



# Advice & Consent On Supreme Court Nominations

*Subcommittee on Separation of Powers  
of the Committee on the Judiciary  
United States Senate*

## Introduction

ON NOVEMBER 21, 1975, I joined Senator Kennedy and Senator Mathias in convening a Symposium on Advice and Consent on Supreme Court Nominations. The purpose of this Symposium was to consider the Senate's "advice" role under the Constitution in Supreme Court nominations, general criteria relevant to Supreme Court appointments, and qualifications to be applied in assessing nominees. The Symposium was open to the public and every member of the Senate was invited to participate. The need for this Symposium became apparent upon the resignation of Mr. Justice Douglas, following his courageous effort to continue serving on the Court despite a

painful and debilitating illness.

This Symposium was intentionally held before the President submitted the name of his nominee in order to focus on the Senate's responsibilities in the advice and consent process without injecting personalities as an issue. The discussions were stimulating and extremely helpful in raising the various factors which the Senate might be expected to weigh in confirming not only a successor to Justice Douglas, but which would be relevant to any Supreme Court nomination.

A panel of distinguished lawyers and scholars participated in the Symposium, sharing with us their evaluations of the nominating and confirming process as well

---

*James Abourezk (South Dakota), Chairman, John McClellan (Arkansas), Quentin N. Burdick (North Dakota), Robert C. Byrd (West Virginia), Charles McC. Mathias, Jr. (Maryland), Hugh Scott (Pennsylvania), Irene R. Margolis, Chief Counsel and Staff Director, William C. Wilka, Jr., Assistant Counsel, Linda Jacobson, Assistant Counsel. Participants: Senator Edward M. Kennedy, Senator James Abourezk, Senator Charles McC. Mathias, Jr., Senator Jacob K. Javits, Robert Meserve, former president of the American Bar Association, Dean Louis H. Pollak, University of Pennsylvania School of Law, Professor William F. Swindler, College of William and Mary, Professor Alfred H. Kelly, Wayne State University, Professor A.E. Dick Howard, University of Virginia School of Law.*

as their analysis of standards they considered relevant to selecting and confirming a nominee to the Court.

The panelists were:

- ◊ Robert Meserve, of Boston, Massachusetts, former president of the American Bar Association;
- ◊ Dean Louis H. Pollak, University of Pennsylvania School of Law;
- ◊ Professor William F. Swindler, College of William and Mary;
- ◊ Professor Alfred H. Kelly, Wayne State University; and
- ◊ Professor A.E. Dick Howard, University of Virginia School of Law.

The Panelists brought to the Symposium a diversity in background which is reflected in the variety of views they expressed on the Senate's role in filling an empty Supreme Court seat. All were in agreement, however, that a nominee should be a "public" person, in the broadest sense of that word. The types

of professional experience which best develop this essential characteristic, which mold a nominee's intellectual honesty, judicial temperament, and attitude toward social issues, were the focus of the panelists' discussion.

The joint role played by the President and the Senate in appointing a Supreme Court Justice addresses the basic constitutional issue of separation of powers. By publishing the entire Symposium, the Senate Subcommittee on Separation of Powers hopes to provide the reader an added insight into the responsibility the two branches of government share in appointing men and women to the third branch, the judiciary. I firmly hope that this Symposium will provide the Senate with a clearer statement of its own role in the constitutional process as seats on the Court are filled in future years.

*James Abourezk, Chairman  
Subcommittee on Separation of Powers*



## Statement of Senator Kennedy

**W**E WILL COME TO order, please. I am pleased to join in welcoming our witnesses this morning.

One of the most important constitutional responsibilities of the Senate is the duty imposed by article II, section 2 of the Constitution to provide "advice and consent" in the appointment by the President of members of the Supreme Court.

As a result of the retirement of Justice William O. Douglas, the Senate will soon be facing the exercise of its confirmation responsibility. In the past, as befits the importance of the Supreme Court, the Senate has been diligent in the performance of its "consent" function with respect to such appointments. But the Senate has only rarely

sought to exercise the "advice" part of its constitutional responsibility at a time when such advice may actually be most useful – at an early stage of the appointment process, after a vacancy occurs, but before a specific nomination is made.

In recent years the Senate has become more effective in asserting its constitutional role in other areas of policy, especially in foreign relations and in the budget process. To a large extent, these efforts have helped to redress the balance of power between Congress and the executive branch, and have made Congress more of an equal partner in our Federal system.

This morning's symposium is an effort to develop a constructive and nonpartisan

approach to the Senate's neglected constitutional role of "advice" with respect to Supreme Court appointments. The relatively large number of potential nominees submitted by the administration for consideration by the American Bar Association is a clear indication that the President is conducting an extensive search for the most appropriate candidate.

By acting at this early stage of the appointment process, the Senate is in a position to participate in the process and render its advice on the qualifications and other characteristics of potential Justices, free of the personal considerations that inevitably arise once a specific individual is nominated and the actual confirmation proceedings begin.

We meet this morning with lawyers and scholars to discuss and to learn how individual Senators and the Senate as an institution can most effectively carry out this advisory role.

First, we shall be addressing questions concerning the meaning of "advice" in the Constitution and the form such advice may take. There are a few precedents to guide us.

In 1869, a large majority of both Houses of Congress signed a formal petition to President Grant, requesting him to nominate Abraham Lincoln's Secretary of War, Edwin M. Stanton, to the Supreme Court. President Grant was already in a struggle with the Senate over a previous nomination. He welcomed a chance for a reconciliation with the Senate, and promptly nominated Stanton. But in a tragic turn, Stanton died 4 days after his name was submitted.

In 1932, President Hoover let it be known that he would like to choose a non-controversial western Republican as the successor to Justice Oliver Wendell Holmes. But the chairman of the Senate Judiciary Committee, George W. Norris of Nebraska, made it plain to the President that

he and other members of the committee would insist on a distinguished successor in the Holmes mold. And Senator Borah of Idaho, chairman of the Senate Foreign Relations Committee, repeatedly called for the nomination of Benjamin Cardozo. After a search of several weeks, Hoover nominated Cardozo, surely one [of] his finest acts as President.

We know, of course, that the search has not always found the best. Judge Cardozo reached the Supreme Court, but Judge Learned Hand never did.

Second, we shall be discussing this morning the various criteria and qualifications and other considerations that have been applied in the past to appointments to the Supreme Court and that should be applied today. The experts will give us their views on factors such as geography; sex; age; religion; race; judicial, legislative and academic experience; political affiliation; philosophy, the desirability of seeking a balance of these factors among the nine Justices; whether the nominee should be a lawyer at all; and whether a predictable or consistent application of these criteria is wise policy, even if it could be achieved.

A truism of American history is that Presidents change, but the Supreme Court endures. On occasion, the appointment of a Justice has been the equivalent of a constitutional amendment. Justice Douglas was still a powerful influence on the Court and the country, 30 years after the death of the President who appointed him. President Ford's choice may well have a similar impact.

Our hope is that the President will seek out the best and the ablest person to fill the Douglas vacancy. In the early 1800's, President John Adams could say, "my gift of Chief Justice John Marshall to the people of the United States was the proudest act of my life." It is in that spirit that we meet this morning, and I am pleased to welcome our distin-

guished witnesses.

But first we will hear from Senator Abourezk and Senator Mathias who will

join with us in bringing our meeting together today. And we ask Senator Abourezk for any comments that he may have.



## Statement of Senator Abourezk

AS WE ARE WELL aware, the Senate plays an essential role in the appointment of a new Justice to the Supreme Court. The President makes his appointment with the “advice and consent” of this body. Our consent is given – or withheld – when we vote on a particular nominee’s fitness to sit on our country’s highest court.

While the “consent” aspect of the Senate’s constitutional role is thus readily discernible, the same cannot be so easily said of the Senate’s duty to give its “advice” on a Supreme Court appointment. Although the Senate must, under the Constitution, offer its advice to the President, it is difficult to state precisely just how that duty is to be exercised institutionally. I say “institutionally” because the Constitution is not, in my view, referring to the President’s personal requests to individual Senators for their advice on the best person to name to the Supreme Court. Such advice is obtained from Senators, but not from the Senate as such.

I think that it is easier to state what this duty to give advice is not. It is not the right to choose the nominee. The Constitution states that the President nominates, not the Senate. Therefore, our advice should not be expressed in the form of a list of names from which the President must then choose. That is not our role.

However, neither do I believe that the Framers inserted the word “advice” into the Constitution carelessly. They surely intended that the word in some way affect the process

whereby the Executive and the Senate play their joint role in the appointment of a new Justice. In fact, the word “advice” cries out for Senate participation in the selection process at some point prior to the strictly “yes” or “no” exercise of consent. I would like to read a brief paragraph from a speech I inserted into the Congressional Record outlining the history of this part of the Constitution.

“The Senate appointment of judges was approved by the Constitutional Convention on July 21, 1787, and was included in the draft of the Committee of Detail on August 6. Hamilton, unhappy with the diminution of Executive power, proposed as a compromise that the President appoint and nominate with Senate power to ‘reject or approve,’ implying that the Senate not participate in the nominating power. The Committee of Eleven, on September 4, accepted Hamilton’s compromise with one significant modification: the words ‘reject and approve’ were changed to ‘advice and consent,’ thereby expanding[] the role of the Senate. This compromise was finally agreed to in the very last days of the convention.”

If that advice is to be anything but a sham, it must be received before a particular nominee is presented to the Senate for its consent. What, then, is our role, if our advice must be given prior to giving [or] withholding consent, yet does not extend to suggesting names ourselves?

It is our duty, I believe, to propose certain standards which any nominee must meet. In

doing so, I do not suggest that the Executive, in making the nomination, is thereby limited to considering only the criteria we recommend. That would infringe upon his power to nominate. But we can articulate those standards by which every nominee will be measured before our consent is given to his or her appointment.

It is in this spirit that I think it appropriate that we meet here today. I am pleased and honored that these five distinguished gentlemen have been able to join us for this symposium. I hope that, with their assistance, we can begin to examine those standards which the Senate should consider when it evalu-

ates the fitness of the next nominee to the Supreme Court.

Thank you.

*Senator Kennedy.* Thank you very much, Senator Abourezk.

We will start this morning with Mr. Robert Meserve. Bob Meserve is an attorney from Boston and an old friend of mine. He is past president of the American Bar Association and former chairman of the ABA Standing Committee on the Judiciary. Mr. Meserve is appearing today to share his own experiences and perspective with us, but not as form[al]ly representing the ABA at this symposium. And we are delighted to have you.



## Statement of Robert Meserve, Lawyer, Boston, Mass.

**T**HANK YOU VERY MUCH, Senator. It is a great pleasure to be here. I am very happy to participate in this process, and particularly happy that the Senate is interested in attempting to delineate and exercise its power of advice if it sees fit to do so.

I speak today on the basis of a long-time experience with judicial nominations, not only in the capacity of a former president of the American Bar Association, but also as a former chairman of its judiciary committee. But I would like to emphasize your remarks, Senator, that I do not represent the American Bar Association here. I speak as a private individual with a tremendous interest in the subject matter and in the hope that I can be helpful.

I should start off by saying that I think the objective to which we would all subscribe is obtaining for the vacancy of the most distinguished and presumptively the most able person that we can possibly find to discharge

the duties of that high office. It is, indeed, a most significant one, and we need the cooperation of everybody concerned in the nominating process in order to reach that objective, which is clear, and I am sure is agreed to in principle by all the parties participating in it.

Lawyers, it seems to me, have a particular responsibility here but that responsibility, as far as the American Bar Association is concerned, and its effective and efficient committee, is limited to an analysis of what we might loosely call professional qualification. I think it would be very unfortunate if a committee which has been called upon repeatedly by Presidents to express its opinion on judicial nominations, both to this Court and to our other courts, should ever attempt to make a selection based on political or ideological grounds. Those are very important considerations in the selection of a Supreme Court Justice, perhaps the most important considerations that the Senate should consider.

I think it would be inadvisable for the

bar or a committee of the bar to attempt to exercise that prerogative. What the bar can do, and what the American Bar Association committee attempts to do, is to pass upon professional qualifications. And specifically, it has said in a report to the house of delegates of the bar that it will limit its report to professional qualifications of the proposed nominee, his integrity, his judicial temperament, and his professional competence. It will not attempt to report on political or ideological matters. And as far as I know, that report, which was made in 1970, still states the policy both of the Bar Association and of its committee.

I have not myself, since I ceased to be chairman of the committee, regularly attended its meetings nor taken part in any discussion of any nominee except as my advice might be asked as to some individual or individuals with whom I was acquainted.

I stand ready to answer any questions, but I think any more general remarks from me might not be helpful.

*Senator Kennedy.* Thank you very much, Mr. Meserve.

I would like to examine these criteria somewhat more elaborately. For example, in the area of integrity, is this just a question of honesty, or does it go beyond that?

*Mr. Meserve.* Well, I think I would rather define the word integrity as including all kinds of honesty. It seems to me that it is not just a question of whether a lawyer will make [a]way with his client's funds, something obviously dishonest of that sort. The issue of integrity, as I see it, goes to his intellectual integrity as well, and his representation of his clients if he is a practicing lawyer, whether or not, in his representation, he makes clear the areas where he himself is speaking for himself and where he is speaking for his client. He makes clear his professional interest where one exists and does not try to tell peo-

ple, in effect, that this is my opinion when it is an opinion that he is paid for giving.

This is the sort of integrity, Senator, to which we address ourselves, although, of course, in the obvious cases where there is a question of financial integrity, we surely would be interested in that. I cannot concede that any President would knowingly, at least, nominate anybody whose character in something of that kind was warrantably attacked.

But in the field of professional integrity, the word has a much broader scope I think than the word integrity alone might suggest.

*Senator Kennedy.* How do you go about measuring judicial temperament?

*Mr. Meserve.* I wish, sir, that I honestly could tell you that I knew. I think that it is a question of investigating attitudes, whether or not the person, who by definition is a man who has been in public life for a period of years, has an attitude which indicates that on the Bench he would try to decide the case on the merits of the matter and not on the basis of preconceptions, not on the basis of who is pressing the matter and so forth, and he will not be irritable with counsel or, in the case of the lower court judge, with witnesses and parties. That he will give everyone an opportunity fairly to speak his mind, and will weigh[] the evidence or the arguments as best he can.

That is what we mean by judicial temperament. How you go about determining it is very difficult. With some people it is not. If you have the history of a judge who habitually harangues litigants in court, and so forth, you know that his judicial temperament wears pretty thin pretty quickly and you surely would not recommend him for advancement.

*Senator Kennedy.* In the area of legal competence, is the criterion just competence within the particular field where that individual has been practicing, or does it have a

broader definition? Do you think political experience is considered professional experience?

*Mr. Meserve.* That (as you know, of course, as a lawyer) is a double question. Let me first say that as far as political experience is concerned I think that our members of the American Bar committee, although they do not go into questions of political views, would regard political experience as a plus. We think it is obviously a duty of an American citizen to participate as far as he can in the political process, and we are very well aware that people that have occupied political office, particularly national political office in this case are people who have been subjected to ideas and have formed ideas which may be very valuable on the Bench, and we would regard it as a plus.

But we would not regard it as the equivalent of professional experience, which is the other issue to which your question directs itself. We would feel, and this gets back to a suggestion made by Senator Abourezk, we would feel that it would be, at this time in the life of our country, extremely unfortunate if the President or the Senate were to adopt the option, which is theirs under the Constitution, of nominating or confirming someone to this Court who is not a lawyer. We feel that only a lawyer will have the ability to deal with the great number of cases which come before the Court, to determine those which are significant in the legal sense and so forth. We think it would be very unfortunate if a man were selected who had never studied law, who would spend the next 4 or 5 years on the Bench studying law at Government expense. And we think this would be unfortunate, even though he had a very good mind, and even though he had a very good idea of the political process.

There are many, many cases which come before any court, including the Supreme

Court, which are not heavy, at least, in political content which involve a knowledge of the history of law and involve[] the knowledge of how the law is practiced from the point of view of a practitioner.

*Senator Kennedy.* Would the nonlawyer be automatically stamped nonqualified?

*Mr. Meserve.* The problem has never arisen, Senator. I would not want to commit my successors. But I think the chances are very good that a nonlawyer would not be regarded as having that professional standing.

*Senator Kennedy.* I know, and I am sure you know a certain reporter, and I will not mention his name, who prior to the time that he was going to report on the Supreme Court decisions went up to a distinguished law school in our part of the country, Harvard Law School, and in 1 year took courses in the first, second, and third year and received straight A's in all of them. He then reported his experiences and had a distinguished record in writing reviews of that. Obviously that is an extraordinary and unusual case, but I suppose, and your point I believe is well-taken, in terms of the weight that has to be given to any qualified lawyer, regarding the burden that would have to be overcome by someone who is not trained as a lawyer.

*Mr. Meserve.* That, Senator, is exactly why I said I would not commit my successor. It is possible. Although I doubt it that such an extraordinary case could arise.

I would like to address myself to your other question, if I may, and it concerns the questions of whether or not we look for a professional competence in a limited field as, for example, a lawyer who has spent his life practicing patent law and was a very good patent lawyer. I have a very strong feeling on that, Senator, and my feeling is that we are interested in lawyers, for the Supreme Court particularly, who have demonstrated that they are more than practicing.

We want practicing lawyers (or lawyers who have practiced, who may be teaching in law schools or something of that sort). But, beyond that, we want lawyers who have shown in some way a knowledge beyond the knowledge of a specific field of law, who have covered many fields of law, who have shown an intellectual interest and an ability to get beyond the particular and search for the general; one of the duties I think of a Justice of the Supreme Court of the United States.

*Senator Kennedy.* Last summer the ABA adopted a resolution on women in the judiciary. As I understand the resolution, it is general in nature. Do you believe that special emphasis should be given to seeking a qualified woman as an appointee to the Court?

*Mr. Meserve.* Yes. I feel very strongly that that language does not direct itself to the issue that at any given moment in history it is important to create a seat specifically for a woman, or to appoint a woman in an instance where it is clear that there are available people of the other sex who are more competent than she. I think it is, however, a very important generality.

I supported the idea that a competent woman should be on the Supreme Court. I think it is very unfortunate, Senator, when a given seat on the Court becomes designated as a Jewish seat or a New England seat. (Incidentally, we don't have any now as you know). Or some other group representation. I think both the group and the individual may suffer. I think that in every instance the objective ought to be to find the best qualified person, male or female.

*Senator Kennedy.* People do think that special seats might be for special groups and they might be entitled to special seats on that Court. Doesn't this theory have an impact of lessening the stature because of the public perception that the nominee was not subjected to the same rigorous standards since

he or she fits some category?

*Mr. Meserve.* Exactly.

*Senator Kennedy.* Some particular pigeon hole?

*Mr. Meserve.* That is the point that I was trying to make I think. You are absolutely correct. I think, if I had the good fortune (when I was young enough to do so) to have been appointed to that Court, I hope people would not have looked upon me, if I had been appointed, as the holder of the New England seat, or as the white, Anglo-Saxon, Protestant seat, or whatever particular group I might fall into. I think that would be demeaning to me and demeaning to the Court. And I would surely hope that we would continue the process of surveying the whole field when a vacancy exits.

On the other hand, I do feel very strongly that the Court ought in a broad sense, and not in any theory of proportional representation, to be truly representative of the people of the United States. And I would hope that that general overall policy, which applies to geography as well as ethnic origin, race, sex, all of these things would be served by a President. But not to the extent of handicapping the President and the Senate in the selection process.

*Senator Abourezk.* On this panel you are, I think, the only practicing lawyer at this point.

*Mr. Meserve.* I am very conscious of that, sir.

*Senator Abourezk.* I think I know what your views are on whether or not the nominee ought to be a practicing lawyer or someone who has practiced; but how valuable, in your view, [are] the nominee's activities as a legal scholar? Would legal scholarship be sufficient if he did not practice?

*Mr. Meserve.* For the Supreme Court of the United States, I would feel that the qualifications are very difficult to define in



advance. I would say that my good friend and former professor, Felix Frankfurter, for example[,] was a distinguished Justice of the Court, that his actual practicing experience was extremely limited, and that he came to the Court essentially from the cloister. And I think he did a very, very good job, although there were some I know who would disagree with me.

I think that generally speaking it is unfortunate that there are too many law school teachers today who, perhaps, have not had the background of practice, because that would be useful to them as professors. But nevertheless, just as I would think that it is not necessary to appoint a sitting judge by promotion to the Supreme Court, but that the nomination could be made from the bar, so I would say the nomination clearly could be made, and in many instances might profitably be made from academia.

*Senator Abourezk.* Now, there have been a lot of commentators since Justice Douglas announced his retirement who have talked about the politically best thing for President Ford to do with this nomination. Some have said now is a perfect time to pick a woman because that would be good for his election next year. Others have said that in order to ward off the Reagan challenge he will pick a conservative, or someone of Governor Reagan's philosophy. Would you comment on those kinds of observations?

*Mr. Meserve.* I think you have suggested my answer. As a lawyer I would feel, I would feel in the first place that I was unable to comment upon the fitness of any person who is chosen on such a basis, and I would hope that no person would be chosen for a purely political reason. I would surely expect that any person that was chosen would be in part selected because of his or her political views, but I would hope that the person to be selected would not be selected in order

to gain political advantage for the President or anyone else. And I surely have enough confidence in the Office of the Presidency to believe Presidents would not nominate to this distinguished office for that purpose. And if they do, I should think that the public reaction would on the whole be unfavorable rather than favorable.

*Senator Abourezk.* Now one final question. It has been suggested that perhaps the Senate ought not to be involved in establishing qualifications for a nominee. Given the circumstances under which President Ford came into office and the length of time he has left, and the difference between the Senate considering nominees for the Cabinet as opposed to the Supreme Court, do you view the increased activity of the Senate in this regard as good or bad or indifferent?

*Mr. Meserve.* Well, it is in my opinion wholly good, and I emphasize again I speak as an individual, and not as one connected with the American Bar Association. I think it is very desirable that in advance of the selection of a particular nominee as to whom there may possibly be ideological or political objection on the part of an individual Senator, that the Senate make it clear to the President that they are interested in obtaining for the office, regardless of politics, the most outstanding practitioner of the law who can be obtained at this time from the bar and who, and I hasten to add to that, who gives a reasonable prospect of being [able to serve for] an effective period of time, given normal human life expectancy.

*Senator Abourezk.* Thank you.

*Mr. Meserve.* Pleasure.

*Senator Kennedy.* Given the fact of the importance and significance of the Court's workload, and the statutory interpretation, is legislative experience more or less important as it might have been in the past history of the country?

Mr. Meserve. Everything is so much more intensified, Senator, that I think it just becomes a question of degree. I do not think legislative experience is any more or less important today than it was when Senator Black was nominated, for example.

I would say that given that, however, I regard legislative experience as a plus, but not as a replacement for adequate experience at the bar, professional experience.

Senator Kennedy. Thank you very much. You have been very, very helpful.

Mr. Meserve. Thank you, Senator.

Senator Kennedy. Dean Pollak, we are glad to have you here this morning. Dean Pollak is with the University of Pennsylvania School of Law, and a distinguished author of "The Constitution and the Supreme Court; a Documentary History." Would you like to proceed.



## Statement of Louis H. Pollak, Dean, University of Pennsylvania School of Law

**T**HANK YOU, SENATOR KENNEDY. It is a great pleasure and privilege to meet with you and Senator Abourezk this morning with this distinguished group of experts, including our one practitioner, Mr. Meserve. I am sorry that he had to depart to get back to the act of practice.

But I do want to say that I think the United States is greatly indebted to the efforts Mr. Meserve and his colleagues in the American Bar Association, most especially Mr. Bernard Segal, have made over the past many years to be of assistance to Presidents in the selection of members of the Federal judiciary, and especially the Supreme Court Justices. Of course, as Mr. Meserve properly said, that assistance has to be characterized as one of responsiveness to requests for professional judgments rather than the individual function which the Constitution vests in the Senate, as you so well pointed [out], Senator Kennedy, in your opening remarks.

There is no private group which can wish or be permitted to substitute itself for the responsibility of the Senate in this regard, and

I know the American Bar Association feels very deeply that constraint on its role. And for these reasons I think I'm sure I speak for all of us here this morning whom you have asked to come and meet with you, we feel very happy to have the opportunity of discussing with Members of the Senate the responsibilities which the Senate bears, together with the President for assuring that appointments to the Supreme Court are of the highest quality and will carry forward our constitutional traditions.

I suppose no more important evidence of the consequences that we are discussing today could be adduced than simply a moment's recollection of the extraordinary career of the Justice whose place is now vacant. It is quite evident that Justice Douglas has given to his Nation an extraordinary constitutional heritage. I would like if I may, Senator, simply to pick up briefly on some of the matters which were in discussion between you and Senator Abourezk and Mr. Meserve.

Senator Kennedy. I thought what we might do is to ask each of you for brief observations as to the remarks of Senator Abourezk and

his opening statement and my own and in some of the areas we have just touched on here; and then come back to some discussion within the group. And I would hope that at any time you want to interrupt each other to comment, please do so. I want this to be as interactive as possible.

*Mr. Pollack.* Fine. Well, I would certainly appreciate being interrupted, and I think it would lend some to the process.

First, Senator, you inquired as to whether politics and participation in politics is an important attribute, or one really not to be given weight. For myself, I would have to say that as we survey the persons, the 100 persons who have constituted the Supreme Court over our history, and those who have contributed most greatly to it, I think we would have to conclude that participation in public life of this country is a major qualification, not perhaps an indispensable qualification, but likely to be a major qualification predictive of important achievement. And I won't quite say, as I understood Mr. Meserve to say, that it cannot be a substitute for the active practice of law.

I think, picking up on your question, Senator, as to the utility of legislative experience, though I am not disposed to say it is more important, being a legislator is a more important qualification now than it has been in the past, and I do think that participation in the legislative process in certain other aspects can be very important as a preface to a judicial career. If I may reach back into an episode, for example, that has now passed, I recall when Congressman Poff's name was suggested for the vacancy that ultimately went to Justice Powell. The point was made that he had had very little experience in practice, and most of his professional life had been in Congress. It strikes me that there was a Congressman whose special participation in the work of the House Judiciary Committee at a num-

ber of devoted and disciplined professional levels gave his candidacy a seriousness which, with all frankness, I would not say would be spread over all Members of either the Congress or the Senate, whether lawyers or not. I suppose what I am saying then is that if one would look at particular instances one could conclude that in some circumstances participation in the legislative process could itself be regarded as professional attainment of an important kind.

But this gives me the opportunity to say something which I hope won't be taken as rudeness, Senator. But if it is taken as rudeness, then so be it. It would be, in my view, very regrettable if the Senate were to continue what I think has been a traditional practice of giving virtually no serious scrutiny to nominees from the Senate itself and nominations from the House of Representatives.

*Senator Kennedy.* That is not rudeness, that is just accurate.

*Mr. Pollak.* I thought what I said was descriptively accurate. The rude part might be my suggestion that it was time for the Senate to mend its ways.

Senator Black turned out to be one of the great ornaments, as we know, of our Bench. But it need not have been so. And I would hope that the Senate could begin to conclude that if a Member of the House of Representatives or the Senate were proposed for a seat on the Supreme Court of the United States, that Member should be subject to the same kind of rigorous scrutiny that any other nominee would, or suffer the fate which you identified, Senator, as being regarded as having lesser stature because he or she was cleared routinely. So that is my rude intervention.

With respect to whether a nominee needs to be a lawyer, I appreciate Mr. Meserve's opinion, and I guess I would have to disagree with it in principle. I was informed a

few months ago by –

*Senator Kennedy.* I do think that the point that is raised about the clubby atmosphere of the Senate in terms of the consideration of one of its own is a fair and legitimate point to be made. We have seen the review of the now-President Ford's qualifications at the time that his name came up as Vice President. There was a careful review that was made both in the House and the Senate that would indicate there is also a situation where in the recent past they had exercised that responsibility in a meaningful way. The record is clear on both sides, and I think what you are doing is flagging an important warning. The judgment that the Senate must make from this particular constitutional requirement should be as strict for one of its own Members as it would be outside.

*Mr. Pollak.* Well, I very much welcome that observation, Senator, and I certainly would applaud the candor with which the Congress addressed the nominations of Congressman Ford to be Vice President and, indeed, Governor Rockefeller to be Vice President. There is some chance that some people might perceive the 25th amendment standard and the congressional involvement there as a more searching one than at the judicial appointment level, and I am glad we are in agreement that they should not be.

I was simply going to say on the point of whether one had to be a lawyer at all, it was recently pointed out to me that Professor Corwin had had a lingering sense of neglect, that he had never been considered for the Supreme Court, and it seems to me quite clear that he would have been an ornament to that Court. I have been thinking before you mentioned your anonymous journalist, Senator, that there, indeed, was an example of a person whose identity I would not reveal by referring to his book, "Gid[.]eon's Trumpet" or his distinguished lectures at the Uni-

versity of Pennsylvania a couple of years ago on lawyers and civilization, but clearly one knows of nonlawyers who are as fully versed in the constitutional process as lawyers. I see no likelihood that a nonlawyer would be nominated, but I think the record, the constitutional record should be clear that there are nonlawyers qualified to participate in the constitutional process. I even think there may be journalists, and I think I know of one journalist in the room whose anonymity I will not break, who has shown in his writing of the Court's work the same kind of qualities that we would like to look for.

*Senator Kennedy.* How do you think the other 10 journalists feel?

*Mr. Pollak.* I have not indicated where I was throwing that golden apple, Senator.

If I may, I would like to turn to the question you raised and discussed with Mr. Meserve about the appropriateness of considering qualifications such as sex or race or religion. I think it is very important that we address these concretely. I think I would, in some respects, differ from Mr. Meserve in emphasis, though certainly not in his conclusion that the primary, the primary responsibility is to select a Justice of the highest professional rank, or with qualities of constitutional judgment which would forward our vital processes.

I would think that in 1975 it would be an important ingredient in a President's thinking and in a Senator's thinking to be concerned with finding within the universe of the highly qualified people, finding a woman to serve on the Supreme Court. I emphasize again within the universe of highly qualified people.

Why do I say that? Not because I think the Supreme Court ought to be a representative institution, but because it is an institution in whose composition and processes the American people must have confidence.

I think it is entirely apparent that most of our two centuries of national existence were a period in which black citizens looking at the Supreme Court could not see in it any indication, from the endless procession of white males who served on it, that their citizenship was being taken seriously. And when Mr. Justice Marshall was appointed to the Court, it was an appointment long overdue. He is one of our most distinguished lawyers, quite obviously, at the highest level of professional achievement. But, he had been so for many years before his appointment. And one might add, that Judge Hast[ie] had been at the same level of professional achievement for a long time, and there were other black lawyers, such as Charles Houston, before them who would have ornamented the Supreme Court of the United States and were not there. One cannot help but think that the institution suffered in terms of the view taken of it by millions of American citizens.

For decades now, we have generally had, but not continuously had a Catholic Justice. I think it was an important thing which President Truman did after the death of Mr. Justice Murphy not to insist that his successor be a Catholic. In the same sense, I think, though I am not on the whole an admirer of some of President Nixon's views about the judiciary, I think it was an important thing

that he did in concluding that it was not essential that a Jew be appointed to succeed Justice Fortas, for the reason that the point had been made. Whether we have a Catholic or two or three on the Court at any given time, or a Jew, or two or three on the Court at any given time, is now no longer important. It was important. It was important when Brandeis was appointed that that supremely qualified Justice not be turned away for the variety of biased reasons for which he was opposed. It was very important when Chief Justice Taney was appointed to the Supreme Court of the United States, that that Catholic lawyer and political leader not be turned away because he was a Catholic.

But once we have established the principle I think there is no longer a claim for any particular ethnic or religious place on the Court. Therefore, in order to establish the pluralist principle as it relates to women, I think now, or very soon, it would be appropriate for a President to give affirmative consideration to the sex of the nominee.

*Senator Kennedy.* Thank you Dean Pollak. Professor Swindler, we will now hear from you.

Professor Swindler is a distinguished professor at the College of William and Mary and the author of "Court and Constitution in the 20th Century."



## Statement of William F. Swindler, Professor, College of William and Mary

**T**HANK YOU, SENATOR KENNEDY. I was interested in Senator Abourezk's remarks that the function of the Senate in advice and consent with reference to appointments, to the judicial branch, particularly to the Supreme Court,

carried with it substantially more significance and responsibility on the Senate's part than perhaps other Executive nominations to other executive branches, because after all, the judiciary is the third branch of Government. Therefore, the other two branches would, in

principle, seem to me to share equal responsibility in finding the people who are going to be permanent occupants of those positions, as distinguished from appointments that perhaps are terminal with the administration of a particular time.

Much has been suggested about the ambiguity or the lack of knowledge of the word advice, and I suggest that probably, in the beginning, it was assumed that it was a matter of political reaction on the part of the legislative branch to the proposals of the executive branch that were considered. In the original drafting of the Constitution, it probably was a matter of politics in terms of the elite group who ran politics at that time. That was perhaps subliminally in the minds of the Founding Fathers.

Nevertheless, the record shows that almost immediately the politics that was practiced in advice and consent was politics in the well-known sense of the word.

Now, we perhaps have a good deal to learn from the procedures of some States. I am thinking of the judicial nominating commissions which have sprung up known as the Missouri plan and the California plan and so on, over the years, in an effort to avoid the most partisan and least responsible elements of political consideration going into judicial selections. We have gotten only as far as a proposal. I believe it was by Senator Nunn, that there be a Judicial Disciplining Review Committee, to act after the man is already on the Bench or already has been on the Bench, which might be the analogy to be drawn from the States that applies to the Federal Government. Absent the possibility, perhaps even the constitutionality, of the nominating commission at the Federal level, it would seem to me that this should be the function of the Senate and particularly the Senate Judicial Committee, in lieu of such a screening function. It is all the more important, and

this again addresses itself to the matter of what are the guidelines that the committee ought to follow.

In an article that I did for the American Bar Association Journal in 1970, I reviewed at that time the historical record of rejections by the Senate of Supreme Court nominations by various Presidents.

There were 11 that were on record as having been specifically rejected; there were 26 altogether who represented proposals of nominations by the White House which, for one reason or another, were not successful. Eleven of these were specifically rejected by a recorded vote. A substantial number of offers were withdrawn by the President when he saw the political handwriting on the wall. Still others were a matter of the Senate euphemism called "postponements" of action, which simply meant that the Senate had no intention of taking action. This was usually when the end of a term was reasonably in prospect.

What this says, I suppose, is that essentially, and perhaps desirably, some political considerations in a nonpartisan sense, are factors in the legislative review of the Executive proposals for the third judicial branch. Political considerations, then, probably are unavoidable, and perhaps desirable, and if that is so, I would voice what Dean Pollak probably was too diplomatic to voice, and say that it is probably politically opportune for all parties concerned to consider the candidacy of a well-qualified woman to the judiciary at this time. It would certainly be the last major social factor to be addressed and disposed of; thereafter, the question becomes academic.

I would hope that in the event of a woman candidate, once the question of a woman's being capable of being nominated, politically capable of being nominated, has been settled, the Senate committee would address itself to

qualifications with the same degree of pragmatism and political consideration as well as professional considerations that it would use with reference to a man.

Among various terms that perhaps we can discuss in due course would be this matter of collegial courtesy or senatorial courtesy, which I would hope would not be equated with or considered to be synonymous with absence of painstaking scrutiny of the candidate in any event. But the sum of what I wanted to say was essentially that it is a political proceeding, it was undoubtedly considered from the beginning as being a proceeding of high politics, and that this is essentially the ultimate effect that we will have to keep in mind when the decision is made in a prospective

case, whoever the individual happens to be.

*Senator Abourezk.* Thank you, Professor.

*Senator Kennedy.* I want to recognize the presence of Senator Javits here who is a former member of the Judiciary Committee and has been enormously interested in and involved in all of the considerations of qualified individuals for the Supreme Court and in all of the debates. We welcome you here.

*Senator Javits.* Thank you, Mr. Chairman.

*Senator Kennedy.* We hope that you will participate to the extent that you wish during the course of this symposium.

Our next panelist is Professor Alfred H. Kelly. Professor Kelly is from Wayne State University and author of "The American Constitution: Its Origins and Development."



## Statement of Alfred H. Kelly, Professor, Wayne State University

**T**HANK YOU, SIR. IT is an honor to be here. I appreciate it.

Let me make a statement which I think is almost the exact opposite, in one respect, of [that] which Mr. Meserve made. I would argue that it is imperative that a Supreme Court appointee be a politician in the best sense of the word, that he be a public man who has participated in the public life of the Nation and that is aware of public issues and has participated in that procedure, as we understand it, and that he knows something of political reality as well as the technical aspects of the constitutional system.

I could approach that from a variety of different points of view. Just sitting here and jotting as my colleagues here spoke, I have put down a list of what might be called distinguished judges. Since I just did this off the cuff, I cannot claim that they represent

any exclusive list. But the generalization that came to me as I thought about it, and I had thought about it before, is that they do not represent any particular kind of public man, but they are all politicians in the best sense of the word. Since they are dead, most of them or all of them, I suppose they are statesmen now.

But, in their day, they were involved very much in the political process: Marshall, a Congressman, a diplomat, as well as a practicing lawyer; Story, a Congressman, a Republican politician; William Johnson, State judge, Republican politician; Taney, a federalist politician, Jacksonian Cabinet officer who got his payoff on the deposits question; Chase, Democratic Congressman, Lincoln's Secretary [of the] Treasur[y]; Field, State judge; David Davis, Senator; the first Harlan, Republican State judge; Hughes, before

his first appointment, former Governor of New York, [] before his second appointment, Presidential candidate and Secretary of State; Brandeis is almost the only one you can think of offhand, with one or two exceptions, who had not held public office, but he was a public man in the extraordinary sense of the word, and certainly a politician.

Black, the U.S. Senator, and Stone, a law professor and Cabinet officer. Frankfurter, a public man, certainly as his writings revealed, even though technically he had been a professor for the most part at Harvard Law School.

The single thing that stands out in this list, and my colleagues here could add to it, or subtract from it, is that those men all had distinguished careers as public figures. They understood the give and take of the politics, they understood the political process, they had been successful at it. They knew that in a constitutional democracy there is a reflex arc relationship between the people and the political process and the responsibilities of office.

I do not think that can be put aside. I think it is naïve to assume that the President of the United States would not take into consideration the element of politics in a nomination. I do not know the politics of every nomination, and I doubt if anybody has studied them that closely, but of the principal ones that I can think of, both successful and failures, the political aspect was prominent in the President's thinking, and it was also prominent in the Senate's thinking. I think it is ridiculous to say that it would not be a factor.

There is a second reason why I think it is important to appoint a public man. (The word politician seems to be tainted, so let us speak of the prospective Justice more as a public man, although for me the word politician is not tainted.) A public man is needed

because of what I as a constitutional historian, I would call the somewhat altered character of judicial review. Now, I would argue that since the great judicial crisis of 1937, and the period of judicial self-denial, which took place for a time thereafter, that the Court has emerged as a new kind of legislative body. I am using that term in a very broad way. The court has taken on the task of solving certain social, political, constitutional, and economic problems, which I am sure the Founding Fathers thought of as being essentially legislative in character. I am thinking of the *Brown* decision, for example. I am thinking of the birth control decision of 1965, the *Griswold* decision. I am thinking of the decision with respect to abortion, I am thinking of the death penalty decision. Those are public policy decisions, they are legislative decisions in the highest sense of the word.

I know the word legislative here can be subjected to technical objections, and I recognize that. But, what is involved here, if one reads, for example, the death penalty opinions, is that they are a mixture of a consideration of the technical, legal aspects of the eighth amendment, and whether or not it is subject to change through the judicial process on constitutional growth. But there is also behind that a very heavy mixture of public policy considerations.

Though technically, in the *Brown* opinion, the Court didn't do this, nonetheless, if you look at the unanimous opinion of the Court in that case, what one sees behind it is very clearly a public policy position. What the Court is passing upon is an aspect of social revolution which it is recognizing and which it is giving life to in the Constitution.

I cannot conceive of a President of the United States not taking this factor into account, and I think it must be taken into account. And I think the success or failure of a Judge on the Supreme Court comes from



whether or not he is a public figure in the highest sense of the word.

I keep saying the highest sense of the word. I do not mean in a narrow, partisan, mean sense of the word, but perhaps a partisan in the highest sense of the word also. I think if I were to describe Justice Douglas' career, or Justice Black's career, or the second Justice Harlan's career, or the first Justice Harlan's career, I would say that on the Court they were politicians in the highest sense of the word. They were aware of the meaning of what they did and the consequences of their action on the growth of the social order, the economic order, the political order, the political mix in the country, the thrust and direction of the American constitutional democracy.

I think that a President of the United States and the Senate must take that into consideration.

For the rest, I subscribe, I think, for the most part to the observations of my colleagues. And I will not detain you at length. I do think that the observation that the time has come to appoint a woman –

*Mr. Abourezk.* Professor Kelly, may I interrupt you just a moment before you go on?

*Mr. Kelly.* Yes, sir.

*Senator Abourezk.* What you have just finished describing I think is perhaps a confirmation of the charge that is sometimes leveled at the Supreme Court that it merely follows the election returns, and perhaps anticipating them. You stated that all of these public men were well aware of the effects of their decisions on politics and society.

*Mr. Kelly.* It is not quite the same thing, Senator, as saying they followed the election returns. Though I think they often have. I agree with Mr. Dooley on that subject.

*Senator Abourezk.* Yet, I wonder if that kind of a judge, then, is able to make a decision, when he is aware that it might be a very unpopular decision but nevertheless

one that is just in terms of what I guess you and I might think of as being a just decision. For example, a desegregation decision which might be very unpopular politically at the time, but the right thing to do. Would your criteria then allow that kind of a Court or Justice to do that sort of a thing?

*Mr. Kelly.* I would even dare to apply the concept of independent judgment to a United States Senator on occasions. That is to say, I think the American political process at its best is not merely one in which politicians are supposed to be stifled. I am aware they often are, but I p[re]fer to conceptualize the relationship as a reflex arc, that is a United States Senator should be a molder and a leader of public opinion, not just a siphoning process in a computer. I am aware of the paradox that is involved in that in a democratic state.

*Senator Abourezk.* That phrase is used on the stump all of the time, but in practical reality I do not see too much of it.

*Mr. Kelly.* Well, I think that as a constitutional historian, I would argue with you a little about that, but that is a little off the theme of what we are getting at here. But, I would insist that a Judge of the U.S. Supreme Court have the power to make independent and even unpopular decisions. And my colleagues here also could give you a list of a dozen decisions that were fraught with political implications and which I think, on a majority basis in the United States in the last 20 years, would have been voted down if they had been put to the public. That does not mean that they were not political decisions.

By saying they are political, I do not mean that they reflect, in the narrow sense, a computerized process of democratic development. What I mean is that the man who makes them is aware of the process, that constitutional law is dynamic, that [it] is grow-

ing, that it has a relationship to the thrust and the direction of the democratic process and to that growth of the country at large. And he is aware of the meaning of it in that sense of the word. I would certainly expect him to have independence of mind, conviction, and philosophic awareness of what he was doing. He has an appointment for life to protect him against political reprisal and he certainly ought to be able to take advantage of that.

I think one could take, for example, the decision on separation of church and State. If the four or five decisions on separation of church and State with respect to parochial schools in the last 5 years were put to a popular vote in the three States that they have affected the most – Pennsylvania, New York, and Rhode Island – I think they would have been voted down by a large majority. Yet those were political decisions in terms of a thrust and direction which they gave to the constitutional system.

I do not mean to say that they do not involve high questions of principle about the nature and the character and the destiny of the American constitutional system, because I think they did. One could argue that, on both sides, whether he disagreed or agreed. But, I also think that they were public policy decisions with profound public policy implications.

I think those Justices, from Chief Justice Marshall, who understood this very, very well indeed, to Chief Justice Warren, who certainly understood it also, have been the most successful as Justices on the Court. I do not think we ought to shy away from the political observation about the Court or the character of a political appointment. Beyond that, it seems to me that these men come from every conceivable kind of background. And one thing that stands out is that they have not been particularly experi-

enced in the judicial process in the narrow sense of the word.

I deliberately gave you a list of men that does not include a single appellate or district judge, on the Federal level. We could put another list along with them. There obviously have been some great appellate judges that went to the Court, Taft, Holmes, Cardozo, White and so on, and someone could lengthen that list greatly.

But, the important fact is that many Justices have often been politicians, that is to say men whose roles have been that of legislators, Congressmen, Governors, or Senators and the like; these men have more often than not, I think, been the stuff out of which the great Justices have come. And I would argue that that is not an accident, that they have understood the political process and what the role of the Court was. And I would argue also, although this is a high[ly] controversial point, that the changed character of judicial review has caused the Court to take over certain legislative functions, with respect to which legislatures themselves seem to be paralyzed. I mean, for example, the *Baker* decision with respect to apportionment. The fact that the Justices perform[] that function now (it can be argued that they always have, but they certainly perform it now) makes it more important than ever that the President appoint and you confirm a public man.

I have ideas about a lot of these other questions, too, but I have spoken long enough.

*Senator Kennedy.* Thank you Professor Kelly. Professor Howard, we are delighted to have you here. Professor Howard is professor of law at the University of Virginia, author of many articles on Justices Black and Powell, and currently writing a book on “The Burger Court.” And we will not hold the fact that you are an old classmate of Senator Tunney’s and mine against you.



## Statement of A.E. Dick Howard, Professor, University of Virginia School of Law

**L**IKE MY COLLEAGUES HERE, I have no prepared statement or remarks. But your introductory statement and that of Senator Abourezk suggest to me two fundamental questions which in my judgment would concern you and your colleagues on the Senate Judiciary Committee.

One of those questions is the essential and legitimate role of the committee and of the full Senate in passing on a nominee: to what extent is the Senate to conceive of itself as being an equal and full partner in the process of seeing who goes on the U.S. Supreme Court. The other question is one that has been addressed at greater length here today: by what criteria do you make that judgment in passing on a nominee.

The first question need not detain us very long. A good deal could be said about it. There have been times in history when one might have thought that the Senate had slid into a somewhat junior partner kind of role – that unless the nominee were extravagantly out of the ball park, unless he were grievously unqualified and flawed in some singular way, then the Presidential nominee ought to be confirmed. Were we sitting here 10 years ago, one might well have argued that, whatever the original intention of the Framers of article II, the convention had arisen, especially in the early part of this century, of a generous presumption in favor of a nominee, with the result that only clearly unqualified nominees would be rejected. I think the events of the last few years have cleared the air on that point. The Senate has properly reasserted itself as having a full and plenary role to play along with the President, who makes the

nomination.

There is nothing in the text of the Constitution, there is nothing in the Philadelphia debates of 1787, nothing in the Federalist Papers, nothing in short in the Constitution's text or history which requires the Senate to assume a deferential role. Moreover, it seems to me that not only constitutional law, but also good public policy will argue in favor of thorough senatorial review. The Senate, after all, will find its legislation passed on by the Court as much as the Executive will find its actions under review. That alone argues for your taking great care with nominees.

So, I will not linger on that point, unless perhaps later on you have some questions about it.

Let me turn, therefore, to the question which has been more fully addressed by my colleagues on the panel: the question, by what criteria should the Senate pass on a nominee, what qualifications should one take into account – ethics, integrity, professional competence, age, geography, race, religion, sex, politics, partisanship, and so forth. In my judgment, to answer that kind of question, one would do well to begin with some assumptions about what one thinks the Supreme Court is there to do. For me the criteria which, were I sitting on the Judiciary Committee, I would use would turn on some underlying assumptions about the Court.

For example, if one conceives the Court as sitting essentially as lower courts sit – trial courts, State courts, Federal district courts – as a court to try cases and give a legal judgment, if that is the kind of court the Supreme Court is, then one is primarily concerned

about professional qualifications in the narrowest sense. That is to say, able lawyers with good credentials, with first-class legal reputations, respected at the bar, men of intellectual, legal, professional sharpness who can decide on a set of facts, make a judgment, and write a persuasive opinion. There is some element of that in the work of the Supreme Court, and to that extent a nonlawyer might well be handicapped on the Court.

But one tends to be so engaged by the cases that have great public interest – church-and-State cases, free speech cases, civil rights cases – that one tends to overlook the fact that a great range of very technical decisions come out of the Court – labor, antitrust, regulatory agencies, and so forth. In cases of that kind, the nonconstitutional part of the Court’s business, lawyerly abilities become more important.

But, surely, nobody living in 1975 can suppose that all the Court does is decide cases between litigants. The Supreme Court is not like other courts.

Felix Frankfort[er] and others who have written about the Court have persuasively driven home the point that appointees who go from other courts to the Supreme Court find that it is a new ball game, it is not the one they played when they were on the New York Court of Appeals, or the Federal District Court, or the Circuit Court of Appeals. That being the case, one has to take into account the sorts of things Professor Kelly had in mind; namely, that the Supreme Court is a court that does more than simply decide cases in the narrow, legal fashion. It is a Court that mediates between tradition and change, a Court that preserves the best of law and social heritage, but that also tries to accommodate the body of law and justice to changing needs and changing perceptions.

What one is looking for, therefore, is more nearly the public kind of person, the person

who has had to deal with important public issues.

There is yet a third way to view the Court, which is important, too. It is perhaps what Dean Pollak had in mind, that is, that the Court is all of the things I have just mentioned, but it is also a mirror of the American people. People whose aspirations are thought to be submerged in this country look ultimately to that tribunal as the outlet for some of their frustrations. It would be difficult for me to imagine the Supreme Court in modern times – when they have dealt with street demonstrations, with sit-ins, and with so many other racial questions that perc[o]lated up to the highest Court – to imagine that Court never having had a black member. I am thoroughly grateful that Thurgood Marshall has sat on the Court during much of this period in our history, not so much so for the precise votes that he cast in particular cases, but rather because black citizens can perceive a court that is not a lilywhite court, not a court for white people only. To that extent, I think [i]t would be useful, whether with this nomination or some other, to see a woman sit on the Court; then that last significant social barrier would fall. It seems to me, however, that one is mistaken if he picks and chooses among those models of the Court and decides on only one that he is going to follow.

Since the Court is a law court and decides cases, since it is a mirror of the people and, therefore, to that extent, has a representative quality, and since it is finally and perhaps more fundamentally a mediator of social change, arguably “legislative” – since it is all of those things, then ideally one judges nominees with all of those models in mind.

Regarding Mr. Meserve’s assumption: as to professional credentials you do want a man other lawyers will respect as a good lawyer – if indeed, the nominee is a lawyer. And as I said a moment ago, there is some

burden if the man or woman is not a lawyer. As to “representative” qualities, I would try not to hang up too much on specifics of race, religion, sex, geography, and the rest. I would try to subsume those in some larger approach, looking for the kind of nominee who is a public person and who has dealt with public issues.

I would reject the argument that a nominee must have sat on a lower court, have been a judge before he came to the Supreme Court. I would reject the argument that he must have been a practicing lawyer, as opposed to an academic or other kind of lawyer. I would reject the argument that a politician, whether he sat in the Congress or somewhere else, was not the best person to choose. I would say now that there is a common denominator cutting across those pigeonholes and categories; that common denominator is a breadth of experience and vision attained by a person who, in one way or another – in practice, politics, a lower court, or whatever – has had to engage himself with fundamental and important issues of a kind that would characterize the work of the Supreme Court.

*Senator Kennedy.* Very, very fine indeed.

We have been talking about the public figure, the importance of such an experience in terms of service on the Court.

Let me ask Professor Swindler whether in view of the recent pay increases in the Supreme Court, whether the emoluments clause of the Constitution automatically disqualifies a sitting Senator or Congressman to appointment to the present vacancy?

*Mr. Swindler.* My personal opinion is that it does, indeed – for two reasons: one, that it was an across the board pay increase and any rollback for a specific individual would be conspicuously an accommodation for that individual or the political pressures behind him; the other, because it would establish a remarkable precedent, I think, for varying

salary scales on the Supreme Court, granted that this discrepancy might be remedied at the normal end of that particular Senator’s term, or Congressman’s congressional term.

The case of William Paterson is a striking one here. You may recall that President George Washington nominated Paterson among the first six Justices of the Supreme Court that had been created by the first judicial act, and before the Senate could even address itself to his qualifications, apparently the Senate did not concern itself with this at all, all of them were approved immediately, but before the Senate could act on Paterson, his name was withdrawn because it was called to Washington’s attention that Senator Paterson had been a Member of the First Congress which passed the acts creating the Federal judiciary. He was in the second class of Senators who served only 4 years; therefore, when his 4 years were over, which was a matter of just a few months later, he was again nominated and duly confirmed.

It would seem to me that under the present circumstances you have one course of action which is self-defeating, and that is to roll back all of the salaries of the Federal judges, and when the Chief Justice is saying he cannot retain people in office with what was proposed, then I do not think you will have any if you were to roll them all back.

The other is that –

*Mr. Pollak.* That would be unconstitutional, would it not?

*Mr. Swindler.* Well, I suppose you could repeal the statutes and pass new statutes. But in any event, you certainly have this problem of having Associate Justices who, from the very beginning – I believe the first salary scale was \$4,000 apiece, and they were considered to be substantially overpaid – have always had the same salary, and so I should think that as a matter of fiscal tradition, if for no other and better reason, this would be

undesirable and perhaps a total barrier.

*Senator Kennedy.* You spoke about the individual statute that could be passed to permit an individual to be able to circumvent this requirement. Do you feel that would be constitutional?

*Mr. Swindler.* Yes.

*Senator Kennedy.* Yes, to eliminate the application of the pay increase for a particular individual?

*Mr. Swindler.* I am not sure what Dean Pollak had in mind in terms of the constitutional objection. It would seem to me that a general judicial salary increase could certainly have had in it certain exceptions; and it would be extended only to certain branches of the judiciary.

*Senator Abourezk.* I do not have a copy of the Constitution here, but I think it says that the salary shall not be diminished during his term of office, and that is in the Constitution.

*Mr. Pollak.* That was my problem, Senator. Any reduction in the general level of the judicial salaries would simply confront that insurmountable barrier.

*Senator Abourezk.* And Attorney General Saxbe, you will recall, when he was appointed out of the Senate, he had to take a cut in pay, and then we passed a law to take care of him after he got out of the Senate. But I do not think you could do that with the Court with that constitutional provision. I do not think that even would be allowable.

*Mr. Swindler.* I certainly agree. I understand his point now. I certainly concur.

*Senator Kennedy.* Perhaps the panel could talk about some of the examples of Presidents who conducted a search for the best individuals to serve on the Supreme Court. What did they do, and are there any lessons that we could learn from that experience?

*Mr. Swindler.* I believe, Senator Kennedy, you were inquiring about the historical re-

cord of procedures that Presidents have followed in seeking the best. My own matured reflection and conclusion after studying at least the processes for the period of the second century of the Court, from 1889, has been that this is lipservice that is paid, that when Presidents are seeking an outstanding candidate, particularly for the Supreme Court, they are seeking the best in the context of the political or philosophical accommodations they have already set up as their own personal criteria. It may be true that Judge Cardozo was recommended by an almost unanimous academic and professional community, and that this amounted to a pressure that President Hoover recognized. But at the same time this would be a conspicuous exception, I suspect.

*Senator Kennedy.* Do any of the others on the panel want to make any comments?

*Mr. Howard.* Senator, it seems to me that the process of selecting a nominee, especially to the Supreme Court, is not likely to be non-political. I think it is unrealistic to suppose that politics, in whatever sense, never enters in. That means that the lesson to be learned, to borrow your phrase, to not so much trying, as a citizen, to give advice to the President on how he should come up with his nominee and how he should fashion the search and what criteria he should use. The lesson emphasizes that the process, while a search for the best person, also has political connotations. Both parties to that search – the President, who nominates and the Senate, which confirms or rejects – enter into a process which brings out as much as one can learn about the person who was, in fact, put in nomination.

There have been some useful examples in recent years of the Senate's serving the role of bringing information to the public's, as well as their own attention, information which might not have come out in the first place.

*Senator Kennedy.* I know Dean Pollak has to leave shortly, but let me ask you a question. Would it not make some sense for the President to publish a list of names that he is thinking about so that you can get some comments from different groups on these individuals so that the President could make a final judgment? Would that not serve a useful purpose rather than just trying to keep the list quiet or secret, and then finally revealing one and popping it on the Senate?

*Mr. Pollak.* You are suggesting, Senator, that the President would publicly state that he is interested in and has asked for professional comments?

*Senator Kennedy.* Suppose there are 10 different names that the President is going to choose from, unless of course some other name comes up by some other kind of means. He asked the Bar Association for their comments. Why would one want to keep them secret and then make a recommendation? Is that useful in terms of the American public?

*Mr. Pollak.* Well, I guess I don't have a very strong view either way. I can certainly see that one would, as President, rather wish not to be, by publishing the names of 10 or a dozen possible appointees, the center of essentially a lobbying process in which groups begin to form to propose or to support or to attack a particular nominee. I am thinking beyond the question of what this may do for the particular persons that are in this public tug of war. I am really thinking that the President's ultimate freedom of action and freedom of sensible judgment may be prejudiced.

On the whole, I guess I do see some merit in your thought, Senator. I guess I am still a little more comfortable with the idea of having this scrutiny directed to the nominee after the President puts forward a particular name.

May I slightly change the subject, Senator, to go back to one of the other matters, be-

cause I am about to depart? I simply wanted to say with respect to this discussion which we have all had as to the qualifications, I fully subscribe to what I think my colleagues have said about the public person aspect of a nominee, I don't think we ought to be understood as saying, that the role of the Court with respect to its larger, for the most part constitutional domain is really just a higher form or more elegant form of legislating. That was implicit in Senator Abourezk's original question, I think, to Professor Kelly. I do not mean that Senator Abourezk was embracing that concept, but he was putting that concept before us. It is a part of the general criticism of the Court. From my point of view, it has been an unwarranted and essentially an inappropriate generalization of what the Court is there for, and what, in fact, it has been doing although there may be particular cases to support this view. And I precisely subscribe to the observations made by Professor Kelly that if one gets a public person such as Governor Warren, if you will, when he has the Constitution in his custody, he will not be the reflex of the ordinary public opinion processes but will vindicate constitutional values wherever the chips may fall.

So the Court's role is really a very different one from this body's, if you will, and properly so. But it is one of making ultimate policy choices for the country at the highest levels, and that is why one wants a person of the greatest breadth. That breadth may be obtained in political life, it may be obtained in law practice, it may be obtained in teaching, as with Justice Frankfurter, or even as a State court judge, as with Holmes and Cardozo. There is no single definition of the right profile.

If you will excuse me, Senator, I have to go.

*Senator Kennedy.* I do not know whether the others wish to comment on the publica-

tion of the list. If we are talking about involving the public in the process, it may be looked upon as lobbying or subjecting these individuals to the worst aspects of political life. Hopefully you are subjecting them to the best aspects. Through this kind of a free flow of comments, suggestions, or observations about them, the people best qualified would emerge and there would be a natural process by which the President would make a recommendation; and the Congress and the Senate would embrace it.

But I don't know. Do any of you have comments on the open publication?

*Mr. Swindler.* One thin[g] I might say, Senator Kennedy, is that this does become a matter of political manipulation and political gamesmanship, if you will, when the names are not officially announced. In almost all cases, they will all be known, thanks to the ingenuity of the media. When I used to be a newspaperman I heard a phrase used in Washington that nothing is easier to cover than a secret meeting. I suspect that that still obtains.

One thing that worries me is that there seem to be two groups of names that the President – any President – tends to allow to be leaked out without his committing himself to one or the other. One group is a group that is submitted to the American Bar Association for professional review. A member of the judiciary or the standing committee of the ABA phoned me about a week ago and read me the names in confidence because he was soliciting some evaluations, and he said to keep this very confidential. The very next morning the entire list was in the Washington Post. And I phoned him to tell him that I did not give anyone the list. As a former newspaperman I was not surprised that it was there.

The other group of names apparently is a group of names that floats past the influential members of the President's own party,

and apparently their political acceptability is being sought, I assume, so that somewhere in the processes of determining the specific candidate, the White House is trying to find the name that happens to surface most favorably in both the ABA's scrutiny and in the party's scrutiny.

I suggest that that may not always happen. There is a difficulty, it seems to me, and perhaps that is what you have in mind, of a President deliberately using both the ABA and the media to conceal his ultimate candidate. As I recall, when the last two nominations were made for the positions now held by Justices Powell and Rehnquist, every other name except those names found their way into the media, and the ABA went to a considerable length, apparently, to evaluate some of these and to hasten to say that some of them were not acceptable.

But as far as I know, the ABA did not have any invitation to consider either of the men who actually were nominated. And this is an example of perhaps Presidential manipulation of the media, and perhaps this could be avoided if a commitment to make all of the names public were made. I suspect it would be politically unacceptable to the White House.

*Senator Kennedy.* Mr. Kelly or Mr. Howard, do you have any reactions?

*Mr. Kelly.* I think, Senator Kennedy, you are suggesting something perhaps quite different than has ever been done before. My tentative reaction when you suggested this was to say that the idea was an unfortunate one. Many Presidents in the past have floated names; to mix up my metaphors, they have floated them both to the surface with the press and they have floated them underground through Congress, or newspapermen, in a confidential way. Franklin Delano Roosevelt did that; Harding did it regularly, and so on. Maybe it's inevitable that that process



happens, and I do not think you are going to stop Presidents from seeking advice.

Some of them, such as Harding, for example, even turned to the Supreme Court to get advice, although Taft's relationship with Harding in that respect was not very successful. But certainly when President Nixon attempted in a kind of way to publish a list, gave it to the Bar Association and implied that his nomination somehow would come from there, and when the nominations leaked to the press, the result, and I am thinking of that summer of 1970, somehow had a bad effect both for the President and for the United States. Maybe that was intrinsic in the peculiar political circumstances of the Presidency at that moment. But it had a bad effect for the Presidency of the United States and it had a bad effect, I think, for the Bar Association. The process didn't work well.

Now, maybe if it were a formal public statement to the U.S. Senate of a list which the President had already worked out, in which he said I have privately cleared these names and they are now before you for your consideration, I do not promise to nominate from this list, but I should like your reaction, what you are really doing is suggesting that the phrase "advice" in the Constitution be invigorated for the first time in 180 years. As a constitutional historian, I would observe that that word "advice" started to die in the Washington administration, and except for occasional threats of one kind or another, it has been pretty much left alone ever since that time, never having had any real substance to it as a formal constitutional process since the famous confrontation between Washington and the Senate in 1789. And as a constitutional historian, I would even argue that probably the premise of the convention with respect to the role of the Senate when it used that word was that of the Senate as an advisory body in the sense that upper houses

had a cabinet function in colonial times, and obviously the growth of the Senate, plus the tradition of the separation of powers, more or less destroyed that function. And it has never had it. And one can certainly understand the attempt and the interest of the Senate of the United States in restoring that word with some vigor. Conceivably this process you speak of would have meaning if it were done not as a legal process but as a formal public statement.

I think your difficulty, Senator, would be that the President of the United States would think himself limited by the process in a way that he might find politically unacceptable.

*Mr. Howard.* Senator, my reaction parallels that of Professor Kelly. I believe the suggestion you are airing might require some readjustments of constitutional assumptions about the separation of powers. Therein lies one's hesitancy about it. If one had nothing but the text of the Constitution before him, the *advi[c]e* and consent language might suggest more than has come to be the case. I think the "advice" part has atrophied, and what you are really talking about is consent. Therefore, one either has to pass a statute forcing the President to come up with a public list, a procedure about which one might have constitutional reservations, or one simply hopes that the President will do it, in which case I suspect that the politics of the situation may prevail.

*Senator Kennedy.* Senator Mathias has joined us here this morning. Senator Mathias has joined with Senator Abourezk and myself in sponsoring this particular meeting this morning.

Before yielding to Senator Mathias and Senator Abourezk, I want to extend my very warm sense of appreciation to our panel here this morning for the obvious thoughtful considerations that you have been giving

these issues. I think they will be helpful to us on this committee, and hopefully they will be helpful to the Senate as we try to fill our responsibilities in meeting the constitutional requirements of advice and consent on the next nominee. I think this meeting has been useful and helpful. I was asked by one of our colleagues when we were talking about this in the Judiciary Committee whether we would hope to extend this kind of ventilation of both history and constitutional understanding to other appointive offices that would be before this committee, and I think it may very well be helpful and useful in trying to establish criteria or at least some guidelines in the areas of other Federal judges or U.S. attorneys or others.

We are not making a decision on that today, but I just wanted to indicate to our panel how much I personally value your comments and your ideas and thoughts on this, and I wanted to say I appreciate your willingness to share your experience with us here this morning.

I want to thank you and yield to Senator Mathias and Senator Abourezk.

*Senator Mathias.* Well, I join with Senator Kennedy in thanking everyone who has participated in the panel. And I think we should confess that we have some selfish motives in stimulating this panel, the selfish motives being I think we are trying to lock the stable before the horse is out of it. Those of us who have spent many painful hours in this very room during some of the Supreme Court nomination hearings, have found the responsibility of withholding consent necessary, but not a pleasant experience. We would like to avoid that by building into the system whatever new and more thoughtful procedures can be devised.

Now, there are those, of course, who have objected even to this very formal proceeding on the grounds that it might invade the Ex-

ecutive prerogative. I think that is nonsense. I think we are entitled, if we feel the need, to develop a checklist of items that we might want to consider when nominees come before us. And I think it has some value to do it in advance when it is a completely objective and impersonal exercise.

I do not think it binds members of the committee or the Members of the Senate, because obviously Senator Abourezk may put more or higher priority on some items on the checklist than I would, and vice versa. But the value would be that there was a checklist against which every nominee could be impartially and impersonally measured. I think this could be helpful, and I think that this is a proper function of the Senate in the discharge of its portion of the appointment power.

So, I am grateful to you, and I merely regret that I did not have more opportunity to be here earlier. I was locked up with the CIA Committee in an airtight chamber with the Secretary of State all morning, and it was very difficult to escape. But we are nonetheless grateful, and I will review the record with great interest.

*Senator Abourezk.* In reflecting on the checklists that all of you have provided and, of course, the political requisites that President Ford is faced with in an election year, my only comment is that it is too bad that Nancy Reagan is not a lawyer.

In a serious vein, this has been highly enlightening for me and I cannot thank you enough for the great service you have performed in providing advice not only to those of us here, but those Members of the Senate who will read about what you have said in the press and in the committee print that we are going to provide. I want to express my personal gratitude.

This meeting is adjourned. [Whereupon, at 1:05 p.m., the symposium adjourned.] *GB*