2024 LEADERSHIP WORKSHOP

PUBLIC STATEMENTS

- Guidelines for Public Statements
- Recommendations for a Senate Special Committee
- Guidelines Points for Response to Attacks on Judiciary

GUIDELINES FOR PUBLIC STATEMENTS BY THE COLLEGE AND ITS FELLOWS

The College may from time to time wish to publish a statement that reflects the official position of the College. Official positions of the College shall be limited to matters that impact the Mission of the College.

Recognizing that decisions on particular statements will require case-specific review and approval by the Executive Committee or the Board, these Guidelines are designed to provide guidance with respect to public statements.

1. Official Statements of the College. The College may from time to time wish to publish a statement that reflects the official position of the College. Official positions of the College shall be limited to matters that impact the core missions of the College set out in Section 1.1 of the Bylaws.

Although not included among our core missions, collegiality is as important as any of those missions, and no statements should be made which unduly threaten our collegiality by taking a position on one side of a matter of genuine and divisive controversy. That does not mean that a single Fellow or small group of Fellows should be given veto power. A case in point is the official position taken by the College that it disfavors the election of judges. That position is clearly within our core mission; it is a sound position. But it is not a universally held position – many Fellows legitimately disagree. The Board of Regents made the reasoned assessment that a position against judicial elections was so fundamental to our mission that the statement should be issued, despite the existence of less than unanimous support among the Fellows. It is easy to see other issues that could arise where the calculus would be different. While election/merit selection is an area of disagreement, it is a calm disagreement. Take a more emotional issue, like whether we should have the death penalty, and it would be harder for the Board to conclude that the College should take a position at odds with a strongly held minority view.

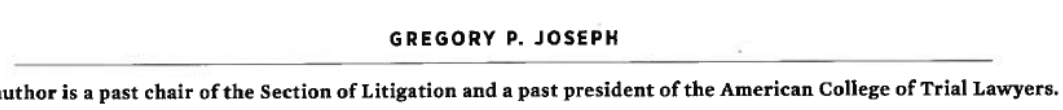
It is for that reason that official positions require, except in limited emergencies, the thoughtful deliberation of the Board. No official statement should be made unless approved by the Board of Regents after reasonable notice and opportunity for discussion, except, in rare circumstances, where the nature of the statement is time-sensitive and it is impractical to obtain Board consent, in which case the statement may be issued upon unanimous approval of the Executive Committee ("EC").

2. Amicus Briefs. It is the Policy of the College to file amicus briefs only where its position or argument can add something of significance not otherwise available to the parties. The decision to seek leave to file an amicus brief shall be approved by the Board. If approved, the Board shall designate one or more Fellows to liaise with amicus counsel.

3. General Committee Statements. General Committees may make statements that fall within their mandates. For example, the Federal Civil Procedure Committee may – in fact should – comment on proposed changes to the Federal Rules. Committee statements should be drafted to clearly reflect that they express the views of the *Committee*, not the College. And although the statement will be the Committee's, no statement should be made until the Committee's Regent and the EC have had an opportunity for comment and approval. If there is dissent among the Committee members on the substance of the statement, that fact should be clearly flagged for the attention of the Regent and EC and consideration should be given to expressing the minority view in the statement.

4. State and Province Committee Statements. Statements by State and Province Committees should follow the same guidelines, but, in general, no statement should be made such as "the Fellows of the State of Illinois take the position that
. . . " unless it is literally true – that is, that every Fellow in the State has agreed. It will be rare that a Committee will be able to achieve unanimous consent, so better language will be something like "The members of the Illinois State Committee take the position that . . . " A caution: the EC is far more likely to sign off on a General Committee statement with a dissent than a divided State/Province Committee statement. In a General Committee, the dissent will be limited to a few individuals. But State/Province Committee members are representatives of the entire State or Province – so the dissenters may and likely do represent a wider group.

5. Statements by Individual Fellows. So long as there is no suggestion that the College endorses the statement of an individual or group of individual Fellows, there is nothing wrong with factually stating that a person happens to be a Fellow. For example, there is nothing wrong with a Fellow mentioning that fact in the byline of a published article such as



GREGORY P. JOSEPH

The author is a past chair of the Section of Litigation and a past president of the American College of Trial Lawyers.

– especially if, as in this example, the Fellow writes well.

RECOMMENDATIONS FOR A SENATE SPECIAL COMMITTEE ON JUDICIAL NOMINATIONS

Judicial Independence Committee

Approved by the Board of Regents
September 2023

MISSION STATEMENT OF THE
AMERICAN COLLEGE OF TRIAL LAWYERS

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

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"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

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RECOMMENDATIONS FOR A SENATE SPECIAL COMMITTEE ON JUDICIAL NOMINATIONS

INTRODUCTION

Founded in 1950, the College is dedicated to maintaining and improving the standards of trial practice, professional ethics and the administration of justice. It is an invitation-only fellowship of lawyers in the United States and Canada who have achieved acknowledged distinction in trial practice. The College has no ties to any political party or any partisan endeavors and is comprised of Fellows from every State, the District of Columbia, and the Commonwealth of Puerto Rico, as well as the Provinces of Canada. For many decades nearly every Justice of the Supreme Court of the United States (and every Justice of the Supreme Court of Canada) has been inducted as an Honorary Fellow of the College, following confirmation to the Court. Many Fellows of the College have served as state and federal judges following their induction in the College. Justice Lewis F. Powell, Jr., served as President of the College shortly before he was appointed to the Supreme Court.

JUDICIAL INDEPENDENCE COMMITTEE

The College has a General Committee on Judicial Independence. Its mandate includes the duty "to recommend initiatives, as appropriate…in educating the public regarding the judiciary's role in protecting the rule of law." The Committee, and the College as a whole, recognize that the Senate performs a critical "advice and consent" function in the confirmation process for federal judges. In performing that function, the Senate significantly affects the public's perception of the role of the judiciary, as well as its understanding of the essence of principled judging. The widely publicized and often televised Senate confirmation hearings for nominees to the Supreme Court attract extensive media and public attention. As a result, those hearings have a direct, deep and long-lasting impact on the public's opinions, not only of nominees to the Supreme Court but of the entire judicial system. Article III of the Constitution reflects the framers' intention that the judiciary be not only separate from the political branches but also independent of them, and nonpartisan. Indeed, all Article III judges pledge in their oath of office to "faithfully and *impartially* discharge all the duties incumbent upon me…under the Constitution…." That fundamental obligation cannot be fully achieved, and the perception of fair and impartial justice cannot be maintained if the public lacks confidence and trust in the process that leads to the nomination and confirmation of Article III judges.

And yet, many Senators, including current incumbents, have acknowledged that for many years the Senate's confirmation hearings have been deeply flawed and in acute need of repair. Thus, for example, Senator John Cornyn noted long ago that "[t]he Senate's judicial confirmation process is badly broken." *Restoring Our Broken Judicial Confirmation Process,* 8 Tex. Rev. of Law & Politics 1 (2003). In that article, Senator Cornyn quoted Senators Charles Schumer and Dianne Feinstein to the effect that the process was not only broken but needed to be fixed. *Id., p. 2.* Senator Cornyn observed:

> It is a great disservice to the American people that the Senate Judiciary Committee has become one of the most partisan and hostile committees in Congress. It does not have to be that way…and what is sorely needed is a restoration of civility to the Senate's broken judicial confirmation process.

Id., p. 35. Senator Cornyn then pointed out an encouraging development: a bipartisan group of then-recently elected members of the Senate had written the Senate leadership calling for a fresh start.

Yet, fifteen years after Senator Cornyn's article, former Senator John Danforth, in a Time magazine article, lamented that the Supreme Court confirmation process remained "broken." He also proposed that a bipartisan solution should be implemented. Notwithstanding those proposals, the problems observed by these leaders of the Senate have grown only worse. The most recent confirmation hearings have led to overtly partisan, even hostile, treatment of nominees and witnesses, with inquiries and pronouncements that veer far beyond the nominees' qualifications, or their reputations for fairness and integrity. It is unnecessary to cite examples; several Senators from both parties have taken this approach.

We recognize that no nomination and no confirmation process occur in a political vacuum. Any effort to improve the process must take that into account. In recent years, however, the primary message that all too many citizens will draw after observing confirmation proceedings is that members of the Supreme Court are likely to shape their rulings to be consistent with, or even to advance, policies or positions of the politicians who nominated and confirmed them. In short, confirmation hearings have caused far too many citizens to view the Supreme Court itself as a partisan political body.

The College's Judicial Independence Committee has evaluated a proposed framework for the Senate Judiciary Committee to consider when it accepts the urging of many Senators and citizens alike to "fix the problems."

Most importantly, we propose that the Senate create a Special Committee on Judicial Nominations to evaluate reforms to improve the currently flawed system. Because the Senate has the sole responsibility to "vet" Supreme Court and other federal judicial nominees, we are offering a framework of suggestions for the Senate to consider.

APPROACH

Before we set forth our specific recommendations, we offer the following summary of our approach in formulating them.

(1) We took into account that it is not just the composition, performance and reputation of the Supreme Court that is at stake; the reputation of and public trust in the Senate, too, have significantly suffered because of the manner in which confirmation hearings have been conducted. Accordingly, we have offered suggestions that, if adopted, would strengthen the public's confidence in the Senate's confirmation process.

(2) We reviewed and considered numerous professional and academic articles about the confirmation process. We conducted extensive interviews dealing with these issues, including with sitting Senators; former Senators; representatives of the Department of Justice; sitting and retired lower court federal judges; retired Supreme Court Justices; and representatives of the press and broadcast media. We considered numerous specific recommendations that some of these experts

had promoted about how the Senate can improve the hearings process. We debated their usefulness and practicality but we did not merely incorporate any of them. For example, some thoughtful commentators recommended that the questioning of nominees and witnesses in committee hearings be conducted by only one or two members of each party or only by experienced lawyers. We do not support such proposals. The College recognizes that every member of the Senate Judiciary Committee has the right to participate actively in the confirmation process, including by questioning nominees and witnesses at hearings. No Senator should be precluded from participating directly in that function, because it is the Senate that has the constitutional power to determine on its own how to carry out its authority to advise and consent.

(3) We recognize that the problems with the confirmation process are by no means attributable solely to the Senate. Numerous Senators and others have repeatedly voiced understandable frustration about the unnecessary or formulaic tendency of judicial nominees to decline to answer appropriate questions posed by Senators. Nominees frequently do so by asserting that they would risk violating their duty to keep an open mind about issues that might be presented in cases that will come before them if they are confirmed. That assertion is legitimate in principle, and we do not challenge it. But we believe that it must be appropriately limited.

What follows are our recommendations for the Senate's Special Committee on Judicial Nominations (or the Judiciary Committee itself) to consider.

RECOMMENDATIONS

1. The Senate itself should consider preparing a guide or internal manual for conducting confirmation hearings. This guide or manual would describe the central purposes of the confirmation process and not be a homily about civility and fairness. It would acknowledge and describe previous instances of inappropriate questioning or conduct (including inappropriate responses of nominees and witnesses) that the Senate seeks to curb. The guideline should renounce approaches employed as reprisals for unfair hearings or inquiries that the other political party conducted in the past. In short, the Senate would call a truce to such "payback" approaches. By doing so, the guide would recognize that the entire process of nominations, investigations, hearings and confirmation debates and votes has had a profoundly adverse impact on the citizenry's confidence in our courts and in the Senate itself. It would acknowledge that reform of the process would enhance the public's understanding and appreciation of the critical role of the Senate and the federal judiciary within the separation of powers framework central to the Constitution. And it should recognize the importance of a nomination and confirmation process designed to promote and maintain a federal judiciary that the public trusts to rule without regard to partisan political pressures.

2. Questioning at hearings generally should focus on the following attributes of the nominee: professional background and experience; intellectual capacity; temperament; integrity; collegiality; participation in civic life; and personal achievements, including (where applicable) overcoming disabilities and obstacles to advancement.

3. We recognize that a legitimate and vital aspect of the confirmation process for Senators includes inquiry about the nominee's judicial philosophy; preferred methods of interpreting the Constitution and federal statutes and regulations; pending proposals to change or affect the

composition of the Supreme Court, or of courts in general, such as term limits and age limitations; Supreme Court-specific ethical rules; public broadcasting of Supreme Court argument sessions; and similar topical issues. If the nominee has made previous statements or published articles or made presentations about such issues, Senators' questioning should recognize that the passage of time and the capacity of individuals to change their minds may influence the nominee's current testimony.

4. The Constitution recognizes that religious observance and tolerance are central features of our Bill of Rights. Government and public officials may not unduly interfere with anyone's religious affiliations, beliefs or observance. Therefore, the extent and nature of a nominee's adherence to the precepts of whatever religion [s]he practices should not be challenged and should never be a basis for criticism or disqualification, unless the nominee states, unequivocally, that he or she could not follow a specific law or precedent because of the tenets of the nominee's religion.

5. Many Supreme Court nominees have previously served as lower court judges. It is not inappropriate for Senators to question a nominee about a ruling [s]he previously issued. The Judiciary Committee should permit the nominee a full opportunity to explain the ruling, the context in which it was issued, and the legal precedents and framework the judge was confronting. In addition, if the nominee was questioned about the legal issue in the confirmation process during nomination to a lower court, the nominee should be permitted to explain any later developments that may have affected his/her views about their prior ruling. A Senator who voted to confirm the nominee as a judge of the lower court, but who intends to oppose that person's appointment to the Supreme Court should explain his/her change in position.

6. Some Supreme Court nominees have represented controversial or even nefarious clients when the nominees were practicing law. Every Senator should understand that it is the professional duty of a lawyer representing a client to promote or defend the client's interest zealously, within the scope of applicable laws, ethical rules and court rules. Absent a nominee's failure to comply with those rules, questioning about such prior representation should be limited to the facts of the case and applicable law. Neither questioning nor commentary by a Senator should expressly or impliedly attribute the client's views or behavior to the nominee who previously represented that client.

7. Similarly, if in previously serving in the executive or legislative branch, the nominee advocated for or against a policy, law or legal interpretation then being considered, a Senator's questioning should recognize the importance of neither asserting nor implying that the nominee's prior position on the issue necessarily represents the nominee's current view. The nominee should have the opportunity to explain how their role as a judge might move them to differ from positions taken as an executive or legislative branch employee.

8. To ensure that confirmation hearings are conducted both informatively and efficiently, the Judiciary Committee should in advance of the hearing provide to all members of the Committee and to the nominee, a copy, or at least a list, of all documents, communications and materials sent to or obtained by the Committee staff in preparation for the hearing. We recommend providing these materials no less than twenty-four hours before the Committee convenes the hearing.

9. Questioning by the Senators should avoid surprise inquiries about issues, prior conduct or other matters that were not disclosed to the nominee in advance of the hearing.

10. The Judiciary Committee should consider adopting rules imposing stricter time limits on Senators' opening statements and affording a timely opportunity for the nominee to respond directly to each Senator's opening statement.

11. Our discussions with Senators from both parties and their staffs indicate that a vexing feature of all Supreme Court nominee hearings within the past several decades is the near-rote refusal of nominees to discuss a legal issue or case that they assert may come before them if they are confirmed. Nominees frequently do so by asserting that they would risk violating their duty to keep an open mind about issues that might be presented in such cases. There is considerable merit to the concern that stating a position about such an issue might prevent the nominee from appearing to maintain an open mind in analyzing the particular issues and facts in a future case. Sometimes it appears that Executive Branch personnel responsible for preparing the nominee for the hearings may have gone too far in cautioning nominees to be circumspect. Accordingly, we recommend that the Senate propose to the Department of Justice and the Office of White House Counsel that a select group of representatives from the Senate and from those Executive Branch entities explore possible reforms or adjustments in the preparation process of nominees [and witnesses]. There may well be fair and legitimate questions about current issues that nominees can answer substantively, so long as there is a mutual understanding, acknowledged publicly by the nominee and questioning Senators, that the nominee has not committed to a particular position that may come before the nominee in a future case. Notwithstanding this recommendation, there should be bipartisan agreement to refrain from questioning nominees about the issues in a particular case in which an appeal to the Supreme Court has been filed, the Supreme Court has granted *certiorari* or a petition for *certiorari* is pending.

CONCLUSION

We offer these recommendations because, we, as a profession, have an obligation to speak when the courts, especially the Supreme Court, are at risk of delegitimization. Both the Supreme Court and the Senate must have the confidence of the public. It is our hope that consideration of these recommendations will enhance public trust and restore faith in an independent Supreme Court.

Guideline Points for Response by the American College of Trial Lawyers to Attacks on Judges and Justices

The College will respond only if we can do so within 48 hours of the event giving rise to our response.

The Executive Committee (EC) will consider first whether a response should come from the State or Province Committee, rather than the EC. Placing the responsibility with the EC allows for responding more quickly than a State or Province Committee can respond. When the reason calling for the College to respond is "clearly local," however, it is better for the State or Province Committee to be speaking.

1. Any threat, even if implicit, of physical violence or injury.
2. Any threat to jurors or witnesses.
3. Any attempt to cause fear or humiliation of the judge or to chill the judge's independence.
4. A public official's interference or attempted interference, in a pending case.
5. A public official's statements that intend, or appear to intend, intimidation of a judge in his/her decision, before or after the decision. Evaluation of the College's response to intimidation must take into account that public officials are free to advocate publicly for a particular ruling on a pending case or legal issue and to criticize a judge's decision. The College will face a recurring judgment call to distinguish the public official's freedom of expression from the intention or goal of intimidation.
6. Any attack on a judicial body because of any given ruling(s). To illustrate, former President Trump's declaration that the Ninth Circuit was "a lawless disgrace" following one trial judge's immigration ruling.
7. The College will be alert to prosecutors facing attacks for prosecutorial decisions they have made. Recognizing that these attacks do not aim at judges, we know these attacks threaten the safety of prosecutors and their families.
8. The College should condemn the attack on a judge for an opinion because [s]he was influenced by a political lobby (as Governor Newsome did re Judge Roger Benitez, in a gun case); because [s]he has an ethnic or religious affiliation (as former President Trump did regarding Judge Gonzalo Curial); or because [s]he was beholden to the President who appointed her, when the intemperate criticism of the judge altogether ignored the applicable legal principles and analysis—i.e. the merits—of the ruling.
9. Characterizing a judge as being of a certain perspective/bias/allegiance calls for our engagement. One illustration is the claim that, a case with this judge means "justice is for sale."
10. Legislative attacks on the judiciary in reprisal for unpopular (with a majority of the legislature) judicial rulings.

These guidelines are not "ranked" or listed in order of importance.