



STATEMENT

of

PAMELA A. BRESNAHAN

on behalf of the

**STANDING COMMITTEE ON THE
FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION**

concerning the

**NOMINATION OF
LEONARD STEVEN GRASZ**

**TO BE JUDGE OF THE
UNITED STATES COURT OF
APPEALS FOR THE EIGHTH
CIRCUIT**

before the

**COMMITTEE ON JUDICIARY
UNITED STATES SENATE**

October 30, 2017



STATEMENT OF PAMELA A. BRESNAHAN

Mr. Chairman and Members of the Committee:

My name is Pam Bresnahan. I am a practicing lawyer here in Washington, DC. I am the present Chair of the American Bar Association's Standing Committee on the Federal Judiciary. Below are this Committee's views on the nomination of Leonard Steven Grasz to be a United States Court of Appeals judge for the Eighth Circuit.

I. PROCEDURES FOLLOWED BY THE STANDING COMMITTEE

Before I turn to the specifics of this nomination, I would like to review briefly the Committee's procedures so that you might have an understanding of the process that the Committee followed in this investigation. A more detailed description of the Committee's procedures is contained in an ABA pamphlet titled "Standing Committee on Federal Judiciary: What It Is and How It Works" (October 2017). The Judiciary Committee's staff has recently received copies of this updated pamphlet, which we call "the Backgrounder."

The ABA Committee investigates and considers only the professional competence, integrity and judicial temperament of the nominee. Each of these components are defined in the Backgrounder. The ABA Committee ultimately produces a rating of either "Qualified," "Well Qualified," or "Not Qualified." As the Judiciary Committee knows, ideological or political considerations are not taken into account. This is a non-partisan process. Our processes and procedures are carefully structured to produce a fair, thorough and objective evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment,

writing and analytical ability, industry, knowledge of the law, professional experience, character, integrity, open-mindedness, freedom from bias, compassion and general reputation in the legal community. The investigation is ordinarily assigned to the member of the Committee residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. The starting point of an investigation is the receipt of the nominee's responses to the public portion of the Senate Judiciary Questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications -- professional experience, significant cases handled, major writings, and the like. The principal evaluator personally conducts extensive confidential interviews with a broad spectrum individuals who are in a position to evaluate the nominee's professional qualifications and also examines the writings of the candidate. Both writings provided by the candidate and information from the public record or court files are included. The principal evaluator interviews the candidate and discusses his or her qualifications for a judgeship, as well as the substance of adverse information raised during the investigation. The nominee is given a full opportunity to respond and to provide any additional information he or she may choose.

Sometimes a clear pattern emerges in the interviews, and the investigation can be concluded. In other cases, conflicting views as to professional competence may be received, or questions may arise as to integrity or temperament. The principal evaluator submits an informal report of the investigation to the Chair, providing a preliminary report of the nominee's qualifications. In those cases where it appears that the informal report indicates that a recommendation may be "Not Qualified", a second evaluator is appointed to conduct a supplemental evaluation and conduct a further evaluation as appropriate, including a second interview of the nominee.

At the conclusion of all inquiries, a formal investigative report, containing a description of the candidate's background; a written description of the scope of the investigation; summaries of all interviews conducted, including the interview or interview(s) with the nominee; and, finally, a recommended rating is prepared by the evaluator or evaluators. The Formal Report is then circulated to the full Committee, along with the Senate Judiciary Questionnaire and any other attachments the evaluator(s) deem pertinent. The Committee then reviews the Formal Report and then votes on a rating, generally after some discussion or comment to the full Committee. The vote is e-mailed electronically to the Chair, who collects the votes. Thereafter, letters confirming the ratings are sent to the nominee, the White House, the Department of Justice and the Senate. The Committee is also sent a letter confirming the rating.

An important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information from a nominee's peers on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure. It is the Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential of abuse of confidential disclosures. To that end, the substance of the adverse information is shared with the nominee, who is given a full opportunity to explain his or her view of the issue and provide any additional information bearing on it. If that cannot be done, the information may not be relied on by the Committee in reaching its evaluation.

The Committee has engaged in a similar process for all nominees since the Eisenhower administration. In most administrations, the ABA has been advised of proposed nominees, prior to their being announced publicly or sent to the Senate for hearing. This system allowed any

rating of Not Qualified to be considered by the administration privately in deciding whether or not to nominate the individual. In the present administration, as was true for President George W. Bush, the administration has chosen to announce the nominee publicly before receiving the ABA Committee's evaluation.

A rating of Not Qualified by the Committee has not been a frequent event. Prior to today, only one (1) of President Trump's nominees has received a rating of Not Qualified, and the remaining forty-one (41) have received ratings of Qualified or Well Qualified.

II. THE INVESTIGATION OF MR. GRASZ

Mr. Grasz was nominated on August 3, 2017. Professor Cynthia Nance began her investigation immediately. On August 18, 2017, Professor Nance received a copy of Mr. Grasz's Senate Judiciary Questionnaire (SJQ). On September 18, 2017, Professor Nance submitted to me, as Chair of the Committee, an Informal Report that thoroughly presented the results of her investigation, summaries of all of her 183 confidential interviews, a summary of her interview with Mr. Grasz and a recommendation. Because the recommendation proposed was that Mr. Grasz be found "Not Qualified", consistent with the Committee's procedures, I appointed a second evaluator, Mr. Laurence Pulgram, a practicing lawyer from San Francisco and a current Committee Member, to conduct a supplemental evaluation.

Mr. Pulgram conducted 24 additional confidential interviews of lawyers and judges experienced with Mr. Grasz. Mr. Pulgram, consistent with the Committee's procedures, also collected and reviewed additional materials and personally interviewed Mr. Grasz.

On October 25, 2017, Professor Nance's and Mr. Pulgram's reports were transmitted to all the Members of the Committee. Members of the Committee discussed among themselves,

including with the two evaluators, both orally and electronically, the issues raised by the reports. After the Committee members had an opportunity to study and reflect on both reports and their attachments, they transmitted their votes to me. The Committee unanimously found Mr. Grasz "Not Qualified", with one abstention. The vote was reported to Senator Grassley and Senator Feinstein on October 30, 2017 (today).

At the outset, Professor Nance noticed that a number of lawyers were missing in the nominee's report of his "10 most substantial litigated matters." As she began the evaluation, Professor Nance encountered a reluctance on the part of members of the Nebraska bar to respond to her inquiries. Among those who did respond, many expressed reservations about speaking, and were concerned about possible repercussions from their participation. During the course of her evaluation Professor Nance became concerned about a clear, consistent pattern of the criticisms that emerged from the interviews. Mr. Grasz's professional peers expressed concerns about his views of *stare decisis*, and questioned his commitment to it. In addition, a number of Grasz's colleagues expressed the view that, in terms of judicial temperament, as evaluated by the Committee, Mr. Grasz is not "free from bias." Specifically, they expressed the view that he would be unable to separate his role as an advocate from that of a judge. Finally, members of the bar shared instances in which Mr. Grasz's conduct was gratuitously rude. The concerns were sufficient enough that Professor Nance was not dissuaded over the seriousness of these allegations by the fact that she had interviewed some lawyers who said they did not share these concerns.

Mr. Laurence Pulgram's evaluation encountered a similar and unusual fear of adverse consequences expressed by those from whom interviews were solicited, of all political parties, based on the nominee's deep connection and allegiance to the most powerful politicians in his

state. Mr. Grasz has stated that he spends about 50% of his professional time lobbying and 50% of his time in litigation. Many questioned whether Mr. Grasz would be able to detach himself from his deeply-held social agenda and political loyalty to be able to judge objectively, with compassion and without bias.

Mr. Grasz has expressed his recognition of the theoretical difference between acting as an advocate and as an adjudicator. But there were numerous indicators of inability to differentiate between the roles in practice. One example was Mr. Grasz's statements that he respects *stare decisis*, and that he views the role of a lower court judge to be applying neutrally the decisions from the higher courts, rather than legislating from the bench. At the same time, Mr. Grasz states that he continues to adhere to views he expressed in "If Standing Bear Could Talk . . . Why There Is No Constitutional Right To Kill A Partially Born Human Being," 33 Creighton L. Rev. 23 (1999). In that article, referring to the Supreme Court's rulings in *Roe* and *Casey*, he argued that a lower court "need not extend questionable jurisprudence into new areas or apply it in areas outside of where there is clear precedent." He further argued that, because "abortion jurisprudence is, to a significant extent, a word game," the lower courts—not merely the Supreme Court—should have construed the 14th Amendment as granting a "partially born" fetus right to life that overruled a mother's right to choose established in *Roe* and *Casey*. Mr. Grasz's professed loyalty to a higher court's rulings is difficult to square with this suggestion that a lower court judge was entitled, in deciding the issue, to question the jurisprudence of a superior court; that it could construe that jurisprudence as a word game; and, that it, therefore, should adopt a new 14th Amendment construct for analysis of the rights of the unborn that could avoid *Roe* and *Casey*. Also troubling was that Mr. Grasz maintains that his own pro-life agenda has no impact on his conclusion as to how a lower court could and should have avoided *Roe* and *Casey*. He was

unable to identify the lack of objectivity that his personal convictions had created.

This instance was not the only one in which Mr. Grasz' passionately-held social agenda appeared to overwhelm and obscure the ability to exercise dispassionate and unbiased judgment.

In sum, the evaluators and the Committee found that temperament issues, particularly bias and lack of open-mindedness, were problematic. The evaluators found that the people interviewed believed that the nominee's bias and the lens through which he viewed his role as a judge colored his ability to judge fairly. It was also clear that there was a certain amount of caginess, and, at times, a lack of disclosure with respect to some of the issues which the evaluators unearthed. As noted by another Committee member, "a life devoted to partisan politics is not disqualifying. Here, however, I believe both evaluators have focused on the correct issue and carefully identified the problems with the nominee's ability to set aside personal bias in carrying out his judicial duties, notwithstanding his professed recognition of the distinction between the roles of an advocate and a judge."

I am happy to answer questions that the Judiciary Committee may have regarding the American Bar Association's Standing Committee on the Federal Judiciary's rating of Mr. Grasz. I can be reached at (202) 467-8861. Thank you for the opportunity to be heard with respect to this nomination.