

Testimony of
Mr. Thomas Hayward

Former Chair, Standing Committee on the Federal Judiciary
American Bar Association
October 1, 2003

STATEMENTS OF

THOMAS Z. HAYWARD, JR.

and

PATRICIA M. HYNES

ON BEHALF OF THE

STANDING COMMITTEE ON FEDERAL JUDICIARY

of the

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF DORA L. IRIZARRY

TO BE JUDGE OF THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

before the

COMMITTEE OF THE JUDICIARY
UNITED STATES SENATE

OCTOBER 1, 2003

STATEMENT OF THOMAS Z. HAYWARD, JR.

Mr. Chairman and Members of the Committee:

My name is Thomas Z. Hayward, Jr. I am a practicing lawyer in Chicago, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. With me today is Patricia M. Hynes, a former member and past Chair of the Committee, and circuit member for this investigation. We appear here to present the views of the Association on the nomination of Dora L. Irizarry to be a U.S. District Court judge for the Eastern District of New York. After careful investigation and consideration of her professional qualifications, a majority of our Committee is of the opinion that the nominee is "Not Qualified" for the appointment. A minority found her to be "Qualified."

I. PROCEDURES FOLLOWED BY THE STANDING COMMITTEE

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures so that you will have a clear understanding of the process the Committee followed in this investigation. A more detailed description of the Committee's procedures is contained in the Committee's booklet, *Standing Committee on Federal Judiciary: What It Is and How It Works* (April 2002).

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee: his or her competence, integrity and judicial temperament. Ideological or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law, breadth of professional experience, character, integrity, compassion, courtesy, open-mindedness, patience, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the committee member residing in the judicial circuit in which the vacancy exists, but it may be conducted by another committee member or former member. In the current case, Mrs. Hynes, in her capacity as a former member, was asked to undertake this investigation because the current member from the Second Circuit was already undertaking another investigation.

The starting point of an investigation is the receipt of the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications -- professional experience, significant cases handled, major writings, and the like. The circuit member makes extensive use of the questionnaire in the investigation. In addition, the circuit member examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations and others who are in a position to evaluate the nominee's integrity, professional competence and judicial temperament. This process provides a unique "peer review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is discovered, the circuit member will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching confidentiality, the investigator will not use that information in writing the formal report and the Committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges in the interviews, and the investigation can be briskly concluded. In other cases, such as this one, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the circuit member takes whatever further steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the circuit member then submits an informal report on the nominee to the Chair, who reviews it for thoroughness. The circuit member then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications, which is circulated to the entire 15-member committee, together with the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials. After careful consideration of the formal report and its enclosures, each member submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified," or "Not Qualified."

I would like to emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the committee member by multiple sources. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared, the information will not be used by the Committee in reaching its evaluation.

II. THE INVESTIGATION OF THE NOMINEE

Ms. Irizarry was nominated on April 28, 2003. Carol Dinkins of Houston, Texas, who was then chair of the Standing Committee, assigned Mrs. Hynes to the investigation, as explained above. She began her investigation shortly after receiving the nominee's May 23, 2003 responses to the public portion of the Senate Judiciary Committee questionnaire.

On July 9, 2003, Mrs. Hynes prepared and submitted to Chair Dinkins an informal report that presented the results of her thorough investigation, including summaries of all of her confidential interviews and a description of her interview with the nominee. On July 11, 2003, Mrs. Hynes' formal report was transmitted to all of the members of the Committee. Those who had questions were encouraged to contact Mrs. Hynes directly. After all Committee members had an

opportunity to study the report and all the attachments, they reported to the chair their votes on the qualifications of the nominee.. A majority of the Committee found the nominee "Not Qualified" and a minority found her "Qualified." The vote was reported to you on July 21, 2003.

I will now ask Mrs. Hynes to describe her investigation of the nominee.

STATEMENT OF PATRICIA M. HYNES

Mr. Chairman and Members of the Committee:

My name is Patricia M. Hynes. I am a trial lawyer from the State of New York and, as Mr. Hayward indicated, I am a former member and past chair of the Committee. With that background, I was asked to undertake the investigation of the qualifications of Dora L. Irizarry to be a United States District Judge. During my membership on the Committee, both as the Second Circuit member and as Chair, I participated in numerous investigations of potential and actual nominees to the U.S. Courts of Appeals and the U.S. District Courts. My investigation of the nominee was conducted in the same manner all investigations by the Standing Committee are conducted, as Thomas Hayward just explained to you.

My investigation was conducted during May, June and July of this year. It included approximately 70 confidential interviews, including those of 50 lawyers and 17 judges. During each conversation I inquired how the person knew, if at all, the nominee and what the person knew about the nominee's professional competence, judicial temperament and integrity that would bear on her qualifications to serve as a United States District Judge. I also inquired if they knew any reason why the nominee was not qualified to so serve. I made a particular effort to locate and speak to lawyers who had had trials before the nominee. In addition to these interviews, I reviewed other pertinent materials, including writing samples the nominee selected, such as legal opinions she had written. I also met privately with the nominee in her office in New York. During the course of our meeting, concerns that had been identified during my investigation were discussed and the nominee was given an opportunity to rebut the adverse information and provide any other additional information.

The majority of the lawyers interviewed raised concerns about Judge Irizarry's judicial temperament. These lawyers were both prosecutors and defense lawyers from three different counties -- Bronx, Manhattan and Brooklyn -- all counties where Judge Irizarry sat as a judge from late 1995 to May 2002. These comments all had a starkly common theme and included statements that Judge Irizarry was gratuitously rude and abrasive and demeaned attorneys; that she flew off the handle in a rage for no apparent reason and screamed at attorneys; that she was impatient and did not fully listen to attorneys' legal arguments, and did not have a good grasp of the legal issues presented to her; that she took offense easily, was short tempered and volatile, and got angry when lawyers disagreed with her; that she was rigid and dismissive and did not treat lawyers with respect.

On the issue of judicial temperament, the Committee's background booklet states that "in investigating judicial temperament, the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to justice under the law."

Our Committee, in reviewing my report on the nominee, could not discount the number of complaints about the nominee's temperament. Certainly some attorneys who appeared before her have not encountered problems, but unfortunately they do not adequately make up for the substantial number of negative comments concerning her judicial temperament. The breadth and depth of these negative comments signal a serious control problem. If the investigation had disclosed that the nominee's judicial temperament had improved over the years as she acquired more experience, the Committee would not have exhibited the same amount of concern. However, the concerned comments about her lack of judicial temperament appear consistently until her resignation from the state bench to run for political office.

The best judge in the world can have a bad day from time to time, and a judge who is smart and trying to run a tight courtroom will almost inevitably leave some of the lawyers or litigants with a bad taste from time to time. But this investigation and the information gathered go well beyond the thesis that, occasionally, with a crowded docket and stressful conditions, a judge may step over the line insofar as temperament is concerned. After careful consideration of my report, a majority of the Committee was of the view that Ms. Irizarry is not qualified for the position. A minority of the Committee found her to be qualified.

Our Committee takes most seriously its responsibility to conduct an independent examination of the professional qualifications of judicial nominees. There is no bright-line litmus test as to whether a nominee is or is not qualified. Our recommendation is not the result of tallying the comments - pro and con - about a particular nominee. Rather, in making our evaluation, we draw upon our previous experience, the information and knowledge we gain about the nominee during the course of our investigation, and our independent judgment. I must stress that we apply the same standards and criteria impartially to all nominees.

In my service on the Committee, I have either conducted or reviewed literally hundreds of reports on judicial nominees. I have never before experienced such widespread and consistent negative comments about a nominee's temperament.

Thank you for inviting us to share our views.