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Volume 28

Number 3 *Symposium—The Sound of the Gavel:
Perspectives on Judicial Speech*

Article 7

4-1-1995

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R. S. Paz, *Federal District Court Nomination Process: Smears of Controversy and Ideological Sentinels*, 28 Loy. L.A. L. Rev. 903 (1995).

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FEDERAL DISTRICT COURT NOMINATION PROCESS: SMEARS OF CONTROVERSY AND IDEOLOGICAL SENTINELS

*R. Samuel Paz**

I. INTRODUCTION

On Thursday, August 12, 1993, Senator Barbara Boxer¹ made public the nomination of R. Samuel Paz, an Alhambra, California attorney, and Richard A. Paez, a Los Angeles municipal court judge, for appointment as federal district judges.² The candidates' names were submitted to the White House and both were subjected to rigorous scrutiny by the Department of Justice, Office of Policy Development.³ Thereafter, the American Bar Association's (ABA) Standing Committee on the Federal Judiciary⁴ and the Federal Bureau of Investigation (FBI) subjected both candidates to exhaustive background checks. Judge Paez, who was nominated on March 9, 1994, and confirmed by the Senate on June 15, 1994, is now sitting in the Central

* Senior Partner, Law Offices of R. Samuel Paz, A Professional Corporation; Adjunct Professor of Law, Loyola Law School, Los Angeles. For their advice and criticism, I am deeply indebted to Professor Gary Williams of Loyola Law School, Los Angeles and Sonia M. Mercado, Esq. For their understanding and support, I would like to thank Scott Bice, Dean, University of Southern California Law Center and Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California Law Center. I would like to thank the editors of the *Loyola of Los Angeles Law Review* for their invitation to prepare this Essay on my experiences.

This Essay is dedicated to those lawyers and judges who have a vision of equal justice for everyone, even the despised and unpopular, and the courage to live it.

1. United States Senator, D-California.

2. Henry Weinstein, *Boxer Backs L.A. Judge, Attorney for Federal Bench*, L.A. TIMES, Aug. 13, 1993, at B1, B4.

3. The Office of Policy Development is responsible for screening nominees for federal judgeships. At the time of the Author's nomination and hearing, the Office of Policy Development was headed by Eleanor Dean Acheson, Assistant U.S. Attorney. For a profile of Ms. Acheson, see Charley Roberts, *Judge Picker, Policy Maker: Clinton Justice Official Has Washington Roots*, L.A. DAILY J., Apr. 4, 1994, at 1, 28.

4. For a discussion of the formation of the Standing Committee, see Joel B. Grossman, *The Role of the American Bar Association in the Selection of Federal Judges: Episodic Involvement to Institutionalized Power*, 17 VAND. L. REV. 785, 797-98 (1964).

District.⁵ Due to a delay in the ABA evaluation, the President did not nominate Paz until March 24, 1994.⁶

On August 25, 1994, the Senate Judiciary Committee held a hearing on Paz.⁷ Wisconsin Democrat Herbert Kohl, who was the only panel member to quiz the nominee, chaired the hearing. No member of the Senate Judiciary Committee asked any questions at the hearing regarding the nature of Paz's practice or his qualifications to sit as a federal district court judge.⁸ The following day Senator Orrin Hatch,⁹ in a letter to Paz, asked Paz to respond to nine ideologically centered questions.¹⁰ Paz immediately filed responses and no further questions were asked of the nominee.

For the remaining months of the 103d Congress, the committee's chair, Joseph R. Biden, Jr.,¹¹ did not submit Paz's name to a vote before the Senate Judiciary Committee. After the elections of November 1994, when the Republicans became a majority in the Senate, Barbara Boxer resubmitted the names of R. Samuel Paz and Judith McConnell, a superior court judge in San Diego, California, to Presi-

5. FEDERAL JUDGES AND JUSTICES: A CURRENT LISTING OF NOMINATIONS, CONFIRMATIONS, ELEVATIONS, RESIGNATIONS, RETIREMENTS, 103d Congress, II-64 (Iris J. Wildman compiler, 1994).

6. 140 CONG. REC. S3816 (daily ed. Mar. 24, 1994).

7. 140 CONG. REC. D1049 (daily ed. Aug. 25, 1994). The nominee was required to submit to the Senate Judiciary Committee the completed Questionnaire for Judicial Nominees within five days from the date of nomination. For three weeks thereafter the portions of the questionnaire which were not confidential were made available for public viewing. The nominee was advised that the hearing before the Senate Judiciary Committee could be set any time after the three-week public viewing.

8. The hearing was described, in part, as follows:

Today's Senate Judiciary Committee hearing was a family affair, with the relatives and close friends of three judicial nominees making up the bulk of the audience at the low-key confirmation hearing.

Wisconsin Democrat Herb Kohl, who chaired the hearing, was the only panel member to quiz the nominees, and he asked few questions. The hearing, scheduled only a few days ago, lasted less than an hour.

Judiciary Panel Holds Low-Key Confirmation Hearing, NAT'L J. CONG. DAILY, Aug. 25, 1994, at 2.

9. R-Utah and senior ranking member of the minority party during the 103d Congress. Senator Hatch is, at the time of this publication, the Chairman of the Senate Judiciary Committee, 104th Congress. JOINT COMM. ON PRINTING, 1993-1994 OFFICIAL CONGRESSIONAL DIRECTORY 103D CONGRESS 59 (Duane Nystrom & Leslie Mason eds., 1993).

10. Senator Hatch had previously been part of a group of three conservative senators who had sent ideologically based questions to a Latino nominee for a federal judgeship. See *Judicial Quiz*, HARPER'S, Aug. 1985, at 19, 19 (reprinting letter and questions sent from Senators Denton, East, and Hatch to nominee Joseph Rodriguez).

11. D-Delaware. During the 103d Congress, Senator Biden was the chairman of the Senate Judiciary Committee. CCH CONGRESSIONAL INDEX 104TH CONGRESS 1995-1996, at 12,058 (1995).

dent Clinton. On January 20, 1995, both McConnell and Paz were advised that the President had requested that the nominees withdraw their names. Although the White House failed to provide either nominee with any information regarding this request, it was reported that Senator Boxer had spoken to Senator Orrin Hatch, now the new chairman of the Senate Judiciary Committee, and Hatch had expressed opposition to the nominees.¹² In the case of Paz, it was widely reported that Hatch's opposition was based on the fact that Paz had successfully represented victims of police brutality.¹³

This Essay is intended to serve the legal community's pedagogical interests by sharing some of my experiences with the federal judicial appointment process. I start with some thoughts on what considerations should be pondered before throwing one's hat into the ring. These reflections are followed by a summary description and some comments on the merit-screening process Senator Barbara Boxer implemented.¹⁴ Thereafter, the steps in the judicial prenomination process, after a senator submits the candidate's name to the White House, are described. This description is followed by my views on the nomination and hearing "experience."

Finally, this Essay discusses whether an attorney who has successfully advocated for civil rights victims against law enforcement agencies and police officers should be considered unqualified to serve on the federal bench.

12. David Corn, *The Right Judges?*, NATION, Feb. 20, 1995, at 225, 225-26. The Author understands President Clinton's request to have the nominees withdraw their names as a signal that the White House would not challenge the Republicans on judicial nominations. Corn opined, "[t]he bottom line: Hatch has a veto on federal bench appointments." *Id.* at 226.

13. *Id.*; Tony Perry, *2 Sponsored by Boxer for U.S. Judgeships Withdraw from Consideration*, L.A. TIMES, Jan. 21, 1995, at B3; Charley Roberts, *White House Drops Judicial Nominees*, L.A. DAILY J., Jan. 23, 1995, at 2.

14. President Jimmy Carter created the United States Circuit Judge Nominating Commission to recommend applicants for appointment to the federal appellate courts. Exec. Order No. 12,059, 3 C.F.R. 180, 182 (1979), *revoked by* Exec. Order No. 12,305, 3 C.F.R. 150 (1982); *see also* 28 U.S.C. § 44 (1988) (Executive Orders) (detailing subsequent history of Executive Order No. 12,059 creating nominating commission). President Carter's efforts to affirmatively attempt to identify qualified candidates, including women and members of minority groups, extended to district court nominees. *See* Exec. Order No. 12,097, 3 C.F.R. 254, 255 (1979), *revoked by* Exec. Order No. 12,553, 3 C.F.R. 204, 210 (1987); 28 U.S.C. § 133 (1988) (Nomination of Women and Blacks to Federal Judgeships); *see also id.* (Executive Order No. 12,097) (detailing subsequent history).

II. "WHO ME?"—CONSIDERATIONS BEFORE APPLICATION

Shortly after the election of President Clinton,¹⁵ Cruz Reynoso¹⁶ asked me to consider applying for a position on the federal bench. What are the weighty considerations to be contemplated before subjecting one's self to the process? Did eighteen years of general litigation practice provide sufficient experience?

Some serious reflection on the standards established by President Carter's United States Circuit Judge Nominating Commission¹⁷ provided some concrete direction for self-evaluation. In evaluating the qualifications of each candidate, the Commission articulated what I believed to be the necessary requirements for nomination to the federal bench. Those requirements were:

1-201. The standards to be used in determining whether a person is qualified to serve as a district judge are whether that person:

(a) Is a citizen of the United States, is a member of a bar of a state, territory, possession or the District of Columbia, and is in good standing in every bar in which that person is a member;

(b) Possesses, and has a reputation for, integrity, good character, and common sense;

(c) Is, and has a reputation for being, fair, experienced, even-tempered and free of biases against any class of citizens or any religious or racial group;

(d) Is of sound physical and mental health;

(e) Possesses and has demonstrated commitment to equal justice under law;

15. President Clinton was elected in November 1992. See Cathleen Decker, *Clinton Camp Celebrates the Power of Hope*, L.A. TIMES, Nov. 4, 1992, at A1.

16. Former Associate Justice, California Supreme Court and currently Professor of Law, University of California, Los Angeles. Justice Reynoso urged me to apply for a federal judgeship. In his letter to Senator Feinstein, he wrote:

The possibility that R. Samuel Paz will assume the federal bench is as exciting to contemplate as when the late Thurgood Marshall was named Solicitor General and later Supreme Court Justice. Why? Few lawyers fighting for integration were appointed to the bench during the fifties and sixties. Today, few lawyers who have a combined background in civil rights, personal injury, and police malpractice find their way to the bench.

Letter from Cruz Reynoso to Senator Dianne Feinstein (Mar. 11, 1993) (on file with the *Loyola of Los Angeles Law Review*).

17. For a more thorough discussion of these standards, see Elliot E. Slotnick, *Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration*, 1 YALE L. & POL'Y REV. 270 (1983).

(f) Possesses and has demonstrated outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and their processes;

(g) Has the ability and the willingness to manage complicated pretrial and trial proceedings, including the ability to weigh conflicting testimony and make factual determinations, and to communicate skillfully with jurors and witnesses.¹⁸

After a serious self-assessment, it appeared that I met these seven requirements. My career had provided me with the confidence to take the first step of the journey. In making this decision, substantial consideration was given to my years of hard work as well as the personal and familial sacrifices I had made to create and build a successful and thriving civil law practice. Numerous honors and awards and substantial recognition by colleagues and community groups suggested my good standing in the community.¹⁹

The personal consideration that proved to be the most difficult, however, was the prospect of disassembling a staff of loyal friends and confidants, who were also coworkers and employees. Several of them had been together over fifteen years. The loss of these personal relationships outweighs all of the many other important considerations that must be confronted when closing down a private practice built upon reputation and community support.

Obviously, the business considerations for each potential applicant will be unique. Because of the vigorous evaluations by the Department of Justice, the ABA, the FBI, and the Senate Judiciary Committee, anyone considering application to the federal bench should first give serious and critical self-analysis to the Nominating Committee standards before submitting to the process. However, as will be discussed below, while passing muster under these standards may have been sufficient under past administrations, future nominees

18. Exec. Order No. 12,097, 3 C.F.R. 254, 255 (1979), *revoked* by Exec. Order No. 12,553, 3 C.F.R. 204, 210 (1987).

19. See Cassandra Smith, *Profile*, L.A. DAILY J., July 15, 1991, at 1, 11 (profiling R. Samuel Paz). The Nominee's response to the Senate Judiciary Committee's Questionnaire for Judicial Nominees listed 13 community and legal organizations that had bestowed honors and awards upon the nominee—most for outstanding contributions to the legal community and for protection of legal, civil, and human rights. Response from R. Samuel Paz to the Senate Judiciary Committee's Questionnaire for Judicial Nominees (Mar. 29, 1994) (on file with author).

should consider whether they care to be subjected to the unspoken, but clearly discernable, ideological and philosophical standards being enjoined upon the nominees for the federal district court.

III. MERIT SELECTION: VINTAGE SENATOR BARBARA BOXER

A simple letter with an attached resume initiated the process with Senator Barbara Boxer. Within a few weeks, Senator Boxer's staff replied with the first of many in-depth questionnaires covering my life's activities, commencing with graduation from high school. The questionnaires placed heavy emphasis on judicial experience, business enterprise, occupational activities, and, of course, a probing inquiry into the nature of the applicant's practice of law. Multiple questions requested disclosure of any violations of law since the age of eighteen. These questions encompassed violations of federal, state, county, and municipal regulations or ordinances. The only violations the questions did not cover were traffic violations for which a fine of fifty dollars or less was imposed. Senator Boxer also propounded a multitude of wide-ranging questions that included issues of tax liens, collection procedures against the applicant, or possible violations of criminal or civil law and state bar proceedings. Other wide-ranging areas were the nature and description of free legal services provided to nonprofit organizations or indigent individuals, involvement in community affairs, and inquiries related to legal books, articles, honors, prizes, awards, affiliations with associations, political office, professional societies, committees, and other general volunteer professional activities. The forty-one questions required a seventeen-page-response.

Angela Oh, a partner with the Los Angeles law firm of Beck, DeCorso, Werksman, Barrera & Oh, chaired Senator Boxer's Central District Merit Screening Committee. Other members of the Committee were Marta Macias Brown, executive assistant to George Brown;²⁰ Brown Greene, an attorney with the firm of Greene, Broillet, Taylor & Wheeler in Santa Monica; Lori Harris, a Santa Barbara attorney; Monica M. Jimenez, a Santa Ana attorney; Sheila J. Kuehl,²¹ then managing attorney for the California Women's Law Center, Los Angeles; Dr. Douglas A. Martin, special assistant to the Chancellor, University of California at Los Angeles; Vilma S. Martinez, an attorney with the firm of Munger, Tolles & Olson; John J. Quinn, an attorney

20. D-San Bernardino, California.

21. Ms. Kuehl (D-Los Angeles) was elected to the California Assembly on November 8, 1994. See Jon D. Markman, *Kuehl Supporters Celebrate Assembly Victory That Bucked Conservative Trend*, L.A. TIMES, Nov. 10, 1994, at A26.

with the firm of Quinn, Kelly & Morrow, Los Angeles; and Gary Williams, professor of law at Loyola Law School, Los Angeles.²²

Two members of the Merit Screening Committee conducted subcommittee interviews. Subcommittee members propounded oral questions which focused on both the applicant's written questionnaire and a wide range of legal issues. Months later, the full Merit Selection Committee met and conducted extensive interviews²³ with a number of candidates they deemed "finalists." Of those, only three applicants received the unanimous endorsement of the Committee. Those names were submitted to Senator Boxer and, on August 12, 1993, Senator Boxer selected R. Samuel Paz and Richard A. Paez as her candidates²⁴ for appointment to the federal district court.²⁵ The Committee had scrutinized more than seventy-five applications in a seven-month period.²⁶

IV. FROM CANDIDATE TO NOMINEE

A. *White House Questionnaires*

On September 2, 1993, I received correspondence which included a package of materials from Ronald A. Klain, associate counsel to the President.²⁷ The instructions required the candidates to complete the forms and return them to Washington within seven days.²⁸ Each form sought comprehensive and detailed information covering almost every aspect of the candidate's personal and professional life. The White House requested that each of the forms be completed separately be-

22. Rex Bossert, *Boxer Names 4 Panels to Aid in Judge Selection*, L.A. DAILY J., Feb. 9, 1993, at 1, 9.

23. Questions to this Applicant included: a request to expound on the development of the law of privacy and to predict what areas of federal law could be impacted in the future; an analysis of how I resolve a conflict of a moral nature, where there are serious moral implications and consequences on both sides of the issue; a discussion of problem areas in discrimination litigation involving the disabled; and many more questions regarding substantive areas of federal law.

24. As used in this Essay, "candidate" is the designation given to a person a senator has recommended to the President for nomination for a judicial appointment.

25. See Weinstein, *supra* note 2, at B1.

26. See *id.* at B4. This description of the Committee's activities are limited to what this applicant experienced and the information received during discussions with the Committee at the interviews. How the Committee functioned internally, the identity of the other applicants, and other such matters should be the subject of some other presentation.

27. Letter from Ronald A. Klain, Associate Counsel to the President, to R. Samuel Paz (Sept. 2, 1993) (copy on file with the *Loyola of Los Angeles Law Review*).

28. *Id.*

cause each had a separate purpose.²⁹ The Justice Department required two questionnaires³⁰ which the Office of Policy Development³¹ utilized in reviewing the candidate's potential for nomination. They included a wide variety of subjects but, when contrasted with the others, the Justice Department inquiries primarily focused on financial affairs and conflicts of interest.³² The second Justice Department questionnaire sought information regarding the candidate's medical condition.³³

The ABA prescribed the ABA Personal Data Questionnaire.³⁴ It was also exhaustive, primarily requesting educational background, law practice experience, litigation and trial experience, and other occupational pursuits.³⁵ In-depth questions regarding accusations of breach of ethics or unprofessional conduct were prominent.³⁶ The form required submission of legal work, including: legal articles, books, briefs, and other legal writing that reflected the applicant's personal work.³⁷ Membership in legal organizations and participation with volunteer organizations were also the subject of inquiry.³⁸ The form required the listing and description of the ten most significant litigated matters the candidate personally handled.³⁹

29. Memorandum for Prospective Appointees from Bernard Nussbaum, Counsel to the President (copy on file with the *Loyola of Los Angeles Law Review*).

30. *See id.*

31. For a description of the Office of Policy Development, see *supra* note 3.

32. *See* Office of the Attorney General, U.S. Department of Justice, Information Requested of Prospective Judicial Nominees 2-5 (copy on file with the *Loyola of Los Angeles Law Review*).

33. Memorandum for Prospective Appointees from Bernard Nussbaum, Counsel to the President (copy on file with the *Loyola of Los Angeles Law Review*). Candidates were advised that responses to the Department of Justice questionnaires would be kept confidential.

34. American Bar Association, ABA Personal Data Questionnaire (on file with author).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* The question as presented in the ABA's form was similar to the Senate Judiciary question on litigation:

Describe the ten most significant litigated matters which you personally handled. Give the citations, if the case was reported, and the docket number and date if the cases were unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;

(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

The FBI background investigative forms required the listing of every residence, including complete address and specific unit number, where a candidate had lived since age eighteen.⁴⁰ It also requested the current names, addresses, and telephone numbers of persons who knew the candidate.⁴¹ It sought complete disclosure of the candidate's employment history from high school, and a complete military history, police record, medical record, financial record, as well as a divulgence of any illegal drug and alcohol use since the candidate's eighteenth birthday.⁴²

The Senate Judiciary Committee Questionnaire for Judicial Nominees, Part I, included nineteen questions involving biographical information which essentially sought a description of the applicant's employment, educational, legal, and community service career.⁴³ Part II focused on financial data and conflicts of interest.⁴⁴ Part III entitled "General" sought information on ethical considerations under Canon 2 of the ABA's *Model Code of Professional Responsibility* calling for "every lawyer, regardless of professional prominence or professional workload to find some time to participate in serving the disadvantaged."⁴⁵ This section also sought information regarding membership in organizations that discriminate, a description of the selection process the judicial nominee experienced, and an essay question inviting a discussion on the notion of "judicial activism."⁴⁶ Section IV involved confidential questions involving discharge from employment, tax problems, tax liens, audits, investigations, bankruptcies, civil or criminal violations or investigations, administrative complaints, bar association disciplinary problems, lawsuits where the applicant had been a party to the litigation, and a request that the nominee "advise the committee of any unfavorable information that may affect your nomination."⁴⁷

(c) the individual name, address, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Committee on the Judiciary, U.S. Senate, Questionnaire for Judicial Nominees 4-5 (on file with the *Loyola of Los Angeles Law Review*).

40. Federal Bureau of Investigation, Questionnaire for Sensitive Positions, Standard Form 86 (on file with author).

41. *Id.*

42. *Id.*

43. Committee on the Judiciary, U.S. Senate, Questionnaire for Judicial Nominees 2-5 (on file with the *Loyola of Los Angeles Law Review*).

44. *Id.* at 6-7.

45. *Id.* at 8 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1981)).

46. *Id.* at 8-9.

47. *Id.* at 10.

B. White House, ABA, and FBI Interviews

After submitting the requested materials, five Assistant U.S. Attorneys, who were staff members of the Department of Justice, Office of Policy Development,⁴⁸ interviewed me at the Department of Justice in Washington, D.C. Eleanor Acheson headed the interview, and the discussions primarily focused on the process that I should expect and how I should prepare. My sense upon leaving the interview was that these people were supportive and concerned with ensuring my confirmation.

The ABA conducted an evaluation of my reputation in the legal community. Utilizing the ABA form which required the listing of the ten most significant cases litigated,⁴⁹ and any other information from the candidate,⁵⁰ the ABA investigator independently spoke with each opposing counsel, co-counsel, and judge involved in the matter to determine my reputation among my colleagues for integrity, work ethic, and legal ability. The investigator asked probing questions regarding my ethical behavior, honesty, and commitment to the rule of law. The investigator also inquired into intangibles such as my demeanor and character as they related to judicial temperament. After this exhaustive evaluation, the fifteen members of the ABA's Committee reported that a majority of the Committee found me qualified and a minority of the Committee found me well qualified.⁵¹ Although the Standing Committee does not disclose its report to the public, the ABA's opinion on judicial nominees continues to enjoy a prestigious and significant role in their evaluation.⁵²

The FBI assigned an agent to investigate each of the nominees. Over a three-week period, I experienced over twenty-five hours of

48. For a description of the Office of Policy Development, see *supra* note 3.

49. For a more detailed description of the ABA form, see *supra* note 38.

50. The ABA investigator assigned to me when I commenced the evaluation, requested a supplemental list of all the cases that I had litigated since 1988, with emphasis on those tried, in the same format as those "ten most significant cases."

51. The letter containing the final recommendation and evaluation does not contain a numerical breakdown of how the committee voted. The procedures of the Standing Committee do not allow the disclosure of the reasons for its vote.

52. See AMERICAN BAR ASS'N, STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (1977); William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 35-61 (1990). Ross discusses the varying levels of deference different presidents have accorded to the Standing Committee's evaluations. On this point Ross states that "[i]n view of the ABA's conservative political leanings, it is not surprising that the Standing Committee has had more influence upon Republican administrations. No President can afford to ignore the influence of the Standing Committee; even Democratic Presidents have listened carefully to its opinions." *Id.* at 38 (footnote omitted).

face-to-face interviewing with an FBI agent as well as numerous telephone calls and requests for written materials such as old passports, case files, and thirty-year-old military records. The FBI's report is confidential, but it is safe to assume, by virtue of the President's decision to nominate me, that the report was positive.⁵³

After clearing the ABA, the FBI, and the White House, President Clinton formally submitted the nomination to the Senate Judiciary Committee on March 24, 1994.

C. Senate Judiciary Committee Hearing

The Senate Judiciary Committee hearing was held on August 25, 1994.⁵⁴ Wisconsin Democrat Herbert Kohl chaired the hearing and was the only panel member to quiz the nominees. Three nominees were questioned: John Gleeson, a nominee from New York; Stan Wood Deval of Tennessee; and myself.⁵⁵ On August 26, Senator Orrin Hatch sent written questions to the Department of Justice seeking my written responses. The questions sought to elicit my position on a number of ideological issues. Some of these issues concerned my position on hiring quotas, my position on the death penalty, and how I viewed the concept of judicial activism. One question referred to some letters of opposition asserting that I was biased. It asked whether I could be fair to law enforcement in light of the fact that I had represented victims of police abuse in the past.⁵⁶ My answers

53. During the period the FBI agent was conducting the background investigation, over 20 old friends, acquaintances, and classmates, some from very distant places, called and reported their experience being questioned by FBI agents. Neighbors also timidly expressed a range of mixed emotions caused by having agents come door-to-door asking questions they perceived to be intimate and personal.

54. *Judiciary Panel Holds Low-Key Confirmation Hearing*, *supra* note 8, at 2.

55. *Id.*

56. My response to the accusation of bias against the police was as follows:

Without qualification or limitation, I harbor no personal bias and no prejudice against any law enforcement personnel or any individual police officer.

So that you may have a perspective of who I am, I can state that my personal life and legal career have demonstrated a high respect for the law and law enforcement. In my early teen years, I went to live with my maternal grandmother near the downtown area of Los Angeles, north of Dodger Stadium. Two uncles, both of whom served 25 years with the Los Angeles Police Department, were huge influences on me growing up. They taught me the importance not only of the police's work, but also of respect for the law. They were also instrumental in keeping me in school and away from the gangs.

After graduation from USC Law School, I became a partner of a general practice law firm, with concentration on worker's compensation and medical negligence cases. As part of its general practice, our firm also began to accept civil rights cases, many of which I handled, although they have probably not exceeded 30% of my open docket at any time in 20 years of practice. However, those civil rights cases which I did take on, I have litigated with the same dedication, profes-

were promptly submitted on August 26. No other questions were asked and that was my last direct contact with the Committee.

Notwithstanding positive evaluation by the ABA, the FBI, and the President's nomination, I was advised that Republican Senator Orrin Hatch had exercised his senatorial prerogative to prevent a vote on the nomination during the 103d Congress. Neither Senate Judiciary Committee Chairman, Joseph R. Biden, Jr., who had the authority to set the agenda for the Committee, nor any other member of the Democratic majority on the Committee moved to submit my name for a vote during the 103d Congress.⁵⁷

On Tuesday, November 8, 1994, two years after President Clinton had been elected, the elections resulted in a Republican majority in the U.S. Congress.⁵⁸

D. From Nominee to Citizen

On January 20, 1995, I received information from Senator Barbara Boxer that Senator Orrin Hatch opposed my nomination and that of Judge Judith McConnell.⁵⁹ The White House responded by requesting that McConnell and I withdraw our nominations immedi-

sionalism and integrity with which I approach every litigated case. I have never presented to a court a civil rights case found to be unmeritorious.

I believe I share with the vast majority of law enforcement officers an understanding that civil rights cases are one important avenue available to citizens to petition their government for redress of grievances. I firmly believe that while most police officers are fine public servants doing a difficult and dangerous job, that those few who violate the law should be held to the same standards as every other person in society.

Response from R. Samuel Paz to Senator Orrin Hatch (Aug. 26, 1994) (on file with author).

57. See Corn, *supra* note 12, at 225-26. Corn opines on the Democratically controlled Senate Judiciary Committee's failure to submit the nomination to a vote: "Partly responsible is Senator Dianne Feinstein of California, a member of the Judiciary Committee. She might have moved Paz's nomination last year—while the Senate was still democratic—but chose not to, fearful that Michael Huffington would exploit Paz in one more negative ad against her." *Id.* at 226.

58. Robert Shogan & David Lauter, *GOP Rolls Up Gains Across U.S.*, L.A. TIMES, Nov. 9, 1994, at A1.

59. Hatch's opposition to Judge McConnell was reportedly based on a single case in which the judge decided not to award custody of a 16-year-old boy named Brian Batey to his mother. Perry *supra* note 13, at B3. Instead, Judge McConnell gave custody to the male partner of the boy's deceased father. *Id.* The judge's decision was based in part on recommendations and reports of investigating agencies that must be kept confidential under state law. *Id.* Other factors were that the natural mother, during the time when Brian's father was alive and contesting custody, kidnapped the boy and was the subject of an FBI hunt that took approximately two years. *Id.* It was also reported that at the time the placement of Brian was before the court for decision, he had requested to be placed with his father's partner. *Id.*

ately. Both McConnell and I, who had been found qualified by our colleagues and peers, were not allowed to present our views on the accuracy or truthfulness of our detractors' accusations.

V. CIVIL RIGHTS LAWYERS NEED NOT APPLY?

A. *The Accusations: Fact or Fiction?*

On initial examination, the stated reasons for Senator Hatch's opposition would seem to have merit to a sizable segment of the population who may strongly identify with law enforcement. Bias in favor of police officers and a concurrent hostility towards plaintiffs and their lawyers who assert civil rights in litigation is a familiar part of the landscape for any attorney who has questioned prospective jurors⁶⁰ in these cases. The allegations police groups advanced against my confirmation were that " 'Paz has proven himself not to be a friend of law enforcement or equal rights for all citizens including police officers.' "⁶¹ A video showing me speaking on the pretrial procedure in a civil rights case, which was recorded at a Los Angeles trial bar association training seminar where attorneys received State Bar required Continuing Legal Education credits, prompted another letter lamenting that "[Paz] is making a fortune off our backs."⁶²

My statement after the August 1991 shooting of a nineteen-year-old resident of Ramona Gardens Housing Projects gave rise to another police group's letter. After investigating the scene of the shooting and collecting eyewitness accounts, a reporter asked my assessment. I described the incident as "a classic example of an officer who violated all the rules." This statement prompted a letter blaming me for having an " 'offensive and inflammatory practice of making allegations to the media prior to investigations of officer-involved shootings.' "⁶³ This statement was also the basis of the charge that

60. There are numerous treatises, articles, and books on the ever-present, popular belief that police officials should never, or rarely, be subject to question. See MICHAEL AVERY & DAVID RUDOVSKY, *POLICE MISCONDUCT: LAW AND LITIGATION* 12-1 (2d ed. 1993); ELISSA KRAUSE & BETH BONORA, *2 JURYWORK: SYSTEMATIC TECHNIQUES* (2d ed. 1994); MINIMIZING RACISM IN JURY TRIALS 47 (Ann F. Ginger ed., 1969).

61. Henry Weinstein & Carla Hall, *L.A. Brutality Case Lawyer's Road to Judgeship Blocked*, L.A. TIMES, Dec. 17, 1994, at A1, A28-29. The authors attribute this accusation to Joe Flannagan, chairman of the Los Angeles Chapter of the Peace Officers Research Association of California. *Id.* at A28.

62. *Id.* at A28. The authors attribute this comment to E.F. (Skip) Murphy, state president of the Peace Officers Research Association. *Id.* My time at the seminar was donated.

63. *Id.* (quoting letter from Shaun J. Mathers, President of the Association of Los Angeles Deputy Sheriffs, to Joseph Biden, Chairman of the Senate Judiciary Committee). The authors attribute this statement to Shaun J. Mathers, the president of the Association of

“Mr. Paz continued to incite the community against the Sheriff’s Department and the deputies.”⁶⁴

From all available sources,⁶⁵ the allegations described above were the only allegations available to the Senate Judiciary Committee at the time my nomination was pending.⁶⁶

B. *The Facts of the Jiminez Case*

As the Ramona Gardens shooting was the only case or factual matter presented to the Senate Judiciary Committee to bolster their opposition to my confirmation,⁶⁷ a brief review of the outcome of that litigation supports the appropriateness and accuracy of my statement.

The police group’s letter claimed that “[t]he officer’s actions to protect his life and the life of his partner, who had been knocked unconscious by the PCP-charged suspect were determined to be entirely justified.”⁶⁸ The defendant police officer refuted the first unsupported aspect of the claim himself. He testified, in deposition and at trial, that the killing was not to protect his life because he was not in fear of his life at the time of the discharge of his weapon.⁶⁹ The second unsupported statement was the claim that the partner had been knocked

Los Angeles Deputy Sheriffs. *Id.* Mr. Mathers was not present at the time of this shooting, took no part in the litigation of this case, and had no personal knowledge of the facts.

64. *Id.*

65. None of the letters sent to the Senate Judiciary Committee were made available to the Nominee from any source during the time the nomination was pending, and no copies were ever sent to the Nominee from any person submitting opposition to the nomination.

66. One other accusatory article was written by Shaun Mathers after the White House had requested the nominations be withdrawn. *See* Shaun Mathers, *Paz’s Inflammatory History Disqualified Him*, L.A. DAILY J., Feb. 23, 1995, at 6.

67. *See* Weinstein & Hall, *supra* note 61, at A28-29.

68. *Id.* at A28 (quoting Shaun J. Mathers, president of the Association of Los Angeles Deputy Sheriffs).

69. In deposition and at trial the defendant, Deputy Jason Mann, testified that on August 3, 1991, he and his partner were on patrol in the County of Los Angeles when they were ordered to return to the station by the radio station dispatch. Deposition of Jason Mann at 49, *Jimenez v. Mann*, No. BC 038838 (Super. Ct. L.A. County Oct. 2, 1991) (copy on file with the *Loyola of Los Angeles Law Review*). Instead, the deputies began to follow a car containing four Mexican youths. *Id.* at 77. The deputies lost the vehicle within a few seconds and were unable to testify to any crime or suspicious activity. *Id.* at 97. Mann could testify to the race and appearance of the youths. *Id.* at 77, 82. The deputies continued to look for the car. *Id.* at 86-87. They drove, leaving the unincorporated area of the County of Los Angeles, patrolled by the Los Angeles County Sheriff’s Department, and entered the City of Los Angeles, patrolled by the L.A. Police Department. *Id.* at 96. The patrol car then entered Ramona Gardens, a housing project for low-income tenants, which is also patrolled by housing project police. *Id.* at 87. The defendants continued to cruise slowly around the projects with the patrol car’s headlights out. *Id.* at 88-89. They cruised aimlessly through the entire housing project, which contained thousands of vehicles, resi-

unconscious.⁷⁰ The partner told investigators that on the night of the shooting he was standing when the shooting began, that he had not been hit until after he heard the first shots, that someone other than the deceased hit him with their fist, and that he had *not* been knocked unconscious the entire night.⁷¹

dents, and many hundreds of housing units, and left, now close to a mile out of their patrol district.

Shortly before 1:00 a.m. they came upon some residents of the projects who were sitting on a low wall. *Id.* at 108. Noting nothing out of the ordinary, Mann shined a spotlight on the group for approximately a minute. *Id.* at 112. Mann's partner urged that they return to the station as they had been ordered. *Id.* at 119. As they began to drive away, they heard a bottle break near their car. *Id.* at 117. Neither knew from where the bottle had been thrown. *Id.* at 118. No damage had been done to the deputies or the car. *See id.* at 117. They had not reported their location to either their dispatch or to the two police agencies responsible for the area. *Id.* at 119. Defendant Mann asked his partner, the senior deputy, what they should do. *Id.* The senior deputy advised that they should get back to the station. *Id.* Instead, Mann bolted from the car, and, alone, rushed up to one of the residents, demanding he be told who threw the bottle. *Id.* at 121. The deputy then punched the man in the chest, knocking him back. *Id.* at 130.

Numerous eye witnesses testified that as a group of residents gathered and began to yell at the deputy to stop hitting the man, Mann pointed his weapon into the crowd and fired, killing Arturo Jimenez. A sheriff's homicide investigation proved a distance of 15 to 20 feet between Mann and the deceased.

Mann's partner testified in deposition and at trial that, when Mann bolted from the car, he followed Mann up to the location of the shooting. Deposition of Dana Ellison at 65, *Jimenez v. Mann*, No. BC 038838 (Super. Ct. L.A. County Oct. 2, 1991) (copy on file with the *Loyola of Los Angeles Law Review*). Mann was already in a screaming match with the group when Mann's partner heard the shooting start. *Id.* at 73. The partner's location was slightly behind and to the left of the shooting officer, actually further from the deceased than that of Mann. *Id.* at 67. *Mann's partner also testified in deposition and at trial that he was never knocked unconscious, id.* at 102, although he did receive a fist to the lower jaw area after the shooting. *Id.* at 74. Medical records proved the partner was not struck by blows with a heavy metal flashlight as Mann contended.

Mann's story to justify the shooting was that as he was screaming at the group of residents, he heard a sound of "metal to bone," and saw his partner "fall like a board," rigid, totally unconscious. Deposition of Jason Mann at 148, *Jimenez v. Mann*, No. BC 038838 (Super. Ct. L.A. County Oct. 2, 1991) (copy on file with the *Loyola of Los Angeles Law Review*). He claimed he was attacked by this large crowd, all of whom he believed to be Mexican gang members. *Id.* at 155-56. He claimed to have been bombarded by scores of baseball-sized rocks and bottles, and struck numerous times. *Id.* at 154, 161. As the attack continued, Mann claims he heard the sound of "metal to bone" and looked back to see his still-unconscious partner. *Id.* at 165-66. Mann then claimed he saw a person he had never seen before, leaning over his fallen, unconscious partner while striking his partner in the face and head area with a large metal flashlight. *Id.* at 169. As the person raised the flashlight to strike again, Mann claimed he fired his gun. *Id.* at 180. No rocks were found at the scene, and two bottles were found in an area away from the shooting scene, under some bushes.

70. *See supra* note 69.

71. *See supra* note 69.

Was the statement, "This is a classic example of an officer who violated all the rules" incorrect? After two weeks of trial and eyewitness testimony, the County of Los Angeles and Sheriff Sherman Block agreed to pay the deceased's mother a \$450,000 settlement.⁷² Had there been adequate proof that the defendant had indeed violated all the rules of patrol policing and, by his own conduct, precipitated the circumstances that gave rise to the shooting, and then told a story unsupported by the facts in an attempt to cover up the true facts? If those facts advanced against the nomination were true, why would the defense not prevail at trial? Why would the Sheriff not stand behind the facts as argued by Mr. Mathers and allow the case to go to the jury? While settlements are not admissions of liability, substantial settlements in excessive force cases are based primarily on an assessment of the likelihood of adverse verdicts.⁷³

C. *The Report of Special Counsel on the Jiminez Shooting*

In the report of Special Counsel James G. Kolts,⁷⁴ Judge Kolts concluded after a six-month probe, "[m]y staff and I found deeply disturbing evidence of excessive force and lax discipline."⁷⁵ The report goes on to describe the deputy's conduct in the shooting death of Jiminez as "[a]mong the most disturbing behavior we came across in our investigation involved [the Gang Enforcement Team], and perhaps the most troubling of all is what occurred in Ramona Gardens in August

72. Weinstein & Hall, *supra* note 61, at A28. Procedures enacted after the Report of Special Counsel James G. Kolts require that settlement of civil litigation must be approved by the Sheriff. L.A. COUNTY SHERIFF'S DEP'T, A RESPONSE TO THE KOLTS REPORT 11 (1992). Prior to this, a settlement of a civil action could be settled upon recommendation of counsel, approval by a committee of the Board of Supervisors, County of Los Angeles, and final approval by vote of the County Board of Supervisors. *See id.* at 47.

73. In December 1991, the Los Angeles County Board of Supervisors appointed a highly respected retired superior court judge and former prosecutor to conduct a review of the "policies, practices, and procedures of the Sheriff's Department" as they related to, among other things, "allegations of excessive force." *See* JAMES G. KOLTS ET AL., L.A. COUNTY SHERIFF'S DEPARTMENT 1 (1992) [hereinafter KOLTS REPORT].

The report was initiated due to an increase of officer-involved shootings and what Judge Kolts described in his introduction as "[f]our controversial shootings of minorities by LASD deputies in August, 1991, [that] added a measure of urgency." *Id.* at 1. The death of Arturo Jiminez was the first of those four shootings. Another factor was \$32 million in claims paid arising from the operation of LASD over the previous four years.

One section of the report reviewed 124 civil cases, and in that context, articulates that cases settle for substantial amounts when an adverse verdict is anticipated. *See id.* at 25-75.

74. *Id.*; *see, e.g.*, Hector Tobar & Kenneth Reich, *Probe Finds Pattern of Excess Force, Brutality by Deputies*, L.A. TIMES, July 21, 1992, at A1, A18-20.

75. *See* KOLTS REPORT, *supra* note 72, at 1.

of 1991.”⁷⁶ Kolts reviewed the facts of the case and opined that “the conduct was reckless and senseless.”⁷⁷ He concluded, “[t]his is not a story of a bungled arrest. It is a story of deficient training and flawed judgment, and a deputy who was not suited for a GET assignment.”⁷⁸

D. Search for the Truth, or Partisan Politics?

Assuming the Senate Judiciary Committee was concerned with determining the truthfulness of the assertions lodged against a nominee, it would appear that the information to rebut the claims against my nomination were available. The hearing on the nomination of Justice Robert Bork for the Supreme Court⁷⁹ was replete with interest-group-generated falsehoods and distortions about the nominee.⁸⁰ Senator Orrin Hatch attacked Judge Bork’s opponents and painstakingly researched and presented the factual truth.⁸¹ He objected to assessing the merits of a judicial candidate on the basis of thirty-second sound bites relative to complex issues.⁸² And although Senator Hatch has condemned the consideration of the political or ideological in the appointment process,⁸³ it would appear from his opposition to Judith McConnell and myself that these principled positions are actually the polemics of a partisan politician⁸⁴ who has imposed an ideological screening test, apparently unchallenged, on future nominees.

76. *Id.* at 316.

77. *Id.* at 318.

78. *Id.* at 319. In the section entitled “Internal Departmental Culture,” Kolts cites the tragedy created by Deputy Mann’s conduct as typical of “Contempt of Cop,” a fictional “crime” that within the police culture means that the officer felt a lack of respect and retaliated for the perceived transgression. *See id.* at 315-19.

79. The hearings of Robert Bork have been the subject of numerous articles. *See, e.g.,* STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 128-33 (1994); Randall R. Rader, *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*, 77 KY. L.J. 767 (1989).

80. Senator Orrin Hatch found that in three separate, full-page newspaper ads opponents of Judge Bork stated 67 falsehoods in one advertisement, 84 in another, and 99 in still another. 133 CONG. REC. S14692-97 (daily ed. Oct. 21, 1987) (statement of Sen. Hatch).

81. *Id.*; *see* Rader, *supra* note 79, at 811.

82. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 100th Cong., 1st Sess. 36-37 (1987) [hereinafter *Bork Hearings*] (statement of Sen. Hatch).

83. Senator Hatch argued that he favored examining the qualities of integrity, ethical sensitivity, intellect, legal experience, and a willingness and ability to uphold the Constitution. *See* Orrin G. Hatch, *A Response to Senator Biden: The Dangers of Politicizing Supreme Court Selections*, L.A. DAILY J. REPORT, Aug. 21, 1987, at 13, 23.

84. *Bork Hearings*, *supra* note 82, at 30 (statement of Sen. Thurmond). The Republicans who supported the nomination of Robert Bork continuously advanced the argument that a nominee should not be rejected unless the nominee is found not to “support the basic, longstanding consensus principles of our nation.” *Id.*

E. *Hold Them or Fold Them?*

Given the ideological litmus test being imposed on President Clinton's nominees for the district court and the opposition of Senator Hatch and the Republican leadership on the Judiciary Committee,⁸⁵ it would seem in the best political interests of the President⁸⁶ to stand up for the nominees his Democratic senators recommend, and let the opposition justify to the American people why otherwise qualified nominees had been rejected. The failure to do so sends a very powerful signal to those in the community who have trusted in the President and expected him to stay the course on issues that placed him into office. Moreover, not to stand behind a nominee who the opposition party attempts to smear with half-truths and outright falsehoods may, in the future, dissuade from the federal bench those qualified lawyers and bench officers who have followed their conscious, ethically made, difficult and controversial choices to do justice in a complex world.

VI. CONCLUSION

From this experience, I can share the honor and gratification of earning the respect and support⁸⁷ of my colleagues during this ordeal. It is also personally rewarding to have been selected to be Senator Boxer's candidate from what I understand to be an outstanding field of nominees.

With this recently gained experiential knowledge, I can equally express the bitter disappointment of being the subject of mischaracter-

85. Charley Roberts, *GOP Attorney Urges Centrist Judicial Picks*, L.A. DAILY J., Dec. 10, 1994, at 1. Edward Whelan, General Counsel for the Senate Judiciary Committee, 104th Congress, was reported to have "warned that President Clinton risks having confirmation of all his judicial nominees blocked if he tries to appoint liberal activists to the federal bench." *Id.* (quoting Edward Whelan).

86. Since June 3, 1993, when the President withdrew the nomination of Lani Guinier for Assistant Attorney General for the Civil Rights Division, Department of Justice, his willingness to support a nominee his opposition party deems "controversial" has been the subject of question. See Krista Helfferich, Comment, *The Stress, the Press, the Test, and the Mess with the Lani Guinier Smear: A Proposal for Executive Confirmation Reform*, 28 LOY. L.A. L. REV. 1139 (1995); *Don't Withdraw Lani Guiner*, WASH. TIMES, June 2, 1993, at G2; David Lauter, *Aides Say Clinton May Drop Rights Nominee*, L.A. TIMES, June 2, 1993, at A1. Lauter suggested that one of the consequences of withdrawing Guinier's nomination would be that his supporters, the civil rights community and women activists "will accuse him of buckling under pressure." *Id.* This is exactly what happened. Helfferich, *supra* at 1166-68.

87. Senator Boxer and her staff representative Jannine Mohr received in excess of 100 letters of support from colleagues, all of whom knew me personally and most of whom had firsthand knowledge of my professional skills and comportment.

izations by persons whom I have never met, without being afforded the opportunity to address their baselessness.

In conclusion, I come away from this experience understanding, as a member of a noble profession, that my selection by Senator Boxer's committee and the support of my colleagues and the community was because of my career work at successfully litigating cases that many of my noble colleagues rejected for many years. Having done what I believe to have been "the right thing," and having represented the causes of the defenseless or the oppressed,⁸⁸ it is with an awareness of the political realities of these times that I also understand that my career's work is also the reason for which my detractors seek to prevent me—and those of my colleagues who litigate on behalf of civil rights—from serving our country on the bench.

To those who care to take the first step toward court appointment, be aware that this step must be taken with the realization that your success is tied to the political astuteness and courage of the President, his advisors, and the ever shifting winds of politics.

88. California Business and Professions Code section 6068(h) states that it is the duty of a lawyer "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." CAL. BUS. & PROF. CODE § 6068(h) (West 1990 & Supp. 1995).

