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Defending Liberty Pursuing Justice

AMERICAN BAR ASSOCIATION

Standing Committee on the Federal Judiciary

December 5, 2017

The Honorable Chuck Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

Enclosed are the responses of the ABA Standing Committee on Federal Judiciary to the questions posed by you and certain other Senate Judiciary Committee Members following the November 13 hearing concerning the nomination of Leonard Steven Grasz for the United States Court of Appeals for the Eighth Circuit.

Sincerely,

Pamela A. Bresnahan

Chair

Responses
to
Senator Chuck Grassley
Questions for the Record
for
Pamela Bresnahan
Chair, ABA Standing Committee on the Federal Judiciary

1. **The Backgrounder published by the ABA Standing Committee on the Federal Judiciary articulates its evaluation criteria in vague generalities. For example, an evaluator must consider "[i]n evaluating 'judicial temperament' the Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law." What steps has the ABA taken to ensure that these factors are applied consistently and objectively?**

Answer to Question 1

The Backgrounder sets forth the important elements that are used to evaluate temperament. These are well understood, frequently cited components of judicial temperament, and lawyers and judges often raise the very elements set forth in our definition when discussing their concerns about a nominee's judicial temperament. In addition, lawyers often volunteer, without prompting, that judicial temperament goes to the core of being a judge because it deals with whether a judge will be fair to all litigants and will put aside personal views to follow the law. Rather than offering vague guidance, the Backgrounder's explanation of our criteria and procedures helps ensure that each evaluation is conducted in the same manner and is limited to assessing professional qualifications through an examination of a nominee's professional competence, integrity, and judicial temperament.

Three additional factors that ensure consistency and quality deserve mention. First, at the start of every association year, newly appointed members undergo an exhaustive day of training with current and former members. During training, the evaluation process is discussed in detail and sample formal reports are reviewed and dissected. It also helps that only about a third of the

members of the Standing Committee are new every year and that members who are rotating off the committee have a duty to – and willingly do—act as mentors to their replacements. Second, an important factor in assuring high-quality, thorough, impartial evaluations that reach deeply into the nominee's legal community is that the Standing Committee chair reviews every Report for quality and thoroughness before it is circulated to Committee members for review and a vote. Finally, after review by the chair, every nominee is assessed and voted on individually by each of the 14 distinguished members of the Committee.

2. **The Senate Judiciary Committee received hundreds of letters in support of L. Steven Grasz. The ABA refuses to identify the witnesses who spoke negatively about Mr. Grasz. Why should the Committee credit an unsourced, bottom-line assessment from the ABA over the public statements of many members of the Nebraska legal community?**

Answer to Question 2

The Standing Committee's confidential peer evaluation of Mr. Grasz and public statements of support for him serve very different functions, and both deserve consideration and scrutiny by your Committee.

The purpose of our evaluations is to provide an objective, peer assessment of a nominee's professional competence, integrity and judicial temperament. We are able to obtain candid assessments of a nominee's professional qualifications from those who work with the nominee professionally because we promise to maintain the confidentiality of the identity of every interviewee. Absent a promise of confidentiality, many lawyers and judges would hesitate to speak frankly about a nominee, knowing full well that they will continue to have a professional relationship with the nominee, either as a judge or lawyer who practices in the same community. Under most circumstances, lawyers, judges and others interviewed are willing to be frank and candid about their assessment of a nominee's professional qualifications precisely because they are confident that they can speak confidentially.

With regard to concerns that our evaluations are unsourced, it is important to point out that the Standing Committee does not give consideration to comments made by anonymous sources: all interviewees who wish to have their comments regarding a nominee considered by the Committee must agree to the disclosure of their identity only to Committee members.
In conclusion, in our view, confidentiality improves the reliability of the information we obtain and is essential to our ability to provide objective peer assessments. Members of the Senate, of course, take many additional factors into consideration when deliberating over a life-time appointment and are free to decide for themselves how much weight to accord our evaluations.

3. **Your statement dated October 30, 2017, stated that some interviewees "expressed concerns about [Mr. Grasz]'s views of *stare decisis,* and questioned his commitment to it." What evidence was offered to substantiate these concerns?**

Answer to Question 3

Please refer to the additional discussion in our Supplemental Statement of November 13, 2017. There is no one event that made Mr. Grasz' peers question his ability to apply precedent faithfully. Their concerns were based on their individual cumulative experiences with the nominee, his approach to legal issues, and his writing. Concerns about whether the nominee could be fair, open minded, and follow the law gave rise to expressions of concern over his level of commitment to the principle of s*tare decisis*.

4. **Your statement dated October 30, 2017, stated that some interviewees "expressed the view that [Mr. Grasz] would be unable to separate his role as an advocate from that of a judge." What evidence was offered to substantiate this view?**

Answer to Question 4

Please refer to the additional discussion in our Supplemental Statement of November 13, 2017. We have summarized concerns without providing specific details to preserve the confidentiality of those we interviewed.

5. **Your statement dated October 30, 2017, stated that some interviewees "shared instances in which Mr. Grasz's conduct was gratuitously rude." What evidence was offered to substantiate the conclusion that Mr. Grasz is gratuitously rude?**

Answer to Question 5

Please refer to the discussion on page six of the Supplemental Statement of November 13, 2017. His colleagues raised concerns based on their interactions with him in the course of his representation of his clients.

6. **Your statement dated October 30, 2017, stated that some interviewees expressed a fear of adverse consequences "based on the nominee's deep connection and allegiance to the most powerful politicians in his state." Were any other reasons offered besides the fact that Mr. Grasz is involved in politics?**

Answer to Question 6

While it is impossible for anyone to know the motivation of another person's actions, we can report that multiple individuals said that those with whom Mr. Grasz was closely affiliated and to whom he is deeply committed, including those at and near the pinnacle of state government, valued loyalty within the ranks of their party and would punish those who did not display it. If true, such attitudes would encourage expressions of support and chill any desire to candidly express concerns.

7. **Your statement dated October 30, 2017, states that Mr. Grasz affirmed that lower courts must follow Supreme Court precedent. You identified a 1999 law review article written by Mr. Grasz, entitled *If Standing Bear Could Talk . . . Why There Is No Constitutional Right to Kill A Partially-Born Human Being*, 33 Creighton L. Rev. 23 (1999). Your statement indicates that the ABA believed it was inappropriate for Mr. Grasz to assert that courts "need not extend questionable jurisprudence into new areas or apply it in areas outside of where there is clear precedent" and his belief that courts "should adopt a new 14th Amendment construct for analysis of the rights of the [partially born] that could avoid *Roe* and *Casey*."**

    a. **Considering the Supreme Court did not announce that partial-birth abortion should be assessed under the *Roe* / *Casey* framework until after this law review article was published, why was it inappropriate for Mr. Grasz to suggest another framework to assess a different abortion procedure with relevant factual distinctions from those assessed in *Roe* and *Casey*—i.e., the**

dismantling of a partially born child as opposed to destruction of an unborn fetus?

b. The ABA granted Goodwin Liu a unanimous "well-qualified" rating in 2011 despite having published law review articles critical of seminal Supreme Court precedent in the areas of school desegregation and affirmative action. *See* Goodwin Liu, *"History Will Be Heard": An Appraisal of the* Seattle/Louisville *Decision*, 2 Harv. L. & Pol'y Rev. 53 (2008); Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002). Can you explain the ABA's disparate treatment of Mr. Liu's direct criticisms of Supreme Court precedent and Mr. Grasz's argument that certain Supreme Court precedent does not necessarily apply to a particular case?

c. Your statement suggests that the ABA was troubled that Mr. Grasz continues to adhere to the views set forth in his law review article. Is it the position of the ABA that scholars and practitioners must abandon their personal assessments of legal opinions when nominated to the bench?

d. Can you provide another example of the ABA rating a judicial nominee unqualified because of the nominee's attempts to distinguish potentially adverse precedent or the nominee's criticism of existing precedent?

Answer to Question 7

a. On principle, there is nothing wrong with a scholar or commentator criticizing the Supreme Court's jurisprudence and suggesting that the Supreme Court should change it. Our exploration of the article with Mr. Grasz during our interviews and subsequent discussion of it in both of our statements were not pursued to determine if Mr. Grasz is right or wrong, or too conservative or too pro-life to be a good judge. We used the article as vehicle for exploring whether the nominee is able to detach decision-making from his ardently held views in light of the many concerns raised by peers that his personal views may interfere with his ability to render impartial decisions based on the facts and the law.

b. Neither I nor the evaluators were on the Standing Committee when Judge Liu was nominated and therefore can't answer this question. However, one might just as readily ask why controversial writings of other nominees of this President have not set off alarms or resulted in a "Not Qualified" rating. This is probative because the answer is probably applicable to the evaluation of Judge Liu. The answer is that a nominee's writings that take the Supreme Court to

task, advance controversial issues, or express his or her ardent personal views, are not in themselves problematic and normally are not scrutinized by the Standing Committee. They become issues of concern when peers point to them to explain why they have strong concerns about a nominee's judicial temperament. Nominees who appear to have engaged in identical activities or who have other similarities get different ratings because their peers have evaluated their professional qualification differently, not because the Standing Committee has applied different standards or procedures.

c. It is not the position of the ABA or of the Standing Committee that scholars and practitioners must abandon their personal assessments of legal opinions when nominated to the bench. It is our belief that they must put aside their personal assessments of legal opinions in order to decide cases objectively and without bias.

d. We disagree with your characterization of why this nominee was rated "Not Qualified." The Standing Committee did raise *stare decisis* concerns when discussing the judicial temperament of a 5th Circuit Nominee who received a "Not Qualified" rating in 2005 and again in 2006. His nomination was returned at the end of the 109th Congress, and he was never renominated.

8. **Your statement dated October 30, 2017, states that Mr. Grasz's assertion that his pro-life views had no impact on his legal analysis meant he was "unable to identify the lack of objectivity that his personal convictions had created."**

a. Is it the ABA's position that holding pro-life views is inconsistent with taking an objective view of the law?

b. What is the basis for your conclusion that it was Mr. Grasz's pro-life views—as opposed to a good-faith legal argument—that caused Mr. Grasz to assert that *Roe* and *Casey* did not apply to partial-birth abortion bans?

c. Does the ABA have a rubric for determining when a nominee's stated legal views indicate a "lack of objectivity?" If so, please explain this rubric.

d. Is it the ABA's position that making a good-faith legal argument distinguishing potentially inapplicable precedent—and maintaining the

correctness of this distinction—raises questions as to "the nominee's ability to set aside personal bias in carrying out his judicial duties?"

e. Considering that a substantial part of legal practice is distinguishing potentially adverse precedent, how does the ABA determine the circumstances in which attempted distinctions of adverse precedent indicate an inability to set aside personal bias?

Answers to Question 8

a. No, that is not the position of the ABA and it is not an assumption upon which the Standing Committee bases its evaluations. There is no litmus test or simple formula for determining if a nominee has the requisite judicial temperament that will enable him to carry out his duties with open-mindedness, freedom from bias, and commitment to equal justice.

b. Please refer to page six of our October 30 Statement and pages 15-16 of the November 13 Supplemental Statement where this issue was discussed in detail.

c. No. The instances in which this concern is raised strongly by peers is sufficiently rare that each individual case is independently analyzed.

d. No. Please refer to responses to 7(a), 7(b), and 8(c).

e. The role of an advocate is to use existing precedent or a good faith extension of it to support a client's position. But a judge's role is to consider the arguments with an open mind and decide cases based on the facts and existing precedent or a good faith extension thereof, not to find a way to make the law justify the desired outcome.

9. Your statement dated November 13, 2017, states that the ABA is "able to evaluate thoroughly each federal judicial nominee. . . because the peers of the nominee who are interviewed are assured that their identities will be kept confidential."

a. When the ABA conducts interviews with a nominee's colleagues, does the ABA review their backgrounds to determine whether they have any animus or bias against the nominee?

b. What steps does the ABA take to substantiate adverse comments besides allowing the nominee to respond?
c. If the nominee does respond that the allegations are untrue, does the ABA still use them in its report?

Answer to Question 9(a) – (c)

As you correctly stated, interviews are conducted under an assurance of confidentiality. It bears emphasis that the Committee's ability to secure candid and complete assessments of a nominee's professional qualifications from the judges, lawyers, and others who are interviewed concerning the nominee is dependent upon the maintenance of strict confidentiality.

However, while confidentiality is the linchpin of our evaluation procedures, we are sensitive to the critical need to be fair to the nominee with respect to any adverse comments that are received during the course of the evaluation process. We strive to make sure our information is reliable and verifiable before asking the nominee about any adverse comments. That is why it is important to emphasize that while we do not disclose the identity of our interviewees we ourselves know who they are.

Each Report prepared by an evaluator sets forth the identities of all individuals who have provided comments regarding a nominee's professional qualifications. The Report also provides the explanatory context for the comments made by an individual, such as the degree of familiarity with the nominee and the particular case or other experiences that provide the underlying basis for the comments. Members of the Standing Committee consider this information about the background and relationship to the nominee of peers providing reviews, including whether there is any pre-existing allegiance or interest, or any pre-existing adversarial or political animosity, or any other motivation for comments.

If an individual is unwilling to be identified in our Report, any comments by that individual regarding the nominee are not considered by the evaluator in making his or her recommendation, nor are such comments included in the Report for consideration by other Committee members. It is important for members of the Standing Committee to know the identities of the sources of comments regarding nominees and the context in which they were made so that each member

can independently decide, based on his or her own judgment, how much weight to ascribe to each comment.

The members of our Committee are skilled lawyers who are called upon to elicit facts and assess credibility every day. They call upon these skills when conducting evaluations for the Standing Committee. Evaluators carefully question the lawyers and judges who raise concerns about temperament and other criteria on which we assess professional qualifications. They ask for corroborating information, such as published cases or articles and the names of other lawyers or members of the legal community who could further address the concerns raised.

If adverse comments made about the nominee are included in the Report and used by the evaluator to determine a recommended rating, the investigator will disclose to the nominee during the personal interview as much of the underlying basis for the adverse comments as reasonably possible, consistent with the promise of confidentiality made to interviewees. During the personal interview, the nominee is afforded a full opportunity to rebut the adverse comments and provide any additional information relevant to them. The investigator will then follow up on any such information provided by the nominee. This information will be included in the Report so that each member can decide independently how to weigh conflicting interpretations of the issues raised.

10. James Scurlock, an Arkansas lawyer, publicly stated on Twitter that he was part of the evaluation process. He stated he was "happy to lend [his] voice" to the ABA's unqualified rating of Mr. Grasz. In other tweets, Mr. Scurlock also advocated violence against Republicans.

a. Was Mr. Scurlock involved in Mr. Grasz's evaluation process in any way?

b. Did the ABA take steps to ensure that it did not consider the opinions of individuals with partisan motivations to discredit Mr. Grasz?

c. What assurances can the ABA give that the peers who provided negative opinions of Mr. Grasz were not motivated by ideology or partisanship?

Answer to Question 10

a. As stated in my testimony, I don't know James Scurlock. Despite my desire to do so, I am constrained from directly answering the question posed in (a) because I believe our guarantee of confidentiality prevents us from confirming or denying whether a specific individual was contacted and/or submitted information for consideration. I suggest you contact Mr. Scurlock directly and ask him if he has had any contact with the Standing Committee and if so, to describe it.

b - c. Please refer to our response to Question 9.

11. Your statement dated November 13, 2017, states that Cynthia Nance received comments that Mr. Grasz "had been inappropriately aggressive and that his conduct towards opposing counsel could be difficult, bordering on incivility." Could you elaborate on what conduct specifically was described?

Answer to Question 11

We are unable to provide more context because of confidentiality concerns. However, it is important to note that Professor Nance received numerous comments during the course of the evaluation from both lawyers and judges that Mr. Grasz had been inappropriately aggressive and that his conduct towards opposing counsel was a problem. The seriousness and consistency of these concerns contributed to her recommended" Not Qualified" rating.

12. Your statement dated November 13, 2017, states that Cynthia Nance found Mr. Grasz "was described by the majority of those providing feedback as gracious, even-tempered and easy to work with." Is there criteria for determining how much weight to ascribe to various commenters? If Ms. Nance found a majority of respondents had favorable views of Mr. Grasz, why did she ascribe more weight to a minority of commenters?

Answer to Question 12

The focus on determining which comments were ascribed more weight is misplaced. A nominee who receives favorable ratings with regard to one of the Standing Committee's three criteria or with regard to only certain elements that comprise a criterion may still not be deemed competent

to become a judge. As provided by the Backgrounder, the nominee must meet all of the Standing Committee's criteria, and failure to satisfy any one is sufficient reason to rate the nominee "Not Qualified," even if the other criteria are met.

13. Your statement dated November 13, 2017, states that Laurence Pulgram found that "[m]any peers believed that the nominee is sufficiently open-minded and would be able to be free from bias." Can you describe why the opinions of some commenters were ascribed more weight than others when rating Mr. Grasz?

Answer to Question 13

Please refer to the response to Question 12.

14. The ABA claims to be a politically independent organization. At the same time, it spends over $1 million every year on lobbying efforts. Recently, the ABA has taken public positions on federal legislation such as its opposition to the "Stop Illegal Reentry Act" and the restructuring of the 9th Circuit. The ABA has also taken positions on many contentious issues before the courts, from abortion to same-sex marriage to gun rights.

a. In the last fifteen years, what legislation has the ABA lobbied on and what positions has it taken?

b. In the last fifteen years, in what federal court cases has the ABA submitted amicus briefs? Please identify the party on behalf of whom the ABA submitted an amicus brief.

Answer to Question 14

a. The Standing Committee operates separate and apart from the ABA. Its work is insulated from, and independent of, all other activities of the ABA. My role is to sit as Chair of a non-partisan committee, independent of the ABA's policies made by its House of Delegates and its Board of Governors. I therefore refer you to the attached publications of the ABA *Washington Letter*. Each summarizes legislation of concern to the ABA that was active during a Congress in the period in question.

b. Every amicus brief dating back to 1998 is available on the website of the ABA Standing Committee on Amicus Briefs at: https://www.americanbar.org/groups/committees/amicus.html.

15. The current members of the ABA's Standing Committee on the Federal Judiciary have contributed significantly more to Democratic candidates than to Republican candidates. Both of Mr. Grasz's evaluators, Cynthia Nance and Laurence Pulgram, likewise have supported Democratic candidates and liberal causes.

a. Do you understand why a Republican nominee and Republican senators would view ratings produced by a body with such clear partisan leanings with some skepticism?

b. What steps has the ABA taken, or will it take, to ensure more ideological diversity on its Standing Committee on the Federal Judiciary?

Answer to Question 15

a. With all due respect, I do not accept your assumption that members of the Standing Committee have clear political leanings, and I further do not accept the leap of logic required to assume that members of the Standing Committee violate the ethical and procedural rules of the Standing Committee to insert their own views into a process specifically designed to enable them to gather candid information about the professional qualifications of a nominee from his or her colleagues. I also do not think it is plausible to assert that the ratings issued by members of the Standing Committee are suspect or tainted, given the fact that, as of December 4, 2017, the Standing Committee has found 52 of President Trump's nominees "Well Qualified" or "Qualified."

b. Each ABA president, prior to beginning a one-year term in office, appoints approximately one-third of the members of the Standing Committee for three-year terms. Prior to making these appointment, the president-elect is apprised of the procedures of the Standing committee if not already familiar with them, and has discussions with current members and involved staff about the importance of making appointments that reflect the diversity of the profession in every way.

16. In 2009, the Political Research Quarterly published an article evaluating the ABA's ratings of federal judicial nominees between 1977 and 2008. The article concluded: "Holding all else equal, individuals nominated by a Democratic president are significantly more likely to receive higher ABA ratings than individuals nominated by a Republican president….Overall, we find support for the proposition that the ABA ratings reflect a bias in favor of Democratic nominees." Furthermore, the study found "strong evidence of systematic bias in favor of Democratic nominees. All else being equal, a Democratic nominee is more likely to be rated Well Qualified than a similarly qualified Republican nominees." This study received widespread attention in the press.

a. What was the ABA's response to this study?

b. Did the ABA make any changes to its evaluation process to address this systemic bias?

Answer to Question 16

a. The Standing Committee chair responded to a few media inquiries. There was no further response from the ABA.

I would like to point out that the article you cite contains numerous other conclusions, not just the one cited. For example, the authors concluded that "the ABA is just as likely to rate poorly [i.e. to confer a "Not Qualified" rating] liberal nominees who lack acceptable qualifications as they are conservative nominees."

b. We do not believe that the evaluation process suffers from systemic bias.

17. In 2016, the ABA launched the Implicit Bias Initiative, which is hailed as the "go-to repository for anyone who wants to know more about implicit bias in the justice system or in the ranks of the legal profession." Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These attitudes can be based on someone's race or gender, but also their religion or political affiliation.

a. Does the ABA require evaluators to complete a course in recognizing and responding to implicit bias?

b. How does the ABA ensure that its evaluators are aware of their implicit biases?

c. Is it your opinion that evaluators' implicit biases account for the disparities found in the 2009 study discussed in the previous question?

Answer to Question 17

a. In 2012, the Standing Committee held its first annual implicit bias training workshop for its members as part of its annual training session. Since then, we have had workshops, required our members to take the Harvard online implicit bias tests; provided research materials on implicit bias, and have engaged in regular discussions about it. Many of our members also have partaken in training provided by their firms.

b. Please refer to the answer, above. In addition, it is important to remember that we provide the Senate Judiciary Committee with a peer evaluation of the professional qualifications of nominees, not an evaluation based on our own views.

c. No, that is not my opinion.

Responses

to

Questions for the Record for Ms. Pamela Bresnahan
Chair, ABA Standing Committee on the Federal Judiciary
Regarding
Nomination of Steven Grasz to the U.S. Court of Appeals for the Eighth Circuit

Submitted November 22, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. **Ms. Bresnahan, Mr. Grasz received a unanimous "Not Qualified" rating from the American Bar Association (ABA) Standing Committee on the Federal Judiciary. Your October 30 Statement concluded that his "temperament, particularly bias and lack of open-mindedness, were problematic."**

   a. **What factors does the ABA examine when evaluating a nominee's temperament? How does the ABA gather evidence of these factors?**
   b. **How many judicial nominees has the ABA released public ratings for since 1989?**
   c. **Of that total, how many nominees were rated unanimously "Not Qualified" due to concerns over judicial temperament and the ability to be an unbiased and impartial judge?**
   d. **As of the date of your reply to these Questions for the Record, please provide the Committee with updated numbers regarding how many of President Trump's federal judicial nominees the ABA has rated overall, how many of those have been rated either "Well Qualified" or "Qualified," and how many have been rated "Not Qualified."**

Answer to Question 1

a. The criteria for evaluating judicial temperament are set forth in the Backgrounder and include freedom from bias, impartiality and open-mindedness and commitment to equal justice under the law. Evidence of a nominee's judicial temperament is gathered from the writings of the nominee, the personal interview or interviews of the nominee, and most importantly, from extensive interviews of the nominee's peers who have personal, professional knowledge of the nominee.

b. Since 1989, the Standing Committee has rated 1,734 Article III nominees and 21 Article IV nominees.

c. Only two of these 1,755 nominees have been rated "Not Qualified" by unanimous vote due to concerns over judicial temperament and the ability to be an unbiased and impartial judge.

d. As of November 30, 2017, the Standing Committee has rated a total of 55 judicial nominees by President Trump. Fifty-one received a rating of either "Qualified" or "Well Qualified," and four received "Not Qualified" ratings.

2. **Ms. Bresnahan, the ABA's November 13 statement discussed the unusual response Professor Nance received when she reached out to schedule interviews. Professor Nance's testimony states as follows: "Having served as the lead evaluator in two previous evaluations for the Eighth Circuit, I noticed a reluctance on the part of members of the Nebraska Bar to participate in the evaluation here. I had not encountered that situation in my previous two Circuit evaluations, despite the fact that as judges those nominees also would have the ability to directly impact lawyers as litigants. Specifically, the reluctance to participate in the evaluation process was readily apparent for four reasons. First, people I spoke with expressed concerns about retribution, should their comments be made public. Second, others told me they had reached out to members of the bar and asked them to visit with me, and those persons were afraid to do so. Third, a number of the people I contacted would not return my calls or email messages, including those whose colleagues had given me their names and suggested I call. Finally, several of the individuals who were interviewed with respect to Mr. Grasz's nomination have since stated they were not contacted by this Committee."**

    a. **This certainly does seem unusual. Has the ABA Standing Committee seen a similar response regarding any other judicial nominee in this Administration?**
    b. **How did this impact the ABA's evaluation process?**

Answer to Question 2

a. The degree of reluctance that Ms. Nance encountered was indeed unusual. When conducting evaluations on a post-nomination basis, one expects to encounter some reluctance on the part of a nominee's peers to share adverse information, but concerns are often assuaged by promises of

confidentiality and more commonly are encountered by the second evaluator whose appointment signifies to those being interviewed that there may be problems with the nomination. During the evaluation of another nominee of this administration who also received a "Not Qualified," a second evaluator encountered reluctance by those contacted to offer candid comments. However, the desire to not respond to the initial evaluator's inquiries early in the evaluation process and the degree of avoidance sets this case apart.

b. The refusal of a significant number of the nominee's peers to be interviewed and the concerns about retribution of others who did agree to talk prolonged the evaluation process, adding days to the time that needed to be spent on the evaluation to assure its thoroughness.

3. Ms. Bresnahan, some of my colleagues have characterized the ABA's concern with Mr. Grasz's ability to be an impartial judge as the result of the ABA's—or the two evaluators'— disagreement with Mr. Grasz's conservative views and record, even though of the 12 conservative circuit court nominees the Committee has considered in this administration, only Mr. Grasz has received this rating.

a. How would you respond to those who have suggested that the ABA's rating of Mr. Grasz is based on his politics?
b. How does the ABA Standing Committee on the Federal Judiciary guard against any potential for ideological or political bias in its evaluation process for judicial nominees?
c. Does the evaluation process involve determining how a nominee would rule on a legal issue, if confirmed?

Answer to Question 3

a. That characterization is inaccurate, at best. The fact that only one out of 55 nominees was found to be "Not Qualified" on the basis of temperament *more strongly suggests that* the nominees' peers did not think he should sit on the bench because they believe he could not decide cases with an open mind and without bias. Were this rating based on his politics, one would expect that other nominees with similar politics also would have received "Not Qualified" ratings based on temperament**.**

The characterization also fails to factor in that it would require every member of the Standing Committee to base his or her rating on the same view of politics since the Reports and

information about Mr. Grasz were reviewed independently by each member of the Standing Committee, and all 13 who voted individually determined that he was not qualified for a lifetime appointment to the Circuit Court bench. (For your information, even though the Standing Committee is comprised of 15 volunteers, only 13 voted because one member abstained from voting and the chair only votes if there is a tie.)

With regard to other nominees from the Eighth Judicial Circuit, Professor Nance notes that she has conducted evaluations of two additional nominees, both of whom were found to be "Well Qualified." She also evaluated a district court nominee from another circuit whom the Committee found "Qualified."

Finally, it is worth mentioning that both Justice Willett and Mr. Ho, who were nominated to circuit court positions and who were on the first panel on November 15, were found "Well Qualified" by the Standing Committee. The Majority made no mention of these ratings when examining the named nominees.

b. The ABA Standing Committee is comprised of experienced lawyers who are appointed for staggered three-year terms by the ABA President. Since the ABA president holds office for only one year, no ABA president appoints more than about one-third of the Committee. ABA members are tapped to serve, based on their own high professional stature, integrity, and varied work experience. No member is asked about his or her political affiliation. Each committee member spends countless hours investigating the professional qualifications of nominees by contacting and interviewing people who have direct professional knowledge of the nominees and by spending significant time interviewing nominees. The Standing Committee members volunteer their time and energy to this endeavor so that the Senate has the benefit of an exhaustive, independent, nonpartisan peer evaluation for consideration when deciding whether to confirm a nominee for a life-time appointment to the bench.

Every member participates individually in every rating decision by reading the evaluator's comprehensive confidential Report of his or her investigation, which has been reviewed by the chair for thoroughness prior to distribution, and reviewing the nominee's Senate Judiciary

Questionnaire (SJQ) and selected writings. After reviewing these materials and discussing any questions with the evaluator or chair, each member independently votes on a rating for the nominee. While the majority rating represents the Standing Committee's official rating of the nominee, in situations where the vote is not unanimous, the Chair discloses that the nominee received a certain rating from either a majority (8-9 members) or substantial majority (10-13 members) of the Committee and notes that a minority gave the nominee another rating or ratings. Split votes occur because ratings are not arrived at collectively. Instead, each member of the Standing Committee, who is a distinguished lawyer in his or her own right, makes an independent assessment of the professional qualifications of a nominee, based on the information provided by the nominee and by his or her peers. This process provides a check on the potential for a rating to be tainted by ideological or political bias of a member of the Standing Committee.

4. **As was noted at the hearing, it was unusual and disappointing that only you were invited to testify—rather than having you testify in addition to the evaluators who conducted the evaluation of Mr. Grasz. It was especially disappointing given that the evaluators were personally criticized by several of my Committee colleagues, yet did not have a chance to explain or defend themselves directly.**

    a. **At the hearing, much was made of the evaluators' partisan affiliations prior to their service on the Standing Committee. If the evaluators would like to clarify, explain, or rebut anything that was said about them personally, I would invite them to do so.**
    b. **At the hearing, much was said about how the evaluators did or did not conduct themselves in interviews with Mr. Grasz and others. If the evaluators would like to correct the record about anything that was said about their conduct in the evaluation, I would invite them to do so.**

Answer to Question 4 with Respect to Mr. Pulgram

There have been a number of misstatements made during the hearings on November 1 and 15, 2017, and in the related press reporting, about the ABA Standing Committee's process and Mr. Pulgram's participation in it. These include inaccurate characterizations of the Standing Committee's 13-0 rating of "Not Qualified" as being based on political preferences, and of Mr. Pulgram's interview with the nominee as being hostile or biased. Neither characterization is correct. Mr. Pulgram addressed these accusations in the Supplemental Statement submitted by

the ABA's Standing Committee before the November 15, 2017, hearing (copy attached). He was present at the hearing and regrets that he was not afforded the customary opportunity to explain the evaluation in person before the Judiciary Committee. Please consider the following:

- Mr. Grasz has already implicitly recanted his allegation in his testimony (Tr. p.59) that Mr. Pulgram "repeatedly used in a negative connotation the phrase 'you people,'" referring to "conservatives and Republicans." Mr. Pulgram unequivocally stated in our Supplemental Statement that this never occurred, and Mr. Grasz's post-hearing written responses to Senator Sasse, dated November 13, 2017, withdrew the "you people" allegation made in testimony on November 1. *See* page 36 of 44 in this pdf file.

    - As set out in the Supplemental Statement, during the interview Mr. Pulgram had been inquiring about an article in which Mr. Grasz claimed that the non-partisan judicial nominating process in Nebraska was unfair. Mr. Grasz said this was because the plaintiffs' trial lawyers had the most influence. Mr. Pulgram asked why they had the most influence. Mr. Grasz said because the plaintiffs' lawyers "care more." In response, Mr. Pulgram asked why that would be unfair, because "you guys are entitled to care just as much." Mr. Pulgram—who is not a plaintiffs' lawyer—explained that this was not meant to take sides. He would have asked the same question if someone said that defense lawyers had an unfair advantage because they cared more. He was just trying to understand why it was that Mr. Grasz thought a process to be unfair when it was responsive to whoever might care more or be more active.

    - Mr. Grasz's correction of his erroneous prior testimony on this point, though belated, was a positive step: his response to Senator Sasse's question stated that "During one section of the interview, Mr. Pulgram repeatedly referred, in a negative tone, to 'you guys'." Unfortunately, Mr. Grasz had distorted his recollection of the events in his testimony and then used that distortion to claim bias in his evaluators.

- Another unfounded attack on Mr. Pulgram erroneously portrayed a discussion during their interview about whether Mr. Grasz's children attended Concordia Lutheran School, an

inquiry that Mr. Grasz testified "surprised" him. As explained in the Supplemental Statement at pages 11-12, this subject came up as part of a standard line of inquiry into Mr. Grasz's pro bono and public service activities. Mr. Grasz listed the Concordia School three separate times, on pages 3, 7 and 58, in the Questionnaire he returned to the Senate Judiciary Committee. Mr. Pulgram asked about that school, and how Mr. Grasz became involved in it (that is, whether it was because his children attended), to learn about this public service activity. That Mr. Grasz professed "surprise" at this question during his November 1 testimony is particularly troubling because he had volunteered the same information about his children's attendance when the school come up in the first evaluator's interview, as part of the same inquiry the ABA Standing Committee regularly makes into public service activities. See Supplemental Statement at page 8.

- Contrary to allegations during the Senate hearings and in the press, attention to Mr. Grasz's political allegiances and commitments was not based on any personal agenda of the evaluators, but involved following up on interviews with his peers who frequently questioned whether Mr. Grasz could be open-minded and free from bias. These included questions about Mr. Grasz's participation in the judicial nominating commission activities described in the Supplemental Statement, which is reflected in the 14-page document described there. Notably, these activities were not known to Nebraskans, but only uncovered by the Standing Committee. The Standing Committee investigated all of the concerns that were raised by his peers and, for the reasons described fully in the Supplemental Statement, unanimously concluded that Mr. Grasz did not meet the requirements for a "Qualified" rating.

- Contrary to Mr. Grasz's suggestions that the interview with Mr. Pulgram was hostile, biased, or included inappropriate questioning, Mr. Pulgram in the Supplemental Statement (e.g., at pages 13-14) describes the interview as entirely professional and wide-ranging and appropriate in subject matter. Mr. Grasz even followed up with Mr. Pulgram after the interview with friendly emails, including unsolicited commentary on events Mr. Grasz attended in which he and Mr. Pulgram had shared mutual interests. Mr. Grasz's negative impression and characterization of the interview appear to have emerged only after he learned of the Standing Committee's "Not Qualified" rating.

Answer to Question 4 with Respect to Professor Nance

a. As stated in the Supplemental Statement on pages 4-5, Professor Nance's outreach to the bar included all the states of the 8th Circuit. (She stated that she did not know anyone in Nebraska other than academic colleagues.) And, as explained on page 5, Professor Nance served as the lead evaluator for two previous 8th Circuit nominees (Ralph Erickson and David Stras), both of whom received a rating of "Well-Qualified" from the Standing Committee. In addition, she has participated, as a voting member of the Standing Committee in the ratings of every nomination made by this administration to date. This history suggests no evidence from which to draw an inference of bias. Further, all members of the Standing Committee had an opportunity to read the Reports of both evaluators and to independently reach their own conclusions. The vote was unanimous.

b. Professor Nance's interviews with the nominee's peers were based on the Judiciary Committee's Backgrounder -- that is, she asked each interviewee his or her opinion on Mr. Grasz's professional competence, integrity, and judicial temperament. Her Report is based on and accurately set out their candid responses. As she noted in the Supplemental Statement, the concerns highlighted in her Report and conveyed to this Committee were raised by multiple interviewees and were consistent in their content.

5. At the hearing you testified at, one of my colleagues sought to characterize the ABA as an "openly liberal" organization.

a. What is the mission of the ABA?
b. What segment of the legal profession does the ABA draw its membership from?
c. Is the Standing Committee's work connected with the rest of the ABA? If not, what steps are taken to ensure that the Standing Committee is kept separate?

Answer to Question 5

a. ABA Mission: To serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession. For a more detailed explanation, please click here: https://www.americanbar.org/about_the_aba/aba-mission-goals.html

b. The ABA is a voluntary organization of over 410,000 members. We have members from every state and territory and from every segment of the legal profession. Members range in age and participate in the activities of the ABA's 3,500 divisions, sections, and committees.

c. The ABA Standing Committee's charge is to evaluate nominees for the federal judiciary consistent with the criteria set forth in the Backgrounder. The Backgrounder sets forth in Section I.C the steps that are taken to maintain a complete wall of separation between th**e** Standing Committee and the rest of the ABA. It states:

> *The impartiality and independence of the Committee and its procedures are essential to the effectiveness of its work. The ABA's Board of Governors, House of Delegates and Officers are not involved in any way in the work of the Committee. Furthermore, no disclosures regarding the Committee's substantive work are made to ABA volunteers, up to and including the President of the ABA. Its work is insulated from, and independent of, all other activities of the ABA. Further its work is not affected by ABA policies, other than those stated herein.*
>
> *To preserve the integrity and independence of the Committee, no member may be an Officer of the ABA, member of the Board of Governors or a candidate for such offices while serving on the Committee. To further ensure the impartiality of the Committee, as a condition of appointment, each member agrees not to seek or accept a federal judicial nomination while serving on the Committee and for at least one year thereafter.*
>
> *In addition, for one year after a judge's appointment, if the member who conducted the evaluation of that judge enters an appearance in a case assigned to him or her, the member must disclose to opposing counsel and the Court that he/she conducted the evaluation on behalf of the Committee. This disclosure obligation applies only to the member, not to other attorneys in the member's firm.*
>
> *Also, while serving on the Committee, each member agrees not to participate in, or contribute to, any federal election campaign or engage in any partisan political activity on the federal level. The prohibition on partisan federal political activity requires that a member, while on the Committee, not host any fund-raiser or publicly endorse a candidate for federal office.*

In view of the confidence reposed in the Committee and the vital importance of the integrity and credibility of its processes, these constraints are strictly enforced.

In addition, the Standing Committee's Governing Principles, which are attached as Appendix I and reprinted in the Backgrounder provide additional guidance. An electronic version is available here:

https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf

6. **At the hearing, you were asked by Senator Cruz about a tweet from someone who claimed to have been interviewed as part of Mr. Grasz's ABA evaluation.**
   a. **I assume that pursuant to its guaranty of confidentiality to those it interviews, the ABA Standing Committee would not confirm or deny whether they had spoken to the individual in question. However, I would like to clarify: Does the ABA ever base a nominee's rating on concerns raised by one individual?**
   b. **How many persons did the two evaluators have substantial contacts with regarding Mr. Grasz's nomination?**

Answer to Question 6

a. You are correct; our guarantee of confidentiality prevents us from identifying whether an individual spoke to our evaluators about a nominee. While it is a closer call, confidentiality also prevents us from confirming or denying that a specific individual was contacted and either declined to comment or responded that he or she did not know the nominee. Although I can't identify people by name, I can offer that 366 individuals responded they did not know the nominee.

   The Standing Committee makes every effort to submit ratings to the Senate Judiciary Committee based on thorough, unbiased peer evaluations. It does not base any of its judicial ratings on a handful of comments made by peers, and it certainly does not issue a "Not Qualified" rating based on concerns raised by one or two individuals. The Standing Committee is committed to undertaking thorough, impartial, peer evaluations of the professional qualifications of judicial nominees.

   Our evaluation process entails interviews of a broad cross-section of lawyers and judges with

personal knowledge of a nominee's professional qualifications. The evaluator seeks to interview persons identified in the nominee's responses to the SJQ, federal, state and administrative judges before whom the nominee has appeared; lawyers who have been co-counsel or opposing counsel in cases handled by the nominee; and, if the nominee is a former or sitting judge, other judges who have served with the nominee. In addition, interviews may be conducted with law school professors and deans; legal services and public interest lawyers; representatives of professional legal organizations; and community leaders and others who have information concerning the nominee's professional qualifications.

The confidential Report prepared by the evaluator contains a summary of every peer interview, the basis for any adverse information disclosed during an interview, a detailed summary of the issues discussed with the nominee, and the nominee's responses.

The interview summaries set forth the identities of all individuals who have provided comments regarding a nominee's professional qualifications. They also provide explanatory context for the comments made by an individual, such as the degree of familiarity with the nominee and the case or other experiences that provide the underlying basis for the comments. If an individual is unwilling to be identified in our Report, any comments by that individual regarding the nominee are not considered by the evaluator in making his or her recommendation, nor are such comments even included in the Report for consideration by other Committee members. It is important for members of the Standing Committee to know the identities of the sources of comments regarding nominees so that each member can independently decide, based on his or her own judgment, how much weight to ascribe to comments and what rating to give to the nominee. The detailed information that is required to be contained in every Report enables every member of the Standing Committee to assess the breadth and depth of the evaluation and to determine whether there is sufficient evidence to support the proposed rating.

b. Ninety-three individuals had substantial contacts with the two evaluators. In several cases the second evaluator, interviewed persons that were also interviewed by the first evaluator.

7. **Some have criticized the fact that ABA interview process for judicial nominees is done confidentially.**
   a. **Why is confidentiality important for these interviews?**
   b. **How does the ABA ensure that it does not rely solely on confidential information?**
   c. **Are nominees provided with an opportunity to respond to negative information that the ABA receives from other sources?**

Answer to Question 7

a. Maintaining the confidentiality of the identities of interviewees is essential to the Standing Committee's ability to perform meaningful evaluations of judicial nominees. If professional colleagues of the nominee could not be assured that their participation in the Standing Committee's peer evaluation process will be kept strictly confidential and not shared with anyone outside the Standing Committee, the potential interviewees would likely remain silent, rather than risk public exposure and possible professional and personal retaliation by the nominee and the nominee's supporters. Indeed, interviewees have repeatedly insisted on an assurance of confidentiality and explicitly stated that they would decline to be interviewed absent such an assurance. Absent the assurance of confidentiality, the Committee would be unable to obtain candid information and would therefore be unable to perform meaningful, thorough peer evaluations of the professional qualifications of nominees.

b. The Standing Committee also relies on the nominee's interview, what the nominee has written and what was written about the nominee. The Standing Committee also makes inquiries of disciplinary authorities and other public information regarding the nominee.

c. While confidentiality is the linchpin of the Committee's evaluation process, the Committee strives at the same time to be fair to the nominee with respect to adverse comments that are received during the evaluation.

   If adverse comments are made about the nominee, the evaluator will disclose to the nominee during the personal interview as much of the underlying basis and context of the adverse comments as reasonably possible, consistent with the promise of confidentiality

made to interviewees. The evaluator also will discuss with the nominee any adverse comments that are a matter of public record or are otherwise known by the nominee.

If an adverse comment about the nominee is made by someone who has not waived confidentiality, and if disclosure of the substance of that adverse comment would necessarily compromise the promise of confidentiality given to the source of the comment, it will not be reported by the evaluator to the nominee nor revealed to, or considered by, the Committee in its evaluation and rating of the nominee.

During the personal interview, the nominee will be afforded a full opportunity to address and rebut any adverse information or comments disclosed by the evaluator, and to respond to any disciplinary issues. If the nominee identifies persons or provides documents or other information that can shed additional light on the adverse comments or on the nominee's professional qualifications, the evaluator will conduct appropriate follow-up interviews and such further investigation as may be deemed necessary. Information obtained from the further investigation is included in the Report.

Responses

to

Written Questions of Senator Jeff Flake

"Nominations"

Questions for Pamela Bresnahan, ABA Standing Committee on the Judiciary

U.S. Senate Judiciary Committee

November 15, 2017

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1. **Please provide a comprehensive list of all qualification ratings for federal judicial nominees whom the ABA Standing Committee on the Judiciary evaluated between the years beginning with the 97th Congress and ending with the 102nd Congress. In each instance please indicate whether the qualification was unanimous and, if not, the majority, substantial majority, and minority ratings.**

Answer to Question 1

You have asked for the ratings of nominees of the Reagan administration (1981- 1989) and the George H.W. Bush administration (1989-1993). The ratings of all nominees during the George H.W. Bush administration, covering the 101st and 102nd Congresses are posted on our website at: https://www.americanbar.org/groups/committees/federal_judiciary/ratings.html.

We do not have verified lists of the ratings of all nominees from the Reagan administration or earlier ones. We do, however, have a list of ratings of all Reagan appointees, which are attached as Appendix II. This same list was submitted in 1989 to the Senate Judiciary Committee on August 28, 1996.

Please note that prior to 1990 the Standing Committee utilized a four-tier rating system for lower court nominees: Exceptionally Well-Qualified, Well-Qualified, Qualified, and Not Qualified. In the waning months of 1989, the Standing Committee simplified its rating scheme by eliminating its highest rating and adopted a three-tier rating system for all nominees (Well-Qualified, Qualified, and Not Qualified) that is still in use today.

Responses

to

Written Questions of Senator Ben Sasse

for the Record

for Ms. Pamela Bresnahan

November 22, 2017

1. **I'd like to take this opportunity to raise a number of concerns about how this process has played out in a way that has proven particularly unfair to Mr. Grasz. In particular, I'm concerned that this process has been deliberately manipulated to deny Mr. Grasz the opportunity to respond to attacks on his character when he appeared before this Committee. Let me note a few data points:**

   - **The ABA released its rating of Mr. Grasz on Monday, October 30th, just two days before Mr. Grasz's hearing.**

   - **Not coincidentally, this timing allowed the ABA's rating to dominate news coverage going into the hearing.**

   - **After the Committee immediately invited the ABA to testify at Mr. Grasz's hearing, ABA representatives claimed that the timing didn't permit them enough time to testify.**

   - **Mr. Grasz's nomination was announced nearly three months earlier, on August 3rd.**

   - **In fact, the ABA notified this Committee on September 25th that their evaluation of Mr. Grasz's nomination would be completed no later than October 20th.**

   - **The public notice of Mr. Grasz's hearing went out on Wednesday, October 25th, a week before the hearing, as is standard operating procedure for this Committee.**

   - **The ABA certainly found the time before Mr. Grasz's hearing to produce a seven- page statement attacking on Mr. Grasz's character.**

   - **Subsequently, the ABA submitted a "supplemental" statement attempting to discredit the oral and written testimony provided by Mr. Grasz at his hearing.**

   a. **Don't these data points make it pretty clear that the ABA could not have**

reasonably claimed not to have enough notice to testify at Mr. Grasz's hearing, a forum in which he could have responded to these attacks?

Answer to Question 1

Your "data points" fail to acknowledge that, in this case, the Senate Judiciary Committee departed from prior, established practices governing post-nomination evaluations by the ABA's Standing Committee.

As you know, troublesome investigations take significantly more time to complete because the Standing Committee appoints a second evaluator in cases where there is a possibility of a "Not Qualified" rating. We do this for the benefit of the nominee. The second evaluator needs time to review the first evaluation, solicit the input of individuals who may not have been contacted or who declined to respond to an earlier request, re-interview any individuals whose comments need clarification, and re-interview the nominee. The second evaluator also needs time to prepare his or her Report, which is reviewed by the Chair and then sent, along with the first Report, to the Standing Committee members for review and a vote on a rating.

The Majority staff was well aware that a second evaluator had been appointed and was kept apprised of the revised timetable required to complete the second Report and vote. Since the start of this administration, we have shortened the time we take to complete an evaluation, and we have made every effort to expedite evaluations when possible to accommodate the Senate Judiciary Committee's schedule. However, it is difficult to be accommodating in the absence of sufficient communication, and, even in the best of circumstances, it is almost impossible to expedite an evaluation where a "Not Qualified" vote is possible and so much is at stake. Getting it "right" is far more important than beating the clock.

During the eight years of the George W. Bush administration, when we also conducted our evaluations on a post-nomination basis, there were only seven instances when the chair of the Senate Judiciary Committee held hearings on nominees whose ratings had not yet been submitted. And there was a firm understanding that the Standing Committee Chair and evaluators would be invited to testify at a hearing of a nominee who had received a "Not

Qualified" rating and would be notified in advance of the proposed date for the hearing. This made it possible for the Chair and evaluators, who have full-time demanding practices, complex schedules, and who hail from all parts of the country, to rearrange their schedules, prepare a written statement and appear in person to testify at the nominee's confirmation hearing. There was an orderly predictable, and respected process in place.

Despite knowing about these circumstances, the Majority scheduled Mr. Grasz' confirmation hearing before our evaluation was completed and rating was submitted. I notified the Majority staff of the "Not Qualified" rating, after all the votes were in, on Monday, October 30, a few hours before I submitted the rating letter and a short statement of reasons for the rating. I was not asked for the Standing Committee to testify until Monday for the Wednesday hearing, and until Monday there was no expectation, let alone assurance, that I would be asked to testify, based on the Teeter and Talley hearings. Under these circumstances, neither I nor the evaluators had pre-cleared our schedules in advance, and there was insufficient time to rearrange our schedules and for our evaluators to fly in to testify less than 48 hours after receiving the invitation.

2. In the November 13 testimony, Prof. Nance claims "several of the individuals who were interviewed with respect to Mr. Grasz' nomination have since stated that they were not contacted by [the Standing] Committee."

a. This appears to be an assertion that some interviewees have lied or otherwise misrepresented what occurred. Exactly how many Nebraskans is the ABA accusing of lying publicly?

Answer to Question 2

The Standing Committee has not accused anyone of lying about being contacted or interviewed by the evaluators. As I have stated before, confidentiality prevents us from disclosing who or how many individuals made a public statement or whether there was pressure exerted to make a public statement in support of the nominee.

3. In your October 30 written testimony, you referred to Prof. Nance providing

"summaries of all of her 183 confidential interviews." In the November 13 written testimony, Prof. Nance stated: "I contacted more than 1800 lawyers and judges, and I received 183 responses, 69 of which were substantive interviews, faxes or e-mails." Both the October 30 and November 13 statement refer to Mr. Pulgram as having spoken to 24 individuals, though the November 13 statement admits that this number included "follow[ing] up with some of the persons whom Professor Nance had contacted." In your oral testimony, you stated that the total number of interviewed individuals was: "Around 120. Don't hold me to the exact number, but it's around there."

a. **Why did you characterize all 183 "responses" received by Prof. Nance as "confidential interviews" when even she admits that less than 38 percent of these "responses" were "substantive interviews, faxes, or e-mails"?**

b. **Given that the maximum number of individuals interviewed by the two evaluators was no higher than 94—a figure which omits the overlap admitted to by Mr. Pulgram—how did you overstate the number of interviews by upwards of 30 percent in your oral testimony?**

Answer to Question 3

a-b. Professor Nance's Report included a summary of the 183 responses received from individuals whom she believed were likely to have first-had professional knowledge of Mr. Grasz. However, many of them had only minimal or no knowledge of the nominee. Please see page 6 of the November 16, 2017 Supplemental Statement. The point is that there was a wide net cast that resulted in substantive responses from a broad cross-section of the legal community with whom Mr. Grasz works.

4. **In his testimony, Mr. Grasz described one of the evaluators focusing "a significant portion" of the interview on Grasz's white paper on the state judicial selection process. In that paper, Mr. Grasz—in his words—"critici[zed] the role of interest groups, including trial lawyer's groups and the ABA, in the process." The ABA's November 13 statement makes reference to the exchange as well.**

Additionally, you emphasize in both your written and oral testimony how many "hundreds of hours" each member of your committee devotes to their ABA work each year, how you personally intend to spend "close to probably 2,000 hours this year" on your committee work, the "great pride" you and your fellow committee members take in your work, and how you believe you "help instill public trust in the federal judiciary."

a. In light of Mr. Grasz's criticism of the ABA's role in judicial selection, doesn't every member of the standing committee have a glaring conflict of interest in evaluating his nomination?

Answer to Question 4

The introduction to this question refers to "the state judicial selection process" and repeats an assertion that Mr. Grasz criticized "the role of interest groups, including trial lawyers and the ABA, in the process." This is apparently taken from Mr. Grasz's November 1 testimony when he observed: "I think at least half-an-hour of that time [the second interview] was devoted to discussing a white paper that I had written on the judicial selection process for State judges in Nebraska. There was one paragraph in that rather lengthy article where I had criticized the oversized involvement of the American Bar Association in that process…." This assertion by Mr. Grasz, repeated in the introduction to the question, is perplexing: The ABA does not have – and never has had – any role in any state's judicial selection process, Nebraska's included. To be clear, the Standing Committee believes that Mr. Grasz has overstated the time spent discussing any aspect of his white paper, and only a small fraction of the time related in any way to the ABA.

We are also confident that the nominee's subsequent criticism of the ABA's institutional role in the federal judicial confirmation process does not create a personal conflict of interest on the part of any individual involved in evaluating the nominee.

5. Your testimony repeatedly claims that Mr. Grasz characterizes his current work as 50% lobbying, yet in his SJQ, Mr. Grasz describes that half of his work as "half government relations and legal consultation for firm clients." In his written responses to my questions, he explains that this category of work "includes a wide variety of legal activities, such as work on health care scope-of-practice issues, administrative law issues, and, most notably, [his] work for the Papio-Missouri River Natural Resources District for which [his] firm serves as general counsel." He further indicates that a review of his firm's records indicates that he has spent less than 1% of his time lobbying this year.

a. Given that your November 13 written testimony elsewhere makes reference to his answers to my written questions, why did your November 13 testimony perpetuate this politically charged mischaracterization of Mr.

Grasz's work as 50% lobbying in light of his detailed clarification and its consistency with the original language of his SJQ?

Answer to Question 5

The evaluators' understanding from the nominee and the SJQ was that lobbying, including all aspects of government relations work, comprised 50% of his practice. This was not an issue of concern to us and therefore not one for which we sought additional information.

6. Your November 13 testimony makes some startling accusations about Mr. Grasz disclosing confidential information. The testimony, though, admits that it was Mr. Pulgram that first asked Mr. Grasz about the matter.

a. If Mr. Pulgram knew or suspected that the matter involved confidential information—as he claims Mr. Grasz warned him—then why was it appropriate for him to ask Mr. Grasz to discuss the matter at all?

Answer to Question 6

Prior to Mr. Grasz' second interview, the ABA Standing Committee received reports in peer interviews with Nebraskans that Mr. Grasz had allegedly attempted to undo the outcome of a Nebraska Judicial Nominating Commission ("Commission") after it had denied Mr. Grasz' preferred candidate a nomination to the Nebraska Supreme Court for. These reports raised serious issues. The Commission's proceedings were, by Nebraska law, non-partisan and required to be kept confidential. For an outsider to have obtained, and then used, knowledge of the content of the Commission's confidential proceedings, and/or to have attempted to influence them in a partisan way, was potentially troubling. It also raised questions about Mr. Grasz' judgment and ability to put aside his partisanship, in particular, in the selection and operation of the judiciary.

Accordingly, during the second interview, Mr. Grasz was asked about this subject. Mr. Grasz acknowledged that he had a preferred candidate for the Supreme Court. Mr. Grasz said that he was very upset when this candidate was not nominated by the Commission, a fact that precluded the Governor from appointing the candidate. Mr. Grasz was a close

advisor to the Governor, stated that he had assisted the Governor in evaluating judicial nominees, and stated that he had been in touch with either the Governor personally or, if not, "the Governor's people" regarding the preferred candidate prior to the Commission's process.

Mr. Grasz also acknowledged that, before intervening on his candidate's behalf, he obtained information that was confidential under state law about what had happened in the Commission's meetings where the preferred candidate was not nominated. The 14-page document itself reflects an extensive collection of this information, and Mr. Grasz's use of it. It describes private and confidential meetings of the Commission, and alleges events during those meetings that are expressly confidential as a matter of Nebraska Revised Statutes § 24-812 (providing that all communications not in public sessions "shall be confidential").[1] The 14-page document requests, among other things, that the Commission reconsider its denial of the nomination of the candidate, based on confidential information about the Commission's meetings and actions.

It should be remembered that it was Mr. Grasz who first introduced this subject to the Senate Judiciary Committee. In his November 13, 2017 responses to Senator Sasse, Mr. Grasz referred to his "support of a friend who had applied for a seat on the Nebraska Supreme Court." The ABA's first statement on this subject followed. Mr. Grasz has alternatively stated that the candidate whom he supported was his "client." Mr. Grasz, however, did not submit anything to the Commission as an attorney on behalf of a client.

[1] The Nebraska statute also provides a further layer of protection for communications with the Commission, providing that all communications, including in public sessions, are "privileged" (i.e., not subject to a claim such as defamation or invasion of privacy), with an express exception to this privilege for claims of misconduct by Commissioners. Neb. Rev. St. § 24-812. Regardless of the existence of or exceptions to this additional *privilege*, however, nothing in statute authorizes any exception for transmission, receipt, or use of *confidential* communications of the Commission for any purpose. Further, while Nebraska Rule of Court 1-602(C) permits any person to challenge a Commissioner's impartiality, it does not provide that any person may obtain, transmit or use confidential communications in the Commission's closed session to do so. If a potential to allege partiality of a Commissioner were sufficient to excuse any citizen obtaining and using the Commission's confidential internal communications, that would gut the confidentiality of the process.

> He submitted the 14-page document on his own behalf, not on anyone else's, claiming, in paragraph 1, personal standing as an individual citizen. In the Standing Committee's view, the nominee's obtaining and use of confidential information as an individual, to attempt to steer what was by statute a non-partisan judicial nomination process towards his preferred candidate, crossed important lines in an effort to obtain his preferred political result. They gave rise to serious concerns as to Mr. Grasz's judgment and ability to separate his partisan agenda and allegiances from the operation of the judiciary. This is why the Standing Committee investigated these activities, even though they have not been previously known to Nebraskans, and why they contributed to the rating of Not Qualified.

In sum, and as expressed by the Standing Committee in both of its Statements and in these responses, Mr. Grasz' unanimously "Not Qualified" rating was the result of an exhaustive peer review and evaluation of his qualifications for a lifetime appointment. This issue with respect to the judicial nominating commission was only one component that raised issues with respect to Mr. Grasz' temperament under the Standing Committee's criteria.