ASSEMBLY-LINE APPROVAL:

A Common Cause Study of Senate Confirmation of Federal Judges

by Michal Freedman

January 1986

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

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

* * * *

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.