

CENTER for JUDICIAL ACCOUNTABILITY, INC.

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Elena Ruth Sassower, Coordinator

BY FAX: 212-714-5548 (12 pages)

BY E-MAIL: stephanie.genkin@turner.com

November 12, 2002

Lou Dobbs/CNN

ATT: Stephanie Genkin [Tel: 212-714-5800]

RE: Federal Judicial Selection

Dear Ms. Genkin

Thank you for your invitation to provide informed non-partisan comment on federal judicial selection. Hopefully, next time you phone I will not be up against a court deadline and will be available for an interview.

As discussed, our non-partisan, non-profit citizens' organization, Center for Judicial Accountability, Inc. (CJA), has over a decade of experience working on issues of federal judicial selection, exploding commonly-held myths and assumptions. During this period, we have documented the gross deficiencies of both the pre-nomination and post-nomination screening processes, which have not only failed to adequately investigate the qualifications of candidates, but have actually screened-out disqualifying information. Reflecting our early work is the enclosed copy of our Letter to the Editor, "*Untrustworthy Ratings?*", published in the July 17, 1992 New York Times.

Most recently summarizing our experience is CJA's July 3, 2001 letter to Senator Charles Schumer, Chairman of the Senate Judiciary Committee's Courts Subcommittee, submitted in connection with a Subcommittee hearing on the role of ideology in judicial confirmations. A copy of the 18-page letter, sent, *inter alia*, to every member of the Senate Judiciary Committee, to the Senate Majority and Minority Leaders, and to President Bush, is attached by e-mail. Only from President Bush did we receive a response.

Insofar as the Senate Judiciary Committee's role, our July 3, 2001 letter stated (at p. 3):

"...except when the Senate Judiciary Committee is searching for some non-ideological 'hook' on which to hang an ideologically-objectionable nominee – the Committee cares little, if at all,

about scrutinizing the qualifications of the judicial nominees it is confirming. Indeed, the Committee wilfully disregards incontrovertible proof of a nominee's unfitness, as likewise, of the gross deficiencies of the pre-nomination federal judicial screening process that produced him.

The Senate Judiciary Committee's failure to discharge its duty to investigate the qualifications of judicial nominees – notwithstanding its self-promoting pretenses to the contrary – has been powerfully chronicled in the 1986 Common Cause study, Assembly-Line Approval – which made a list of salutary recommendations, most of which appear to be unimplemented today. Other studies, also with unimplemented salutary recommendations, have included the 1988 Report of the Twentieth Century Task Force on Judicial Selection, entitled Judicial Roulette, with a chapter entitled '*Senate Confirmation: A Rubber Stamp?*', as well as the 1975 book by The Ralph Nader Congress Project, The Judiciary Committees, with a chapter entitled '*Judicial Nominations: Whither 'Advice and Consent'?*'. These are important resources for the further hearings that your prefatory statement announced would be 'examin[ing] in detail several other important issues related to the judicial nominating process'[]'. (emphases in the original).

As discussed, enclosed are the completely non-partisan recommendations from the Common Cause study (pp. 4-5), as well as from the Twentieth Century Fund (pp. 7-8). It is now more than six years since CJA undertook to highlight the importance of these recommendations and to build a non-partisan coalition of organizations and entities to advance them. This includes reaching out to those organizations and entities whose names and phone numbers I provided you: Alliance for Justice; Free Congress Foundation; the American Bar Association (and its Justice Center affiliates, such as American Judicature Society); and the Constitution Project.

It would be a great public service if, as part of Mr. Dobbs' exploration of federal judicial selection, he would ascertain the views of his guests as to each of these specific recommendations and verify which have been implemented, when and in what manner. This would include whether such implementation is reflected by any written document.

Stephanie Genkin/Lou Dobbs

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November 12, 2002

Thank you.

Yours for a quality judiciary,

A handwritten signature in black ink, appearing to read "Elena Ruth Sassower", with a long horizontal flourish extending to the right.

ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc. (CJA)

Enclosures: including CJA's informational brochure

Subj: **federal judicial selection**
Date: 11/12/02 8:59:52 AM Eastern Standard Time
From: Judgewatchers
To: stephanie.genkin@turner.com
File: **11-12-02-cnn-genkin.ZIP** (29767 bytes) DL Time (115200 bps): < 1 minute

TO: Stephanie Genkin
CNN: Lou Dobbs

FROM: Elena Ruth Sassower, Coordinator
Center for Judicial Accountability, Inc.

RE: Federal Judicial Selection

DATE: November 12, 2002

Attached is my previously faxed 3-page letter to you, along with the indicated 18-page letter to Senator Charles Schumer, Chairman of the Senate Judiciary Committee's Courts Subcommittee.

As it appears from my fax receipt that only 11 of the 12 pages I faxed to you were transmitted, I would be pleased to send you the missing page, if you call and indicate which one it is.

Regards.

TRANSMISSION VERIFICATION REPORT

TIME : 11/12/2002 08:47

NAME : CJA

FAX : 9144284994

TEL : 9144211200

DATE, TIME	11/12 08:40
FAX NO./NAME	12127145548
DURATION	00:07:24
PAGE(S)	11
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JUDICIAL ROULETTE

**Report of the Twentieth Century Fund
Task Force on Judicial Selection**

Background Paper by David M. O'Brien

PP Priority Press Publications/New York/1988

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,

** 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.

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ASSEMBLY-LINE APPROVAL:

*A Common Cause Study of Senate Confirmation
of Federal Judges*

by Michal Freedman

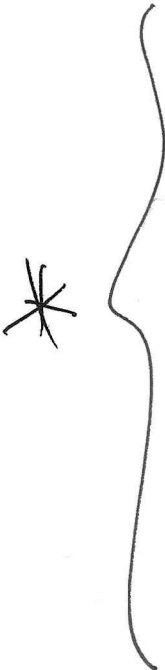
January 1986



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:

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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.