ASSEMBLY-LINE APPROVAL:

A Common Cause Study of Senate Confirmation of Federal Judges

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January 1986

The final Senate vote on the Kozinski nomination embarrassed the Democratic members on the Judiciary Committee, who then pressed for changes to improve the process. The major element of the resulting agreement provides for at least three weeks to review each nominee before a hearing is held, except in the cases of controversial nominees where no time limits will be imposed.

The degree to which this agreement improves the confirmation process will depend to a great extent on the treatment of nominees about whom serious questions of fitness have been raised. By itself, the plan does little to provide the Judiciary Committee or the Senate with better information concerning the competence, integrity, temperament and other qualifications of nominees, or to bring out defects.

Common Cause recommends the following changes in the Judiciary Committee's review of judicial nominees:

1. Investigative staff should be added to assist the Committee in reviewing nominees.

2. The Committee should provide itself adequate time to review thoroughly judicial nominees.

3. The Committee should ask the ABA to provide information on the scope of its investigation, a summary of the basis for its evaluation, and a summary of the controversial issues, if any, discovered concerning the nominee.

4. Relevant outside groups should be given prompt and adequate notice of nominations and invited to provide information.

5. The Committee should provide adequate public notice of its hearings, particularly to those participating as witnesses.

6. Hearings should be limited to fewer than six nominees at a time, the current limit on group hearings for judicial nominees.

7. To help increase the resources for careful review of judicial nominees, the Committee members should rotate the lead responsibility for monitoring judicial nominees.

8. In order to carry out its duty of assuring federal judges of high quality, the Committee should attempt to identify the qualifications requisite in federal judges.

9. The Committee should issue reports setting out any questions about the fitness of each nominee and explaining how these questions were resolved prior to the full Senate's vote.

Recommendations

Common Cause believes that the Senate has a critical obligation to ensure that it provides independent and careful review of all judicial nominees. We therefore urge that the following steps be taken.

1. Investigative staff should be added to assist the Committee in reviewing nominees.

Currently, the majority party has four investigators on the Judiciary Committee staff and the minority, two. This level of staffing is inadequate to handle the number of nominees that the Senate is expected to review, partly because the confirmation process has taken on a particularly partisan cast,[14] with the Republicans showing even less interest than the Democrats in examining carefully issues raised about the nominees. During the controversial Kozinski confirmation, as discussed below, Chairman Thurmond failed even to acknowledge throughout the entire process that any serious issues had been raised.

The need for additional staff might be less urgent if the staff proceeded on an aggressive, bipartisan basis with close cooperation. But, as indicated above, staff do not report this kind of collaboration. For the most part, each staff member can

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[14] In one judicial confirmation hearing Senator Paul Laxalt (R-NV) said: "I, for one, if someone would forgive my partisan reference here, am delighted that we are finally starting to develp a Reagan team, so to speak, out there on the Federal bench."

handle little more than the investigation of one controversial nominee at a time. Given the large number of nominees (particularly those with mixed ratings) coming before the Committee, it is important that the investigative staff of the Committee minority be increased.

The new Committee agreement reinforces the importance of expanding the number of investigators because it permits as many as six nominees to be considered each week. At the December 5 executive session meeting on the agreement, Senator Biden said, "When you have ten [nominees], you have got to have three investigators spend all night for three weeks." Under the agreement, they could face six nominees every week. They should expand their staff.

In addition, since by the staffs' own admission they have negligible accounting expertise it would be advisable to add staff with such expertise to the investigative team.

2. The Committee should provide itself adequate time to review thoroughly each judicial nominee.

As indicated earlier, the Congressional Quarterly reported that the average time between nomination and hearing for judicial nominees is only 18.5 days this year compared with 57.8 days during the 96th Congress. Three weeks is the length of time that the Committee has agreed to continue to use, except in controversial cases. Whether this new system will improve the process by permitting adequate time to review all nominees will depend on a number of factors. It remains an open question whether three

weeks is sufficient time to permit preliminary investigations of nominees, given the current level of staffing and the rate of nominations.

Three weeks is certainly not enough time to do more than a preliminary investigation. A critical issue, therefore, is how the opportunity to shift a nominee from the "conventional" three-week track to the non-scheduled "controversial" track will be taken advantage of and how it will be honored. How much evidence will Senators feel compelled to offer or be forced to offer to obtain extra time to review a nominee? How much time will they get? It is essential that when serious questions are raised about a nominee's fitness to be a federal judge, sufficient time is provided to examine thoroughly the nominee's qualifications.

3. The Committee should ask the ABA to provide information on the scope of its investigation, a summary of the basis for its evaluation, and a summary of the controversial issues, if any, discovered concerning the nominee.

The Judiciary Committee relies greatly on the ABA's simple categorical rating. Yet the sources that the ABA contacted and the particular findings it made for each nominee are shrouded in secrecy. It is inappropriate for the Committee to rely on the ABA rating without knowing the scope and nature of each investigation and what troublesome issues, if any, arose concerning the nominee. This is particularly important when the ABA has given the nominee a mixed "qualified/unqualified" rating.

A summary of these matters need not breach the confidentiality of the ABA's sources or of the ABA's Committee members. In fact, the ABA has provided detailed information on its investigation and findings when it has concluded that a nominee is unqualified. In 1983, for example, after finding nominee Sherman Unger unqualified to be a United States Circuit Judge for the Federal Circuit, Mr. William Coleman, the committee member who conducted the investigation, testified before the Judiciary Committee against Mr. Unger. His statement on behalf of the ABA began by saying, "I cannot shrink from the important, if personally unpalatable, task of presenting to the Senate Judiciary Committee the results of our investigation." The statement, which was no mere summary, went on for another 34 pages, which were followed by 639 pages of exhibits.

Moreover, in past years the ABA frequently shared the substance of its findings on district and appellate court nominees with the Judiciary Committee. Also, the ABA's own pamphlet, "American Bar Association Standing Committee on Federal Judiciary: What It Is and How It Works" states that for Supreme Court nominees "[a]t the Senate Judiciary Committee's hearings, a spokesperson for the ABA Committee appears and makes an extensive report on the reasons for the Committee's evaluation of the nominee, while preserving the confidentiality of its sources." There appears to be no principled reason against reviving the previous ABA practice, nor for distinguishing between Supreme Court and other federal judicial nominees in terms of the kinds of information available to the Judiciary Committee.

4. Relevant outside groups should be given adequate notice of nominations and invited to provide information.

Currently, notice of nominations among private organizations is greatly dependent on the efforts of these organizations rather than the Committee's actions to stimulate the development of information. The Committee should provide public notice of a nomination as soon as it is received. Notice should go to the major newspapers in the jurisdiction in which the nominee seeks the judgeship as well as to local and national associations with either a potential interest in the particular nominee or ongoing interest in judicial selections.

An active outreach program is not without precedent. During the 96th Congress, the Committee attempted to encourage greater public participation in the evaluation process. The Committee developed a long list of groups who were contacted to provide information, including the local bar associations of the jurisdictions with judgeships to be filled.

5. The Committee should provide adequate public notice of its hearings, particularly to those participating as witnesses.

Except for unusual circumstances, hearing dates should be scheduled with adequate time for outside groups to investigate nominees and prepare testimony. Currently, notice of hearings is often as short as a few days. As the Appendix makes clear, witnesses have been asked to testify as little as five days (and even only one day) before a hearing.

While the Committee may want to develop guidelines for appropriate minimum time periods, any guidelines must take into account the number of nominees appearing before the Committee. As indicated above, hearings may cover as many as six nominees in one day. Even several weeks notice is likely to be insufficient to investigate the qualifications of nominees where many nominees are under consideration at the same time.

6. Hearings should be limited to fewer than six nominees at a time.

Permitting hearings that cover as many as six nominees at a time is an acknowledgment of the pro forma character of most of the Committee's confirmation hearings. Certainly, penetrating hearings are not warranted in every case. But the danger in allowing hearings that cover six nominees per day is that perfunctory hearings will be encouraged both because the agreement sets up an expectation that assembly-line processing of judicial nominees will continue and because it permits overloading the system. If repeatedly faced with six nominees at a time, the two minority investigators will be unable to monitor critically all members of each group. What inevitably will happen is that staff will be forced to rely even more on outsiders -- whose resources are already severely stretched -- to identify the candidates whose fitness has been called into question. And the other nominees will be carried on to confirmation without serious scrutiny because of the pace of the established schedule.

7. The Committee members should rotate the lead responsibility for monitoring judicial nominees.

Currently the same minority Senator takes responsibility for monitoring all nominees. This has been assigned to Senator Simon, who is the most junior minority Senator on the Committee and who is not a lawyer. There is no way one individual can adequately monitor all of the nominees. Even the ABA Committee splits its investigative responsibilities among 14 members. To do otherwise is to place the monitoring Senator in a position where he takes major responsibility for the inevitable failures of his impossibly large responsibilities.

Instead, the Chairman and the ranking minority member on the Committee should rotate responsibility for monitoring judicial nominees among the Senators of each respective party. This would help ensure a more realistic allocation of burdens.

8. In order to carry out its duty of assuring federal judges of high quality, the Committee should attempt to identify the qualifications requisite in federal judges.

In the past, Senators have typically applied a negative standard in evaluating nominees -- is the nominee clearly unqualified to serve on the judiciary? This kind of standard not only discourages aggressive scrutiny of nominees, but also encourages approval of marginally qualified nominees.

Senators do not use a negative standard in hiring for their own staffs. They would not be comfortable filling staff slots

with those for whom a quick review had shown no signs of criminality or financial wrongdoing. Appointments to the federal judiciary -- lifetime appointments -- should certainly be no less rigorous than for senatorial staffs. Senators should attempt to identify affirmative standards to provide a set of reference points to help the Senate evaluate nominees.

9. The Committee should issue reports to the full Senate setting out any questions about the fitness of each nominee and describing how those questions were resolved by the Committee prior to the full Senate's vote.

The Committee typically has not issued reports explaining its decisions on judicial nominees to the lower courts. Even in the case of Alex Kozinski, as described in the Appendix, where numerous serious charges had been brought, the Committee failed to issue a Committee report. This failure has contributed to the members' opportunity to avoid confronting and resolving the charges made.

When serious issues have been raised about a nominee, the Committee should prepare a written, substantive report on the nominee indicating how issues were resolved and the reasons for the Committee's final decision on the nominee. It would not be necessary to issue such reports routinely, without regard for whether controversial issues have arisen. But where such issues have been raised, reports not only would help assure that the Committee members explain and resolve what they might rather

ignore -- reports would also help the full Senate reach an informed decision.

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The changes recommended above will not in themselves ensure that the Senate provides independent and careful review of judicial nominees. Without the commitment of majority and minority Senators entrusted with these responsibilities, new procedures can only have limited impact. The quality of our judiciary depends greatly on the depth of that commitment.