THE JUDICIARY COMMITTEES

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For Justice
Ralph Nader

A Study of the House and Senate Judiciary Committees

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The Ralph Nader Congress Project

Grossman Publishers
A DIVISION OF THE VIKING PRESS
NEW YORK 1975

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Judicial Nominations: Whither "Advice and Consent"?

The importance to the American political system of a federal judiciary of high competence, integrity, and independence can scarcely be exaggerated. It is not simply that federal judges are appointed for life terms and daily decide questions of great political significance and legal complexity. As de Toqueville noted long ago, our system is distinctive in the extent to which the most fundamental political, social, and philosophical issues are eventually passed upon by judges. To list but a few of the subjects of judicial decisions in recent years—racial equality, procedural rights in criminal cases, the rights of the poor, legislative reapportionment, relationships between religious and secular

NOTE: This chapter was prepared by Peter H. Schuck and Dr. Martha Joynt Kumar.

authority—is to affirm what the authors of *The Federalist* predicted, that the quality of the federal judiciary and the quality of American legal institutions are indissolubly wedded. The Senate Judiciary Committee's performance of its constitutional duty to advise and consent on judicial nominations, then, is a critical test of its responsiveness to the most fundamental needs of the American polity. And by almost any standards, Judiciary fails that test.

Judicial nominations amount to a considerable portion of the Senate Judiciary Committee's workload. (The House plays no role in the nomination process.) The number of nominees, of course, varies from one Congress to another, depending upon the number of vacancies caused by death and retirement, and the number of new judicial positions created by legislation. The fluctuation can be seen in the number of nominations the committee has considered since the Eighty-seventh Congress.

Justices of the United States Supreme Court, judges of the United States circuit courts of appeals, United States district court judges, United States attorneys (i.e., federal prosecutors), United States marshals (i.e., officials who execute federal court orders)—all these nominations are considered by the Senate Judiciary Committee. Since the processing of Supreme Court nominations by the Senate Judiciary Committee and the full Senate has been a subject of some study,[1] and since most articles concerning judicial nominations have stressed consideration by

TABLE 6.
Executive Nominations Considered by Senate Judiciary Committee

Congress	*Nominations*
92nd	169
91st	344
90th	140
89th	284
88th	84
87th	354

SOURCE: The Calendars of each Congress published by the Senate Judiciary Committee.

Because the committee must deal with so much legislation, members do not seriously scrutinize appointments unless compelling questions are raised by other senators or by interest groups. Neither senators nor interest groups, however, raise questions about nominations to the district or circuit courts or to the U.S. attorney and U.S. marshal positions. According to one senator who led a challenge and lost, "You don't get involved in these nominations because you rarely can win a fight on lower court nominations and you just make enemies. Senators take a challenge to their nominee as a personal affront."[20]

After a district or circuit court nomination has lain in the full committee for about two weeks, Senator Eastland typically announces in the *Congressional Record* that the *ad hoc* subcommittee will consider the nomination. One week after the announcement, the subcommittee holds hearings on the nomination and reports back to the full committee, which in turn submits its report to the full Senate. No individual announcements or accounts of hearings are sent to committee members. The time lag between the hearing and full Senate approval is generally no more than a few weeks, depending upon when the full committee meets.

The hearings on district and circuit court nominations before the *ad hoc* subcommittee are regarded by almost everyone as a formality; certainly they do not represent any serious, independent investigation by the Judiciary Committee into the merits of the appointments. The full committee is only too ready to accept the "findings" of the subcommittee, and the full Senate is equally uncritical of the determinations of the Judiciary Committee. *Hearings, subcommittee approval, full committee approval, and Senate confirmation frequently occur all on one day.* Of the ninety district and circuit court nominations sent to the Senate in the Ninety-second Congress, forty-one went from hearings to full Senate confirmation in one day. In addition, several nominees were considered together on the same day. Almost all of those nominees confirmed on one day were treated in conjunction with

as many as seven other circuit and/or district court nominees.* On five separate days, thirty-two such nominees were considered.

Consider one day, April 21, 1971. On that day, the nominees for four circuit and three district court vacancies were considered. Only one member of the full committee, Senator Roman Hruska, was present throughout the hearings on these seven nominees. The then chief counsel, John Holloman III, also attended. Other senators, not on the Judiciary Committee, presented testimony in favor of nominees from their states. Senator McClellan appeared for consideration of a nominee from his circuit, but the Judiciary Committee was not otherwise represented.

Senator Hruska conducted individual hearings on each nominee. *The seven hearings took a total of fifty-five minutes to complete, an average of six minutes per nominee.* The format was as follows: Hruska opened each hearing with a statement that senators had approved the nomination by blue slip and that the ABA and state bar association had rated the appointee. Senators from the nominee's state read a biography of the nominee in a perfunctory manner. Hruska's main question was whether the nominee was aware of the rule of the Judicial Conference prohibiting judges from having conflicts of interest by reason of membership on corporate boards of directors or other official corporate ties. The nominee was asked if he had any conflicts of interest and, if so, what provisions he had made to remove that conflict. Hruska asked if anyone in the room wished to speak on behalf of or against the nominee. The subcommittee then moved on to the next nominee. Six minutes had elapsed from start to finish. Another federal judge had been appointed to a life term on the bench. This format was typical of the processing of all the district or circuit court nominees in the Ninety-second Congress; none aroused any controversy.

Senators do occasionally interrogate a nominee at a hearing,

* April 21, 1971 (seven); May 26, 1971 (three); September 21, 1971 (five); November 23, 1971 (six); December 1, 1971 (three); December 2, 1971 (six); December 4, 1971 (two); June 28, 1972 (eight).

the full case before them prior to the presentation of informal as well as formal reports. Rather than accommodating its ratings to the Justice Department's wishes, the ABA should hold fast to its own ratings, leaving it to the president and the Senate to determine what factors other than professional competence should be weighed in the appointment process. The ABA should not exercise a veto over nominations, because its rating represents the views of only a few of the nominee's peers concerning his professional competence. Until the ABA committee makes public its rationale for particular ratings, these ratings should not be a determinative factor in the nomination process.

If the ABA is to have the privilege of partnership in the nominating process—an extraordinary delegation of public power to a private organization—other interest groups should also be encouraged to participate, for their views of the nominee's qualifications may be at least as informative and relevant as those of the ABA. The only group besides the ABA that is consistently interested in nominations is the NAACP, but even this group rarely gets involved in nominations for positions below the Supreme Court level. At the very least, the Judiciary Committee should notify groups other than the ABA and the state bar associations concerning nominations. Until the committee can convince such groups that its nomination deliberations are not simply *pro forma* and sham, however, widespread participation by such groups will not be forthcoming.

Part of the inadequacy of the process of consideration can be explained by the inherent difficulty of scrutinizing nominees. The Judiciary Committee must exploit independent sources of information about nominees if it is to perform its investigatory function. Committee staff can be used to compile data concerning the qualifications and criticisms of nominees, rather than simply putting together one-page biographies to be read at a six-minute hearing. The committee should also encourage the formation of an investigative, research network of lawyers, law school professors, and journalists, similar to the group that developed such devastating evidence concerning the judicial fit-

ness of Judge G. Harrold Carswell, to investigate the qualifications of lower court nominees. It is essential that an adversary, independent, fact-finding capability and mechanism be built into the nomination process to replace the one the Founding Fathers relied upon, but which has atrophied from disuse.

That the Senate Judiciary Committee has utterly failed to discharge its independent responsibility in the nomination process for district and circuit court positions is evident from the committee's performance in confirming the nomination of Carswell to the Fifth Circuit Court of Appeals in 1969. Although the same information that later defeated Carswell's nomination to the Supreme Court was available to the committee then, Carswell was confirmed for the Fifth Circuit in the same hasty and desultory fashion typical of the committee's deliberations on almost all judicial nominations. The *ad hoc* subcommittee heard data on Carswell as only one of three nominations on the morning of June 5, 1969, and apparently the session was of informal brevity.* The full committee approved his nomination along with those of twenty-eight other judicial nominees on June 19. On June 19, the Senate confirmed Carswell and eighteen other nominees. At every stage in this process, every major participant —the senators from Florida, the Department of Justice, the ABA, the *ad hoc* Judiciary subcommittee, the full Senate Judiciary Committee, and the full Senate—relied upon every other participant to perform the necessary investigation. In the end, *none* assumed the responsibility.

* Since the committee's file on Carswell is unaccountably missing from its repository in the National Archives, information concerning the duration of the 1969 hearing was necessarily based upon an interview with Richard Wambach of the Judiciary Committee staff.