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# NOMINATION OF BYRON R. WHITE

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COMMITTEE  
NOMINATION

## HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

NOMINATION OF BYRON R. WHITE, OF COLORADO, TO BE  
ASSOCIATE JUSTICE OF THE SUPREME COURT  
OF THE UNITED STATES

APRIL 11, 1962

Printed for the use of the Committee on the Judiciary



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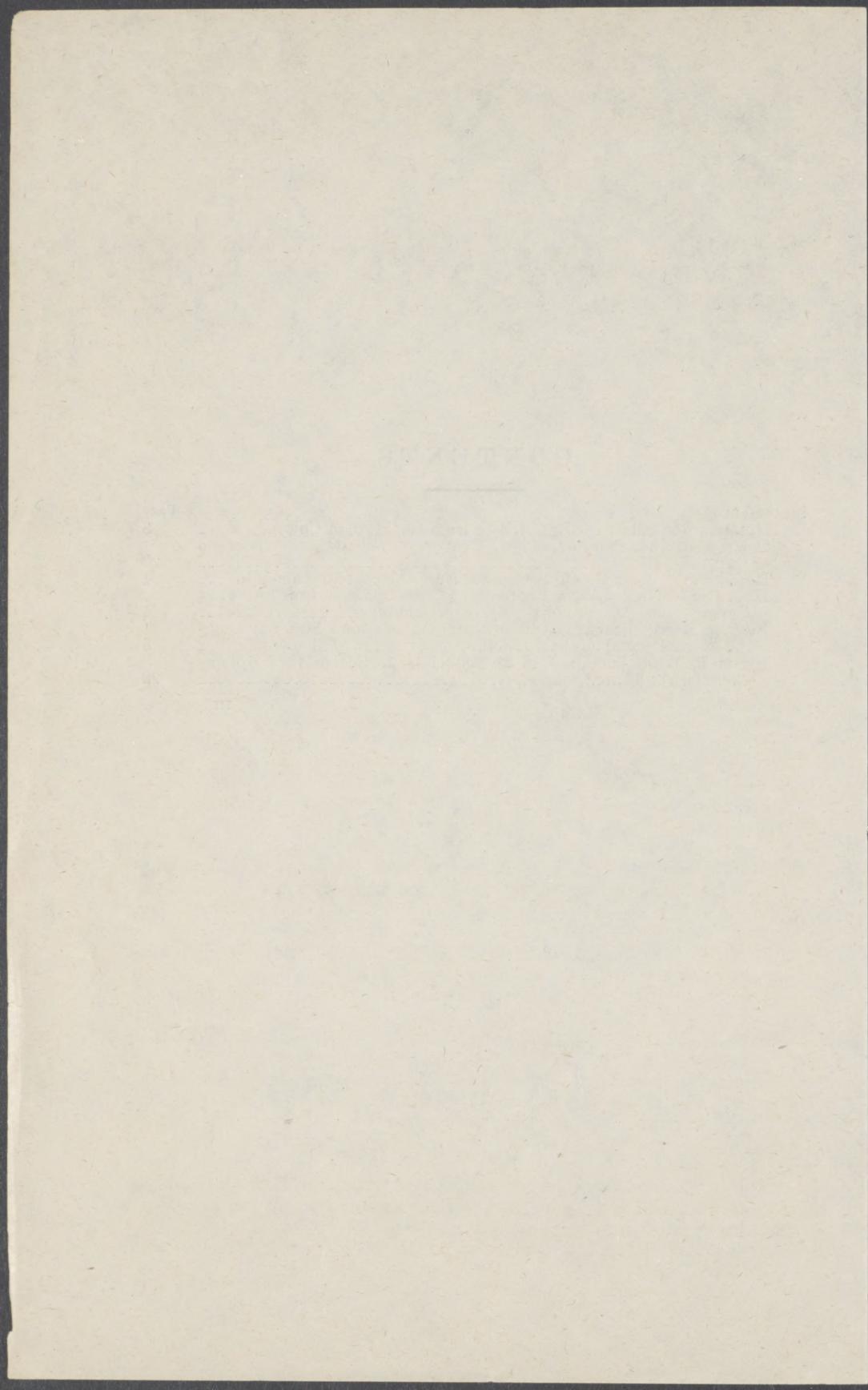
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# NOMINATION OF BYRON R. WHITE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, APRIL 11, 1962

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The Committee met, pursuant to call, at 10:30 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, Carroll, Kefauver, Ervin, Dodd, Hart, Long of Missouri, Dirksen, Hruska, Keating, Fong, and Scott.

Also present: Joseph A. Davis, chief clerk.

The CHAIRMAN. The hearing this morning has been scheduled for the purpose of considering the nomination of Byron R. White, of Colorado, to be an Associate Justice of the Supreme Court of the United States.

Notice of this hearing was published in the Congressional Record of April 3, 1962.

Senator Carroll, by blue slip, approves the nomination.

Senator Allott, by blue slip, has no objection to the nomination.

By letter of April 9, 1962 the chairman of the Standing Committee on Federal Judiciary of the American Bar Association, has advised that he plans to appear personally in behalf of the association to make an oral statement.

By wire of March 31, letter of April 6, and wire of April 9, the Colorado Bar Association considers the nominee exceptionally well qualified for the appointment; and a statement from the president of the association will be presented in person by Hugh A. Burns of Denver.

By wire of April 1, 1962, the Denver Bar Association recommends the nominee very highly.

I understand that the two Senators and Congressman Rogers desire to appear in behalf of the nominee.

First, does anyone present here desire to oppose this nomination? (No response.)

Senator CARROLL. Mr. Chairman, we have Mr. Hugh Burns here who is going to appear in behalf of the Colorado Bar Association.

The CHAIRMAN. Yes, sir. Is there anyone in addition to the names mentioned appearing on behalf of the nominee? If so, give us your name.

Senator CARROLL. I have telegrams here from the Bar Association of Colorado, and from the Denver Bar Association, strongly urging that this committee approve the nomination of Byron White. I ask that they be placed in the record at this point.

(The telegrams referred to follow :)

DENVER, COLO., *March 31, 1962.*

Hon. JOHN A. CARROLL,  
*U.S. Senate, Washington, D.C.:*

Following message sent Senator Eastland today: "The Colorado Bar Association considers Byron White exceptionally well qualified as an appointee to the U.S. Supreme Court and strongly urges his immediate confirmation by your committee and the Senate. His intellectual force, personal integrity, and moral responsibility guarantee that the appointment will reflect the highest standards of the Court, the Federal jurisdiction and the law of the land. This estimate is the result of more than 20 years of close observation by Colorado lawyers, judges, and leaders in every field. Your support of the nomination will be a true service to the Nation. Any data we have is at your command."

COLORADO BAR ASSOCIATION,  
By HARRISON LOESCH, *President.*

DENVER, COLO., *April 1, 1962.*

Senator JOHN A. CARROLL,  
*Senate Office Building, Washington, D.C.:*

The following wire was this day sent to Senator James O. Eastland, chairman of the Judiciary Committee:

"The Denver Bar Association happily offers its services to your committee in its consideration of Byron White as a members of the Supreme Court. Byron White has been a practicing attorney in Denver for 20 years and as such has appeared in all our courts in important litigation. His fellow lawyers consider him unusually qualified by reason of his scholastic accomplishments, his service to his community, State and Nation and his wide experience in the legal field. He is a devoted and capable lawyer and would make an outstanding member of the Supreme Court. We highly recommend Byron White and will gladly aid your committee as you may desire."

DENVER BAR ASSOCIATION,  
By DAVID BROFMAN, *President.*

Senator CARROLL. Mr. Chairman, I think no statement of Byron White and his qualifications could be better stated than was stated by the President of the United States. This is an article which appeared in the Denver Post of March 31, 1962. It was President Kennedy's statement announcing the appointment of Byron R. White, and I want to read from that statement. It is short and to the point. I am quoting from the President.

The President of the United States has few more exacting responsibilities than the appointment of Justices to the U.S. Supreme Court. I am delighted to announce today that Byron White, the Deputy Attorney General of the United States, has accepted appointment as an Associate Judge of the Supreme Court.

The President continues:

I have known Mr. White for over 20 years. His character, experience, and intellectual force qualify him superbly for service on the Nation's highest tribunal. His varied experience in legal practice, in Government, and in the Navy, in addition to his remarkable scholarly accomplishments and his service as law clerk to Chief Justice Vinson, have given him a human understanding in his approach to people and to problems.

The President continues:

He has excelled in everything he has attempted in his academic life, in his military service, in his career before the bar and the Federal Government, and I know that he will excel on the highest court in the land. I am gratified, in addition, that the American Bar Association has rated Mr. White as exceptionally well qualified for his new responsibilities.

That is the end of the statement of the President of the United States.

Speaking now for myself, and I think in behalf of the people of Colorado, this is a very proud day for the people in our State to have Byron White nominated for this high office. There is nothing more that I can say than the President has said. I have known Byron for almost 25 years, but we of this committee know him, too, because it was on January 18, 1961, when he appeared before this committee to be approved as the Deputy Attorney General of the United States. Some 15 months have passed. We know his work. We know his capacity, his integrity, his intelligence. It is my opinion that he will, as the President has said, go on into this High Court and give an excellent performance. This is one of the characteristics of this young man.

And he is not satisfied with just performing in an ordinary fashion. He has never been content to settle for anything less for himself than peak performance and top achievement, and I predict, and it is my sincere belief that he will render this type of service in the highest court in the land.

There are many more things that I can say that would be more laudatory. We know his record. I know my colleagues from the Colorado delegation want to give their opinion, and I am sure it is expressing far more eloquently than I have done, but I strongly urge this committee to act promptly, and it is my hope it will be unanimous.

The CHAIRMAN. Thank you, Senator Carroll.

Senator Allott is recognized.

Senator ALLOTT. Mr. Chairman, I have known Byron White since his high school days. While I have never had the privilege of practicing law in the court either with him or against him, I do know from the comments of many of my close friends over the years that he is extremely capable and a brilliant lawyer.

I have a wire from Harrison Loesch, president of the Colorado Bar Association, which I think expresses this very well, and I will read it in part:

The Colorado Bar Association considers Byron White exceptionally well qualified as an appointee to the U.S. Supreme Court and strongly urges his immediate confirmation by your committee and the Senate. His intellectual force, personal integrity, and moral responsibility guarantee that the appointment will reflect the highest standards of the Court, the Federal jurisdiction, and the law of the land. This estimate is the result of more than 20 years of close observation by Colorado lawyers, judges, and leaders in every field. Your support of the nomination will be a true service to the Nation. Any data we have is at your command.

It is signed by Harrison Loesch, president.

(At this point the chairman left the hearing room.)

Senator ALLOTT. I have another wire from the Denver Bar Association in which they offer their services to this committee for any information the committee may desire, and they go on to say—

We consider him unusually qualified by reason of his scholastic accomplishments, his service to his community, State and Nation, and his wide experience in the legal field. He is a devoted and capable lawyer and would make an outstanding member of the Supreme Court. We highly recommend Byron White and will gladly aid your committee as you may desire.

This is signed by David Brofman, president, Denver Bar Association.

There will be others who will wish to testify and I will make my concluding remarks brief, Mr. Chairman. I have known clients of Mr. White over the years and, of course, I have known many judges, both Federal and State, in Denver that he has appeared and practiced law before in Colorado. From their personal observations, men in whom I have the greatest confidence and trust, I am sure that he is a lawyer of extremely unusual great capacities and that he has great intellectual capacities. He will bring to the bench a clean, analytical, legal mind.

We in Colorado are particularly glad of this nomination because we have felt for a long time that this great area in the Midwest should have a representative on that great judicial body, and so personally, in behalf of myself, I am sure in behalf of all Coloradans, I personally support the nomination, and I hope that this committee will confirm this nomination at once.

Mr. Chairman, may I say, in conclusion, it is necessary for me to leave because I have a markup at the moment of the second supplemental bill at which I must be present, and I would not want my leaving construed as any lack of interest in seeing the hasty and immediate confirmation of this nomination.

Senator CARROLL (presiding). I thank the Senator from Colorado. There will be no such construction placed upon your leaving. We understand that the Senators are working in many committees. We are delighted that you could come here today.

The next witness is the distinguished Representative from the First District of Colorado, Byron G. Rogers.

#### STATEMENT OF HON. BYRON G. ROGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. ROGERS. Mr. Chairman and members of the committee, I am Byron G. Rogers of the First District, which is the city and county of Denver and the legal residence of the nominee. I am authorized on behalf of the Honorable Wayne N. Aspinall, Representative from Colorado, representing the Fourth District, to also urge that you confirm as soon as possible the nominee, Byron R. White.

It has been my pleasure to know Mr. White for more than 25 years. In fact, I became acquainted with him when he was making his name at the University of Colorado, and when he became Phi Beta Kappa and other outstanding features of his career started at that time.

Later, after war service and returning to Colorado after his service with Justice Vinson, it was my honor to come in contact with him on a number of occasions as he practiced law in the city and county of Denver. Throughout that time those who were members of the bar learned to respect and honor the nominee, Byron R. White. It was during that time that he established an excellent reputation not only among the members of the bar of the city and county of Denver and State of Colorado, but through clients and the citizens as well. He took an active part in much of the civic affairs of that fair city and State, and we in Colorado know that he is amply qualified, and when confirmed, will perform an excellent service on the Supreme Court of the United States. So we of Colorado, at least, urge every consideration of his nomination and confirmation by the Senate.

Senator CARROLL. I thank Congressman Rogers for an excellent statement. Thank you very much.

The next witness is Mr. Bernard G. Segal, chairman of the Standing Committee on Federal Judiciary of the American Bar Association. Mr. Segal.

**STATEMENT IN BEHALF OF THE AMERICAN BAR ASSOCIATION  
BY BERNARD G. SEGAL, OF PHILADELPHIA, CHAIRMAN OF THE  
ASSOCIATION'S STANDING COMMITTEE ON FEDERAL JUDICIARY**

MR. SEGAL. Mr. Chairman and members of the committee, I appear, as you have stated, Mr. Chairman, as the official representative of the American Bar Association in my capacity as chairman of the standing committee on Federal judiciary.

In behalf of the association and of myself personally, I express our very great appreciation for the opportunity to appear here today in support of the nomination of the Honorable Byron R. White as Associate Justice of the Supreme Court of the United States.

Although the Senate Judiciary Committee has been affording the American Bar Association an opportunity to appear at all hearings on the confirmation of the nominations of judges since 1945, the opportunity of the organized bar to present its views at the executive level did not commence until 1952. In 1956, at the specific direction of President Eisenhower, the role of our committee was further extended to reporting on the qualifications of persons under consideration for appointment to the Supreme Court.

Mr. Chairman, since this nomination was announced a number of observations on the appointment have come to me and I have prepared a longer statement than I propose to give orally today expressing the views of the association and of our committee on these observations made editorially and by letter. I should ask that my full statement be incorporated in the record and I have given a copy of the full remarks to the reporter.

Senator CARROLL. Without objection, so ordered.  
(The statement referred to follows:)

**STATEMENT IN BEHALF OF THE AMERICAN BAR ASSOCIATION BY BERNARD G. SEGAL  
OF PHILADELPHIA, CHAIRMAN OF THE ASSOCIATION'S STANDING COMMITTEE ON  
FEDERAL JUDICIARY**

Mr. Chairman and members of the committee, my name is Bernard G. Segal, and I appear as the official representative of the American Bar Association in my capacity as chairman of its standing committee on Federal judiciary.

In behalf of the association and of myself personally, I express our very great appreciation for the opportunity to appear here today in support of the nomination of the Honorable Byron R. White as Associate Justice of the Supreme Court of the United States.

Although the Senate Judiciary Committee has been affording the American Bar Association an opportunity to appear at all hearings on the confirmation of nominations of judges since 1945, the opportunity of the organized bar to present its views at the executive level did not commence until 1952. In 1956, at the specific direction of President Eisenhower, the role of our committee was extended to reporting on the qualifications of persons under consideration for appointment to the Supreme Court.

And so, when the prospective retirement of Mr. Justice Whittaker became known to the Attorney General, discussions with our committee as to his successor promptly followed. In due course, we were asked for a report on Mr.

White's qualifications for this appointment. And as President Kennedy stated in announcing the nomination, our committee reached the unanimous conclusion that Mr. White was "exceptionally well qualified" for the appointment. I feel a great sense of personal gratification at being able to bring that same unanimous recommendation to this subcommittee today.

Mr. Chairman, there exists a multitude of views on the essential qualities which a nominee to the highest Court of the land should have. An even more divergent pattern of views concerns the nature of the professional experience, the background that best equips a lawyer for service on the Supreme Court. There is no universally accepted formula on these subjects, and to my mind, any such formula is unattainable. Beyond that, an effort to devise a fixed set of prerequisites for this high office, or to establish that any particular background of experience should be possessed by all nominees, is inherently unwise.

As Mr. Justice Frankfurter has concluded after a searching study into the backgrounds and the qualities of the Justices who have served on the Supreme Court, lawyers of the stature justifying appointment to the Supreme Court have been found in a variety of professional careers. It is not the particular career which a lawyer has had, he points out, but rather his capacious mind and reliable powers for disinterested and fair-minded judgment, his functional fitness, his disposition to be detached and withdrawn, his inner strength to curb any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis. My own view is that one of the strengths of our Supreme Court derives from the rich cross section of backgrounds from which its members have been drawn.

Long ago, a great practicing lawyer, Alexander Hamilton, observing how difficult it would be in the new government to secure able judges, went on to comment on the further difficulty of accurately appraising in advance whether an individual would make a good judge. Science, he observed, had discovered no way of measuring the faculties of the mind. It hasn't even yet. We still have no precise standards by which to measure those indefinable qualities of spirit, wisdom, judicial temperament, innate rectitude, intellect, insight, impartiality which we all treasure in a judge. But we do have, all of us, our experience in appraising past performance as some guide to future conduct, in assembling facts, in exploring and appraising the objective opinions of the professional community of judges and lawyers. We have, too, our reason and our instinct to rely upon in evaluating these facts and in recognizing the quality of a human being.

I wish to emphasize that our committee is fully cognizant of the fact that our role in reporting to the Attorney General is advisory only, that we are but one of the sources of information and judgment available to him. We seek only to convey to him the opinions of the professional community of judges and lawyers, sifted and weighed and objectively appraised. In the case of Mr. White, our committee had the additional advantage of having met and worked with him at close range during his 15 months as the Deputy Attorney General of the United States.

From the earliest stages of his educational career, Mr. White evidenced unusual intellectual capacity. Despite the fact that he was called upon to contribute to his own support through school and attained national preeminence in three important college sports, he stood first in his class at the University of Colorado, was elected a member of Phi Beta Kappa, and went on to study as a Rhodes scholar at Oxford University. And despite the disruptions to his law school career which his engagement in professional football and his distinguished Navy service occasioned, he won his degree in law from Yale University magna cum laude and was elected a member of Order of the Coif. Throughout his educational career, he demonstrated that mental ability, that indefatigable energy, and that zeal for learning which have marked his activities ever since.

Mr. White is a technically equipped lawyer to a superlative degree, and he has had an unusual variety of experience for a person of his comparative youth.

Upon his graduation from law school, Mr. White served as law clerk to the late Chief Justice Vinson during that Chief Justice's first term on the Court, commencing in 1946. That was a momentous year for the Court, which decided such cases as *Adamson v. California* and *Fay v. New York*, leading decisions on the interpretation and application of the 14th amendment to the Constitution; *SEC v. Chenery Corp.*, an important decision on the scope of judicial review of the decisions of administrative agencies; *United States v. National Lead*

*Co.*, a noted antitrust case; and *Hickman v. Taylor*, perhaps the most fundamental decision on the permissible scope of pretrial discovery in civil cases. A far-reaching opinion on which Mr. White worked during his year with the Supreme Court was the famous contempt case against the United Mine Workers and John L. Lewis.

In passing, I note that, as far as I have been able to discover, Mr. White's appointment will elevate to the Supreme Court for the first time a lawyer who began his career with service as law clerk to one of the Justices.

For the next 14 years, Mr. White was engaged in the private practice of law in Colorado, his native State. Here, again, he will be a first, for Colorado has never had a native son on the Supreme Court. His practice in Denver was active and varied. He engaged in litigation in a wide variety of cases and he represented corporate and individual clients in large questions of corporate, bankruptcy, real estate, tax, antitrust, and other fields of the law. He earned the solid respect of his partners in the important law firm of which he was a part, and the high regard of judges and lawyers of his community.

In January of 1961, he came to Washington as the Deputy Attorney General of the United States by appointment of President Kennedy. I first met Mr. White after this appointment was announced, but before he assumed office. Since then, I have been with him on many occasions. I have worked with him whole days at a time, and I suppose there is scarcely an hour of the day or the night during which I have not talked with him on the telephone. I have had a rare opportunity to observe him at work in the difficult, complicated, intensive, and critical role of Deputy Attorney General.

My principal contacts with Mr. White have, of course, been in the field of judicial selection. During the past 14 months, in addition to his manifold other duties, he has had the primary obligation for reviewing the applicants for the greatest number of vacancies in Federal judgeships in the whole history of our country. In addressing the house of delegates of the American Bar Association at Chicago last February, I said of Mr. White: "No man is more dedicated to the ideal that our Federal judiciary be composed of the very best judges and lawyers available, and no man is doing more about it. All of us are greatly in his debt."

That, I am sure, is a fair statement. But it does not describe the rugged adherence to principle, the scrupulous fairness, the deep insight which he has demonstrated in his performance of this vital role.

Mr. White's capacity for work is prodigious. Despite the pressures of his many duties, he has found time to meet with our committee whenever we have called upon him to do so—and not briefly, but for whole days at a time. There is not a member of our committee who has not been impressed by the directness of his responses, the searching nature of the questions he has asked and the problems he has posed for our committee, the contributions he has made to our thinking. I have been a member of the Standing Committee on Federal Judiciary for a long time, and ever since 1956 I have been its chairman. Nevertheless, I have learned much from Mr. White on this ever-fluid ever-changing subject in the 14 months that I have been working with him. He has a remarkable ability to absorb facts and a ready capacity for learning new fields.

Those who have known Mr. White a long time testify that he is essentially a reflective person, with superior intellect, not given to be wooden or doctrinaire. But despite his soft demeanor, he is a person of inner toughness. Readily apparent to anyone who has worked with him are his modesty and simplicity, his graciousness, his sense of humor, the practical soundness of his judgment.

At age 44, Mr. White is far from the youngest person to be appointed to the Supreme Court, but it is, of course, true that at 44, a lawyer's experience cannot be expected to have reached the level of lawyers more advanced in age. This was the only phase pertaining to Mr. White which caused our committee to hesitate momentarily in arriving at the rating to be accorded to him. But as we reflected on the abilities he had already demonstrated, the qualities of heart, mind, and temperament which we had observed and to which those of whom we made inquiry unhesitatingly attested, the largeness of his view and the depth of his understanding so vital to adjudication of the large issues to come before the Supreme Court, we concluded that he was indeed "exceptionally well qualified," an accolade that we have used exceedingly sparingly in rating prospective appointees to the bench.

Mr. Chairman, it has been uncommonly true in the history of our courts that the challenge of Federal judicial service touches the deepest, most fundamental sensitivities of the men trained in the law who come to the bench. The judge

with his personal system of private values will, of all citizens, stand nearest the Constitution with its public system of public values. He will equate the one with the other. And in doing so, he will have his unique and precious chance to make sure that American jurisprudence shall have added what Mr. Justice Jackson so eloquently termed "a valuable and enduring contribution to the science of government under law." "Law," he said, "as the expression of the ultimate will and wisdom of the people has so far proven the safest guardian of liberty yet devised. And, Mr. Chairman, I have no doubt that as a Supreme Court Justice, law, as the will and wisdom of the people, is the client Byron White will serve. I believe that as he assumes the lonely and awesome responsibility of making what so often will be irreversible decisions on great and far-reaching questions, he will bring to his task extraordinary capacities, a wise and understanding heart, and a deep and abiding sense of justice.

Mr. Chairman, in behalf of the American Bar Association, I respectfully urge that the nomination of Byron R. White as Associate Justice of the Supreme Court of the United States be promptly confirmed.

Mr. SEGAL. Mr. Chairman, when the prospective retirement of Mr. Justice Whittaker became known to Attorney General Kennedy, he promptly instituted discussions with our committee as to Mr. Justice Whittaker's successor. In due course and after our committee chairman and a representative of the Attorney General had had several conversations over a 2-day period concerning Mr. White, our committee was asked for a report on Mr. White's qualifications for the appointment. As you have heard this morning and as President Kennedy stated in announcing the nomination, our committee reached the unanimous conclusion that Mr. White was "exceptionally well qualified." I feel a great sense of personal gratification at being able to bring that same unanimous recommendation to this subcommittee today.

From the earliest stages of Mr. White's educational career, he evidenced unusual intellectual capacity. Despite the fact that he was called upon to contribute to his own support through school and attained national preeminence in three important college sports, he stood first in his class at the University of Colorado, was elected a member of the Phi Beta Kappa, and went on to study as a Rhodes scholar at Oxford University. And despite the disruptions to his law school career which his engagement in professional football and his distinguished Navy service occasioned, he won his degree in law from Yale University magna cum laude and was elected a member of the Order of the Coif. Throughout his educational career, he demonstrated that mental ability, that indefatigable energy, and that zeal for learning which have marked his activities ever since.

In our investigation, if the committee please, we found Mr. White to be a technically equipped lawyer to a superlative degree, and he has had an unusual variety of experience for a person of his comparative youth.

As you heard this morning, upon his graduation from law school, Mr. White served as law clerk to the late Chief Justice Vinson during that Chief Justice's first term on the Court, commencing in 1946. I mention this because I think it is interesting to note—I have made a fairly complete research into the subject—that Mr. White's appointment will elevate to the Supreme Court for the first time a lawyer who began his career with service as law clerk to one of the Justices of that Court.

For the next 14 years, Mr. White was engaged in the private practice of law in Colorado, his native State. Here again, he will be a first, for according to my research, Colorado has never had a native son on the Supreme Court.

His practice in Denver was active and varied. He engaged in litigation in a wide variety of cases and he represented corporate and individual clients in large questions of corporate, bankruptcy, real estate, tax, antitrust, and other fields of the law. He earned the solid respect of his partners in the important law firm of which he was a member, and the high regard of judges and lawyers of his community.

And as you have heard this morning, he has also earned the accolades of both the State bar of Colorado and the city bar of Denver, actions which we consider highly significant, since of course it is the people at home who know best the lawyers who practice among them.

In January of 1961, he came to Washington as the Deputy Attorney General of the United States by appointment of President Kennedy. I first met Mr. White after his appointment was announced but before he assumed office. Since then, I have been with him on many occasions. I have worked with him whole days at a time, and I suppose there is scarcely an hour of the day or night during which I have not talked with him on the telephone, sometimes I regret to say, without the full approval of the lovely lady who sits behind Mr. White in the room today. I have had a rare opportunity to observe him at work in the difficult, complicated, intensive, and critical role of Deputy Attorney General.

My principal contacts with Mr. White have, of course, been in the field of judicial selection. During the past 14 months, in addition to his manifold other duties, he has had the primary obligation for reviewing the applicants for the greatest number of vacancies in the Federal judgeships in the whole history of our country in any comparable period of time.

In addressing the house of delegates of the American Bar Association, at Chicago, last February, I said of Mr. White:

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We believe that as he assumes the lonely and awesome responsibility of making what so often will be irreversible decisions on great and far-reaching questions, he will bring to his task extraordinary capacities, a wise and understanding heart, and a deep and abiding sense of justice.

Mr. Chairman, in behalf of the American Bar Association, I respectfully urge that the nomination of Byron R. White as Associate Justice of the Supreme Court of the United States be promptly confirmed. Thank you.

Senator CARROLL. Thank you, Mr. Segal.

Senator DIRKSEN. May I ask a question?

Senator CARROLL. Yes. Senator Dirksen.

Senator DIRKSEN. How many serve on the American Bar Committee?

Mr. SEGAL. There are 11 members, Senators, one from each of the 11 circuits of the United States and we maintain direct contacts with the State delegates and other representatives of the American Bar Association in the other 50 States, numbering some 290 lawyers and judges.

Senator DIRKSEN. I notice in your report to the Federal Judiciary, you use the classification "exceptionally well qualified," "well qualified," and "not well qualified." I was wondering where you procured the information to make that kind of determination.

Mr. SEGAL. Senator, when we commence an investigation, we believe that the primary sources of our information should be the judges, Federal and State, appellate court and trial court, and the lawyers of all segments of the bar as well as the organized bar officials and representatives in the community in which the individual practices.

Long ago we found that letters are of little value, most of them having copies sent to the person about whom they are speaking. Many of them are not frank, and I regret to say in many cases our oral interviews produce different results from the letters. Therefore, in every case we conduct either on-the-spot interviews or telephone conversations with a very broad cross section of the judges and lawyers of the community in which the person involved practices law. We, therefore, think in effect what we are is the conduit to the Attor-

ney General for the opinion of the professional community of judges and lawyers, sifted, weighed, and objectively appraised.

Senator ERVIN. May I ask a question?

Senator CARROLL. Certainly.

Senator ERVIN. Mr. Segal, I am not having any particular reference to this particular nomination, but Justice Sutherland said one time something which I will paraphrase. He said, the most tragic epitaph which can be written for any constitutional principle is that those who enjoyed it did not extend the saving hand while there was yet time.

Up to about 30 years ago, normally, the President selected for appointment to the Supreme Court of the United States, a man who had considerable judicial experience or at least a man who had devoted his major efforts to the practice of law. Does your recollection agree with mine or disagree with mine to the effect that there has not been a single man appointed to the membership on the Supreme Court, during approximately the last 30 years who had more than 8 years' judicial experience. I refer to Justice Minton.

Mr. SEGAL. Yes, I think if you place it at the 8-year level my hasty recollection is that your statement is correct, although as you know the last three justices have all had State court or Federal court experience, ranging from 2 to 6 years.

Senator ERVIN. Justice Whittaker had about 6 years.

Mr. SEGAL. A little less, Senator.

Senator ERVIN. Justice Harlan, I believe, had 9 months on the circuit court when he was appointed to the Supreme Court.

Mr. SEGAL. Yes, I think, though, he had had about a year and 4 months before he assumed office.

Senator ERVIN. Yes, and he has made a fine effort because he devoted his major time to the practice of law rather than other pursuits.

Mr. SEGAL. The 6-year judge you referred to was Justice Brennan who had been on the Superior Court of New Jersey and the Supreme Court of New Jersey for 6 years.

Senator ERVIN. As a matter of fact, outside of Justice Minton, Justice Harlan and Justice Whittaker and Justice Brennan, has there been anybody appointed to the Court since 1932 who had had any judicial experience at all before his appointment to the bench?

Mr. SEGAL. Mr. Justice Rutledge's name comes to my mind immediately and Justice Vinson.

Senator ERVIN. Each of whom had about 4 years' experience on the circuit court.

Mr. SEGAL. And as I say, Mr. Justice Rutledge's name comes to mind immediately. I believe that in the history of the country, of the 92 Justices, 52 had prior judicial experience either in the Federal courts or in the State courts.

Senator ERVIN. Over what periods of time?

Mr. SEGAL. Over the entire history of the country. Of the 92 justices who have served, 52 had prior judicial experience and 40 did not.

Senator ERVIN. Usually, in times past, those who had not had prior judicial experience had devoted their major efforts to the practice of law itself.

Mr. SEGAL. I think that is largely true, sir.

Senator ERVIN. In other words, I was interested in this subject and I wondered where, when the Founding Fathers drew the Constitution, they put some limitations on the power of everybody except the members of the Supreme Court. They gave the President, for example, the power to veto acts of Congress. They said that Congress would keep the President from becoming a dictator. They said Congress should have the power of the purse and no appropriation for the Army or defense forces was to exceed 2 years' duration, but there is no limitation there on the powers of the members of the Supreme Court, is there?

In other words, as you used the expression awhile ago "irreversible decisions," there is virtually no way, any power on earth, that for all practical purposes can reverse the decision of the Supreme Court of the United States.

Mr. SEGAL. On constitutional questions, of course, nothing other than a constitutional amendment. I should mention, Senator, there are jurisdictional limitations on the Supreme Court, for example, the 10th amendment, as to the rights reserved to the States.

Senator ERVIN. There may be some rights to the State, but I had—

Mr. SEGAL. As to what has happened to them, I won't say, but it is still there.

Senator ERVIN. Those are some of the constitutional principles which have been nullified because those who supposedly enjoyed the benefits would not extend the hand while there was still time. I think the time has already gone. That's my opinion.

Well, don't you believe that experience is the most efficient teacher of all things including doing judicial work?

Mr. SEGAL. Senator, I would have to tell you that various authorities who have written on the subject—Mr. Justice Frankfurter especially eloquently, a number of law professors, a number of practicing lawyers—have about come to this conclusion, that there is no universally accepted formula, that there is no particular background which exclusively or even best fits one for the Supreme Court. As we review the great Justices of our courts, we find that I suppose the majority of Justices had no prior Federal judicial experience. It is hard to find, barring the present Court, which I do not comment on, it is hard to find among the greatest Justices or among any list of the greatest Justices, a man who came from the Federal system.

Now, we do have from the State system, Justice Holmes and Justice Cardozo. Chief Justice Marshall had never sat on the bench. Justice Story had never sat on the bench, Chief Justices Hughes and Taney had never sat on the bench. Justice Owen Roberts never sat on the bench. So I would say that the Supreme Court draws its strength from its members coming from a variety of backgrounds and that what we ought to do is concentrate on the experience of the individual, his character, his temperament, his ability, his wisdom, his innate strength, and not be concerned about whether he served in a particular capacity or not.

I believe that that is the course that is followed. We will finish with a court, the members of which will be well distributed in background and, as I say, the Supreme Court will draw strength from that variety.

Senator ERVIN. Let's see if you agree with Alexander Hamilton, and I will associate myself with Hamilton. As I say, I got interested in this question: Why was it they gave the Supreme Court blank authority that no limitations, in fact—I started to say nobody above except the Lord, but I now hate to state whether he is above—in the Federal list Alexander Hamilton was asked an argument that members of the Supreme Court of the United States would, under the guise of interpreting the Constitution, would substitute their personal notions for the Constitution, and Alexander Hamilton said that was not true, that that was the phantom. He said the only men that would be appointed to the Supreme Court would be men who had devoted their lives in effect to the administration of justice and the practice of law and would be familiar with the precedents and by reason of their experience, would feel themselves obligated to follow the precedents; and that therefore there was no danger that the members of the Supreme Court of the United States would substitute their personal notions for the law as declared in the Constitution.

Now don't you agree with me that the law is the rule of action? That is, the rule to guide the conduct of government and the conduct of people, and that it is highly desirable that that law be stable? If it is going to follow for a rule of action, and that it be reasonably entertainable in the precedents?

Mr. SEGAL. I think that is true. I have a favorite quotation from Mr. Justice Jackson in which he said that—

The important thing about law is that it be an expression of the ultimate will and wisdom of the people as expressed in the Constitution of the United States.

And if the ultimate will and wisdom of the people controls under the rule of law, that will prove to be our safest guardian of liberty. I believe that principle, if all Justices are controlled in their thinking about it, and are objectively applying it, will result in no difficulty of view between what you have expressed and my ideas on the subject.

Senator ERVIN. I infer from your statement concerning the nominee that you are of the opinion that he has devoted his major energies to the practice of law, and by reason of that fact, plus his native abilities and his acquired abilities, that he is very competent to serve on the Supreme Court.

Mr. SEGAL. Senator, I would say that unhesitatingly, that in appraisal of Mr. White against the background of other individuals who were discussed, I made this statement to the Attorney General's representative and later to him, that what we liked about Mr. White is that he had never had any interest in his adult life other than the law, that he had shown a fierce interest in the law, that he had shown a great desire to perpetuate the sound principles of the law and that he had shown great ability in the application of those principles.

Senator ERVIN. This has no reference to the present nominee, but Solomon says the four things he could not understand were, one, the way of a serpent on a rock; another the way of an eagle in the air; another was the way of a ship in the middle of the sea; and the other was the way of a man with a maid.

Now, there is one thing that really puzzles me more than those four things, and that is why during recent years, during practically a third of a century almost, now, the Presidents have not appointed to

the Supreme Court of the United States a single Federal or State jurist who has had 10 or 15 years of experience in judging.

Mr. SEGAL. One of the problems, Senator, I think, in that has been that the appointments at State and Federal levels in the past have come to men of such age, that after 10 years they had reached ages beyond those which Presidents would care to elevate them to the Supreme Court. Right at this moment, for example, in reviewing the judges of the U.S. courts of appeals, and without putting any specific emphasis on any one of them, of the outstanding judges of the courts of appeals, the greatest number of them are at and above retirement age. They have been on the court 10 years or more. They have been appointed at ages which make them ineligible, and this is one reason that our committee has been endeavoring to persuade the appointing authorities to appoint younger men. It is one reason we like Mr. White's appointment. We think he has long, vigorous years ahead to learn and to give the country the benefit of what he learns.

We deplore the appointment of older judges and one of the reasons is that they are not available for the type of promotion to which you refer.

Senator ERVIN. How old was Judge Holmes when he was called to the Supreme Court of the United States?

Mr. SEGAL. I don't know, but I know the oldest man who has ever been appointed to the Supreme Court was 69.

Senator ERVIN. Wasn't it Judge Holmes? My recollection is he was 60 or more, wasn't he? And Cardoza was a man of very ripened judicial experience, and both he and Holmes came from the judicial court of Massachusetts, and they brought vast experience to the Court.

Mr. SEGAL. You see, when I spoke of judges who had reached retirement age, they had to be at least 65 or 70 years of age, and this applies to the majority of the leaders of the U.S. court of appeals today.

Senator ERVIN. I am not saying this myself, but you know there are some people in the country who think that perhaps they ought not to be apprentice on the job of training the members of the Supreme Court, and that it would be better to take advantage of these men who have acquired this great wisdom.

You quoted Justice Jackson awhile ago, and I am going to quote something from him that gives me and a lot of the bench and bar concern. He says—

Rightly or wrongly, the belief is widely held by the practicing profession that this Court—

referring to the Court of which he was then a member—

no longer respects impersonal rules of law, but it is guided in these matters by personal impression which from time to time may be shared by the majority of the Justices. Whatever has been intended, this Court has also generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have meant to the profession, that the law knows no fixed principles.

That's rather caustic comment from a member of the Supreme Court who in my judgment was one of the most brilliant members who sat there, who made it, and I would have to say with restraint that I think he correctly reflected the opinion of a large part of the bench and bar of the United States. So I think that Mr. White will have an opportunity to see to it that the reputation of the Court in this

respect reaches a higher state than given to it by Mr. Justice Robert H. Jackson.

Mr. SEGAL. I will finish, Senator, with a statement I made to the Attorney General just informally. I predict that 5 years from today the people sitting in this room will label the young man who is under discussion today as already having demonstrated those qualities which will stamp him as a great Justice of the Supreme Court.

Senator ERVIN. I have had a number of contacts with the nominee since he became Deputy Attorney General, and I have been most favorably impressed by him, by his outlook, by his deliberate judgment, and I am heartened to considerable extent to the fact that your assurance that he has devoted his major efforts to the practice of law. Frankly, I would be just a little bit happier if he had been a judge for about 10 years.

Mr. SEGAL. I would have to tell you with all frankness and fairness, this would not have influenced us one bit either way. We would have appraised his scholarship, his wisdom, his temperament, his rugged adherence to principles, and if he had them and had them more than a man with 10 years' experience as a judge, we would immediately prefer him. I am going to send you, with your permission, the article by Mr. Justice Frankfurter entitled "The Mirror of the Justices" in which he analyzes the 90 Justices who up to that time, and this was before the last two appointments, had been appointed, and he compares those with judicial experience and those without it. I think you will find it interesting and enlightening reading.

Senator ERVIN. I am sure I will. I also note, I think it was Tennyson who says, "We are all part of what we meant." And Mr. Justice Frankfurter was one without prior judicial experience.

Mr. SEGAL. By the same token, may I say he was hung on his own petard because he had recommended to the President people he was commenting upon who had had judicial experience.

Senator ERVIN. I wish to state that I have a high opinion of Mr. White and will vote for his confirmation and at the same time utter a prayer when he gets on the bench to show he is a judge rather than a man who would like to make laws and constitutions. In other words, I hope he demonstrates the fact that he is a judge at heart rather than a legislator.

Mr. SEGAL. I would join your prayers on your last statement, sir.

Senator CARROLL. Senator Kefauver?

Senator KEFAUVER. Mr. Chairman, I was sorry I was not in here when Mr. Segal started to testify, because I would like on that occasion to have expressed my highest esteem of Mr. Segal, whom I have known as a friend for many, many years. I think he is one of America's very great and most able lawyers, and like some great lawyers he has taken time out from the active pursuit of his profession to render very important public service which has to do with the judiciary and even with us here in the Congress and the Senate, Mr. Chairman.

I recall that after a resolution was sponsored in the Senate by Senator Dirksen during the 83d Congress, I believe, Mr. Segal was the chairman of a special commission that was composed of Members of the Congress, members of the Supreme Court, public members of farmers, businessmen, and labor to consider increasing the compensation for the judiciary and for Members of Congress. He did the

very remarkable job of getting complete unanimity of this very large committee. I was chairman of the subcommittee of the Judiciary Committee which considered the legislation recommending a substantial salary increase, and think that many of us have been sorry we did not go along further with your committee, Mr. Segal. Maybe we will get there later.

I do know also, Mr. Chairman, as chairman of the Committee of the Judiciary of the American Bar that Mr. Segal has devoted tremendous time and thought and effort in consideration of judicial appointments. We are very grateful to him and I think we could not have a more thoughtful and better qualified or more experienced witness to speak on behalf of any nominee. I want to say for my part that my experience with Mr. White has been the same as yours, Mr. Segal, and I join you in feeling that this is a very outstanding appointment the President has made, and he will have a distinguished, able record on the Supreme Court.

Senator KEATING. Mr. Chairman.

Senator CARROLL. Yes, Senator Keating.

Senator KEATING. I think it is an appropriate time for this committee to pay tribute to Bernard Segal for the great help which he has given to us in the task we have of passing on the nominees. I want to join in everything that Senator Kefauver said.

Mr. Segal and his committee are performing a very important public service, and I am sure that I voice the sentiments of all on this committee, all the Members of the Senate in this regard. Mr. Segal is likewise an old friend of mine of many years standing, he and his family, and I know what a busy lawyer he is—one of the Nation's busiest lawyers—but he takes this time off to perform this important public service, and I think he is entitled to more bouquets than we can throw at him.

I want to ask you one question, Mr. Segal: I am very much impressed with the unusually high appraisal you have given the nominee. Can you tell us, this year and last, how many judges the American Bar Association has passed upon with regard to their qualifications?

Mr. SEGAL. Yes, I can say, first, that we have passed upon—this is since President Kennedy assumed office—passed upon 670 persons and have actually reported to Mr. White or his assistants on that number.

Senator KEATING. Judicial—

Mr. SEGAL. That is individuals under consideration for appointment.

Senator KEATING. Oh.

Mr. SEGAL. The President has made 95 nominations in addition to requesting the Senate to confirm the three Eisenhower nominations which would add up to 98. Of those, one failed because the Senate adjourned at the last session without confirming.

Senator KEATING. Of those 98, how many did your committee find to be "exceptionally well qualified?"

Mr. SEGAL. We found 17 including Mr. White to be "exceptionally well qualified."

Senator KEATING. That seems to me a very impressive statistic, Mr. Chairman.

Mr. SEGAL. I will go a little further, Mr. Chairman, and say that of the 600, we found only 19 exceptionally well qualified.

Senator KEATING. Thank you very much.

Senator CARROLL. Senator Long?

Senator LONG. Just to keep the record straight, when Senator Keating said he spoke for all, in stating he represented all the committee in praising the making of recommendations by Mr. Segal's committee to us, I don't think Mr. Segal, although I have every regard for him personally, was any help to me in making recommendations for judicial appointments.

Senator KEATING. I should have spoken only for myself, but I feel strongly about it.

Senator CARROLL. I think the Chair should say at this time, we in the Senate and the Senate Judiciary Committee, at least some of us, are concerned about our own prerogatives. We do commend, at least, I personally, commend Mr. Segal and the American Bar Association. We recognize that your activities are widespread through the Nation and sometimes you may not get correct information yourself. Now, we are aware of that, and we are also aware that we just don't rubberstamp what the American Bar Association recommends, at least I don't. I reserve my own opinion about the recommendations because I think the record would show that there have been some mistakes made on the recommendations. And that this case, speaking for myself, I will not hold your recommendation against the present nominee.

Mr. SEGAL. Mr. Chairman, I feel constrained to say that we are fully cognizant of the fact you state. We recognize that we are not the President upon whom rests the responsibility for making the nomination, that we are not the Senate upon whom rests the responsibility to confirm it. We recognize that our role is unofficial, that it is advisory and that our sole function is to present facts and to present the conclusions that we think come from the local judges and lawyers, and I do recognize that we have no complete measuring stick and that all human conclusions are subject to fallibility.

Senator CARROLL. That's the point I want to make, and you are to be commended because you are doing an excellent job of it on these new appointment recommendations.

I know that your members have gone throughout the Nation and have explained the various districts in which you function and operate, and of course we understand there is no perfection in these things, and I know that you have had the close association with the Deputy Attorney General and what I consider to be a magnificent effort on the part of both the bar association and the recommendations of the Attorney General coming from the President into this committee, and I think almost without exception they have been proved.

Senator LONG. I would like to ask Mr. Segal if he can tell me what percentage of lawyers of the Nation are members of the American Bar Association.

Mr. SEGAL. Yes. You count that two ways, Senator. There are somewhere between 220,000 and 240,000 practicing lawyers in the country. The active paid membership of the association is about 110,000 and the members of the house of delegates who are there in a representative capacity represent about 205,000 of the 220,000 to 240,000.

Senator LONG. The actual paid membership is less than 50 per cent.

Mr. SEGAL. I would say the present membership campaign should result in having one out of every two lawyers in the United States a paying member of the association.

Senator ERVIN. And all the members that do belong to the American Bar Association are voluntary members, they are not drafted members in any way?

Mr. SEGAL. That is so, without question.

Senator CARROLL. Are there further questions of Mr. Segal?

Senator FONG. Mr. Segal, I notice that your committee has done a fine and outstanding job in ferreting out the qualifications of the various nominees, but I note with some disquietude that your committee has had very little influence with the Justice Department and the President in having members of the minority party selected.

I notice that out of 95 people selected, probably only 2 were Republicans.

Mr. SEGAL. I think the number is now three, and I think if you are patient that the papers in the immediate days ahead will contain announcements of some more.

Senator FONG. You are quite optimistic about that.

Mr. SEGAL. Optimistic as to the statement I just made, yes.

Senator FONG. What comments have you relative to the disproportionate selection of the members of it from the minority party? Certainly, I know that you as a member of an advisory committee to the President and the Justice Department, I mean to the judiciary, look with alarm, should I say, at this very disproportionate representation.

Mr. SEGAL. Yes, since the earliest days of our Government, the complaints as to partisan appointments of judges have prevailed. There has regrettably been no President in the history of the country who has not appointed a great majority of the judicial nominees from his own party. In this century, the President with the lowest percentage was President Hoover, and his percentage ran to, I think, 86 percent of his own party. The highest percentage was President Wilson, and I think that ran 99 percent.

The position of the American Bar Association has been and continues to be over the years that we look to the millennium when judges will be appointed on the basis of qualifications and without regard for political affiliations. Intermediately, we are striving mightily to persuade the appointing authority as we have with the Presidents who have preceded, to introduce bipartisanship in judicial appointments not because we think that it will result in better judges but we think it will dispel the cynicism of the public that judicial appointments are no more than judicial patronage, that there is no difference between appointment of a lifetime judge and appointment of a local postmaster.

We cannot expect full citizen support and full citizen respect for the courts which is so basic to our kind of law and to our leadership of the world community under a rule of law until we achieve that. I am as fully convinced of that as I can be. I do want to make clear that I believe that we get about as good judges today as we would if there were bipartisanship, just because the Democratic Party and

Republican Party each obviously has enough good lawyers to supply the quota of available judgeships, but that does not meet the need. The need is to dispel what is the undoubted cynicism of the public. As you know, if you went to your constituents and asked them what is the difference between the appointment of a U.S. district court judge in Hawaii and the man who works on the roads and the man who has the local postmaster position, he will say it does not matter; that they all have to get it through political patronage. We think there ought to be a difference between judicial appointments and political patronage, and we think the best way to persuade the public of that until we achieve nonpartisanship it is a fair distribution—bipartisanship.

Senator FONG. I agree, although one of the appointments of three Republicans, you say one was Hawaiian, Mr. Nils Tavares.

Mr. SEGAL. I say three. There has been a fourth in the District of Columbia, which is a term appointment, not a lifetime appointment.

Senator FONG. I hope your committee will appoint this, that whatever influence you have with the Justice Department and with the President to see more Republicans appointed. This percentage of 3 out of 95 is what percentage?

Mr. SEGAL. A very small percentage. It is about 3 percent, Senator. It's running about 97 percent Democratic at the moment. Thank you.

Senator CARROLL. Senator Hruska.

Senator HRUSKA. After all, that cynicism by the American public is pretty well justified, isn't it? It's my recollection that in January 1953 the Federal judiciary posts contained 239 Democrats and 57 Republicans. That was after 20 years of Democratic administration. As of about a year ago, that had pretty much evened up to 163 Democrats and 163 Republicans.

Mr. SEGAL. Exact parity.

Senator HRUSKA. I do imagine it would be kind of unrealistic to say that there would be one of one and one of the other notwithstanding the almost even popular vote for the presidential candidates in November 1960, but I want to commend the American Bar Association for saying that this is one of the times that it will be possible to observe and to maintain a reasonable proportion between the parties for the very reason which you have assigned, and to that extent, I would like to commend your association and your committee for having spoken up on that point and for voicing its opinion of the past.

Mr. Segal, I was very much interested in the questions of the Senator from North Carolina with reference to previous judicial experience of nominees. I don't know that I would totally subscribe to the necessity of judicial experience as a prerequisite to consideration for even the Supreme Court. I would say that it should not be entirely discounted. I do believe, however, that there is such a thing as balance, and with judicial experience many fine things come, and many fine kinds of wisdom. However, with practical experience and with the lack of judicial experience, perhaps to even get in the road of one's thinking, and his philosophy and his approach to a legal problem, there is also merit, and in that connection, we did find the designate here learned in the law not more than 15 months ago. That is one of the qualifications of the Assistant Attorney General and the Deputy Attorney General. It does not happen to be for the Attorney General for constitutional reasons, but we did find Mr. White as

learned in the law, and that was on the basis of his wide experience in the general practice, and, of course, if he earned that brand 14 or 15 months ago, he certainly does merit it even more now in view of his experience. So I thought I would just make that comment at this time, rather than later in the hearing.

Mr. SEGAL. Thank you, sir.

Senator CARROLL. Further questions? Senator Hart.

Senator HART. No, sir.

Senator CARROLL. Senator Dodd?

Senator DODD. No, sir.

Senator CARROLL. Mr. Segal, I want to say that I appreciate, at least I do personally, this difficulty of selecting Republicans and Democrats. I personally would like to see the selection of some Independents, but I have been on this committee long enough to know that in our own State we have had the appointment of a Republican, a good friend of mine, and a good lawyer, and two district Republicans, so this sort of cuts both ways.

Mr. SEGAL. It certainly does.

Senator CARROLL. I'm in favor of a few Republicans.

Senator HRUSKA. About three, Mr. Chairman?

Senator HART. I did omit what I realize was appropriate, something while Mr. Segal was here. I need not say it here. You recounted some historic firsts in connection with the appointment of Byron White. I think it would not be out of order for the record to reflect this is the first appointment of a player of the Detroit Lions to the Supreme Court also.

Mr. SEGAL. If you do that, then you ought to include for the record that he also played for our Pittsburgh Steelers.

Senator HART. I will be glad to add that.

Senator CARROLL. Thank you very much, Mr. Segal. Now, we have one more witness here, at least, Hugh A. Burns, a distinguished and prominent lawyer from Colorado who is here to make his presentation on behalf of the Colorado Bar Association.

Mr. Hugh A. Burns.

#### STATEMENT OF HUGH A. BURNS, ON BEHALF OF THE COLORADO BAR ASSOCIATION

Mr. BURNS. Thank you, Mr. Chairman. Mr. Chairman, members of the Judiciary Committee of the Senate, it is my privilege to bring to this committee from the State of Colorado the warmest endorsement of the nomination of a fellow member of the Colorado Bar Association. I have a statement to present to the committee from the board of governors of the Colorado Bar Association and its president, Mr. Harrison Loesch:

The Colorado Bar Association considers Byron R. White exceptionally well qualified for appointment to our Nation's highest court, and strongly urges his immediate confirmation by your committee and by the U.S. Senate.

We, the lawyers and judges of Colorado, have observed Byron R. White's activities for more than 20 years, both as a student and as a practitioner of the law. We know him to be unusually well qualified in the law, his scholastic accomplishments, his personal integrity, and

moral responsibility guarantee that he will reflect the highest standards of the Supreme Court and the law of the land. Byron R. White is a devoted and capable lawyer with vast experience in all phases of the law and in all respects unusually well qualified to serve as a justice of the U.S. Supreme Court.

We who have had the opportunity to work with him over these many years know that in addition to his many capabilities and qualifications, Byron R. White is possessed of true judicial temperament.

Once again we urge your favorable consideration of this nomination to the U.S. Supreme Court, and I would like to add the warm endorsement of the Denver Bar Association, of which Mr. White is also a member, presented from that association, David Brofman, Denver County judge.

Senator CARROLL. Thank you, Mr. Hugh Burns. May I say to members of the committee he is a prominent young Denver lawyer. He is my neighbor and I pay special attention always to his advice. Thank you very much for coming.

Mr. BURNS. Thank you, Senator.

Senator CARROLL. The chairman announced at the outset of this meeting as to any person who wanted to testify against. There was no response. We have had this list and I believe because of the lateness of the morning hours we do not want to shut anybody off who wants to be heard for or against the nominee, but I think at this time we ought to proceed without objection now to question Mr. White.

I have before me the statement of Byron R. White. He was born—I will ask Mr. White to check this with me to see that the record is correct or that corrections may be made if needed. Born June 8, 1917, Fort Collins, Colo. Educated, University of Colorado, graduated 1938. I think he ranked first, as I remember the record. In 1939 he was a Rhodes scholar at Oxford University, Oxford, England, then he went to Yale University Law School. You have heard the testimony on his high scholastic achievement at Yale University Law School. This is where he received this LL. B. He was admitted to the bar in 1947 in Colorado. Then he got into his athletic prowess, Pittsburgh Steelers and Detroit Lions. Then, World War II in the Navy, entering as an ensign and honorably discharged as a lieutenant commander. Then in 1946-47 he was law clerk to Chief Justice Fred M. Vinson of the Supreme Court of the United States, in Washington, D.C.

From 1947 to 1961 with the law firm of Newton, Davis & Henry, also Lewis, Grant & Davis, Denver, Colo., as attorney and partner.

I can say from my own knowledge that this is one of the outstanding law firms in Denver.

Since January 24, 1961, Mr. White has been Deputy Attorney General, Department of Justice. He appeared before and was approved by this committee. He is married and has two children; his present office is with the Department of Justice; his home address is 5174 Watson Street NW., Washington, D.C.

STATEMENT OF HON. BYRON R. WHITE, NOMINEE TO BE AN  
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED  
STATES

Senator CARROLL. Any corrections to the record?

Mr. WHITE. No, I believe it is correct.

Senator CARROLL. Mr. White, every member of this committee knows you and your record. They have studied it. They have attended the hearings of January 18, 1961, and I think now it is proper to proceed with Senator Kefauver. Would you desire to lead off with the questions?

Senator KEFAUVER. No, Mr. Chairman, I have already expressed my very high opinion of Mr. White.

Senator CARROLL. Senator Ervin?

Senator ERVIN. I have already stated that I expect to vote for Mr. White's confirmation, and I expect to pray that he may be guided to the performance of his duties as a judge and resist any temptation to perform those of a legislative nature while he occupies a seat on the High Court.

Senator CARROLL. Senator Hart of Michigan?

Senator HART. Mr. Chairman, I am satisfied that the same excellence which has attached to everything that Byron White has undertaken will characterize his service on the Court, certainly on a less judicial and austere note than some of the earlier ones.

My comment about it, about the athletic prowess, I think, was not out of order. Anybody charged with the responsibility, and everybody has at least an indirect responsibility in trying to raise children, male children, will find the job enormously helped by being able to point to an outstanding male such as Mr. White. This I know: People are hesitant to say these things because it is thought to be "corny," but it is literally true that America will have in him an extraordinary example of a man who combined great physical skill and intellectual capacity with the resulting product of the outstanding citizens in service. There are a million ways to put it, but the young people of America will know about this Justice even though they may not know about the names of other Justices.

Senator CARROLL. Senator Keating?

Senator KEATING. Would the Senator yield on that point? The Senator from Michigan and the Senator from Tennessee and I, particularly, and others on the committee, too, have had great interest in professional football and baseball legislation, and if any of that ever reaches the Court, it would be wonderful to have somebody there who knew something about them.

Senator HART. I hope some of that legislation reaches the law books.

Senator KEATING. I hope some gets to Congress sometime.

Senator CARROLL. Senator Long.

Senator LONG. I have not so indicated, but certainly my intentions are to support this nomination. My work here on the committee and with Mr. White has been very cordial, and in the time I have known him, I have grown to have a deep affection for him and a very high regard for him.

The Senator from Michigan commented on raising boys and I am in the position of raising girls, and I think they can look with great admiration toward physical prowess.

There are two questions I would like you, though, to comment on briefly, if you would care to. I would like you first to comment on your attitude concerning circumstances under which a Justice of the Supreme Court should disqualify himself in the consideration of a case. There are a number of cases that have come in and matters you have been involved in with the Justice Department, and which are perhaps being considered by Congress now. I think the record should ask for your views now.

Mr. WHITE. There is a statute, Senator Long, which governs this matter. You will find it under title 28. It substantially says if you have a substantial interest in the case, if you have been a witness or of counsel, you should disqualify yourself. There is no discretion there.

Senator LONG. Would that be extended to include proposals of law in the department you have worked with?

Mr. WHITE. No, I don't believe so, but the statute goes on and says, if you have such relations and connections with either the party or the counsel in the case, which would lead the individual justice to feel that he could not judge the case properly, that he should also disqualify himself. There is also the accumulated custom on the Supreme Court, about which I cannot speak intimately, but certainly various members of the courts have had considerable experience in going to the Court after having experience in the Department of Justice, and I shall take counsel from those people if the Senate deems it wise to confirm me.

Senator LONG. I am sure that you will do whatever is proper and ethical in arriving at the end of those cases.

One other question: I think perhaps the Senator from North Carolina has touched on this briefly, but would you care to comment just briefly on the role of the Supreme Court in our constitutional form of government, as you view it?

Mr. WHITE. Article III of the Constitution vests the judicial power of the United States in the Supreme Court and inferior courts established by Congress, and the judicial power is exercised by deciding cases; the cases within the original jurisdiction and the appellate jurisdiction of the Supreme Court are brought to the Supreme Court, and they are decided on the facts, the record and the law applicable in that particular case. That is its function.

Senator LONG. There has appeared comment in our various news media about the Supreme Court attempting to legislate or perhaps attempting to go further than they have ever gone in our constitutional form of government in interpretations. I don't want to embarrass you in any way, or if you do care to comment on it, I would be glad that you not do so.

Mr. WHITE. I think it is clear under the Constitution that legislative power is not vested in the Supreme Court. It is vested in the Congress; and I feel the major instrument for changing the laws in this country is the Congress of the United States. The business of the Congress is that of changing the law. That is your entire business, maybe not the entire business but certainly the better part of your

business, and many of the cases, especially those of constitutional law that have come before the Court, have been precipitated because the Congress of the United States has itself interpreted the Constitution, implicitly or impliedly by virtue of passing a law.

A case comes up in the Supreme Court many times because Congress has itself interpreted the law, as it must do in enacting legislation. The Executive many times must face up to constitutional questions and some of those are presented to the Supreme Court. And many times either the Executive or Congress will take an action which involves a constitutional question which never gets to the Supreme Court at all. No one ever questions it. Certainly the last word is the Supreme Court if the matter comes to the Court, unless there is constitutional amendment or unless Congress determined that it desired to change the appellate jurisdiction of the Supreme Court.

Mr. LONG. I might say to you, rather facetiously, what I have said to the other district judges of Missouri, while they were sworn in and I know you are going to be sworn in: Don't forget, for 15 years you have been on the other side of the bench, and we other lawyers looking down—

Mr. WHITE. Some of the people have suggested I either forget I have been on the other side or—

Mr. HRUSKA. Senator, I do believe every lawyer in the land does rejoice when his ranks of the practicing attorney are called upon to fill the vacancy on the Supreme Court. It means one of their boys has "made it." That rejoicing in this case I am sure is enhanced a good deal by the splendid record that Mr. White has made as evidenced by the testimony here and the hearing that we had previously in January of 1961.

The rejoicing is great in the Middle West and in the mountain country because while geography is not necessarily a big factor in matters of this kind, nevertheless, it does play some part; so I do want to say that it is my intention to vote in favor of the confirmation of this nomination.

Now, the Senator from Missouri has raised a question about jurisdiction, and so forth. Mr. White, the Constitution in article III, after enumerating the many categories of cases over which the Supreme Court has jurisdiction, goes on to say at the end of the third full paragraph—

In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress can make.

Have you ever pondered that particular sentence with reference to the possibility of Congress maybe taking some action to create some exception and to perhaps make such regulations as are contemplated in this sentence? And have you contemplated at any time the wisdom perhaps of Congress venturing into that field?

Mr. WHITE. Well, Congress has ventured into the field, Senator, and they started very early in our history venturing into this field, in describing the type of cases and describing the appellate jurisdiction of the Supreme Court, and of course, the Court has discretionary jurisdiction in a great many cases and supposedly there is appeal as of right in others.

Also, there are direct appeals from the district courts in many of these areas.

In many of these areas, the Congress of the United States has seen fit to prescribe and control and delineate the appellate jurisdiction of the U.S. Supreme Court, which I think the Constitution contemplates and is quite proper. I think there has been an instance or so in our history where the Congress has, in connection with a specific case, either attempted to or successfully enacted a law which removed the case from the consideration of the Supreme Court. That may be another question.

Senator HRUSKA. Was that a named case or a class of case?

Mr. WHITE. No, it was a particular case. I think it was a name case.

Senator KEFAUVER. That was the *Aluminum* case?

Mr. WHITE. I am not sure. I would rather not speak without checking the record on that, but I think it did happen.

Senator HRUSKA. Isn't it true, however, that in the main, any legislation on the part of Congress in this field has been directed to procedure rather than substance?

Mr. WHITE. Well, as to types of cases?

Senator HRUSKA. As to types of cases.

Mr. WHITE. As to what kind of appellate jurisdiction should be exercised, in some cases. As I said, some cases are supposedly appeals of right and some others are without the discretion power of the Supreme Court.

Senator HRUSKA. Some are direct, some must go through the circuit court and so on.

Mr. WHITE. Yes.

Senator HRUSKA. Thank you.

Senator CARROLL. Senator Keating.

Senator KEATING. Mr. Chairman, I have been very much impressed by the unusually high rating accorded this nominee by the American Bar Association, Colorado Bar Association, Denver Bar Association. I have been impressed by his candid and intelligent answers to the questions which have been put to him. I did not have the pleasure of knowing Mr. White before he came to Washington, but all of my contacts with him during his tenure as Deputy Attorney General have given me a very favorable impression of his integrity, his ability, and his judicial demeanor.

It is my expectation that he will be an excellent addition to the Supreme Court, and I shall be happy to vote for his confirmation.

Senator SCOTT. Mr. Chairman, I would like to say that I feel that the President has made an excellent nomination. All that we have heard and know of Mr. White is very much to his credit, and I have tremendous confidence in the findings of the judiciary committee of the American Bar Association which is headed by Mr. Bernard Segal, of Philadelphia, one of the most eminent attorneys in the country. It is quite obvious that the finding of his being exceptionally well qualified would not have been arrived at without full and careful exploration. It is my intention to vote for the confirmation, and I wish for the nominee a very long and illustrious career on the bench.

Mr. WHITE. Senator, thank you.

(Senator Eastland entered the hearing room.)

Senator CARROLL. Now, Mr. Chairman.

The CHAIRMAN. Gentlemen, I have a number of nominations here for the judiciary and I would like to call an executive session of the committee.

Mr. WHITE. Mr. Chairman, could I say just one more word?

I came here a year or so ago not knowing any of you gentlemen except Senator Carroll, and I had met Senator Kefauver. I have had a very enjoyable time working with the committee. I have found your deliberations to be extremely wise and helpful, and I know that the country owes all of you a great debt of gratitude. And, personally, I shall miss you all, and you, Mr. Chairman.

Senator KEFAUVER. Would it be possible to invite the Supreme Court Justices to come back and see us sometime?

The CHAIRMAN. Let's have the executive session.

Senator CARROLL. I want to make a few comments, I think you will make a great Justice of the Supreme Court.

(Whereupon, at 12:05 p.m., the committee proceeded into executive session.)



