations may engage in such activities.³⁰⁶ Under section 501(c)(3), "no substantial part of the activities" of certain tax exempt organizations may involve "carrying on propaganda, or otherwise attempting, to influence legislation."³⁰⁷ Section 501(h), however, accords a "safe harbor" to tax exempt organizations by permitting them to elect to follow an objective test that will enable them to preserve their tax exempt status under section 501(c)(1).³⁰⁸ Under this test, an electing organization's total expenditures for "any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation," may not exceed the annual sum of one million dollars.³⁰⁹ In practice, an organization may not be able to spend one million dollars because qualifying expenditures are limited to specific percentages of its expenditures for an exempt purpose.³¹⁰ Section 501(h) further re-

randomly selected group of the candidate's peers determine qualifications.

Id. at 249.

305. See I.R.S. Notice 88-76, 1988-2 C.B. 392; I.R.S. Announcement 88-114, 1988-37 I.R.B. 26.

306. See I.R.S. Notice 88-76, *supra* note 305.

307. I.R.C. § 501(c)(3) (1982 & Supp. V 1987). Subsection (3) of § 501(c) applies to "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, . . . or for the prevention of cruelty to children or animals." *Id.* Accordingly, the IRS Notice does not affect various nonprofit organizations described in § 501(c) that might carry on lobbying activities. Most notably, the Notice does not affect labor unions, which are governed by subsection (5) of § 501(c).

308. For a discussion of these tests, see McGovern, Accettura & Skelly, *The Revised Lobbying Regulations—A Difficult Balance*, 41 TAX NOTES 1425, 1426 (1988).

309. I.R.C. § 4911(d)(1)(B) (1982).

310. Lobbying expenditures are limited to 20% of the first \$500,000 of an organization's ex-

stricts the amount that an exempt organization can spend on "grass roots lobbying," which is defined as "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof."³¹¹ An electing organization's expenditures for grass roots lobbying may not exceed twenty-five percent of its total limitation on lobbying expenditures.³¹² Failure to comply with these limitations can have drastic consequences for a tax exempt organization. An organization that exceeds the limitations imposed by the Code is subject to an excise tax in the amount of twenty-five percent of expenditures in excess of the limitations.³¹³ More significantly, an organization can lose its tax exempt status if its lobbying expenditures exceed 150 percent of either the total limitation or the grass roots limitation over the course of a four-year period.³¹⁴

The IRS based its conclusion upon the definition of legislation in section 4911(e), which provides with regard to section 501(h) that "legislation includes action with respect to Acts, Bills, resolutions and similar items." The IRS explained that "[b]ecause the Senate's action of advice and consent on a judicial nomination is an action with respect to a resolution or similar item, the Senate's confirmation vote constitutes a vote on legislation."³¹⁵

While the IRS policy does not preclude a tax exempt organization from engaging in lobbying activities because such an organization still may conduct activities that are not "substantial" or may elect to take shelter in the safe harbor, the interpretation still creates potential problems for tax exempt organizations. The determination of what constitutes "substantial" lobbying is at the discretion of the IRS,³¹⁶ which takes a very dim view of lobbying on judicial nominations. Although the safe harbor alternative enables the tax exempt organization to determine with greater certainty whether its activities will jeopardize its tax exempt status, the organization risks the loss of that status if its expenditures somehow exceed the prescribed limitations. Moreover, the

penditures for an exempt purpose, 15% of the next \$500,000, 10% of the next \$500,000, and 5% of any remaining expenditures. *Id.* § 4911(c)(2).

311. *Id.* § 4911(d)(1)(A).

312. *Id.* § 4911(a)(1).

313. *Id.*

314. See McGovern, Accettura & Skelly, *supra* note 308, at 1427.

315. I.R.S. Notice 88-76, *supra* note 305.

316. As one tax expert recently pointed out, "[t]he precise scope and nature of the conduct which constitutes a 'substantial' part of the organization's activities is a very difficult question." Haight, *Lobbying for the Public Good: Limitations on Legislative Activities by Section 501(c)(3) Organizations*, 23 GONZ. L. REV. 77, 84 (1987-1988). Although the IRS has not expressly adopted any rule, some tax practitioners advise charitable organizations to limit lobbying expenditures to five percent of their annual receipts. See *id.* (citing *Seasongood v. Commissioner*, 227 F.2d 907 (5th Cir. 1955)).

alternative rule may impose significant administrative burdens upon a tax exempt organization.

The potential impact of the IRS policy may be ameliorated substantially, however, by proposed regulations issued by the IRS on December 23, 1988. The proposed regulations would revise, narrow, and clarify the IRS definition of "grass roots lobbying." The 1988 proposed regulations replaced controversial regulations issued by the IRS in 1986 that offered a significantly broader definition of "grass roots lobbying."³¹⁷ Critics of the 1986 proposed regulations complained that the regulations³¹⁸ were excessively broad and objected that the definition did not require a communication to encourage recipients to act; that the definition included objective discussions of legislation if such discussion was disseminated to persons who were expected to share a common view of the legislation; and that the definition did not require the legislation to be pending or to be introduced imminently.³¹⁹ The IRS responded to these concerns in the 1988 proposed regulations by offering a new definition of "grass roots lobbying" to include only communications that refer to specific legislation, reflect a view on such legislation, and encourage the recipient of the communication to act with respect to such legislation.³²⁰ As IRS officials have explained, "The 1988 lobbying

317. See *Lobbying by Public Charities*, 51 Fed. Reg. 40,211 (1986) (to be codified at 26 C.F.R. Parts 1, 7, 20, 25, 53, and 56) (proposed Nov. 5, 1986). The 1986 proposed regulations had defined such lobbying as a communication that seeks, opposes, or otherwise pertains to legislation, reflects a view with respect to the desirability of such legislation, and is communicated in a form and distributed in a manner so as to reach individuals as members of the general public, that is, as voters or constituents, as opposed to a communication designed for academic, scientific, or similar purposes. The proposed regulations further provided that "a communication that pertains to legislation but expresses no explicit view on the legislation shall be deemed to reflect a view on the legislation if the communication is selectively disseminated to persons reasonably expected to share a common view of the legislation. . . ." *Id.* at 40,221.

318. Approximately 200 organizations signed a position statement demanding the immediate withdrawal of the proposed regulations. See *Congressional Support Sought for Protest of IRS Lobbying Proposal*, Daily Tax Rep. (BNA) No. 15, at G-1 (Jan. 23, 1987). The IRS also received approximately 5000 individual comments concerning the regulations. See McGovern, Accettura & Skelly, *supra* note 308, at 1427.

319. See McGovern, Accettura & Skelly, *supra* note 308, at 1430.

320. Prop. Treas. Reg. §§ 1.501(h)-2, -3, 53.4945-2, 56.4911-1 to -7, 53 Fed. Reg. 51,826 (1988). The proposed regulations provide that a communication encourages its recipients to take action only if it:

(A) States that the recipient should contact a legislator or an employee of a legislative body, or should contact any other government official or employee who may participate in the formulation of legislation (but only if the principal purpose of urging contact with the government official or employee is to influence legislation);

(B) States the address, telephone number, or similar information of a legislator or an employee of a legislative body;

(C) Provides a petition, tear-off postcard or similar material for the recipient to communicate his or her views to a legislator or an employee of a legislative body, or to any other government official or employee who may participate in the formulation of legislation (but

definition not only requires . . . that the communication contain a reference to specific legislation, but also requires that the communication *both* reflect a view with respect to such legislation *and* encourage the recipient to take action."³²¹ The 1988 proposed regulations also clarify that research and preparation costs of advocacy communications that are not lobbying communications are not treated as lobbying expenditures except in instances of abuse.³²² The 1988 proposed regulations were applauded widely for striking a judicious balance between the government's interest in preventing tax exempt organizations from participating in large scale political activities and tax exempt organizations' interest in influencing legislation that specially concerns their members.³²³

B. Nominations As a "Campaign" or "Election"

Despite its determination to define congressional confirmation of judicial nominations as "legislation" within the meaning of section

only if the principal purpose of so facilitating contact with the government official or employee is to influence legislation); or

(D) Specifically identifies one or more legislators who will vote on the legislation as: Opposing the communication's view with respect to the legislation; being undecided with respect to the legislation; being the recipient's representative in the legislature; or being a member of the legislative committee that will consider the legislation. Encouraging the recipient to take action under this [fourth category] does not include naming the main sponsor(s) of the legislation. . . .

Id. § 56.4911-2(b)(2)(iii), 53 Fed. Reg. at 51,836. The only exception to this definition provides that the IRS will presume a communication to constitute grass roots lobbying if, within two weeks before a vote by a legislative body, or committee thereof, an organization makes a communication in the mass media concerning "highly publicized" legislation that reflects an opinion about the general subject of such legislation and either 1) refers to the highly publicized legislation, or 2) encourages the public to communicate with its legislators on the general subject of such legislation. An organization may rebut this presumption by showing that the organization regularly makes this type of communication in the mass media without regard to the timing of the communication or that the timing of the communication was unrelated to the imminent legislative action. *Id.* § 56.4911-2(b)(5)(ii), 53 Fed. Reg. at 51,838.

321. McGovern, Accettura & Skelly, *supra* note 308, at 1430 (emphasis in original). A very limited number of mass media communications are exceptions to the requirement. *See supra* note 320; *see also* McGovern, Accettura & Skelly, *supra* note 308, at 1430. The IRS attorneys also have explained:

Under such a definition, communications may advocate or oppose specific legislation and not be considered lobbying, so long as the communications do not encourage the recipients to take action with respect to the legislation. The decision to require "encouragement," i.e., a direct or indirect call to action, is part of the difficult balance the 1988 regulations strive to achieve. It bears repeating: the 1988 regulations will not consider an organization to be conducting grass roots lobbying even if the organization seeks to influence legislation by making communications that advocate or oppose specific legislation, so long as the communications do not contain the specific information required to "encourage" recipients to action.

Id. at 1430-31.

322. McGovern, Accettura & Skelly, *supra* note 308, at 1431.

323. *See* Moriarty, *Revised "Grass Roots Lobbying" Regulations*, 42 TAX NOTES 149 (1989).

501(c)(3), the IRS Notice of July 1988 indicated that lobbying by tax exempt organizations on the judicial nominations would not disqualify such groups under another provision of the same section, which provides that tax exempt organizations may "not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office."³²⁴ The IRS, without further explanation, "concluded that attempts to influence Senate confirmation of a federal judicial nominee do not constitute participation or intervention in a political campaign within the meaning of 501(c)(3)."³²⁵ In the same announcement, the IRS concluded that such activity did not constitute the "influencing of a public election" within the meaning of subsection (d)(2) of section 4945, which governs lobbying activities by private foundations.³²⁶

C. Political Expenditures

In another action that may be related to the Bork episode, an August 1988 Announcement by the IRS affirmed that a tax exempt organization's activities to influence Senate confirmations of judicial nominees would constitute "taxable political expenditures" under section 527(f) of the Code.³²⁷ Section 527(b) of the Code imposes a tax on political expenditures by an organization that is exempt under any subsection of section 501(c) if it engages in an "exempt function."³²⁸ Because the IRS Announcement governs all organizations that claim tax exemption under section 501(c), its scope is much broader than the IRS Notice discussed above, which affects only organizations qualifying for exemption under subsection (3) of section 501(c).³²⁹ Section 527(e)(2) defines "exempt function" as "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any

324. I.R.C. § 501(c)(3) (1982 & Supp. V 1987). The restriction on activities to influence legislation was added to the federal tax law in 1934, without the benefit of congressional hearings. See Hopkins, *IRS Interpretation of Law on Tax-Exempts—Wrong or Merely Expansive?*, 39 TAX NOTES 511 (Apr. 25, 1988). The provision concerning intervention in political campaigns was added as a floor amendment by then Senator Lyndon B. Johnson in an effort to curb the activities of a private foundation in Texas that Johnson believed had provided indirect financial support to his opponent in an election campaign. See *id.* The phrase "in opposition to" was added in 1987 as a "clarification" to conform the statute to Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1976). See H.R. REP. NO. 391, 100th Cong., 1st Sess. 1622, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1, 2313-1202; H.R. CONF. REP. NO. 495, 100th Cong., 1st Sess. 1018, reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1245, 2313-1764.

325. I.R.S. Notice 88-76, *supra* note 305.

326. *Id.*

327. I.R.S. Announcement 88-114, *supra* note 305. This Announcement affirmed a January 1988 memorandum of the IRS General Counsel. See Gen. Couns. Mem. 39,694 (Jan. 22, 1988).

328. I.R.C. § 527(b) (1982).

329. See *supra* note 324.

Federal, State, or local public office in a political organization, or the election of Presidential or Vice Presidential electors. . . ."³³⁰ Under section 527(f), a section 501(c) organization that expends any amount for an "exempt function" must pay tax upon the lesser of an organization's net investment income or its "exempt function" expenditure.³³¹ As the IRS recognized, "a section 501(c) organization engaged in an 'exempt function' as a relatively small part of its operations might nonetheless have much or all of its investment income subject to tax under section 527."³³² Section 501(f)(3), however, enables a section 501(c)(3) organization to escape that harsh result if it deposits in a "separate segregated fund" certain contributions for use in an "exempt function" and thereby exposes itself only to tax on the investment income of that fund.³³³

The IRS has taken no action on the proposal since the expiration of the public comment period on March 13, 1989. The Alliance for Justice, joined by forty-six prominent nonprofit organizations, submitted a memorandum in opposition to the Announcement.³³⁴

330. I.R.C. § 527(e)(2) (1982).

331. *Id.* § 527(f).

332. *Id.* Prior to its new interpretation, the IRS does not appear ever to have applied § 527 to a § 501(c)(3) or § 501(c)(4) organization, perhaps because such organizations cannot participate in political campaigns on behalf of or in opposition to any candidate for public office. *See id.* § 501(c)(3), (4); Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1976); Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1988). The definition of political organization "exempt income" in § 527, however, is broader than § 501(c)(3)'s prohibition on participation in political campaigns because § 527 extends to expenditures to influence a "nomination, selection or appointment," while § 501(c)(3) is limited to participation in campaigns for elective office. According to two experts, actions to influence campaigns for nonelective public office therefore "may well be taxable expenditures under section 527, even though they would not, in the case of a section 501(c)(3) organization, jeopardize the organization's tax exempt status." Harmon & Ferster, *Attempts to Influence Judicial Confirmations Are Not Lobbying*, 36 TAX NOTES 1013, 1015 (1987).

333. I.R.C. § 501(f)(3) (1982).

334. Comments in Response to I.R.S. Announcement 88-114 Concerning Section 527(f) of the Internal Revenue Code, submitted to the IRS by the Alliance for Justice, Mar. 13, 1989 (source on file with Author); Letter from Nan Aron, Executive Director of Alliance for Justice, to Robert I. Brauer, Assistant Commissioner of the IRS (Apr. 3, 1989). Most of the groups that joined in the memorandum identify themselves as politically liberal. Although not all of those groups are necessarily likely to undertake large-scale lobbying activities concerning judicial nominations, the opposition of so many groups to the IRS Announcement demonstrates again that the judicial selection process is the subject of widespread public interest and participation. The groups that joined in the memorandum included the ACLU, the American Federation of State, County and Municipal Employees, the American Jewish Congress, the Americans for Democratic Action, B'nai B'rith Women, the International Union of Electrical Workers, the United Automobile Workers, the Mental Health Law Project, the Mexican American Legal Defense and Educational Fund, the NAACP, the National Audubon Society, the National Education Association, the National Legal Aid and Defender Organization, NOW, the National Puerto Rican Coalition, the National Urban League, the National Wildlife Federation, the Native American Rights Fund, People for the American Way, the Sierra Club, the Women's Law Project, and the Women's Legal Defense Fund. The AFL-CIO, attorney Gail Harmon, and Senator Alan Cranston also submitted statements in opposi-

Although the IRS proposal appears to have been issued in response to questions about the tax status of organizations that opposed the Bork nomination, the adoption of the regulation alarmed conservative activists and liberals alike.³³⁵ Accordingly, a broad spectrum of organizations, including the Alliance for Justice, the ACLU, the AFL-CIO, People for the American Way, and the Heritage Foundation supported legislation introduced in Congress last year that would have permitted tax exempt groups to lobby for or against federal judicial nominations without incurring any tax liability.³³⁶ Specifically, the legislation would have amended section 527(f) to provide that the term "exempt function" would not include "influencing or attempting to influence the selection, nomination or appointment of any individual to any Federal, State or local non-elective public office."³³⁷ Although the legislation had bipartisan support and was approved by the Senate, the legislation died because the House did not have sufficient opportunity to consider it. A number of the groups that oppose the IRS proposed interpretation of section 527(f) have urged Congress to declare that section 527(f) does not apply to the activities of section 501(c)(3) organizations.³³⁸

D. Criticism of IRS Actions

The IRS interpretations of the Code to restrict lobbying on judicial nominations constitute an errant reading of the legislation and bad public policy. The IRS conclusion that Senate confirmation votes are "legislation" within the meaning of section 501, because they are "reso-

tion to the Announcement. The Alliance for Justice argued in its memorandum that "exempt organizations will be forced to abandon all efforts to influence nominations and appointments to public office" rather than risk the imposition of tax under § 527(f). The Alliance also contended that "[t]he absence of clear guidance as to what activities are and are not taxable will have a chilling effect even on activities that are not within the scope of the statute." Letter from Nan Aron, Executive Director of Alliance for Justice, to Alliance for Justice Members (Apr. 3, 1989) (on file with Author).

335. See *One Year Later, Bork Enters the Campaign*, *Legal Times*, Oct. 24, 1988, at 11, col. 2.

336. See *id.*; see also 134 CONG. REC. S15,098 (daily ed. Oct. 7, 1988); Author's interview with Nan Aron, Executive Director of Alliance for Justice (Jan. 24, 1989). The lobbying effort was coordinated by the Coalition for Free Marketplace of Ideas. Interview with Mark Weinberg (Jan. 26, 1989). Speaking in favor of the legislation, Senator Alan Cranston observed that "[t]his is an issue which effects organizations across the ideological spectrum. The change in policy this amendment accomplishes has been endorsed by groups as diverse as the AFL-CIO and the Heritage Foundation." 134 CONG. REC. S15,098 (daily ed. Oct. 7, 1988).

337. 134 CONG. REC. S15,098 (daily ed. Oct. 7, 1988).

338. Letter from Nan Aron, Executive Director of Alliance for Justice, to Rep. J.J. Pickle, chairman of the Subcommittee on Oversight of the House Committee on Ways and Means (June 16, 1989) (provided to Author through the courtesy of Nan Aron). Such legislation was urged by the Alliance for Justice, the ACLU, the AFL-CIO, the Center for Community Change, Concerned Women for America, the Heritage Foundation, and the Sierra Club. *Id.*

lutions" within the meaning of the definition of "legislation" in section 4911, relies upon a strained definition of the word "resolutions." Moreover, as a number of prominent tax attorneys have pointed out, the IRS interpretation overlooks the fact that a Senate confirmation vote does not involve the exercise of legislative power under article I of the Constitution but rather imposes a restraint on the President's exercise of power under article II.³³⁹

Likewise, the interpretation of section 527 seems faulty; both the language and legislative history of the statute indicate that it should apply only to lobbying for elective office. The statute's reference to "public office" most reasonably can be read to refer only to an elective office. Such a reading is consistent with an IRS ruling³⁴⁰ that the term "public office" will be defined, for purposes of section 527, in accordance with the "facts and circumstances of each case" and the principles set forth in the regulation³⁴¹ that defines a "public employee." The essential element in determining whether a public employee holds a "public office" is "whether a significant part of the activities of a public employee is the independent performance of policy making functions."³⁴² Because the federal judiciary generally is not deemed to participate in policy-making functions, federal judges would not appear to hold public office within the meaning of the IRS ruling.³⁴³ Moreover, another IRS regulation provides that an analogous reference to "public office" in section 501(c)(3) refers to an elective office.³⁴⁴

The IRS interpretation of section 527 also is at odds with the legislative history of section 527, which demonstrates that it was intended to

339. See, e.g., Harmon & Ferster, *supra* note 332, at 1014; Hopkins, *supra* note 324, at 511. At least one critic of the IRS interpretation has argued that the interpretation also seems at odds with the generally accepted definition of legislation as the formulation of general rules or principles for human conduct. *Id.* at 513-14 (citing J. SUTHERLAND, SUTHERLAND ON STATUTORY CONSTRUCTION § 1:02 (4th ed. 1972)). This argument, however, ignores the fact that the statute has defined the word "legislation" more broadly to include both resolutions and private acts, neither of which prescribes general rules of conduct. See Skelly, *In Defense of the GCM on Influencing Judicial Confirmations*, 39 TAX NOTES 883 (May 16, 1988).

340. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1976).

341. *Id.* § 53.4946-1(g)(2) (1972).

342. *Id.*

343. See Harmon & Ferster, *supra* note 332, at 1015-16. Gail Harmon and Andrea Ferster point out:

[N]o one believes more firmly than the Reagan Administration that it is not the proper role of a Supreme Court Justice to "make policy," and recent U.S. Supreme Court decisions are replete with disavowals of intent to preempt the legislature's prerogative in this regard. Accordingly, the Internal Revenue Service would have difficulty in arguing that the position of a Supreme Court Justice constitutes a "Federal public office," since to do so would run directly contrary to this Administration's formal views on the appropriate role of the U.S. Supreme Court.

Id. at 1016.

344. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1976).

apply to section 501(c)(3) organizations only to the extent that those organizations engage in the same activities as political parties, campaign committees, and political action committees.³⁴⁵ Moreover, the interpretation of both sections likewise constitutes bad public policy because it will have the effect of discouraging public interest groups from making a valuable contribution to the judicial selection process.³⁴⁶ As Senator Alan Cranston observed during the floor debate on the measure to amend section 527:

[A]s Senators, it is our obligation to advise and consent on the nominations the President makes. In order to carry out that duty, we often call upon organizations to offer their views. If the IRS decision is maintained, this valuable source of information could be lost. No matter what position a Senator takes on a particular nomination or appointment, I think all my colleagues will agree that these outside opinions are beneficial to us in the course of our deliberations.³⁴⁷

By interpreting the Code in a manner that discourages public organizations from exercising their right of free speech, the IRS Announcements also could be vulnerable to attack under the first amendment. Although a recent Supreme Court decision upholding the constitutionality of section 501(c)(3)'s restrictions on the political activities of tax exempt organizations³⁴⁸ would seem to preclude the success of a first amendment challenge, a constitutional challenge might succeed if it

345. See S. REP. NO. 1357, 93d Cong., 2d Sess. 29, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7478, 7505.

346. In a letter to the Senate Finance Committee opposing the proposal, Nan Aron, the executive director of the Alliance for Justice, explained that the proposal concerning § 527 "would have a significant negative impact on legitimate, constitutionally protected activities of nonprofit groups, particularly with regard to the serious administrative burden it could impose." Letter from Nan Aron, Executive Director of the Alliance for Justice, to Sen. Lloyd Bentsen, Chairman, Senate Finance Committee (Aug. 25, 1988), reprinted in 134 CONG. REC. S15,099 (daily ed. Oct. 7, 1988). Similarly, Morton H. Halperin, an ACLU official, has protested to the Treasury Department that the proposed regulation would either cause exempt organizations "additional administrative expenses or create a *chilling effect* on otherwise *permissible activities*." Letter from Morton H. Halperin, Director of the Washington Office of the ACLU, to Assistant Treasury Secretary O. Donaldson Chapoton, reprinted in 39 TAX NOTES 1001, 1001-02 (1988) [hereinafter Halperin Letter]. Halperin also correctly has observed that "[m]easuring the section 527 tax by the entire investment income of an organization that only spends a small amount on 'exempt function' activities is obviously too harsh and inconsistent with the goal of taxing investment income of political parties." *Id.*

347. 134 CONG. REC. S15,098 (daily ed. Oct. 7, 1988). Similarly, seven senators stated the following in a letter to Secretary of the Treasury James A. Baker, III:

As Senators, charged under the Constitution with granting or withholding consent to Presidential nominations for executive branch and judicial appointments, we often call upon such organizations to provide us with their views. We would, therefore, be very concerned about any changes in the enforcement of the law which makes [sic] it more difficult or more costly for groups to provide such assistance.

Letter from Senators Bill Bradley, Daniel Patrick Moynihan, John D. Rockefeller, Donald W. Riegle, Jr., Max Baucus, John C. Danforth, and George J. Mitchell to Secretary of the Treasury James A. Baker, III (May 20, 1988), reprinted in 134 CONG. REC. S15,098 (daily ed. Oct. 7, 1988).

348. See *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

could be demonstrated that the IRS deliberately promulgated the regulation for the purpose of discouraging future lobbying on judicial nominations by the groups that helped to defeat the Bork nomination.³⁴⁹ In the decision upholding section 501(c)(3), the Supreme Court held that while the first amendment does not require Congress to subsidize lobbying,³⁵⁰ and while Congress has discretion to select the groups that can lobby without losing their tax deduction,³⁵¹ Congress may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" ³⁵²

Finally, any discussion of the imposition of tax liability on organizations that lobby for or against federal judicial nominations needs to consider whether the reasons for excluding exempt organizations from participation in political campaigns for executive or legislative officers also should not require the exclusion of lobbying on judicial nominations. It is possible to draw a qualitative distinction between the two types of activities: federal judicial offices are nonpartisan, even though the selection process may be highly political. Moreover, there is a quantitative distinction; it is unlikely that any exempt organization will regularly conduct extensive campaigns for or against judicial nominations. If it later appears that tax exempt organizations do engage in such activities, Congress can make appropriate amendments to the Code to draw a clearer distinction between exempt organizations and quasi-political organizations.

E. *The Association of the Bar Case*

In a recent decision that could have significant impact upon future lobbying in connection with judicial nominations, the Second Circuit gave section 501(c)(3) a highly restrictive reading.³⁵³ A unanimous

349. In his letter to the Treasury Department, Mr. Halperin wrote that "I also note that, while we [in the ACLU] do not do so, the recent events in the Senate may cause some to question the motives of the Treasury in announcing the application of section 527 at this time." Halperin Letter, *supra* note 346, at 1002.

350. *Regan*, 461 U.S. at 545-46.

351. *Id.* at 548-50. The Court in *Regan* rejected the plaintiff's contention that the Code violated the equal protection component of the fifth amendment's due process clause because it imposed no restrictions on lobbying by veterans' organizations that qualified for tax exempt status. *Id.*

352. *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

353. *Association of the Bar v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *rev'g* 89 T.C. 599 (1987), *cert. denied*, 109 S. Ct. 1768 (1989). The litigation arose out of the Association of the Bar's petition to the Commissioner of Internal Revenue in May 1982 for recognition as an exempt charitable and educational institution under § 501(c)(3). See Brief for the Association of the Bar at 2, *Association of the Bar* (No. 88-4001). Although the Association for many years had been recognized as a "business league" exempt from taxation under § 501(a)(6), qualification under § 501(c)(3) would have provided additional advantages including exemption from New York State

three-judge panel ruled in September 1988 that the Association of the Bar of the City of New York (the Association) does not qualify as a tax exempt organization within the meaning of section 501(c)(3) because its rating of candidates for elective judicial office constituted "forbidden political activity."³⁵⁴ According to the court, the Association's ratings violated the prohibition in section 501(c)(3) against participation or intervention in "any political campaign on behalf of (or in opposition to) any candidate for public office."³⁵⁵

In *Association of the Bar* the Commissioner of Internal Revenue had appealed the Tax Court's declaratory judgment that the Association qualified for exemption under section 501(c)(3). By a vote of ten to six, the Tax Court had found that the ratings belonged in the category of "permissible voter education activities" because the ratings were based upon the professional experience and technical ability of each candidate rather than upon "partisan or political preferences" or "comparisons between candidates seeking the same office."³⁵⁶ Furthermore, the court found that the ratings do not advocate or oppose the election of any particular individual or recommend that the public vote for or against a specific candidate.³⁵⁷ The court also observed that the Association "merely reports" the ratings in a "passive" manner, which the court distinguished from such "active" conduct as the distribution of campaign literature.³⁵⁸

As the Second Circuit pointed out, however, the Tax Court's opinion seemed ambivalent. Although the court found that the Association's activities were sufficiently neutral to qualify it for exemption, the court acknowledged that the Association's ratings involved "the potential for abuse" and "necessarily will reflect the philosophy" of the organization that compiles the ratings.³⁵⁹ The court likewise pointed out that the Association publishes the ratings with the intent that they may sway the voter.³⁶⁰ Furthermore, the court recognized that the prohibition against political campaign activities by section 501(c)(3) organizations "stems from the general policy that the Federal Government should be

and City sales and use taxes, and eligibility for lower bulk mail postal rates. *Id.* at 2-3, n.3. In 1985 the Commissioner issued a final adverse determination denying the application on the ground that the Association's rating of candidates for elective judicial office constituted intervention or participation in political campaigns on behalf of candidates for public office. *Id.* at 3. The Association then commenced its action in the Tax Court for a declaratory judgment that it was exempt under § 501(c)(3).

354. *Association of the Bar*, 858 F.2d at 377.

355. *Id.*

356. *Association of the Bar*, 89 T.C. at 611.

357. *Id.* at 609-10.

358. *Id.* at 611.

359. *Id.* at 609-10.

360. *Id.*

neutral in political matters and therefore should not directly or indirectly subsidize such activities."³⁶¹

On appeal, the Government argued, in effect, that the exception that the Tax Court seemed to carve out of section 501(c)(3) swallowed the rule. The government contended that the court's apparent distinction between "objective" and "political" campaign activity had no statutory basis, because the statute prohibits any participation in a political campaign, regardless of the organization's motives.³⁶² Indeed, the Government suggested that the ratings were not truly objective because the ratings failed to "convey pros and cons about the candidate which the public can weigh in the balance to reach a conclusion of its own."³⁶³ The Government argued that the ratings failed to qualify as neutral information, the hallmark of "voter education." To the contrary, the ratings expressed preference for some candidates and opposition to others.³⁶⁴

In its opinion, the Second Circuit carried the Government's argument a step farther and flatly declared that the Association's ratings were not objective. The court explained that while a "representation that a candidate is a lawyer or a judge is a readily provable statement of objective fact," a "representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion."³⁶⁵ The court also rejected the Association's contention that the undisputed nonpartisan character of its ratings enabled the Association to qualify under section 501(c)(3). The court found that the statute was not limited in its application to the partisan campaigns of candidates representing recognized political parties.³⁶⁶ The court also observed that "[a] candidate who receives a 'not qualified' rating will derive little comfort from the fact that the rating may have been made

361. *Id.* at 610.

362. Brief for the Appellant at 11, *Association of the Bar* (No. 88-4001).

363. *Id.* at 27.

364. *Id.* at 27-28.

365. *Association of the Bar*, 858 F.2d at 880. The court declared that "[o]bjective data are . . . independent of what is personal or private in our apprehension and feelings, that use facts without distortion by personal feelings or prejudices and that are publicly or intersubjectively observable or verifiable, especially by scientific methods." *Id.* The court contrasted the Association's ratings with the standards that the IRS had set forth in discussing the standards for qualification under § 501(c)(3) for an organization that publishes information about candidates for public office. *Id.* (citing Rev. Rul. 80-282, 1980-2 C.B. 178). The IRS had stated that such a publication would not violate the § 501(c)(3) exemption if it presented the voting records of all incumbents and did not 1) identify candidates for reelection; 2) comment upon an individual's overall qualifications for public office; 3) expressly or impliedly endorse or reject any incumbent as a candidate for public office; 4) widely distribute its compilation of incumbents' voting records; or 5) attempt to target the publication toward particular areas in which elections are occurring or time the publication date to coincide with an election campaign. *Id.* at 880-81.

366. *Id.*

in a nonpartisan manner.”³⁶⁷ Finally, the court refused to accept the Association’s contention that the phrase “substantial part of its activities” as used in the prohibition against influencing legislation should be carried over into the prohibition against participation in any political campaign. According to the court, the Association’s argument contravened the plain words of the statute. Moreover, the court observed that it was unlikely that the “sporadic and relatively inexpensive rating of candidates for public office” would constitute either a substantial part of a charitable organization’s activity or budget. Thus, the interpretation urged by the Association would make this portion of section 501(c)(3) substantially meaningless.³⁶⁸

The Second Circuit does not clarify whether its decision is limited to endorsements of candidates for elective state judicial offices or whether the decision also extends to the Association’s practice of endorsing federal nominees. The language of section 501(c)(3) that refers to participation or intervention in “any political campaign” would seem to suggest that the decision would apply only to endorsements for elective positions.³⁶⁹ Indeed, as we have seen, even the IRS has taken the position that attempts to influence federal nominations do not fall within the prohibition set forth in section 501(c)(3).³⁷⁰

The *Association of the Bar* case presented a difficult issue of statutory interpretation. The clear language of section 501(c)(3) seems to proscribe any form of intervention in a political campaign, no matter how slight, but the question of whether the types of endorsement offered by the Association constituted such participation is not answered easily.³⁷¹ Although the Second Circuit’s decision appears to represent sound statutory interpretation and thus may be correct as a matter of law, the decision’s impact on public policy may not be wise. The decision promotes sound policy only to the extent that it encourages consistency and minimizes IRS intrusiveness. It also forecloses the danger that nonprofessional organizations that qualify for exemption under section 501(c)(3) may cloak endorsements of judicial candidates under the guise of speciously “objective” ratings. The decision, however, has the less salubrious effect of discouraging professional organizations

367. *Id.* at 881.

368. *Id.*

369. IRS Notice 88-76; *see supra* note 324 and accompanying text.

370. *See supra* notes 324-26 and accompanying text.

371. As the IRS observed in its brief, “[i]t goes without saying that the determination whether an organization is ‘biased’ rather than ‘unbiased’ in its manner of selecting candidates for endorsement can be hard to make.” Brief for Appellant at 29, *Association of the Bar* (88-4001). Accordingly, the IRS correctly observed that the IRS rule avoids disparate tax consequences for similarly situated taxpayers and “avoids a possibly open-ended and intrusive examination into the reasons why a charity chooses to support one candidate over another.” *Id.*

from providing an important public informational service by ranking the qualifications of candidates for judicial office.³⁷² Such rankings are particularly useful because voters usually know little about the professional qualifications of candidates for judicial office.

Because professional organizations that rank candidates for judicial office perform a valuable public service, Congress should amend section 501 to create an exception to permit professional legal organizations that qualify for exemption under section 501(c)(3) to publish rankings of candidates for judicial office. Such an amendment, of course, would need to be drafted deftly in order to avoid abuse. For example, Congress would need to define professional organizations to include bar associations whose activities are primarily nonpolitical and to exclude groups that might act as a front for partisan activities. Such an amendment, likewise, should permit exemption only for rankings that are based primarily upon professional qualifications rather than partisan or ideological considerations. Such a law would seem to be preferable to the present law, which has the effect of discouraging professional organizations from performing a most useful public service.³⁷³

VII. CONCLUSION

Although the selection of judges, especially Supreme Court Justices, always has inspired widespread public interest, the clear trend of the past twenty years is toward greater scrutiny of nominees by the Senate, special interest organizations, and private citizens. While few nominations are likely to create the furor that Bork's selection stirred, the Bork episode was no anomaly. It was a natural corollary to the growing public interest in the judicial selection process, and it presages continued and perhaps heightened scrutiny of judicial nominees.

It is unfortunate that the tawdry histrionics that demeaned public discourse during the Senate's consideration of the Bork nomination obscured the salutary benefits of widespread and energetic public participation in the judicial selection process. Inasmuch as the decisions of federal judges profoundly affect every American, citizens have an important stake in that process. Unless the public exercises a role in the judicial selection process that goes beyond the mere selection of the President and members of the Senate, the constitutional provision for

372. As the Association argued, "[i]t would be poor public policy indeed to encourage bar associations generally to provide information to the public on matters concerning the administration of justice, but not to permit those same associations to evaluate the qualifications of nominees for judicial office." Brief for the Petitioner-Appellee at 9, *Association of the Bar* (No. 88-4001).

373. One should not overestimate the chilling effect of the Second Circuit's decision because the Association of the Bar and similar organizations still may receive partial exemptions under § 501(c)(6).

the appointment of judges to lifetime posts is inconsistent with the steady advance of participatory democracy that has occurred during the first two centuries of the Republic's history. When citizens express their views concerning prospective nominees to the President and contact senators during the confirmation process, such citizens can have a significant and proper influence upon the selection process.

Although organizations obviously should refrain from distortions of a nominee's record, an organization may properly oppose a nominee on grounds that are narrower than the grounds on which a senator might oppose a nominee. Organizations whose interests are parochial should not hesitate to oppose a nominee whose judicial record is likely to affect adversely the interests of the organization's members. While the senators have a duty to take a broader view of the public interest and to measure a nominee's merits by more objective criteria, senators certainly should listen to the views of constituents and organizations that express an opinion concerning a nomination. Private individuals and organizations also can serve a useful role in the nomination process by conducting research and investigations into a nominee's record. Contrary to the often-expressed fear that the Bork episode augurs excessive politicization of the judicial selection process, it is unlikely that widespread public participation in that process will permit narrow interest groups to hector the Senate into rejecting well-qualified nominees who are acceptable to a broad spectrum of the American public.

Participation in the judicial selection process is a prerogative of citizenship and serves a number of useful functions; therefore, the federal government and the states should not discourage such participation. In particular, the government should not impose tax penalties or administrative inconveniences upon organizations that support or oppose a nominee for federal judicial office. Recent actions by the IRS that would impose such burdens on such organizations are unjustified under the language and legislative history of the relevant sections of the Internal Revenue Code and generally contravene sound public policy. If the IRS proceeds to enforce those measures, Congress should amend the Code to provide that a nonprofit organization's participation in the federal judicial selection process will not affect its tax status or require it to alter its accounting procedures.

Broader and more intelligent public participation in the judicial selection process also would be facilitated if the ABA's Standing Committee complied with the requirements of FACA. Although the ABA's investigations of nominees and potential nominees should remain confidential, the principal meetings, including policy meetings, between the Department of Justice and the Standing Committee should be opened to the public. While the Standing Committee also is reviewing its inter-

nal procedures for rating judicial nominees and prospective nominees, those procedures need fewer adjustments than many senatorial critics have suggested. In particular, the Standing Committee should continue to protect the confidentiality of its sources, although it should publicize more information concerning the content of information provided by confidential sources. The Standing Committee also should restore language from earlier editions of its *Brochure* that indicated ideology would be considered in ranking candidates in rare instances in which ideology might affect the prospective judge's competence or temperament. Although the ABA certainly should minimize ideological considerations in its evaluations because its role is so influential and its constituency is so diverse, attempts to exorcise ideological considerations completely from its review process are likely to foster hypocrisy.

Public apathy is the bane of democracy. Although broader public participation in the judicial selection process may encourage some of the excesses that occurred during the deliberations on Bork, greater public interest and awareness of the process ultimately should ensure the selection of better judges.