JUDICIAL ROULETTE

Report of the Twentieth Century Fund
Task Force on Judicial Selection

Background Paper by David M. O'Brien

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Changing the Process

Because of the importance of securing high-quality judicial appointments, *the Task Force proposes certain procedural changes in the confirmation process.* Our changes would not require a constitutional amendment. Quite simply, they are geared to focus more attention on judicial training and the experience and reputation of nominees. That is the primary basis on which nominees should be judged. The only feasible way of enhancing the prospects for judgments on this basis and improving the quality of the federal bench is by bringing more light to bear on the legal qualifications of judicial nominees.

In recommending changes in the confirmation process, the Task Force recognizes that presidents have the constitutional right to set their own criteria for selecting nominees, even when their choices run against professional or public opinion. In the future, we will continue to expect presidents to appoint those who share their own visions of legal and social policy. We acknowledge that the standards employed by the Senate when confirming judicial nominees are also likely to reflect the same mix of political and policy considerations as any other legislative vote. But both the president and the Senate should have the same goal in mind when judging candidates for the bench—choosing the well-qualified candidates to serve.

The primary problem with the confirmation process for district and appellate court judges is that the Senate too often gives "rubber stamp" approval to nominees. The Senate Judiciary Committee's confirmation hearings on lower-court judges are usually superficial, lasting five minutes or less, and the Senate's vote to confirm nominees is more often than not a mere formality. In short, the problem with the confirmation process for lower-court judges is a lack of accountability because the process lacks visibility.

Therefore, *the Task Force favors the practice adopted by some senators and states of employing bipartisan nominating commissions that screen and recommend possible nominees for openings in the state and lower federal courts.* To the extent that judicial nominating commissions are politically balanced and include leaders in state and local bar associations, they also may contribute to recruiting high-caliber judges for the federal bench.

At a minimum, confirmation hearings on nominees for the lower courts should be announced in advance with notices in appropriate legal newspapers and the periodicals of state and local bar associations. In addition, the Task Force is in general agreement that the Senate's ad-

vice and consent function under the Constitution could be made more effective were a subcommittee to conduct open hearings in the locale in which a nominee would be seated on the federal bench.

Notices of nominations and hearings should be published and invitations to appear issued to all relevant state and local bar associations. If a nominee's sponsoring senator or a representative of the Department of Justice wishes to offer testimony, he should be heard as well. The subcommittee would then report its findings and recommendations to the full committee.

Such a change would go a long way toward having the Senate give serious rather than cursory consideration to the qualifications and backgrounds of judicial nominees. Although this change could expose the appointment process to greater pressure from special-interest-group politics, it would give the process greater visibility and accountability. It would also reduce the risk of "cronyism," thereby enhancing public respect for those serving on the federal bench.

*The Task Force believes that the fundamental problem with the confirmation process for Supreme Court nominees is just the opposite of that for lower-court nominees: it is too visible and attracts too much publicity.** In some cases, such as the nominations of Louis Brandeis,

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* *Joseph A. Califano, Jr., dissents:* I disagree with the conclusions of the Task Force Report that the confirmation process for Supreme Court nominees is too visible and attracts too much publicity. I also disagree with the conclusion that Supreme Court nominees should no longer be expected to appear as witnesses during the Senate Judiciary Committee hearings on confirmation. Accordingly, I dissent from most of the discussion and other conclusions in the Task Force discussion of the confirmation process for Supreme Court nominees.

Much of the Supreme Court portion of the Task Force report is a thinly tailored argument to repeal the First Amendment to the Constitution as it might apply to hearings on Supreme Court nominees. The public scrutiny of Supreme Court nominees during their testimony before the Senate Judiciary Committee and such scrutiny of the testimony of other witnesses before the committee are essential in our society.

Each of the 9 members of the Supreme Court has far more power than any one of the 100 senators and certainly any one of the 435 representatives. Each Supreme Court nominee should be subjected to widespread public scrutiny before confirmation. This is of the essence in a free society in which one of the branches exercises an enormous amount of power—indeed, final power in some matters—with respect to the other two branches and to the people of the country.