



# AMERICAN BAR ASSOCIATION

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**STATEMENTS**

**of**

**THOMAS Z. HAYWARD, JR.**

**and**

**RICHARD M. MACIAS**

**on behalf of the**

**STANDING COMMITTEE ON FEDERAL JUDICIARY**

**of the**

**AMERICAN BAR ASSOCIATION**

**concerning the**

**NOMINATION OF ROGER T. BENITEZ**

**TO BE JUDGE OF THE UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**before the**

**COMMITTEE ON THE JUDICIARY**  
**UNITED STATES SENATE**

**FEBRUARY 25, 2004**

## **STATEMENT OF THOMAS Z. HAYWARD, JR.**

Mr. Chairman and Members of the Committee:

My name is Thomas Z. Hayward, Jr. I am a practicing lawyer in Chicago, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. With me today is Richard M. Macias, a former member of the Committee, and circuit member for this investigation. We appear here to present the views of the Association on the nomination of Roger T. Benitez to be a United States District Court Judge for the Southern District of California. After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is "Not Qualified" for the appointment. A minority found him to be "Qualified."

### **I. Procedures Followed By The Standing Committee**

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures so that you will have a clear understanding of the process the Committee followed in this investigation. A more detailed description of the Committee's procedures is contained in the Committee's booklet entitled *Standing Committee on Federal Judiciary: What It Is and How It Works (April 2002)*.

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee -- his or her competence, integrity and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law, breadth of professional experience, character,

integrity, compassion, courtesy, open-mindedness, patience, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Mr. Macias, in his capacity as a former member for the Ninth Circuit, was asked to undertake this investigation because the current Committee member from the Ninth Circuit was already undertaking another investigation.

The investigator starts his investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee Questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications, such as professional experience, significant cases handled and major writings. The circuit member makes extensive use of the questionnaire during the course of the investigation. In addition, the circuit member examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the circuit member will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and

provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching the confidentiality, the investigator will not use that information in writing the formal report and the committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the circuit member takes whatever additional steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the circuit member submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the circuit member then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications. This formal report, together with the public portions of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire 15-member committee. After carefully considering the formal report and its attachments, each member submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified," or "Not Qualified."

I would like to emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the Committee members by multiple sources. It is the

Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared with the nominee, the information is not included in the formal report and is not considered by the Committee in reaching its evaluation.

## II. The Investigation of the Nominee

Magistrate Judge Benitez was nominated on May 1, 2003. Carol Dinkins of Houston, Texas, who was then chair of the Standing Committee, assigned Mr. Macias to the investigation, as explained above. He began his investigation shortly after receiving the nominee's May 21, 2003, responses to the public portion of the Senate Judiciary Committee Questionnaire. The investigation took longer to complete than most investigations because negative information about the nominee's professional qualifications was uncovered.

On July 22, 2003, Mr. Macias submitted to Chair Dinkins an informal report of the results of his investigation, including summaries of all of his confidential interviews and a description of his interview with the nominee. Because the report contained information adverse to the nominee, Chair Dinkins asked Mr. Macias to conduct additional interviews with both lawyers and judges to assure that the concerns expressed in the report were reflective of the views of a very broad spectrum of individuals who had knowledge of the professional qualifications of the nominee. On October 10, 2003, Mr. Macias' formal report was transmitted to all of the members of the Committee. Those who had questions were encouraged to contact Mr. Macias directly. After all of the Committee members had an opportunity to study the report and all the attachments, each member reported his/her vote regarding the rating of the nominee to

the chair. A substantial majority of the Committee found the nominee "Not Qualified" and a minority found him "Qualified." This vote was reported to you on October 21, 2003.

Mr. Macias will now describe his investigation of the nominee.

## **STATEMENT OF RICHARD M. MACIAS**

Mr. Chairman and Members of the Committee:

My name is Richard M. Macias. I am an attorney from California and, as Mr. Hayward indicated, I am a former member of the Committee. I served a full term on the Committee starting in 1994, and have provided frequent assistance on an "as-needed" basis since then. I have personally conducted approximately 60 investigations for the Committee and have reviewed many more reports prepared by other Committee members.

In 2003, I was asked to undertake the investigation of the qualifications of Roger T. Benitez to serve as a United States District Judge. My investigation was conducted in the same manner all investigations by the Standing Committee are conducted, as Thomas Hayward just explained.

My investigation took place during the summer of 2003. In addition to carefully reviewing pertinent materials, such as the nominee's responses to the questionnaire, his legal writings and other documents that he sent me to review, my investigation of the professional qualifications of Judge Benitez included approximately 67 confidential interviews with members of his legal community, including 23 judges and 44 lawyers. During each conversation, I asked how the person knew the nominee and what the person knew about the nominee's professional competence, judicial temperament, and integrity that would bear on his competence to be a United States District Judge. I interviewed almost all -- if not all -- of the District Court Judges and Magistrate Judges of the Southern District of California and the Imperial County Superior

Court Judges. I also made a particular effort to locate and speak with attorneys who had made court appearances before the nominee.

I also met privately with the nominee in his office in El Centro on two separate occasions. During our meetings, each of the many concerns over Judge Benitez' qualifications that had been raised during my investigation was discussed, and the nominee was given a full opportunity to respond to and rebut the adverse information and to provide any other additional data, information, or materials that he wished me to consider. Because I received more negative comments concerning this nominee than I had ever received about any other person I have investigated, I met with Judge Benitez twice and spent considerably longer conferring with him than what is normally required.

A substantial number of the judges and lawyers I interviewed raised significant concerns about Judge Benitez' judicial temperament and his courtroom demeanor. Many of the interviewees were initially reluctant to discuss the nominee until I assured them that everything they told me would be held in the strictest confidence. Over the past ten years, I have conducted many investigations for the Southern District of California and, fortunately, I have established a reputation as someone who keeps his word and can be trusted to keep matters confidential when asked to do so.

The lawyers with whom I spoke were civil and criminal practitioners, both prosecutors and defense lawyers, from San Diego and Imperial County, where Judge Benitez practiced law from 1979 to 1997, sat as an Imperial County Superior Court Judge from 1997 to 2001, and has served as a federal Magistrate Judge for the Southern District of California from 2001 to the present.



Over and over I received negative comments regarding Judge Benitez' judicial temperament. Interviewees repeatedly told me that Judge Benitez displays inappropriate judicial temperament with lawyers, litigants, and judicial colleagues; that all too frequently, while on the bench, Judge Benitez is arrogant, pompous, condescending, impatient, short-tempered, rude, insulting, bullying, unnecessarily mean, and altogether lacking in people skills.

Interestingly, a significant number of judges and lawyers with whom I spoke specifically reported that Judge Benitez would often become irrationally upset and outraged if an attorney, who had been appointed to represent a defendant, had a scheduling conflict and asked another equally competent and prepared attorney to appear before the nominee on behalf of the defendant. Scheduling conflicts are a fact of life for litigators: they are a common, everyday occurrence. The people who specifically mentioned this behavior as one example of the nominee's injudicious temperament assured me that almost no other Magistrate Judge in California or Arizona would be the least bit perturbed under similar circumstances.

A number of people with whom I spoke expressed grave doubts over Judge Benitez' ability to competently handle the more demanding docket caseload of a federal district judge and efficiently manage a district courtroom, based on their perception of his very slow and rigid manner of handling his current court calendar in El Centro.

Based on their exposure to the nominee's mode of relating professionally to others in his official capacity as a judge, interviewees expressed doubt over Judge Benitez' ability to become an accommodating and collegial member of the federal district court.

Many of the interviewees further expressed the sentiment that the nominee's temperament problems are compounded by the fact that Judge Benitez fails to appreciate the depth of concern

by the bench and bar regarding his temperament and has not demonstrated that he is willing or able to address these concerns.

I discussed each of the negative comments I received with Judge Benitez when I interviewed him in person. His response was to consistently deny the accuracy of what I had been told. He was unable to explain why so many people would make incorrect, negative comments about him. Frankly, in light of the substantial number of negative comments brought to Judge Benitez' attention, we would have hoped he might have responded that he had not fully appreciated how he was perceived by others and that he would strive to markedly improve his temperament and demeanor. No such conciliatory comments were forthcoming from the nominee.

Our committee members, after reviewing my report on the nominee, were particularly concerned about the clear, consistent pattern to the criticisms that emerged from the interviews. A substantial number of Judge Benitez' professional peers that I interviewed complained about his lack of interpersonal skills and were deeply concerned that he lacked the judicial temperament essential for a district court judge. My colleagues on the committee were not dissuaded over the seriousness of these allegations by the fact that I reported that I interviewed some lawyers who told me that they had not encountered any problems when they had appeared before Judge Benitez.

After careful consideration of my report, a substantial majority of the Committee was of the view that Judge Benitez is "Not Qualified" for a life tenured appointment to the District Court. A minority of the Committee found him to be "Qualified."

Our Committee takes most seriously its responsibility to conduct an independent peer evaluation of the professional qualifications of judicial nominees. There is no simple formula

that we can apply to determine if a nominee is “Well Qualified,” “Qualified,” or “Not Qualified.” Our recommendation is not the result of tallying the positive and negative comments we receive about a particular nominee or giving an assigned weight to other factors that bear upon professional competence. Rather, in making our evaluation, we draw upon our own professional experience, the cumulative experience of the Standing Committee as a whole, the information and knowledge we gain about the nominee during the course of the investigation, and our independent judgment. We do our utmost to impartially apply the same standards and criteria to every nominee, and we take our job very seriously, especially when, like today, we have negative information to report about the professional qualifications of a nominee for a lifetime appointment to the federal bench.

Thank you for the opportunity to appear before you today. Tom Hayward and I stand ready to respond to any questions you might have.