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The American Bar Association now has a strong voice in the selection of federal judges. It has attained this influence through many years of efforts to have recognized the wisdom of allowing members of the profession to pass on the qualifications of those who will judge their cases. Mr. Grossman traces the development of the ABA's influence in this area and concludes that its success has been in large part a product of the development of the ABA itself into a representative body of the American legal profession.

One phenomenon of recent domestic politics has been the resurgence of the American Bar Association as a vital, and often influential, group in the political process as well as in the legal profession. There is no better characterization of this than the ABA's assumption of a lead position in a profession-wide campaign to improve the quality of judges selected for the several court systems in the United States. In a relatively short span of time, the ABA has grown from a group with a minimum of influence to one with a quasi-formal role in the federal selection process. Its success has meant, among other things, that the role of the organized bar in judicial selection has acquired a measure of legitimacy never before attained. To be sure, the federal selection process is not yet completely "bar centered." But the impact of the ABA's influence on the process is clear and unmistakable. Tracing the growth of the ABA's influence and prerogatives in the selection of federal judges, and suggesting some factors contributing to this development, will be the major purpose of this article.

I. The ABA's Traditional Interest in Judicial Selection

Through its activities and major policy pronouncements, the American Bar Association has always demonstrated a continuing *interest* in the selection of judges. Although the selection of "good" judges was not specifically enumerated as an object of the newly formed Association in 1878, it is fair, in the light of the early activities

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of the ABA, to consider it as immanent in the "promotion of the administration of justice"—always a major articulated goal of the Association. The first official statement of the ABA's interest in judicial selection apparently came in 1908, when the Committee on Professional Ethics listed "The Selection of Judges" as the *second* Canon of Professional Ethics:

> It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political, or other character, which may embarass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.[1]

With the addition only of two clarifying "opinions," this statement of the lawyer's position vis-a-vis the selection process has remained unchanged.[2]

But, neither this nor any other canon of the Association provides guidance as to the specific goals to be achieved, the standards of qualification for "good judges," or the expected or desired role which the ABA was to play in securing such judges. How were these goals to be achieved?

The working policy goals of the Association were left to be determined by the contemporary leadership. Typical of the frequently enunciated policy statements was the following Report of the 1924 Committee on Judicial Selection:

> Certain postulates we accept as basic. It is both the right and the duty of the Bar to act in this selection process. The right springs from that inherent privilege which entitles one to demand that he who is chosen from his fellows to sit in judgment of the cause must needs bear worthily that distinction and meet four square the traditional tests of an exalted professional attainment. Born of this, society in turn, has rightfully to require a recognition and performance of the correlative obligation. That duty is fulfilled only when the Bar, offering for its aid and counsel, has registered in full measure its conception of judicial fitness, founded, as it must be, upon a discernment of those qualities of mind and heart, those traits of poise and patience that mark in man the true judicial temperament. To the extent that society accords recognition of this right and that the Bar exerts its duty will results be achieved.[3]

1. COMMITTEE ON CODE OF PROFESSIONAL ETHICS, FINAL REPORT, 33 A.B.A. REP. 567, 576 (1908).

2. Opinions 189, 226, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, AMERICAN BAR ASSOCIATION, 373, 451 (1957).

3. COMMITTEE ON JUDICIAL SELECTION, REPORT, 10 A.B.A.J. 820 (1924).

Beneath the flowery rhetoric the point was abundantly clear. The Bar, as the representative of the legal profession, had not only the right but the duty to actively offer its services in the judicial selection process. Furthermore, the implication is clear that the choice of judges by a process which excludes the voice—or voices—of the organized Bar is to be condemned.

Missing from this statement, however, was any indication of what precise standards of qualification were to be sought. What was it about prospective judges that other lawyers were especially adept at perceiving and evaluating? Was it legal scholarship, courtroom ability, capacity for philosophical thought? "No," said the American Bar Association that same year. "It would, of course, be ideal if every judge were a profound jurist and yet it is probably better that he should have a listening ear than that he be too sure of the correctness of his own conclusions."

> The prime requisites of a judge are . . . integrity and a keen sense of justice. With these qualities and a willingness to hear all that is to be said on both sides of a debatable proposition, little more is required than the faculty of perception, and that type of intellectual serenity which for want of a better name we call the 'judicial temperament.'[4]

These broadly stated goals of the ABA regarding the selection of judges have not materially changed in the intervening years. The claim is still made that "because lawyers are the only group of citizens that are in daily contact with the courts, they are the only group that are really able to judge the qualifications necessary for good judicial material."[5]

The American Bar Association's continuing interest in judicial selection was in keeping with the Bar's venerable tradition of political leadership and public service. But as many friendly critics perceived, this continuity of formal objectives was a facade which concealed the changing nature of the Bar's concept of public service. Justice Harlan Fiske Stone, writing in 1934, declared that "candor would compel even those of us who have the most abiding faith in our profession, and the finest belief in its capacity for future usefulness, to admit that in our own time the Bar has not maintained its traditional position of public influence and leadership."[6]

Nowhere was this change better seen than in the efforts of the ABA to influence the process of judicial selection and in its obvious motives in so doing. One of the underlying reasons for the formation

4. *The Improvement of the Judicial Machine,* 10 A.B.A.J. 176-77 (1924).
5. *Editorial Comment on Fox, The Selection of Federal Judges: The Work of the Federal Judiciary Committee,* 43 A.B.A.J. 685 (1957).
6. Stone, *The Public Influence of the Bar,* 48 HARV. L. REV. 1 (1934).

of the American Bar Association in 1878 was the felt need to "do something" about a trend of judicial decisions illustrated by *Munn v. Illinois*.[7] Committed as they were to the growing industrial empire, the Bar leaders saw the judiciary as the last bastion of defense against encroachments upon the entreprenurial prerogative, and intensified their efforts to assure the recruitment of judges who shared their own views of society. These efforts strengthened the public leadership consciousness of the Bar; but the forms of such leadership rested upon values and assumptions which were at considerable variance with the new progressivism of the twentieth century. An inevitable "confusion" between professional qualifications and ideological soundness marked the judicial selection efforts of the American Bar Association through the New Deal period.[8] These efforts, ostensibly aimed toward insuring the professional quality of judges, were clear and frank attempts to gain a measure of control over the judicial decision-making process. But while these efforts may have been at variance with the traditional "public service" concept, they underscored some of the basic and continuing motivations for lawyers' interest in controlling judicial personnel. Far from being the sole output of a tradition of public service, the Bar's efforts reflected the need and desire of lawyers to exercise an effective control over the policies and practices of the judicial process. It was as much self-interest as public interest which provided the occasion and the impetus for the ABA's judicial selection efforts.

II. EARLY INVOLVEMENTS IN JUDICIAL SELECTION

As opposed to its continuing *interest*, the activities of the American Bar Association in the area of judicial selection prior to 1946 fluctuated from intense effort and participation to passive comment. Its initial efforts consisted mainly of exhorting state and local bar groups to take a more active part in the selection process at their own levels.[9] The ABA was never without at least one committee concerned with general questions of judicial qualification and tenure, but these committees operated largely through the local bar groups. Its occasional intense participation was motivated more often than not by concern for the continued functioning of the judiciary in the manner and on the terms which the ABA believed consonant with

7. 94 U.S. 113 (1876).

8. TWISS, LAWYERS AND THE CONSTITUTION (1942). In addition to Twiss, who was basically a critic of the ABA, the conservative domination of the Bar's activities has been acknowledged by RUTHERFORD, THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION 115-30 (1937). See also SCHMIDHAUSER, THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES (1960).

9. *Cf.* REPORT OF THE COMMITTEE ON JUDICIAL SELECTION, 14 A.B.A.J. 617 (1928).

historical American values.

As illustrations of this episodic participation, and the reasons for it, we will briefly examine three cases. Each details the ABA's response to what it called the "socialist menace," the "threatened subversion of the judiciary," or the "down-grading of property rights."

(1) The response of the American Bar Association to the campaign for recall of judges (1910-1920) was an intense, vituperative, almost hysterical propaganda offensive designed to alert the public to the alleged evils of such reform. Beginning with the appointment of a large "Committee to Oppose Judicial Recall," the ABA sought to enlist the aid of all local bar groups in the fight.[10] In its first year, that Committee worked hard to stimulate interest and action on the part of the state and local bar associations.[11] Three years later, it decided to broaden its forum from the Bar to the lay public. "Judicial Recall" was made the subject of high school and college debates and lectures. Essay contests were sponsored, with the winning paper receiving wide publicity and publication.[12]

As the impetus of the judicial recall movement slackened, the Committee claimed a large share of the credit, but warned that the "menace of the judicial–recall fallacy . . . still persists; and your committee has directed its activities during the past year to combating certain theories and measures which have for their object either direct or indirect judicial recall, as a means . . . to weaken or destroy constitutional safeguards."[13] Probably the most effective propaganda technique the Committee had at its disposal was the "socialist smear." By the simple device of labelling judicial recall as a socialist vice, the Committee was able to infect all those who supported the movement without their professing adherence to socialist principles:

> The propaganda of Socialism, which is now so wide spread . . . is, from its political viewpoint, one of attack upon constitutional government . . . . It is promoted, not alone by the avowed socialist, but by numerous allies, comprising many who would disavow the name of "Socialist" . . . . The socialist political platforms continuously advocate as the first necessary means of establishing socialism, the adoption of judicial recall. The ultimate object of the socialists is the confiscation of property and property rights and the turning over of all property to common ownership in the name of the state. They must first, then, eliminate that judicial function which was established in this country to safeguard the life, liberty and property of

10. REPORT OF THE COMMITTEE TO OPPOSE JUDICIAL RECALL, 36 A.B.A. REP. 51 (1911).

11. REPORT OF THE COMMITTEE TO OPPOSE JUDICIAL RECALL, 37 A.B.A. REP. 574-75 (1912).

12. REPORT OF THE COMMITTEE TO OPPOSE JUDICIAL RECALL, 39 A.B.A. REP. 607-08 (1914).

13. REPORT OF THE COMMITTEE TO OPPOSE JUDICIAL RECALL, 3 A.B.A.J. 454 (1917).

> the individual. They would abolish the United States Senate and all courts . . . and they urge the abolition of the power "usurped" . . . by the Supreme Court of the United States to pass upon the constitutionality of legislative acts, and the revision (presumably on a socialist basis) of the Constitution of the United States. . . . The judicial function of declaring invalid any statute which contravenes constitutional safeguards to individual rights of property and liberty is, so long as it continues, a barrier to the establishment of a government of Socialism.[14]

By 1918, there appeared to be little vitality left in the recall movement, but the Committee was continued as a safeguard.[15]

(2) The response of the American Bar Association to the 1916 nomination of Louis D. Brandeis as Associate Justice of the Supreme Court was also a defense of the dominant ideological values held by leaders of the American Bar Association. Since, at that time, the ABA did not have any formal mechanism designed to evaluate specific candidates for the federal bench, its opposition to Brandeis was in the form of a signed statement by ex-President Taft and six other former Presidents of the Association submitted to the Senate Judiciary Committee. Although the statement emphasized that Brandeis' "reputation, character, and professional career" made him "not a fit person to be a member of the Supreme Court,"[16] it was clear that it was in fact his political and social views which the ABA leaders opposed. In light of his considerable success as a lawyer fighting in opposition to some of the most cherished and widely held values of the Association, Brandeis' legal ability could not be seriously questioned. In the words of Roscoe Pound, who was testifying at the hearings, "Mr. Brandeis is in truth a very great lawyer. . . . So far as sheer legal ability is concerned, he will rank with the best who have sat upon the bench of the Supreme Court."[17] It was, of course, Brandeis' tenacious advocacy of minority causes which brought upon his head the wrath of the ABA leadership.

The Brandeis case has been extensively treated elsewhere, and the facts are too well known to require further documentation here. What interests us, however, is the type and adequacy of the response of the American Bar Association. That the opposition of the ABA to Brandeis did not come through "channels," but was articulated as the personal views of seven former presidents, should not be interpreted as something less than the accurate views of the then small membership of the ABA. At that stage in its development it was still

14. *Id.* at 456-57.

15. REPORT OF THE COMMITTEE TO OPPOSE JUDICIAL RECALL, 43 A.B.A. REP. 85-87 (1918).

16. MASON, BRANDEIS: A FREE MAN'S LIFE 489 (1946).

17. *Hearings Before The Committee on the Judiciary on Nomination of Louis D. Brandeis,* 64th Cong., 1st Sess. 251 (1916).

primarily a closely knit group of successful lawyers whose views probably coincided with those expressed by the seven presidents. Yet the near success which the campaign against Brandeis had could be attributed in part to the personal prestige of the seven presidents, and their ability to mobilize other forces in support of their case. The American Bar Association had not, as yet, developed any formal mechanism for the scrutiny of the federal judicial selection process.

(3) Prior to 1932, the only formal concern of the American Bar Association, with the selection of judges, with minor exceptions, was with the state *systems*. It paid little attention to the particular persons chosen as judges in the states, and no attention at all to the federal judicial selection process. Its concern with particular Supreme Court appointments was haphazard. One reason for this attitude may have been that in the period from 1878-1937, the federal courts, and especially the United States Supreme Court, were *generally considered* able defenders of and protagonists for the economic and social values espoused by the ABA, whereas in the same period the state courts—many with elected judges—were considered centers of radical thought. The ABA's severe condemnation of the Roosevelt Plan to increase the membership of the Supreme Court in 1937, when compared to its ambivalence toward "anti-court" measures in 1958 when the Supreme Court no longer represented conservative views, would support the hypothesis that it was not the Supreme Court, per se, that was being defended in 1937, but rather its making of "good" policy.[18] The ABA's disenchantment with the Supreme Court after 1937 was accompanied by a developing support of the state courts, which in the same period appeared to embrace many of the classical liberal values now rejected by the federal courts.

Among the most significant of the ABA's responses to these changes in the political position of the federal courts vis-a-vis selected conservative values was a variety of attempts to exert greater systematic influence in the selection of federal judges. As early as 1924, the Committee on Judicial Selection of the Conference of Bar Association Delegates suggested that

> If the principle of bar selection is right within the State, it is right within the nation—the more so, indeed, if made to serve a more exalted purpose. It is not to be countenanced, to be sure, that there be the least obtrusion upon this presidential power and prerogative, but it must be true that there lie here the possibilities for helpful suggestion which unquestionably would serve well when occasion should demand.[19]

18. *Cf.* Westin, *When the Public Judges the Court*, N.Y. Times, May 31, 1959, § 6 (Magazine), pp. 16, 41.

19. REPORT OF THE COMMITTEE ON JUDICIAL SELECTION, 10 A.B.A.J. 820, 824 (1924).

No action was taken on this suggestion. The possibility of participation by the organized Bar in the federal selection process was, however, suggested by Attorney-General William D. Mitchell in 1931. Although he distrusted the results of "bar primaries," Mitchell felt that "an overwhelming sentiment by the Bar for or against a particular man makes a deep impression upon the public mind, upon the senators especially interested, and on the appointing power. This is founded on the realization that a lawyer's qualities are most clearly discerned by the members of his own profession."[20] Mitchell indicated that the Hoover Administration made it a practice to consult with the bar of the country on federal judgeships:

> In the Department, we often make up a list of lawyers of professional standing and public spirit, in the community where the appointment is to be made, and send them personal letters asking for confidential information, and in such cases, with rare exceptions, we get a frank, sincere, illuminating picture of the men under consideration.[21]

Encouraged by this receptive attitude on the part of the Administration, and disturbed by the Senate's rejection of Judge John Parker's nomination to the Supreme Court in 1930, the American Bar Association made its first *formal* attempt to gain access to the federal selection process at the confirmation stage. It established, in 1932, a Special Committee of 52 lawyers to advise the Senate Judiciary Committee on all judicial nominations. As is usually the case, the formation of a new special committee indicated the recognition of a new, important problem area:

> The Special Committee on Federal Appointments . . . will deal with a new aspect of the old problem of judicial selection. Heretofore, discussion of the problem has been generally confined to the mode of selection of the state judges—whether by appointment or by election—and where the latter method prevails, to the ways in which the bar can best make its superior information as to the fitness of judicial candidates available to and influential with the electorate. Genuine progress has been made in that direction.
>
> But now the matter of confirmation, an essential part of the process of judicial selection in some states and in the Federal judicial system in particular, is seen to be of no less importance. It does not concern the machinery, but the manner in which machinery for naming a Federal Judge is operated.[22]

With specific reference to the Parker case, the ABA expressed its concern whether "the grounds urged for or against confirmation are such as may properly be considered in the choice of a judge?"[23] It

20. *Appointment of Federal Judges, Id.* at 569, 572.

21. *Ibid.*

22. *Concerning Federal Judicial Appointments,* 59 A.B.A. REP. 610 (1934).

23. *Ibid.*

stated its objection to the practice of disapproving nominees solely because of disagreement with decisions they had made as judges of other courts, "which decisions have been rendered in accordance with precedent and in the performance of that high duty which calls for fearless and impartial determination of all issues under the established principles of law . . ."[24] The Resolution setting up the Committee called upon the Senate to refuse to consider such allegations as valid evidence.

The Committee was set up primarily to advise the Senate Judiciary Committee. But some attempt was also made to extend its operations to the nomination stage although the ABA did not appear to be dissatisfied with the nominations of the Hoover Administration. Due undoubtedly to the change in Administrations shortly after the formation of the Committee in 1932, its services were never once requested by either the new Attorney-General or Senate Judiciary Committee, and at its own request, the Committee was discontinued in 1934.[25]

Reviewing the activities of the American Bar Association in the area of federal judicial selection from 1878 to 1945, it is abundantly clear that they were primarily responses to the shifts in political orientation and position which began to characterize not only the federal courts, but the appointing agents as well. By the time the ABA developed a concern over the decision trends in the federal courts, however, and sought to assert its influence in the federal selection process, it had come upon a period of reduced prestige. In its attempts to preserve a political philosophy on the wane, the ABA lost much of the comforts and strengths normally accruing to a nonpartisan, learned profession—strengths which even had they been preserved would probably have fared poorly in the wake of the liberal revival of the New Deal. Deprived by its own actions of its credentials as a wholly "professional" group, still representing but a fraction of the legal profession, and trying to operate in a very unfavorable political climate, the American Bar Association could only wait for the day when its own resources and a favorable political situation would make its attempts to influence the selection of federal judges more rewarding. That day was not long in coming.

III. The Formation of the Committee on Federal Judiciary

Responding perhaps to a more propitious climate, and also to a series of events which had cast shadows upon the reputation of the United States Supreme Court, the American Bar Association again sought, in 1946, to create the mechanism and the mood which would enable

24. *Ibid.*

25. Report of the Special Committee on Federal Appointments, 59 A.B.A. Rep. 610 (1934).

it to "resume" its campaign for "maintaining high standards of qualification and conduct on the part of judges of the courts of the United States."[26]

The three events which could be designated as primary stimuli of the ABA's action were (1) the erupted feud between Supreme Court Justices Black and Jackson; (2) the decision of that court in the *Southeastern Underwriters* case;[27] and (3) the absence from the Supreme Court of Justice Jackson while he was serving as Chief Allied Prosecutor at the Nuremberg War Trials. Thus, a case of deviant judicial behavior, an "upsetting" decision with serious consequences for the continuation of an historic legal doctrine, and a case of alleged judicial maladministration triggered the ABA's action.

The Black-Jackson feud, which began quietly over Black's failure to disqualify himself from a case argued by his former law partner,[28] erupted when Jackson, in a wire from Nuremberg, accused Black of feeding anti-Jackson stories to the press and revealing the confidential proceedings of the Court in an effort to discredit Jackson's candidacy for the Chief Justiceship.[29] The nationwide reaction to this feud was bitter. Some newspapers sought to justify the actions of one or the other of the Justices. Many suggested that both "quietly and decently . . . step down from the bench they have disgraced."[30] The *New York Times* declared editorially that "Justice Jackson has committed an error in taste and . . . Justice Black has committed the worse offense of lowering judicial standards."[31] A nationwide poll published two weeks later indicated a substantial portion of the population was disturbed by the bickering among the Justices and critical of the caliber of some of the recent appointments to the high bench.[32] There was a brief cry in Congress for impeachment of Justice Black and/or investigation of the incident, but the idea was smothered by the Democratic leadership.[33]

Regardless of the merits of the dispute, there was considerable adverse reaction to the Court, and it was a perfect opportunity for a group, such as the ABA, to begin a campaign to improve the quality of judges. This incident served to compound the smouldering dis-

26. PROCEEDINGS OF THE HOUSE OF DELEGATES, RESOLUTIONS 71 A.B.A. REP. 307, 330 (1946).

27. 322 U.S. 533 (1944).

28. The case was Jewell Ridge Coal Corp. v. United Mine Workers, 325 U.S. 897 (1945). Good descriptions of the feud can be found in GERHARDT, AMERICA'S ADVOCATE: ROBERT H. JACKSON 235-77 (1958); MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 642-47 (1956).

29. New York Times, June 11, 1946, p. 1, col. 8.

30. GERHARDT, *op. cit. supra* note 28, at 263.

31. New York Times, June 12, 1946, p. 26, col. 3.

32. GERHARDT, *op. cit. supra* note 28, at 263.

33. *Ibid.*

satisfaction with the Supreme Court which had already existed for several years. This initial dissatisfaction resulted from the 1944 decision in *United States v. Southeastern Underwriters Association.* Here, the Court, speaking through Justice Black, had in effect overruled an 1869 decision by holding that insurance businesses regulated by individual states were interstate commerce and thus not subject to discriminatory state taxation.[34] Congress responded to this decision by passing the McCarran-Ferguson Act, which authorized state regulation and taxation of the insurance business free of the limitations of federal regulation.[35] Nevertheless, the *Southeastern* decision had had, for the brief time it was in effect, an upsetting influence on the laws of insurance. More important, it came to be regarded by some lawyers as symptomatic of the disregard which the Supreme Court was showing for traditional values and legal precedents.

Dissatisfaction with the Court had also resulted from the absence of Justice Jackson, who was appointed by President Truman to serve at Nuremberg over the protests of Chief Justice Stone. Very irritating to litigants and lawyers alike was the fact that Jackson's absence had caused a number of 4-4 decisions to be withheld pending his return. The work of the Court was obviously suffering with one less hand to share the burdens of opinion writing.

Meeting in July 1946 the House of Delegates of the American Bar Association engaged in a heated debate with the above incidents the chief topics. Former ABA President William L. Ransom of New York sought to channel these expressed emotions toward more "constructive" ends:

> Respect for all our courts is the cornerstone of the American federal system. Disrespect for the courts in a republic endangers the foundations of its free institutions. Criticism of the courts is a right and function of the Bar . . . . [But] mere criticism and the expression of disrespect fall short of what is expected of us. . . . This House ought to do something constructive and remedial . . . . The profession and the public look to us for action now.[36]

Rather than adopt resolutions concerning specific situations, Ransom urged the delegates to "take such present action as will enable prompt action in behalf of the Association when needed, and assure also the remedial study of such criticisms and suggestions as have been made here this week." He successfully argued that the best course to follow would be the establishment of a Committee "charged with the duty of considering and initiating action by the Association as to such

34. 322 U.S. 533 (1944).

35. 15 U.S.C. § 1011 (1958). The Supreme Court aecepted this Congressional "reversal" in Prudential Insurance Company v. Benjamin, 328 U.S. 408 (1946).

36. PROCEEDINGS OF THE HOUSE OF DELEGATES, 32 A.B.A.J. 401, 421 (1946).

situations as have developed as to some members of the federal judiciary. . . ."[37]

Pursuant to a motion by Ransom, the House constituted a Special Committee on the Judiciary of eleven members, one from each judicial circuit and the District of Columbia. The Committee was charged to report back to the House of Delegates its recommendations regarding the proper action to take "to promote the appointment and confirmation of competent and qualified candidates and to oppose the nomination or confirmation of unfit candidates." Furthermore, it was to recommend courses of action to be followed "whenever any judge of any federal court has . . . become disqualified or unfit to continue on the bench, or has been guilty of acts or conducts amounting to less than 'good behavior' within the meaning of the Constitution of the United States." The Committee was also directed to consider the merits of two resolutions designed to alter the existing methods of choosing Supreme Court Justices, and to prevent sitting Justices from accepting off-court assignments.[38]

Thus, after a twelve year interval, the American Bar Association was to make a concerted effort to "reestablish the prerogatives" of the organized Bar in the selection of federal judges. To the editors of the American Bar Association Journal,

> There were many indications that the profession and the public looked to the Association for leadership and action. It is no longer sufficient to talk about the independence and impartiality of the judiciary and its aloofness from controversies extraneous to submitted cases. Those who believe in those standards for the judiciary will have to go to work to insist that they be maintained.
>
> The resolutions . . . entrust to the new Committee a duty and responsibility which the Association has not hitherto undertaken.[39]

The Committee on Federal Judiciary (as it was later named) has become the major instrument in the post-war campaign of the American Bar Association to exert a *direct* influence on the selection of specific persons as federal judges. From the formation of this committee in 1946 until the present, the American Bar Association has sought (and to a large degree achieved) public and official approval for the right and the duty of the organized Bar to be consulted in the actual selection of judges. Its successful campaign to achieve this goal marks the first time in American history that the legal profession has been accorded that privilege at the federal level.

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37. *Ibid.*

38. PROCEEDINGS OF THE HOUSE OF DELEGATES, 71 A.B.A. REP. 307, 328-31 (1946).

39. *Editorial,* 32 A.B.A.J. 478 (1946).

IV. Development of the Committee on Federal Judiciary

The long-range goals of the Committee on Federal Judiciary were decided after considerable debate at the 1946 Annual Meeting and 1947 Winter Meeting of the American Bar Association. The first report of the Special Committee formed in 1946 recommended that, in addition to having the power to oppose or recommend nominations already made by the President and considering questions about the behavior of sitting judges, it should also be permitted to "promote" the nomination of qualified persons. The Committee felt that "the only effective method of opposing a proposed nominee not qualified for judicial office is by supporting a qualified nominee."[40] Pursuing this argument on the floor of the House of Delegates, Chairman John Buchanan of Pittsburgh argued that:

> You cannot oppose very successfully a man with powerful political backing, who has an unimpeachable family and church record, and a modest practice in which he has been guilty of no misconduct, unless you can support, in his stead, the appointment of a real lawyer. And the Committee believes that real lawyers will be willing to signify their willingness to accept appointments to the federal bench if they can be assured of the backing of the Organized Bar. . . .
>
> Without that support, real lawyers will stand little chance against the men who have supported a party ticket through thick and through thin; not without reward in appointment to minor offices, but who think that they have reached the place in political service which entitles them to recognition as judges of the federal courts.[41]

Opposition to the granting of this not inconsiderable power was strong, however, and the question was tabled by a resolution to continue the Committee "in its present form."[42]

The question of revising the Committee's charter was then submitted to the Board of Governors for consideration. At the 1947 winter meeting, the Board came out in opposition to the proposed grant. Instead, it suggested that the Association should urge Congress to establish, by law, qualifications of eligibility for appointment to the federal beneh, including minimum requirements of legal practice and judicial experience.[43] The President of the ABA, Carl Rix, dissented from the Governors' position and urged the House of Delegates to grant the Committee the power to promote nominations. If the Committee were granted this power, it would serve to aid the state and local bar associations in influencing the nomination of judges in

40. Report of the Special Committee on Judiciary, 71 A.B.A. Rep. 234, 236 (1946).

41. Proceedings of the House of Delegates, 33 A.B.A.J. 191 (1947).

42. *Id.* at 192.

43. *Id.* at 396.

their own locales; otherwise, they would be forced to continue to "deal with an appointing power which, without our help, is beyond their reach."[44] By a vote of 79-52, the House overruled the recommendation of the Board of Governors. It empowered the Committee,

> on behalf of the Association, to promote the nomination and confirmation of competent persons for appointment as judges of courts of the United States and to oppose the nomination and confirmation of persons deemed by it to be not sufficiently qualified. It shall have power also to report to the House of Delegates or the Board of Governors on any questions relating to the behavior of judges of such courts and any matters relating to the sufficiency of the members of the federal judiciary.[45]

Pending the achievement of some results by which to evaluate the Committee's operations, it was continued as a Special Committee.

Its general goals and prerogatives settled early in its existence, the Committee was relatively free to create and develop its functions in accord with the objectives of the Association and the realities of the judicial selection process. Since the eighteen year history of the Committee is essentially one of increased prestige and prerogative, it is useful to analyze its growth in sections corresponding to three different time periods, which may be characterized as (1) 1946-1952, a period of development and indifferent success; (2) 1952-1958, a period of increased public acceptance as part of the selection process; and (3) 1958-1964, a period of maximum influence within the presently constituted selection system.

(1) The most noteworthy achievement of the Committee during the 1946-1952 period was its establishment of a working relationship with the Senate Judiciary Committee. Almost immediately upon its formation, the Committee was invited by the Chairman of the Senate Judiciary Committee to either testify or file a recommendation on each nomination given a hearing. Thus, the collective views of the Committee would become a regular factor in the confirmation process.

The formation of the ABA Committee coincided with the election of the 80th Congress, the first since 1930 in which the Republican Party controlled both Houses. Senator Alexander Wiley of Wisconsin, slated to assume the Chairmanship of the Judiciary Committee, announced that his Committee would try to stem the tide of "leftist" judges periodically appointed during Democratic Administrations, and that at least some non-Democratic judges would have to be appointed.[46] Perhaps to emphasize his new order, Wiley announced

44. *Ibid.*

45. CONST. AND BY-LAWS OF THE AMERICAN BAR ASSOCIATION art. X, § 7(k)(2). See also *Judges of Federal Courts: Association Will Promote Qualified Nominations*, 33 A.B.A.J. 305-06 (1947).

46. New York Times, December 2, 1946, p. 26, col. 3.

that so long as he was Chairman, "full weight will be given to the recommendation of recognized and respected legal groups in contrast to those of political officials." And, he added, "the opinions of the American Bar Association and other recognized legal groups have not been accorded the weight and respect which are their just due."[47] Wiley requested all State Bar Associations to assume the responsibility of giving him information on the "character, legal ability, temperament, and the political philosophy" of all nominees.[48]

Although there is no precise evidence (nor could there be), it is not unreasonable to assume that this privilege accorded the ABA and other bar groups was symbolic of the reaction to a long period of Democratic control. Would the ABA have been issued the same "invitation" if the 80th Congress had remained in Democratic hands? As a constant critic of the actions and decisions of the post-1937 Supreme Court Justices, the ABA was the perfect instrument through which Senate Republicans could attempt inroads on the nominations of a Democratic President. Since they would not normally be consulted in advance of nominations by a President of the opposite party anyway, and since by the rules (informal) of the Senate, they could not claim personal privilege to block nominations in their own state, Senate Republicians could use the adverse recommendations of the ABA and local bar groups to either justify occasional rejections of confirmation or to persuade the President to nominate "more acceptable" persons.

Consultation, however, is not the same as influence, and members of the ABA Committee who testified before the Judiciary Committee in this period found that the mere fact that they opposed a particular nominee carried little or no weight with the senators unless specific evidence of disqualification was presented. Then, as now, the senators on the Committee—all lawyers themselves—refused to accept as valid objections to a nomination the opinions of a few bar leaders. The mere assertion that "there were other better qualified men available" had little or no effect on the senators. Regardless of party affiliation, they had a stake in perpetuating the system which accorded the privilege of "selection" to senators of the President's party, and therefore relegated the task of the Judiciary Committee to sifting evidence of *disqualification* only.

A good illustration of the type of situation in which the ABA Committee could function most effectively was the Frieda Hennock case. In 1951, President Truman nominated Miss Hennock, a member of the Federal Communications Commission, to the Federal District Court

47. REPORT OF THE SPECIAL COMMITTEE ON JUDICIARY, 72 A.B.A. REP. 411, 412 (1947).

48. New York Times, February 3, 1947, p. 14, col. 3.

for the Southern District of New York. In 1949, Miss Hennock's name had been submitted to the Association of the Bar of the City of New York for evaluation, and that group had reported her "not qualified." When she did receive the nomination in 1951, they again opposed her, and were now supported by the ABA Committee on Federal Judiciary.[49] She was supported by various women's bar groups and the Federal Bar Association for the Second Circuit. In this case the ABA was able to present, in secret hearings, a substantial amount of derogatory information concerning the ethics of an agreement she had entered into in 1934. The evidence was described as "so adverse" that it could not be seen how further testimony would change the picture.[50] The Senate Committee then pigeon-holed the nomination and it died there with the end of the session. President Truman then offered Miss Hennock a recess appointment—as he had frequently done with other nominations opposed in the Senate—but she declined. To accept the recess appointment would have meant giving up the security of her FCC position with little assurance that she would be confirmed by the Senate. President Truman then appointed David Edelstein, an Assistant Attorney-General. Edelstein was also opposed by the ABA Committee, but his nomination was confirmed with dispatch.[51]

The hiatus of Republican control of the Senate lasted but two years, and the Democratic Committee Chairman from 1949-1953 did not hold the ABA in the same affection as had Senator Wiley. Although Senator Pat McCarran continued the practice of formally requesting an ABA opinion on each nominee, he declared that he was "firmly resolved that the bar associations shall not choose the judiciary of the country."[52]

Thus, although it did contribute to the rejection of four judgeship nominations during this period,[53] the ABA Committee was unable to do much to promote the nomination of high quality judges. It was not accorded the privilege of "re-evaluating" the abilities of the prospective nominee. Its only chance of successfully blocking a nomination lay in showing that the nominee had been guilty of deviant behavior. The Committee's relationship with the Senate Judiciary Committee was not, however, without its benefits to the ABA. It publicized the Association's activities, and acknowledged its role in the selection process, providing a coating of legitimacy to the Com-

49. New York Times, June 13, 1951, p. 17, col. 1, and June 28, 1951, p. 16, col. 4.

50. New York Times, September 28, 1951, p. 24, col. 2.

51. New York Times, November 2, 1951, p. 1, col. 7.

52. New York Times, August 5, 1951, p. 26, col. 3.

53. From 1947 through 1952, the ABA Committee actively opposed ten nominations to the federal courts, four of which were subsequently rejected by the Senate.

mittee's efforts. It gave the Committee a public forum from which it could announce its standards and solicit support.

It was immediately clear, however, that the main thrust of the Committee's influence would have to come at the nomination stage of the selection process. This was immediately recognized by the first members of the Special Committee, and a delegation was sent to confer with Assistant Attorney-General Douglas McGregor. They informed McGregor of the powers of the Committee and asked that it be consulted regarding any persons being considered for nomination to the federal bench. As reported by the delegation, "McGregor stated that the request was a novel one, which the Chairman . . . readily admitted."[54] McGregor promised to submit the request to the Attorney-General, but even with a second plea, the Committee was not consulted in advance of appointments.[55] The Committee did try to make recommendations to the Attorney-General on an ad hoc basis, but this soon proved unsatisfactory. It was at this time, however, that the Attorney-General began to consult with various state and local bar groups on each nomination; this move clearly foreshadowed the entry of the ABA Committee into the process, for the inconvenience of dealing with a multitude of groups with differing standards and methods of operation was not as useful as dealing always with a single group as the representative of the organized Bar.

Perhaps the most compelling cause to be assigned to the inability of the ABA Committee to establish a liaison with the Justice Department during this period was the hostility of President Truman. Reacting in characteristic fashion to the Frieda Hennock case, Truman noted that "he had appointed plenty of good judges opposed by the bar associations," and that such opposition didn't upset him. He stated that he was glad to have bar association approval of his judicial appointments if forthcoming, but that failure to receive such approval would never deter him from making any appointment.[56]

In contrast to this chilly reception in the White House, the first efforts of the Committee on Federal Judiciary were warmly received in the press. Particularly in view of a long line of undistinguished Truman appointees to the federal bench,[57] there was some feeling that perhaps the "right" people weren't advising on nominations. The *New York Times* took strong exception to Truman's "flippant dismissal

54. REPORT OF THE SPECIAL COMMITTEE ON JUDICIARY, 72 A.B.A. REP. 256 (1947).
55. *Ibid.*
56. New York Times, June 29, 1951, p. 23, col. 5.
57. For example, the *New York Times* said of the nomination of Fred Vinson as Chief Justice: "Secretary Vinson has been an able public servant. . . . But he is hardly the ideal appointment to the highest judicial office in the land, and he can hardly be said to measure up to the stature of his most recent predecessors in the post to which he has been named. . . ." New York Times, June 7, 1946, p. 18, col. 2.

of the opinions of bar groups." "Key members of the bar association," it said, "are the best equipped to pass upon court nominations who come from the ranks of fellow lawyers."

> Since the President cannot possibly examine personally all the qualifications of all nominees to the bench, it is necessary for us to ask whose judgment he substitutes for that of bar associations. If the answer to that question is that he relies on the advice of political leaders, we cannot endorse such a substitution.[58]

On balance, the record of the Committee during these formative years was promising if not entirely fruitful. It had established a cordial relationship with the Senate Judiciary Committee, had received favorable treatment in the press, and had at least in a few instances contributed to the rejection of "unqualified" individuals. Its performance satisfied the once hesitant Board of Governors of the American Bar Association, and in 1949 it was given permanent status as a *Standing* Committee, with its duties limited to matters of appointment and removal of federal judges. Peripheral subjects such as retirement and appellate jurisdiction were transferred to another committee.[59]

Perhaps the most important decision which the Committee had to make regarding its objectives and style of operation was made during this formative period, and subsequent events proved it to have been the wisest of decisions. Much as any other newly-formed group, the Committee had to agree on a plan of action which would both achieve the stated goals of the parent ABA, operate in a manner consistent with the expectations of the ABA leadership, and at the same time function in a way most likely to achieve positive results from the politically oriented judicial selection process. Given the assumption that dissatisfaction with the results of the judicial selection process stimulated the formation of the Special Committee on Judiciary in 1946, the major policy decision the Committee had to make was to answer the question, "How can the results be changed?" Clearly, the alternatives were to either work to change the system entirely—as other ABA committees were doing on the state level—or try to achieve sufficient influence within the system to make it produce favorable results. The Committee chose to pursue the latter alternative, over the vehement and persistent objections of two of its members.

As its first item of business in 1946, and again in each of the next three years, the Committee defeated resolutions by Loyd Wright of California and/or A. W. Trice of Oklahoma designed to encourage

58. New York Times, June 30, 1951, p. 14, col. 3.

59. See REPORT OF THE SPECIAL COMMITTEE ON JUDICIARY, 74 A.B.A. REP. 385 (1949).

the Congress to (a) set minimum requirements of judicial experience for higher federal judges, (b) make naturalized citizens ineligible for federal judgeships, and (c) provide for minimum legal experience for lower federal judgeships.[60] The decision was made to work *within* the prevailing system, and to bank on achieving results that way. These two alternatives were not incompatible at first, but they became so in late 1952 when the Committee first entered into a liaison with the Attorney-General. It is entirely possible that had the Committee not devoted most of its efforts in this period to *trying* to work within the system, and had instead worked equally hard to reform it, it would not have been able to gain even the partial access which it achieved in 1952.

It should be noted that the Committee did depart from this policy in one respect. It consistently sought bi-partisan selection of judges as an intermediate step toward achieving a primary goal of the ABA—non-partisan selection. Aside from this exception, it assumed a posture which would permit it, in the "American tradition," to seek gradual reform from within the system.

(2) The first six years of the Eisenhower Administration, from 1953 through 1958, saw the Standing Committee on Federal Judiciary achieve a degree of access to the judicial selection process not theretofore attained by any private association. Until mid-1952 the Committee had made recommendations to the Attorney-General on an ad hoc basis when it learned of the existence of judicial vacancies. Very often its recommendations were submitted after the choice had already been determined, or a firm commitment given. The Committee's continuous offers "to make its services available to investigating and reporting upon candidates other than those recommended by it" were never accepted.[61] Failure to reach any agreement with the Attorney-General posed several problems for the Committee. First, even when the Committee could produce derogatory evidence, it was difficult for the Attorney-General to take any position *other* than that of defending a nomination to which he was already committed. Second, when a nomination was publicized, it was difficult to elicit, even confidentially, candid opinions of the candidate by members of the Bar. Since the expectation is that virtually every judicial nominee is confirmed by the Senate, no lawyer would want to be in a position of criticizing someone who would eventually sit in judgment on his cases.[62] Finally, if the Committee were forced to carry its whole case to the Senate Judiciary Committee, which would

60. REPORT OF THE SPECIAL COMMITTEE ON JUDICIARY, 73 A.B.A. REP. 268, 275, 414.

61. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 77 A.B.A. REP. 215 (1952).

62. *Ibid.*

consider only derogatory evidence, it would be unable to exert any creative influence in the process—*i.e.*, promoting good judges.

In the summer of 1952 a series of events occurred which permitted the Committee to gain its long sought access to the nomination process. The Department of Justice had been rocked by several scandals uncovered by investigations of the House Judiciary Committee.[63] In the light of these disclosures, which resulted in several "vacancies" in the Justice Department hierarchy, the Committee urged Attorney-General McGranery to fill the vacancies with outstanding lawyers. The Attorney-General asked Stephen Mitchell, the House Committee Counsel and later National Democratic Chairman if he conld "find any lawyers meeting these specifications" and who would be "willing to come to Washington . . . at the end of an Administration that obviously is going to be replaced." McGranery is reported to have told Mitchell that if he found such lawyers, they would be appointed.[64]

Among others, Mitchell contacted Ross Malone of New Mexico, who was a past member of the House of Delegates of the American Bar Association and then a member of the ABA's Board of Governors. After a conference with McGranery, Malone accepted the Attorney General's offer to become Deputy Attorney-General, the chief agent of the Attorney-General in recruiting federal judges. Recalling his tenure as Deputy Attorney-General, Malone states:

> Through my membership in the House of Delegates of the American Bar Association and subsequently on the Board of Governors, I was aware of the fact that the Committee on Federal Judiciary had sought for some time to make its voice heard in the selection of federal judges prior to the time that a decision had been reached in the Department and a name forwarded to the White House. I was also aware that the Committee had been wholly unsuccessful in these efforts.[65]

Malone was firmly convinced that the American Bar Association was ideally suited to furnish the Administration with non-partisan advice on prospective nominees. He therefore recommended to the Attorney-General that the Department inaugurate a system of consultation with the Committee on Federal Judiciary to obtain its views before a final decision on any nomination was made. According to Malone, McGranery agreed and directed him to make whatever arrangements were necessary.[66]

63. See New York Times, April 3-5, 1952, p. 1. In the midst of these investigations, President Truman fired Attorney General McGrath and replaced him with U.S. District Judge James P. McGranery.

64. Letter From Ross Malone to Joel B. Grossman, March 6, 1963.

65. *Ibid.*

66. *Ibid.*

Malone "advised" Committee Chairman Howard Burns of the decision to submit names to the Committee and await its recommendations before making a final decision. He said that at the same time FBI investigations were initiated on the two or three serious contenders for each vacancy, the same names would be submitted to the Committee. Burns naturally agreed.[67]

By the time this agreement was reached, the adjournment of Congress was imminent, and the Administration decided to make no interim appointments to the federal bench. Thus, there was no opportunity to put the agreement into effect. When President-elect Eisenhower designated Herbert Brownell of New York as his Attorney-General, and Brownell chose William Rogers as his Deputy, the two met with McGranery and Malone to discuss the transition of Administrations as it affected the Justice Department. Malone explained to them the arrangement he had made with the ABA Committee, and in his own words, "was extremely anxious to sell" this innovation to them. He reports that Brownell didn't commit himself on the idea, but expressed an initially favorable reaction.[68]

Brownell and Rogers decided to continue the agreement excepting only that they requested the Committee on Federal Judiciary to discontinue suggesting names of its own in advance of being asked to evaluate a particular candidate by the Attorney-General. The Committee reluctantly accepted this stipulation, noting in its next Annual Report that "your committee believes that it could be more helpful to the Department of Justice in many instances by affirmatively recommending candidates of outstanding qualifications who have been selected without any regard to political considerations."[69]

A second favorable development for the Committee was the support of its objectives by President Eisenhower. In sharp contrast to the hostile attitude of his predecessor, Eisenhower applauded the efforts of the organized bar, and in particular, the American Bar Association. It was through Eisenhower's influence that Supreme Court appointments were also referred to the ABA Committee for evaluation. Prior to 1953, Committee attempts to have Supreme Court nominees "checked out" were rebuffed. The appointment of Justices of the Supreme Court had always been considered an unfettered Presidential prerogative. As a result, some

67. *Ibid.* These facts were confirmed by two letters from Committee Chairman Burns to Joel B. Grossman, October 8, 1962, and April 25, 1963. Burns emphasized that the liaison idea was primarily Malone's and was not opposed—but not actively supported—by Attorney-General McGranery. See also REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 77 A.B.A. REP. 215 (1952).

68. *Ibid.*

69. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 78 A.B.A. REP. 223, 224 (1953).

eyebrows were raised when, upon the death of Chief Justice Fred Vinson in 1953, the Chairman of the ABA Committee offered his group's "assistance" to the Attorney-General in the search for a successor. Attorney-General Brownell announced that any names the Committee submitted would be considered. However, before the Committee could submit a list, the recess appointment of Earl Warren was announced, and all the Committee could do was to recommend confirmation.[70]

In September, 1956, the new Chairman of the Committee, Bernard G. Segal of Philadelphia, met with Brownell and Rogers to review the relationship of the Committee to the Department of Justice. Segal brought up the fact that the Committee was "without function" respecting nominations of Supreme Court Justices, and suggested that this be rectified. Later that same month, at a press conference, President Eisenhower said in answer to a query about possible successors to retiring Justice Minton, "I believe also that we must never appoint a man who doesn't have the recognition of the American Bar Association."[71] No similar statement by a previous President has ever been recorded.

Later, at the direction of the President, the name of William Brennan was submitted to the ABA Committee. Brennan was highly recommended by the Committee and subsequently was appointed to the Supreme Court. This procedure was followed again in 1957 upon the retirement of Justice Reed. Brownell discussed with Chairman Segal a number of possibilities. When the name of Circuit Judge Charles Whittaker was given to the Committee, he was enthusiastically endorsed, and subsequently nominated.[72] The precedent of consulting with the Committee on Federal Judiciary on Supreme Court as well as lower court nominations is still followed, although as will be suggested below, the influence of the Committee in the case of Supreme Court nominations may be more apparent than real.

At the meeting mentioned above, Segal complained to Brownell and Rogers that in at least six instances, nominations or recess appointments had been made to the lower federal courts without prior consultation of the Committee. Segal noted that this was a breach of the 1953 agreement and argued that if such omissions continued, the value of the liaison to both the Committee and the Attorney-General would diminish and the Committee would have to "reappraise" the nature and intensity of its efforts in behalf of the Attor-

70. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 79 A.B.A. REP. 228 (1954).

71. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 82 A.B.A. REP. 432, 433 (1957).

72. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 82 A.B.A. REP. 272 (1957). See also New York Times, March 3, 1957, p. 1, col. 3.

ney-General.[73] Since that meeting there has been no record of an appointment to the federal bench which completely bypassed the Committee.

It was during this period that the Committee's "right" to be consulted on each prospective nomination grew into a virtual veto power. From 1953-1961 there were ten nominations made over the objections of the Committee. After mid-1958, however, the Attorney General was directed by President Eisenhower to give "considerable" weight to the Committee's recommendations, and no one was nominated without Committee approval during the remainder of the Eisenhower Administration. In fact, the only nomination made contrary to the Committee's recommendation from 1956 to 1961 was a marginal case in which the candidate was opposed primarily on the grounds that he was over-age; and confirmation by the Senate was not opposed.[74]

In contrast to the improvement in its position at the nomination stage of the selection process, the Committee found its operations stymied by the resistance of individual senators and the Senate Judiciary Committee. Where the ABA Committee was unable to block a nomination, it was also unable to block confirmation.[75] It was readily apparent that complete effectiveness would not be achieved until an understanding was reached with senators and the Senate Committee, similar to that with the Attorney-General. Attempts were made to convince individual senators of the need for prior consultation with at least their local bar associations, if not the ABA Committee, before publicly committing themselves to nominations which they would then have to defend, even in the face of damaging and embarassing evidence uncovered by the Committee.

It is noteworthy that in dealing with this obstacle, the Committee still followed the policy of working within the system. No attempts were made to challenge the "right" of senators to choose federal judges in their own states, although such challenges were being issued with increasing frequency in the pages of the American Bar Association Journal.[76]

In an attempt to at least blunt the effects of this senatorial prerogative, the Committee did resort to an extensive publicity campaign favoring non-partisan selection of judges. It sought, without success,

73. Interview with Bernard G. Segal, October 30, 1962. See also REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 81 A.B.A. REP. 440 (1956).

74. This case involved J. Axel Beck, who was appointed to the district court for the District of South Dakota in 1958. Beck was sixty-three years of age, and strongly supported by South Dakota's two Republican senators, Francis Case and Karl Mundt.

75. During 1953-1961 the Committee was unable to block the confirmation of any of the candidates which it opposed.

76. See, *e.g.*, Miller, *Politics and the Courts: The Struggle for Good Judges Goes On*, 42 A.B.A.J. 939 (1956).

to have both major political parties insert pledges of non-partisan selection in their 1952 and 1956 campaign platforms.[77]

In assessing the nature and extent of the Committee's increasing prestige during this period, the public furor surrounding the federal judiciary cannot be overlooked as a possible contributing factor. Stemming in part from its historic 1954 decision in *Brown v. Board of Education*, which alienated southerners, and a series of decisions in 1956 and 1957 which appeared to give some aid and comfort to "political" offenders, which alienated many northern conservatives, the Supreme Court was subjected to a consistent and vituperative verbal barrage of criticism.[78] Much talk and energy was given over by the 85th Congress to ways of "curbing" the court, and of these, a prominent solution was to alter the method of judicial selection. Since many of the "offending" decisions were venturesome in their departure from long-established precedents, the focus of reform centered on recruiting judges who were likely to be more conservative in their adherence to stare decisis.[79]

While there was much sympathy among members of the American Bar Association for this substantive criticism of the Court's work, there was no official condemnation of the Supreme Court as an institution. ABA President Charles Rhyne called on America's lawyers to fight any bills designed to subvert the Court's historic composition and prerogatives. He declared that "particular decisions may be wrong, but the independence of the judiciary connotes the power to be wrong as well as right."[80]

Nevertheless, the constant demands by critics that the method of selecting judges be changed to insure the selection of more experienced men lent strength to the ABA Committee's drive for the *informal* establishment of a similar standard. The pressures of this verbal assault may have been in part responsible for President Eisenhower's strong support of the principle of consulting the ABA on *all* judicial appointments, and for his insistence, after 1954, that all

77. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 81 A.B.A. REP. 271 (1956).

78. These "offending" decisions are well chronicled in PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT (1957). A good discussion of Congress' reaction to these decisions can be found in MURPHY, CONGRESS AND THE COURT (1962).

79. Of the numerous bills introduced in the 85th Congress designed to "curb" the Supreme Court, at least fourteen attempted in one way or another to alter the process of selecting federal judges. These included proposals to provide for the election of judges in the states where they serve, H.R. RES. 119, 85th Cong., 1st Sess. (1957); to provide for the appointment of federal judges by the state courts. H.R.J. RES. 438, 85th Cong., 1st Sess. (1957); to require judicial nominees to have five or more years prior judicial experience, S. 1184, 85th Cong., 1st Sess. (1957); and to require the President to make Supreme Court nominations from a list of names drawn up by the American Bar Association, H.R. RES. 406, 85th Cong., 1st Sess. (1957).

80. New York Times, May 7, 1958, p. 27, col. 6.

Supreme Court nominees have at least nominal judicial experience. By bringing the ABA more intimately into the selection process, the Administration may have sought to stymie attacks not only on its freedom to nominate, but on the powers of the Supreme Court as well.

(3) 1958-1964. One of the complaints which the ABA Committee frequently articulated prior to mid-1958 was that it was being consulted too late in the nomination process for it to be a really effective advisor. Since the name it received for investigation was usually the name to be submitted (it rarely received the "several" names that Ross Malone had envisioned), and many political commitments had been made beforehand, the Committee could deter a nomination only by the presentation of clearly disqualifying information.[81] This procedure was also disadvantageous to the Attorney-General in a number of ways, particularly in cases where there were a number of likely and apparently well qualified candidates for the same vacancy.[82] If he were able to obtain advance information on each of several candidates sponsored by prominent politicians, the Attorney-General could more easily engineer the nomination of the best candidate, or the candidate he preferred.

With this mutual advantage in mind, Attorney-General William Rogers, Deputy Attorney-General Lawrence Walsh and Bernard Segal arranged in 1958 for the institution of two new procedures. First, the Attorney-General agreed to refer to the Committee for *informal* investigation and evaluation the name of *each* person being given serious consideration for a federal judgeship. This would not displace, but would rather augment the procedure already in effect whereby the Committee made a *formal* investigation and report on the candidate most likely to be selected. This new procedure was to be, in effect, a secret, preliminary screening process.

The second innovation, which apparently was initiated by the Committee, was to construct a four point scale of evaluation to replace the general designations of "Qualified" or "Not Qualified" theretofore used. The Committee suggested this to enable it to differentiate between "its function in seeking the best qualified candidates . . . and its function in passing upon names submitted to it by the Justice Department."[83] All candidates would now be rated as "Not Qualified," "Qualified," "Well Qualified," or "Exceptionally Well Qualified."

81. Segal, *Federal Judicial Selection—Progress and the Promise of the Future*, 46 MASS. L.Q. 143 (1961).

82. Interview with former Deputy Attorney-General Lawrence Walsh, December 22, 1962.

83. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, A.B.A. REP. 349, 350 (1958).

These new procedures caused a tremendous increase in the work load of the Committee. With the number of vacancies sufficiently high, the work of many Committee members could become virtually a full-time job. Certainly it became one for the Chairman, who would be involved in processing all of the informal reports, not just those in his own circuit. In 1958-1959, for example, the Committee submitted 127 formal or informal reports, compared with 72 formals for the preceding *two* years.[84] But more important, the combination of these two new procedures accorded the Committee a more significant role in the selection process. It was no longer limited simply to passing upon a choice already made and not likely to be reversed. It was now in a position not only to block unqualified candidates effectively, but also to push for candidates who were better qualified by its standards. To be sure, it still could not exert much influence at the key recruitment stage, but it had advanced substantially toward that goal. From the negativism and frustrations of a veto group, the Committee on Federal Judiciary assumed more of a creative role in the selection process. For the first time in its twelve year existence, the Committee was able to begin to fulfill one of the major objectives of the ABA: to *promote* the nomination of the persons it considered best qualified.[85]

In its Annual Report for 1960, the Committee was able to make the following report of progress:

> [The Committee's relationship with the Administration] stands at the stage where no person is given consideration for nomination to the Federal bench without at least preliminary screening by members of your Committee, and it is reasonably assured that no appointment would be made of a person whom your Committee, for valid reasons, reports as unqualified.
>
> [In a two year period] . . . every nomination . . . sent to the Senate was preceded by a favorable report of your Committee. . . .
>
> Viewed against the background of the situation eight years ago, this represents remarkable progress. Nevertheless, the goal of this Association does not rest here.
>
> The interplay of the various elements which go into the eventual appointment of a federal judge is such that compromises often result, and as a consequence, the appointee, though qualified, is not the most highly qualified.[86]

With that report was expressed the hope that with the inevitable

84. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 84 A.B.A. REP. 277 (1959).

85. *Report by Bernard G. Segal to House of Delegates,* MIDYEAR MEETINGS OF THE AMERICAN BAR ASSOCIATION, Chicago, 1959 (mimeo).

86. REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 85 A.B.A. REP. 452, 453 (1960).

transition in Administrations, the function of the Committee would remain unimpaired. The Committee declared "our gains to this date have taken root, and may before long be institutionalized as part of the political system of our country."[87] This report, adopted by the House of Delegates, urged the incoming President to continue the present working agreement *including* a pledge "not [to] nominate as a federal judge any person who, after thorough investigation and consideration is, for valid reasons, reported by the Standing Committee on Federal Judiciary as not qualified to serve as a federal judge."[88]

In addition to this plea, the Committee again sought to have a plank on judicial selection inserted in the 1960 platform of each major political party, calling for the bi-partisan selection of judges. The Democratic Platform made no reference to judicial selection, but the Republicans included the following statement: "Needed federal judgeships, appointed on the basis of the highest qualifications and without limitation to a single political party, should be created to expedite administration of justice in federal courts."[89] This was the first known plank regarding judicial appointments in any major party platform.

Whatever fears the Committee on Federal Judiciary may have had concerning the future of its liaison with the Justice Department were directed primarily toward an incoming *Democratic* President. If the 1960 Republican Presidential candidate, Vice-President Richard M. Nixon, were elected, then almost certainly the Rogers-Walsh team would have remained and no problems of transition would have arisen. But the views of Senator John Kennedy toward the role of the ABA Committee were not known, and the absence of a judicial selection plank in the Democratic Platform did not alleviate this uncertainty. Senator Kennedy did send a letter during the campaign to the President of the American Bar Association, John Randall of Iowa, advising him that he agreed with the idea of a qualified and independent judiciary, and that partisanship would not be the paramount basis for selection.[90] But the very ambiguity of this statement may have been a chilling reminder to the Committee that its favored position depended entirely on the indulgence of the President.

Before the inauguration of President Kennedy on January 20th, 1961, Attorney-General Robert Kennedy and Deputy Attorney-General Byron White met with Segal and ABA President Whitney North

87. *Id.* at 454.

88. *Id.* at 452.

89. *Id.* at 455.

90. Letter From John F. Kennedy to John Randall, August 30, 1960, REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, 86 A.B.A. REP. 118 (1961).

Seymour and "unequivocally" agreed to submit all names under consideration for informal screening and eventual formal evaluation. According to Segal, this commitment extended also to "appointing only those who were pronounced clearly qualified."[91] But there seems to have been, at best, some confusion on this latter point. Subsequent events made very clear that, unlike its predecessors, the Kennedy Administration did *not* intend to continue to extend to the ABA Committee the veto group role it had previously occupied. The Kennedy Administration appointed eight persons designated "not qualified" during its first two years in office. This represented 7.3 per cent of the judicial appointments made during this two year period, as compared with 5.7 per cent during the entire Eisenhower Administration and only 1.2 per cent during the second Eisenhower term.

Answering criticism of this record in the Committee's Annual Report for 1962, Deputy Attorney-General Nicholas deB. Katzenbach "reminded" the House of Delegates "that the responsibility is the President's and the Senate's, and this Association does not have and would not wish to have a veto over the appointments to be made. I have no doubt," Katzenbach continued,

> that amidst these many appointments . . . there will be disappointments and some of the judges appointed will not come up to the standard which the Administration would wish for all judges. I would be very surprised if there were not judges appointed who will prove to have been unworthy and unqualified. I would be very surprised if this Committee were omniscient and infallible in that respect, and I do not think that they would claim that infallibility. I think that at least some of the Judges found by this Committee to be unqualified will . . . prove to have been good appointments. I think some of the Judges found to be qualified will, over a period of years, prove to have been bad appointments.[92]

Despite this apparent diminution of its influence, it cannot yet be said that over a period of time the Committee will not again approximate an informal veto group. The political patronage pressures on any new Administration are great, and it simply does not have the freedom of operation which an out-going Administration with a lame-duck President can manage.[93]

One cannot disregard party affiliation and philosophy in explaining the relationship of the Committee on Federal Judiciary to the Eisenhower and Kennedy Administrations. Despite its public service and non-partisan facade, the American Bar Association is, in terms of its

91. SEGAL, *op. cit. supra* note 81, at 147.

92. *Oral Reply of Nicholas deB. Katzenbach to House of Delegates*, ANN. MEETING OF THE AMERICAN BAR ASSOCIATION, San Francisco, 1962 (mimeo), p. 3.

93. *Cf.* REPORT OF THE STANDING COMMITTEE ON FEDERAL JUDICIARY, A.B.A. REP. 601 (1962).

political orientation and policy values, much closer to the Republican than the Democratic "orbit" of supporting groups, and no Democratic Administration could afford politically to overlook this factor entirely. While there are certain political advantages which even a Democratic Administration can gain from working with the ABA Committee, it could never afford a "captive" image.[94]

V. The Status of the Committee—1964

Any appraisal of the development of the Committee's prerogatives and functions from 1946-1964 would have to consider the institutionalization of its relationship with the Attorney-General as the most significant advance. While it may yet fall short of the aims of the American Bar Association, it far exceeds the access acquired previously by any other interest group. Although informal, the prospective continuity of this relationship is enhanced by the strong and favorable influence of the articulate press. Typical of the widespread editorial acceptance of the legitimacy of the Committee's function was the following statement in the *New York Times*:

> President Kennedy came into office at a time of approximate political parity in the Federal courts. This has now been thrown off balance by the appointments he has made. [His first eighty-five appointments went to eighty-four Democrats and one Liberal.] But there are still some forty judicial vacancies. In filling them Republicans might be favored among candidates of equal competence. But no one should be appointed who is not "well qualified" or "exceptionally well qualified" in the opinion of the Bar Association—and in fact.[95]

Thus, the *Times* was prepared to go even further than the ABA Committee itself and exclude appointees who were only "qualified" and no higher. Similar criticism of Kennedy's appointment of "not qualifieds" was to be found throughout the country. The *Christian Science Monitor* found it "peculiar" that "of all the lawyers in the United States who are regarded as Republicans, the Administration could not find seven whose juristic abilities would warrant their appointment ahead of the seven whom a bar association considers 'not qualified.' "[96]

While such support could not assure the Committee's position in the event of some dispute between it and the Attorney-General, it would probably serve to prevent the eruption of minor dislocations. The

94. This manuscript was completed prior to the assassination of President Kennedy. But the transition in administrations has not substantially affected the position of the ABA Committee in the judicial selection process. Interview with Assistant Deputy Attorney-General Joseph Dolan, March 11, 1964.

95. New York Times, March 9, 1962, p. 28, col. 1.

96. Christian Science Monitor, February 24, 1962, p. 14.

Committee's position is based on its usefulness as a source of information to the Attorney-General, and as long as this usefulness continues, it would probably not be seriously affected by minor dislocations.

In appraising the success which the Committee has had to-date, one major factor has not been mentioned. And yet it seems probable that this was the necessary, if not the sufficient, factor. It was not until the latter part of the New Deal that the American Bar Association sought to represent, in theory if not in fact, the entire legal profession. To be sure, many times before then it had spoken in behalf of America's lawyers. But until it adopted a federated system of representation in its governing body, the House of Delegates, and actively sought to enroll the rank and file members of the profession on its rolls, it lacked the credentials to represent the organized Bar to the Attorney-General.[97] Its claim to representation is still imperfect, and still less than half of all lawyers are members. But the propriety of it's assuming the role of "Voice" of the American Bar is much less questionable. Without these credentials, it is doubtful that it could have exerted any systematic influence whatever on the selection of federal judges.

97. *Cf.* Radin, *The Achievements of the American Bar Association: A Sixty Year Record*, 26 A.B.A.J. 135, 141, 230, 241 (1940). The ABA now has 43.7% of the lawyer population on its membership rolls, as compared to ouly a fraction of that in 1902.