ASSEMBLY-LINE APPROVAL:

A Common Cause Study of Senate Confirmation of Federal Judges

by Michal Freedman

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EXECUTIVE SUMMARY

Eight years ago Common Cause studied the Senate's review of Presidential nominations to the executive branch. That review, entitled The Senate Rubberstamp Machine, found that "Presidential nominees are hastily considered in an extremely comfortable atmosphere without the benefit of a full record or tough scrutiny." Unfortunately, many of the problems that existed then still exist today. Most alarmingly, they exist in the Senate's review of nominees to serve lifetime appointments as federal judges.

By the end of his second term, President Reagan is expected to have named as many as 400 judges, more than half of the federal judiciary, and more than any other President has appointed. Under the "Advice and Consent" clause of the Constitution, the Senate shares responsibility for each of these appointments.

This is a responsibility that should not be taken lightly, in deference to the President. Judges are not appointed to serve the President, but to direct a separate, equal, and independent branch of government. They serve for life, deciding cases long after the Presidents who nominated them have left office.

In fact, however, in recent years the Senate rarely has given serious scrutiny to judicial nominees. Some Republican Senators closely aligned with President Reagan have pushed to keep the confirmation process moving, as though that were the

highest priority. Other Republicans and Democrats generally have gone along.

This report examines the Senate's recent practices for reviewing judicial nominees, describes deficiencies of the review process and recommends ways to improve it. The Appendix sets forth a case study of the Judiciary Committee's review of one appeals court nominee, which illustrates many of the weaknesses that have characterized the process. Our findings and conclusions are based on an analysis of hearing and executive session transcripts, Senate Judiciary Committee calendars, and interviews with Senate Judiciary Committee staff and others who have participated in the judicial confirmation process.

For the most part, the Senate has treated the confirmation of federal judges as a passive exercise, where consent is given in deference to the President. The Judiciary Committee, which has been delegated primary responsibility for evaluating judicial nominees, has typically engaged in only a perfunctory review of them. It has devoted little energy and few resources to the task of judicial screening. The Committee has relied heavily on the American Bar Association's simple categorical rating of a nominee, although the ABA usually provides no indication of the scope of its investigation or the basis for its evaluation. The Committee's hearings on judicial nominees have been brief, poorly attended and frequently scheduled soon after the nomination, with little information available. They are, as one Committee staffer said, "As pro forma as pro forma can be." The Committee largely has shifted the burden of investigating nominees to outside

groups and individuals, but has made no particular effort to involve these groups, has given them inadequate notice of hearing dates, has failed to pursue aggressively information they provide, and has discouraged critical information by subjecting witnesses to harsh examination -- sometimes harsher than for the nominees themselves.

The Committee has no affirmative standards for confirmation. It seems willing to endorse a nominee unless charges of criminal or flagrantly unethical behavior are proved.

The Committee frequently fails to resolve even those questions which are raised concerning a nominee. When controversial issues have arisen, Chairman Strom Thurmond (R-SC) has been reluctant to schedule additional hearings or allow additional time for investigations, acting more as the administration's agent for expedited processing than as the advocate for an independent Senate review. The Committee typically has filed no report on its deliberations for the benefit of the full Senate, even if controversial issues have been raised about a particular nominee.

The case study in the Appendix of the confirmation of Alex Kozinski to the Ninth Circuit Court of Appeals illustrates the Senate Judiciary Committee's failure to review carefully nominees to the federal bench. Although the Senate Judiciary Committee unanimously approved the Kozinski nomination, the full Senate confirmed him by a vote of only 54-43, the smallest confirmation vote for a federal judge in many years.

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.

ASSEMBLY-LINE APPROVAL:

A Common Cause Study of Senate Confirmation of Federal Judges

Eight years ago Common Cause studied the Senate's review of Presidential nominations to the executive branch. That review, entitled The Senate Rubberstamp Machine, found that "Presidential nominees are hastily considered in an extremely comfortable atmosphere without the benefit of a full record or tough scrutiny." It urged a series of procedural reforms to encourage informed Senate judgments on Presidential nominees.[1] Unfortunately, many of the problems that existed then still exist today. Most alarmingly, they exist in the Senate's review of nominees to serve lifetime appointments as federal judges.

The federal judiciary is currently composed of nearly 750 district and appeals court judges. By the end of his second term, President Reagan is expected to have named as many as 400 judges, more than half of the federal judiciary, and more than any other President has appointed.

Judgeships, however, are not exclusively the President's to dispense. Under the "Advice and Consent" clause of the Constitution, the Senate shares responsibility for each of these appointments.

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[1] These included development of a full public record on nominees, adequate time to deliberate, and explicit affirmative standards for confirmation.

This is a responsibility that should not be taken lightly, in deference to the President. Judges are not appointed to serve the President, but to direct a separate, equal, and independent branch of government, with enormous power over our way of life and form of government. They serve for life, deciding cases long after the Presidents who nominated them have left office. Moreover, as Professor Laurence Tribe of Harvard Law School has pointed out, the judiciary is "designed more to check the executive branch than to do its bidding."

Although less in the limelight than the Supreme Court, judges on the federal appeals and district courts decide the overwhelming majority of federal cases. As Senator Charles McC. Mathias, Jr. (R-MD), a member of the Judiciary Committee, has pointed out:

> The decisions of the men and women who serve on the 13 courts of appeals stand in all but the most exceptional cases as the law of the land. Last year the circuit judges decided nearly 29,000 cases and fewer than 1 percent of these will ever be reviewed by the Supreme Court. As a practical matter, it is upon the judges of the courts of appeals that Americans must depend for fair, evenhanded and impartial justice.
> (131 Cong. Rec. S6336 (May 23, 1984)).

The Senate's responsibility to review carefully the qualifications of nominees to lifetime appointments to the judiciary is especially important compared to its duties to review the cabinet and other political appointees of the President. As Senator Arlen Specter, a Republican member of the Judiciary Committee from Pennsylvania, has said:

> If we are talking about the confirmation of the nomination of a Cabinet officer, someone to serve on the team at the pleasure of the Chief Executive, to carry out his policies, to be terminated as the Chief Executive sees fit, that is

> one thing. But where we have someone as a member of the judiciary . . . we have a different and a much higher line of responsibility in the discharge of our constitutional duty for advice and consent.
> (131 Cong. Rec. S6330 (May 23, 1984)).

In fact, however, in recent years the Senate rarely has given serious scrutiny to judicial nominees. Some Republican Senators closely aligned with President Reagan have pushed to keep the confirmation process moving, as though that were the highest priority. Other Republicans and Democrats generally have gone along.

This report examines the Senate's recent practices for reviewing judicial nominees. It describes the deficiencies of the review process. In its conclusion the report discusses recommendations for improving Senate review of judicial nominees. The Appendix sets forth a case study of the Judiciary Committee's review of an appeals court nominee, which vividly illustrates many of the weaknesses that have characterized the process. Our findings and conclusions are based on an analysis of hearing and executive session transcripts,[2] Senate Judiciary Committee calendars, and interviews with 11 Senate Judiciary Committee staff and more than 20 other participants in the judicial confirmation process.

For the most part, the Senate has treated the appointment of federal judges as a passive exercise, where consent is given in deference to the President. The Senate Judiciary Committee,

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[2]All quotations from executive session and 1985 hearing transcripts are from uncorrected working transcripts.

which has been delegated primary responsibility for evaluating judicial nominees, has typically engaged in only a perfunctory review of each nominee. The Committee has devoted little energy and few resources to the task of judicial screening. It has relied heavily on the American Bar Association's simple categorical rating, although the ABA usually provides no indication of the scope of its investigation or the basis for its evaluation. Hearings on judicial nominees have been brief, poorly attended and frequently scheduled soon after the nomination, with little information available. The Committee largely has shifted the burden of investigating nominees to outside groups and individuals. At the same time the Committee has made no particular effort to involve these groups, has given them inadequate notice of hearing dates, has failed to pursue aggressively information they provide, and has discouraged individuals from offering critical information by subjecting witnesses to harsh questioning -- sometimes harsher than for the nominees themselves.

The Committee has no affirmative standards for confirmation. The Committee seems willing to endorse any nomination unless charges of criminal or flagrantly unethical behavior are proved. Although the importance of a nominee's judicial temperament is often stressed, it remains a concept without definition.

The Committee frequently fails to resolve even those questions that are raised concerning a nominee. When controversial issues have arisen, Chairman Strom Thurmond (R-SC) has been reluctant to provide additional hearings or time for investigations, acting more as the administration's agent for

expedited processing than the advocate for an independent Senate review. The Committee typically has filed no Committee report that would help inform the full Senate before voting on a nominee. Despite its clear constitutional responsibility, the Senate has demonstrated, as Senator William Proxmire (D-WI) commented, a "bashful feebleness in challenging a President in this area." (131 Cong. Rec. S12296 (September 30, 1985)).

An Overview of the Confirmation Process

How it Begins

The confirmation process for a nominee starts when the President files the formal nomination with the Senate. The administration also sends the Senate the American Bar Association's simple categorical rating of the nominee and the nominee's FBI report. Senator Strom Thurmond (R-SC), Chairman of the Judiciary Committee, which receives the nomination papers, sends out a Committee questionnaire to the nominee. Because nominees often have advance copies, the questionnaire is frequently completed and returned to the Committee the next day.

Until an agreement reached by the Committee on December 5, 1985, which is intended to improve the process, there were no agreed upon time periods between the administration's formal submisssion of a nomination and the date of the Committee's hearing on that nominee or between the receipt of the nominee's questionnaire and the hearing. In a November 30, 1985, story the

Congressional Quarterly reported that "Thurmond has moved judges through the hearing process faster than any Committee chairman in the past 20 years, according to the Congressional Research Service." The Quarterly went on to say that the time between nomination and hearing had averaged 18.5 days during 1985. Under the new agreement, there will be at least three weeks between the time the questionnaire is received and a hearing is held except in controversial cases (when it could be much longer).[3]

The Committee has few investigators to review the backgrounds of nominees. At present the Republicans have four full-time investigators, and the Democrats only two.[4] One of the minority staff assumed full-time responsibility for reviewing judicial nominations only since late summer 1985, and the other, late in 1985. In addition, counsel to several Senators contribute some time to review of certain nominees.

Whereas in past years staff reportedly engaged in many cooperative bipartisan efforts, such as field investigations, this kind of collaboration is rare today. Moreover, unlike the period during the 96th Congress, when, according to Senator Biden (D-DE), roughly one in five nominees was subject to a field

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[3]This means that since, as indicated above, the questionnaire is usually returned one day after the nomination is received, the agreement provides in most cases 22 days from nomination to hearing. This is not significantly longer than the 18.5 days averaged before the Committee agreement.

[4]Neither of the Democratic investigators has an accounting background that would permit an expert evaluation of possible financial wrongdoing.

investigation,[5] staff recall very few field investigations in the last several years.[6]

The ABA Rating

As noted above, the Judiciary Committee receives a rating of each nominee by the American Bar Association. The ABA's Standing Committee on the Federal Judiciary rates judicial nominees as "exceptionally well-qualified," "well qualified," "qualified," or "unqualified." In borderline cases, the Committee sometimes issues a mixed rating, with a majority finding the nominee qualified and a minority, unqualified. The ABA typically issues the rating without explanation -- it is accompanied by no discussion of the ABA's basis for reaching the particular evaluation, no discussion of what, if any, issues were difficult or controversial, and no discussion of the scope of the investigation, such as the kinds of lawyers, organizations, and groups surveyed.

Despite these shortcomings, the Judiciary Committee relies substantially on the ABA rating. As Senator Specter has said:

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[5]The minority has recently undertaken a field investigation of Jeff Sessions, the U.S. Attorney in Mobile, Alabama, who was nominated for a district court seat in Alabama.

[6]Duke Short, chief minority investigator during the 96th Congress, who is currently the Committee's chief majority investigator, said that he recalls only four field investigations of judicial nominees that he was aware of during the 96th Congress, two of which he was involved with jointly with the Democrats.

> It is not possible for this Committee, for members to attend the sessions and really give the kind of attention to these individuals who come before the Committee. I think that many of us place a lot of reliance of what the ABA does. (131 Cong. Rec. S6329 (May 23, 1984)).

And, according to Senator Joseph Biden, the ranking minority member of the Committee:

> Without ABA approval, a nominee has little chance of getting through to confirmation; with ABA approval, the Senate, as a whole, infrequently subjects the qualifications of individual candidates to serious scrutiny. In that sense, the ABA screening has become the essence of the nomination and confirmation process. (Emphasis added.) (30 Cong. Rec. S10207 (Aug. 9, 1984)).

The lack of information on the ABA's evaluation has been troubling to some Senators, particularly where the ABA provides a mixed ""qualified/unqualified"" evaluation, a situation that appears to be occurring more frequently.[7]

Moreover, in recent years the process used by the ABA to judge nominees has been called into question. Doubts about the ABA rating were raised during the confirmation of J. Harvie Wilkinson III in 1984 (discussed below), where the integrity of the ABA process and its immunity from political pressure were called into question. Senate reservations about the ABA also grew as a result of its consideration of the nomination of U. W. Clemon in 1980 to a district court seat in Alabama. In the course of testifying against Clemon, the ABA laid out its

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[7] According to a November 26, 1985, New York Times story, five of 10 nominees considered by the Committee in the previous week had received a mixed "qualified/unqualified" rating.

findings. But during the hearings on the nominee, Senators uncovered at least one error in the ABA's findings and questioned several of its conclusions. Responding to the growing criticism of its work, the chairman of the ABA Committee said:

> I think . . . there is a misunderstanding by certain people as to what our role really is. We have never taken the position that we are the final arbiters; we are nothing of the sort.
> All we are is helpers to the Attorney General and to this Senate Judiciary Committee, which has other tools to do other jobs.

Despite the ABA's disclaimer, the Judiciary Committee and other Senators continue to rely heavily on the ABA rating. The Judiciary Committee, in effect, has largely delegated its review responsibilities to the ABA, without ensuring some accountability for the ABA's determinations.

Bringing in Outside Groups

When it receives notice of a nomination, the Judiciary Committee typically does not notify relevant outside groups who might have an interest in the nomination and be able to provide additional information. One Committee staffer explained this was unnecessary because "everyone who should know does know."

But there is reason to believe that this is not true, and certainly many groups that could be helpful do not learn of nominations on a timely basis.[8] One Committee staffer stated

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[8]In a quick check on the accuracy of the theory that Senate notification would be redundant, Common Cause called three state bar associations in states covered by the Sixth Circuit, where,
(Footnote Continued)

that the staff had heard only from groups in Washington, D.C. and had never heard from groups in the states and communities where nominees were working -- where there presumably would be a wealth of firsthand experience with the nominees.

Early notice is particularly important because, as Committee staff have readily admitted, the Committee depends heavily on outside groups to identify which nominees are controversial and require the closest scrutiny.

The Hearing Process

Hearings on judicial nominees have been poorly attended and short. Nominees are usually considered in group proceedings, with as many as six or even seven nominees at a time. The new agreement of the Committee allows as many as six judicial nominees at each hearing.

According to one Committee staffer, hearings are "as pro forma as pro forma can be." The brief, poorly attended, perfunctory nature of the hearings reflects a lack of serious concern for and attention to the fitness of the judicial nominees coming before the Committee. This has been true for years.

While majority and minority Senators both have an obligation to look critically at judicial nominees, the minority members

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(Footnote Continued)
at the time of the calls, two nominees to the Court of Appeals were before the Senate. The director of one of the state bars, presumably someone "who should know," had not heard of the nominations. As a further matter of some concern, both nominees were approved by the Committee in less than three weeks after their nominations.

typically have raised issues about nominees during this administration, to the extent issues have been raised at all. As a practical matter, therefore, it is particularly revealing to look at the participation by minority (Democratic) Senators in the Committee hearings.

In 1981, hearings were held on 41 judicial nominees, eight for appellate court nominees[9] and 33 for district court seats. For 29 of those nominees no more than two of the 18 Committee members were present at the hearings. Only once, in all of 1981, at a hearing, did a minority Senator personally take the time to ask a nominee questions and those questions were asked by Senator Dennis DeConcini (D-AZ) who sat alone and acted as chair of the Judiciary Committee on that day. By our estimates, the total time spent on questioning the eight appellate nominees was less than two hours. On September 15, 1981, the Committee managed to rush through six district court nominees in one hearing, questioning them a total of about 18 minutes.

The situation did not change significantly in subsequent years. In 1982, with hearings on 47 nominees, minority Senators asked questions of only three nominees and failed to ask any questions of nine of the 11 circuit court nominees. The approximate cumulative time for questioning these 11 nominees at hearings was about two hours.

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[9]The circuit court statistics do not include federal circuit nominees.

In 1983, with hearings on 34 nominees, all but three were attended by only one or two Senators from the Committee. Minority Senators asked questions of only one nominee and the total time devoted to questioning the five circuit court nominees was less than one hour.

The next year, 1984, the story was essentially repeated, but the pace stepped up, with the Committee holding hearings for 50 nominees. Of the 10 circuit court nominees, minority Senators questioned only one, J. Harvie Wilkinson III, whose nomination was highly controversial.

In 1985, participation at hearings changed, but for the most part only superficially. Attendance has been higher, but the increase does not indicate any more careful inquiry into nominees' qualifications. The newly elected Republican Senator from Kentucky, Mitch McConnell, appeared at virtually every, if not every, hearing. His role was to congratulate the nominee on his or her nomination, rather than to participate substantively. Senator Paul Simon (D-IL), a freshman Senator selected to monitor judicial nominees for the minority, began regularly attending hearings, but at least until the fall, he largely limited his participation to two standard questions.[10]

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[10]In an apparently indirect attempt to determine whether the nominee has been subject to an "ideological litmus test," as has been alleged to occur, Senator Simon asks the nominee whether he or she has been asked anything "improper" by anyone in the administration or the Senate. Simon also asks what the nominee has done to serve the disadvantaged.

Questioning at the Hearings

The sparse attendance at these hearings might not be so troubling if the questioning of the nominees were less ineffectual. Instead the record typically shows only a few "soft" questions, with little probing of answers. One prominent attorney observing the process commented that the Senators were a "piece of cake" compared to appearing before a judge and that an experienced litigator would have no difficulty fielding such questions. In fact, some of the most intense questioning is reserved for witnesses who come forward with questions or negative information about the nominees.

The confirmation hearing on October 30, 1985, of seven nominees serves as an example of both how delicately nominees are questioned, even when there are serious questions raised, and how differently witnesses are sometimes treated.[11] Senator Simon, the only Senator posing questions to Bobby Ray Baldock, a nominee to the Tenth Circuit, asked about an ACLU lawyer's description of him in the Wall Street Journal as "Death on wheels for civil liberties." Baldock explained that the lawyer had won three of four cases before him, without indicating if these were jury trials, and that to his knowledge no one else had ever said such a thing about him. Senator Simon merely responded, "We have all gone through those kinds of experiences."

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[11]In addition, as indicated in the Appendix, witnesses who testified against appeals court nominee Alex Kozinski were aggressively questioned by the Committee.

Senator Simon then asked Baldock to comment on criticism of him by the Tenth Circuit "for the impatient manner in which [he] conducted a criminal trial of an American Indian." Such criticism of a district court judge by an appeals court judge is highly unusual. Yet, Senator Simon, assuring Baldock of his benign intentions, said:

> I guess it is not a fair question to say, was the criticism valid? But any comment that you would have and do you think that you have learned in the process of going through this and let me just add, all of us make mistakes in the process of this life, and whether we are judges or Senators or even the staffs of Senators occasionally make mistakes. Any comments that you have?

Baldock responded that he would probably handle the case differently today and that even though he "was principally concerned with protecting the defendant's rights,. . . it was one of those things that on the record, it appears that just the opposite was coming out."

Apparently Senator Simon was satisfied, as he accepted this explanation at face value and questioned Judge Baldock no further. But presumably if the Committee staff had thoroughly reviewed the basis for the charges against Baldock, Senator Simon would have been in a position to follow up on his questions and establish a clearer picture of Baldock's record on civil liberties. (In view of the questioning of Judge Baldock and the incomplete record that resulted, it is not surprising that the Committee approved him without objection two weeks later.)

The Committee's treatment that same day of the nomination of James Buckley, a former Senator, also showed that the Committee was willing to allow important issues to remain unresolved.

Opposition to Mr. Buckley's immediate confirmation was voiced by Marna Tucker, past president of the D.C. Bar. Her concern centered on the speed with which Mr. Buckley's nomination had proceeded. Because Mr. Buckley had originally been presented as a candidate for a position on the Second Circuit, the ABA had not consulted with the leadership of the District of Columbia bar, as is traditional with nominations to the D.C. Circuit. Despite Ms. Tucker's request, a formal resolution of the D.C. Bar asking for additional time to review the nomination, and past ABA practice, the Committee did not consult leaders of the Bar. On the contrary, Chairman Thurmond questioned Ms. Tucker aggressively about why the lawyers in Washington, D.C., should have any special input in the review of Buckley.

In addition, the New York City Bar had given Mr. Buckley a "not qualified" rating after he had refused to be interviewed by the Bar's screening Committee. Yet when Mr. Buckley testified, no Senator asked him about his refusal to cooperate with the New York City Bar and there is no evidence in the Committee hearing record that the Committee contacted the New York Bar for the basis for its decision.

Reluctance to Hold Additional Hearings

The Judiciary Committee has been reluctant to hold additional hearings on nominees even when questions affecting the fitness of nominees have been raised but remain unresolved. A look at the Committee's handling of the nomination of J. Harvie Wilkinson III, a controversial nominee to the Fourth Circuit,

illustrates the difficulties faced by Senators who would like to explore outstanding issues on a nominee after a hearing has been held.

A hearing was originally held on Wilkinson in November 1983. A second hearing was held in February 1984 after several civil rights groups complained of lack of adequate notice. One focus of the February hearing was the nominee's virtual absence of experience in the practice of law. In addition, Elaine Jones of the NAACP Legal Defense and Educational Fund suggested that there was information that the ABA had moved from an adverse preliminary determination on him to a minimal "qualified" rating after intense lobbying on Wilkinson's behalf.

On March 15, the day the Committee had agreed to vote on Wilkinson, Senator Edward Kennedy (D-MA), who had recently learned of new charges about the lobbying campaign, asked to defer the vote to hear "from the bar association and from the Justice Department, perhaps even Mr. Wilkinson himself." Senator Arlen Specter (R-PA) also joined in the request for a hearing. Chairman Thurmond objected, stating that the nomination had been around since November, that there had been enough time to explore any issues, that they had a letter from the ABA explaining its procedures, that their votes were not dependent on what the ABA did, and that they had given their word to vote. The vote took place, with Senators Kennedy, Metzenbaum (D-OH), Biden, and Specter objecting to the nominee.

In the face of Chairman Thurmond's continued opposition to reviewing the charges in a hearing, the effort to investigate the

alleged lobbying took the form of a campaign to get the full Senate to send the nominee back to Committee for hearings. On May 17, Senators Kennedy, Metzenbaum and Biden wrote a letter to their colleagues stating that the nomination was not ready for action. Their letter stated:

> Numerous requests by several Senators for an additional Judiciary Committee hearing on the nomination to clear up these allegations have been unsuccessful. A proposed hearing on ABA procedures, tentatively scheduled for May 17, 1984, by the Judiciary Subcommittee on Courts, was indefinitely postponed on May 10 to avoid addressing the Wilkinson nomination prior to consideration of the nomination by the full Senate.
> (130 Cong. Rec. S6339 (May 23, 1984)).

On May 23, on the floor, Senator Mathias, a Republican member of the Committee, also made a plea for more hearings:

> Twice since the Judiciary Committee reported this nomination, I have asked our distinguished chairman to schedule 1 additional day of hearings on the nomination of J. Harvie Wilkinson III. I understand that at least six other members of the committee, representing both sides of the aisle, have made similar requests. Regrettably, none of these requests has been granted.
>
> I take this opportunity to urge once more the chairman of the Committee to grant that additional day of hearings. . . .
>
> . . .
>
> [Citizens] are depending on us to give this nominee's qualifications the objective scrutiny and the thorough examination that is required by the Constitution. They are depending on us to resist any temptation to render a verdict before all of the evidence is in.
> (130 Cong. Rec. S6336 (May 23, 1984)).

Senator Specter also spoke at length about the importance of holding additional hearings before the Senate voted. Nonetheless, Chairman Thurmond did not agree to further hearings and on May 24, a motion to recommit the nomination to the Committee was defeated.

On June 4, Senator Kennedy introduced into the record a report by the Washington Post that Wilkinson pressured a black

law student at the law school where he taught to call a black member of the ABA screening committee just before the critical ABA vote. On July 26, Kennedy introduced more materials into the record, decrying "the stonewalling attitude of the Judiciary Committee." He said, "The persistent refusal of the chairman of the Judiciary Committee to hold another hearing on this nomination strongly suggests that the nominee has no satisfactory answers." (130 Cong. Rec. S9271 (July 26, 1984.))

On July 31 Senator Kennedy again went to the floor asking why no hearing had been held. Finally, Senator Thurmond stated on the floor that he would hold another hearing if there would be a "definite agreement to vote at a certain time."

An agreement was reached on August 2 to provide for an additional hearing, which was held on August 7, five months after the original request. (The hearing revealed that Wilkinson had orchestrated an intensive lobbying campaign, after being notified by the Justice Department that his ABA rating was in trouble. It was learned that he successfully urged several prominent people to lobby the members of the ABA Committee on his behalf. Wilkinson was confirmed by the Senate 58-39 on August 9, 1984.)

Reluctance to Provide Additional Time After the Hearings

The time between the Committee hearing and the Committee's vote on a nominee generally has been quite short, often only one day. Additional time has been discouraged, even when the nominees have been before the Committee only for a short time. For example, in the executive session on October 31, 1985, which

followed a day in which hearings were held on seven nominees, including three circuit court nominees, Senator Metzenbaum asked that the vote be deferred one week on the three appeals court nominees. None had been before the Committee more than three weeks and one, James Buckley, for only two weeks. Senator Metzenbaum explained that he had had only a few days notice that James Buckley was coming up and that he thought there should be another hearing. (Moreover, though Senator Metzenbaum did not say so, the focus of Buckley's hearing had been on the requests of the D.C. Bar association for additional time for its members to review the nominee's record.) Chairman Thurmond agreed to the one-week extension but cautioned "there is no use to delay them unless you have got a reason." Remarking on the unfairness of the postponements, Senator Hatch charged that there had been "delay upon delay" and asked "what is it coming to?"

The pressures to push ahead effectively override the occasional protest by a member of the Committee. In the cases of the three circuit court nominees for whom Senator Metzenbaum had asked for more time, no additional hearing was held and all three were approved by the Committee two weeks later. Among them was James Buckley, who was approved on November 14, two days after the D.C. Bar Board of Governors passed a resolution that was hand-delivered to Chairman Thurmond, urging the Committee to delay consideration of Buckley's nomination for 30 days to allow review by members of the D.C. Bar.

The new agreement reached by the Committee on December 5 provides at least one week, and not more than two, between the

hearing and the Committee vote on a nominee, except that more time may be provided in cases of controversial nominees.

The Quickening Pace

As the year 1985 progressed the pace of the Judiciary Committee's review of nominees noticeably quickened. While slowness in itself is certainly no virtue, it is important that there be adequate opportunity to study each nominee carefully. Yet the review process has begun to resemble one of those constantly accelerating assembly-lines in the movies in which the workers have no reasonable opportunity to keep up. Between February and August 1985, an average of six district court nominees were referred to the Committee each month; in September there were 10, and in October, 14. While no more than three appellate court nominees had been referred to the Committee in any one month through September, in October there were 7. Prior to October there were hearings on an average of about seven nominees a month, in October there were hearings on 16.[12]

The Lack of Standards

At present the Judiciary Committee regularly endorses presidential nominees to judicial posts without seriously

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[12]Although the number of new nominees and hearings did not remain as high in November as October, the pace remained fast. In November, a month cut short by a one week congressional recess, hearings on 11 nominees were held and hearings scheduled for three other nominees were postponed at the last minute.

inquiring into the nominees' competence, impartiality, temperament, and other qualifications. In effect, a nominee is presumed qualified unless there is strong evidence that the nominee has violated criminal laws or serious financial ethical standards.

As one member of the Judiciary Committee in 1970 reportedly argued back then, commenting on the nomination of Harold Carswell to the Supreme Court, the Senate has no right to "withhold its advice and consent in the absence of clear evidence that the nominee is not qualified." More recently, reflecting a similar perspective, Senator Dennis DeConcini (D-AZ) said: "I believe that if an individual is competent and law-abiding, he or she ought to be confirmed."

Some Committee staff have stated that the only solid grounds for opposition to a nominee are criminality or serious financial ethics problems. Senator Metzenbaum said on the Senate floor before the vote on Alex Kozinski, the controversial Ninth Circuit nominee discussed in the Appendix: "Sometimes we think that unless we can find that the nominee of the President is guilty of some heinous crime we ought to confirm him." (131 Cong. Rec. S14929 (November 6, 1985)). Senator Carl Levin (D-MI) concurred that such an attitude was wrong:

> I am concerned that our view of our role in this process has been narrowed over the years, so that our standards for arriving at a decision have been minimized. It has been suggested that it requires, today, actual criminality or serious unethical conduct, explicitly proved, in order to deny the Senate's consent. If that is in fact the case, then we urgently need to revisit those standards and re-evaluate our role in this process.
> (131 Cong. Rec. S14932 (November 6, 1985)).

Although the Committee would remain ineffective unless assisted by sufficient staff to conduct its own inquiries, the process could be improved and the Senate would come closer to discharging its constitutional responsibility if it were to make more effort to identify and focus attention upon qualifications that a nominee should have for holding a trial or appellate court seat.

This has been done by some bar associations. Although the ABA's discussions of qualifications is limited, it at least states explicitly that it evaluates candidates based on their competence, integrity and judicial temperament. At least one local bar organization, the Chicago Bar Association, provides an extensive discussion of what is meant by the criteria it uses. In its 13-page "Guidelines for Judicial Selection," for example, it discusses the indicia of "judicial temperament," including qualities such as open-mindedness and compassion. It also discusses qualities implying an absence of such temperament, such as arrogance and arbitrariness, and it elaborates on the circumstances in which these qualities would be manifest and their implications for judicial performance.

Recent Developments

As the confirmation of Alex Kozinski to the Ninth Circuit Court of Appeals illustrates (see Appendix), the Senate Judiciary Committee fails to review carefully nominees to the federal bench. Although the Senate Judiciary Committee unanimously approved the Kozinski nomination, the full Senate confirmed him by a vote of only 54-43, the smallest confirmation vote for a federal judge in many years. By following up on the information presented to the Committee, Senator Levin, who is not a member of the Judiciary Committee, played the decisive role in making the case against Kozinski.

Six Democratic members of the Judiciary Committee, who had approved Kozinski after rejecting pleas for additional hearings, opposed Kozinski on the Senate floor when forced to confront the results of Senator Levin's intensive review of the Kozinski record.

The final Senate vote on the Kozinski nomination embarrassed the Democratic members on the Judiciary Committee. Senator Biden, ranking Democrat, pressed for changes to improve the review process. The resulting Committee agreement, referred to earlier, established:

o that there will be at least three weeks between the Committee's receipt of the nominee's questionnaire and the holding of a hearing;

o that there will be at least one week and not more than two weeks between the Committee hearing and vote on each nominee;

o that there will be no time limits for considering nominees whom Democrats single out as the most controversial;

o that no more than six nominees will be considered together at a hearing or Committee vote;[13]

o that questions submitted by Democratic members of the Committee will be added to the Committee's questionnaire; and

o that the nominees' financial disclosure statements will be publicly available.

The degree to which this agreement improves the confirmation process will depend to a great extent on the treatment of controversial nominees. As this part of the agreement is laid out in general terms, its implementation will depend on the resources, industriousness, and courage of Committee members to identify and raise questions about potentially controversial candidates and on the good faith of the rest of the Committee to permit continued investigation of such nominees.

The plan, however, does little by itself 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. For example, allowing hearings to continue to treat six nominees at a time encourages perfunctory review of nominees.

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[13]It was agreed that this would be subject to reconsideration in May 1986.

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.

* * * *

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.

APPENDIX

A Case Study: The Confirmation of Alex Kozinski

A close look at the course of the Kozinski confirmation highlights the Senate Judiciary Committee's failure to fulfill its constitutional responsibilities. The case study demonstrates that instead of determining independently whether a nominee has the qualifications to merit lifetime appointment as a federal judge, the Committee presumes that the nominee is fit to serve. Moreover, the Committee shifts the burden of investigating nominees from itself to outside groups. Then, unless outside groups can rapidly demonstrate definitively that a nominee is not qualified, the Committee approves the nomination.

The nomination of Alex Kozinski to the Ninth Circuit Court of Appeals was approved unanimously by the Judiciary Committee. In the full Senate, though he was confirmed, more votes were cast against him than against any other judicial nominee in years. The extraordinary turn-about was due to the perseverance of outside groups and individuals[15] and of one Senator (and his staff) who does not serve on the Judiciary Committee.

On June 5, 1985, the Senate Judiciary Committee received the nomination of Alex Kozinski to serve as a United States Court of Appeals judge for the Ninth Circuit. Kozinski, who is only 35,

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[15]While, as indicated below, the Government Accountablity Project developed the bulk of the information on Kozinski, a number of other groups, many of which took no position on Kozinski, put ongoing pressure on the Committee and the Senate to resolve the issues raised about Kozinski. Common Cause was among those groups.

was Chief Judge of the U.S. Court of Claims, a position he had held since 1982 when he left the Office of Special Counsel (OSC) of the Merit Systems Protection Board. For 14 months in 1981 and 1982 Kozinski had been the head of OSC, an office established to protect federal whistleblowers (employees who reveal government abuses) against reprisal.

The Committee was on notice from the outset that there were questions about Kozinski's fitness for office. The ABA's Standing Committee on the Federal Judiciary had given Kozinski a mixed "qualified/unqualified" rating, an unusually low evaluation. As has become customary, the ABA conclusion was transmitted to the Judiciary Committee without explanation.

Also, Kozinski's tenure as head of the OSC had been controversial. Allegations were made that he subverted the mandate of the OSC, transforming it into an office more interested in helping agency managers than protecting employees from unfair sanctions. A 1982 newspaper column, for example, stated: "Employees who take whistle-blowing disclosures to the special counsel find it almost impossible to get results." The column quoted the resignation letter of Jesse James, Jr., assistant special counsel for prosecution under Kozinski, who wrote: "We no longer provide any protection to federal employees from merit system violations and abuses."

It was also publicly charged during Kozinski's tenure at the OSC that he treated his staff unfairly and abusively. A press account covered James' resignation from the OSC, when he wrote: "The Special Counsel appears to receive some type of sadistic

pleasure out of forcing employees to resign or causing employees great mental anguish."

When the Committee received notice of Kozinski's nomination on June 5, it did not invite relevant outside groups to provide information. The Government Accountability Project (GAP), the whistleblower-support organization that ultimately developed the bulk of the information on Kozinski, learned of the nomination in late June. Thomas Devine, Legal Director of GAP, was invited to testify on July 12, only five days before the Kozinski hearing. Of the 18 Committee members, only one was present for GAP's testimony. The hearing, which lasted less than three hours, covered five other judicial nominees, including two other circuit court nominees, in addition to Kozinski.

Thomas Devine's testimony focused on Kozinski policies that undercut protection of employee rights and his abuse of staff, reporting allegations that 40 percent of agency employees resigned in the first ten months of his term.

Following the hearing, former OSC staff, government whistleblowers, and private attorneys familiar with the Kozinski-led OSC asked to testify to dispute or respond to Kozinski's testimony. Among them were Jesse James, former assistant special counsel for prosecution, whose letter requested an opportunity to "provide testimony about Mr. Kozinski's treatment of employees and complainants while he served as Special Counsel," which James thought would be "very relevant to Mr. Kozinski's judicial temperament as a judge." James received no response from anyone on the Committee.

Another request came from Joseph Gebhardt of the law firm of Dobrovir and Gebhardt, who explained in his request

> I carefully followed [Kozinski's] actions as Special Counsel because I had first proposed creation of that Office ... and had been involved in developing the legislation that became the Civil Service Reform Act. I also had dealings with the Office's staff as a private attorney representing federal employees during Mr. Kozinski's tenure, learning firsthand the antipathy of that Office towards the employees whom it was Mr. Kozinski's duty to protect against prohibited personnel practices.

Gebhardt received no response from the Committee.

Billie Pirner Garde, a former Assistant District Office Manager of an Oklahoma Census office who blew the whistle on "a major campaign of sexual harassment against the women in the census office," requested the opportunity to testify "that Kozinski did absolutely nothing to eradicate the causes of sexual harassment in the Bureau of the Census, notwithstanding the fact that a Department of Commerce Inspector General investigation confirmed massive sexual harassment in a district census office." She received no response from the Committee.

Another request came from Ernest Hadley, a lawyer in a firm specializing in civil service law. His letter stated that he had "devoted considerable energies to researching the activities of the Office of the Special Counsel" and that he had found that "Judge Kozinski demonstrated an unwillingness to carry out the statutory mandates of the Office and, in fact, succeeded in making the Office an effective weapon of management against federal employees who chose to exercise their First Amendment rights." Again, there was no response from the Committee.

Many others, including the General Counsel of the American Federation of Government Employees, offered to testify. None was provided the opportunity to testify.

Instead, the Committee agreed in its executive session meeting on July 25 only to postpone the vote until after Congress' August recess, acceding to the requests of some Senators who had unanswered questions. Even this was not agreed to readily. Senator Orrin Hatch (R-UT) objected, withdrawing his objection only after Senator Paul Simon (D-IL) assured the Committee that there would be a vote on Kozinski the first meeting in September. Even though only eight days had elapsed since Kozinski's hearing, Hatch concluded: "I just think that we are dragging our feet on these judges and it is terrible."

The Committee did not act to resolve the questions about Kozinski; the responsibility fell instead to GAP and other private groups. As a result of the activities of these private organizations, charges were made that Kozinski repeatedly misled or deceived the Committee in testifying about his performance as Special Counsel. GAP presented the results of a survey of ten staff employed at the OSC under Kozinski who were asked to comment on the accuracy of his testimony. GAP found that "respondents answered on 137 occasions that [Kozinski's] testimony was inaccurate, compared with 9 instances where anyone believed his statements were accurate." For example, in response to Kozinski's testimony that he emphasized positive reinforcement of the staff and gave 50 awards and promotions to a staff of only

86 in May-June 1982, near the end of his tenure, one employee-respondent commented:

> "The notorious "awards" -- mass "awards," were made in May 1982, in response to months of bad press about low morale in OSC because of Kozinski. It was seen as a last ditch move by him to try to save his own job, to try and make himself look better in the eyes of Congress and the public."

Jesse James, one of the respondents, questioned Kozinski's lapse of memory when asked by the Committee about the case of a coal mine inspector at the Department of Interior. James alleged that Kozinski coached agency managers from a mining safety office in how to remove an inspector employee who was making disclosures to the press, even though Kozinski was officially charged with protecting employees against such reprisals.

In a further letter to the Committee Jesse James disputed Kozinski's testimony to the Committee:

> Mr. Kozinski's inaccurate statements include his assertion that he had a very fine working relationship with the OSC staff . . . ; [that] he engaged in a new policy of combating sexual harassment, in the workplace; [that] he had an increased emphasis on resolving cases through settlement rather than through litigation; that he caused or directed investigators to look at complaints very thoroughly and not to leave any possibilities of a prohibited personnel practice uninstructed; [and] that he brought every case he had . . . ."

On September 6, GAP, public interest lawyers, former OSC staff, civil rights advocates, and the Committee Against Government Waste (a group interested in protecting whistleblowers against reprisal because it opposes military waste and procurement fraud) held a press conference urging additional hearings on the Kozinski nomination. The Ad Hoc Committee on the Kozinski Nomination, as they called themselves, discussed how "Mr. Kozinski not only neutralized his own staff at the Office of

Special Counsel; [but] went out of his way to assist managers throughout the federal government who likewise wanted to blunt legitimate expressions of opinion from career employees."

A September 10 submission to the Judiciary Committee from GAP included an affidavit from a prosecuting attorney at the OSC under Kozinski disputing Kozinski's testimony to the Committee that he vigorously worked to combat sexual harassment in the federal workplace. She described a case that she concluded was so well-substantiated (40 supporting affidavits and the unanimous support of attorneys working on it) that Kozinski's decision not to prosecute "made clear to the Office staff that if this case was closed without action, indeed no federal employee's sexual harassment case would ever stand a snowball's chance of being prosecuted by Special Counsel Kozinski."

The submission also included a letter from Congresswoman Patricia Schroeder (D-CO) to Chairman Thurmond (R-SC) that corrected Kozinski's testimony indicating that she had unfairly presented statistics on his record at the OSC without consulting him, when, as she explained, he provided the statistics to her. She also stated:

> "The fact that the Office of Special Counsel, under the leadership of Mr. Kozinski, had failed to utilize its statutory powers, together with the enormous number of complaints which I received from employees who tried to make use of the Office, convinced me to introduce legislation to abolish the Office of Special Counsel."

Other materials submitted described two cases, Saldana, an unsubstantiated Hatch Act action against a Democrat that was authorized by Kozinski at OSC, and In re Judicial Complaint, a case in which Kozinski dismissed a judicial misconduct complaint

at the Court of Claims as frivolous and then imposed sanctions without notice or a hearing against the attorneys filing the complaint. (Elaine Mittleman, an attorney in private practice, later presented the Committee with a detailed memorandum seriously questioning the ethical propriety of Kozinski's decision in the judicial misconduct case.)

Following the September 6 press conference, staff at the AFL-CIO, NAACP, NOW, and others pressed for additional hearings and/or opposition to Kozinski. The Judicial Selection Project of the Alliance for Justice, a coalition of civil rights, civil liberties, and other groups, wrote the Committee requesting that the vote be deferred until the outstanding issues were resolved.

On September 12, immediately prior to the Committee's vote, two Senators expressed "unease" with the nomination. Senator Dennis DeConcini (D-AZ) said:

> There has been a great rise of objection to this man, and it troubles me that they keep coming forward. And I cannot in good faith ask for any more consideration of the Chairman or of the committee. But I join my colleague from Illinois that there is some uneasiness about this particular nominee.
>
> I say that in hopes that that nominee is either here, or will hear these words of, I hope, constructive suggestions, that he moderate his temperament and the attitude that he has exhibited in the past, in stories that have been told to me by employees of different courts and the different parts of the government that he has worked in, that is anything but complimentary.

Senator Charles Grassley (R-IA) then asked for reassurance from Senator Simon that his concerns had been satisfied. Senator Simon responded saying that although he had no "solid basis for objection," he could "not say that all of [his] concerns have been satisfied."

Moments later, despite the serious charges against Kozinski, the requests for more hearings, and the acknowledged doubts of several Committee members, the Committee voted unanimously to approve the nomination and send it to the Senate floor. It issued no report containing its findings of fact or conclusions -- the Committee merely walked away, leaving the charges unresolved.

After the Committee vote, GAP, still urging additional hearings on the issues raised, continued to bring new information to the attention of the Judiciary Committee and other Senators. A September 20 affidavit of Mary Eastwood, who was acting special counsel of OSC prior to Kozinski's appointment and continued as associate special counsel for investigation during his tenure, disputed his testimony to the Committee on several grounds, particularly his treatment of staff. She said:

> As a result of Mr. Kozinski's harsh and demeaning treatment of OSC staff, many professional employees sought employment elsewhere.
>
> Six of the eight most senior attorneys (grade 14 and above) in the Central Office resigned or retired during Kozinski's first year in office . . . .
>
> Eight of the 15 investigators in the Central Office resigned, transferred or retired.

A September 20 affidavit of Jesse James alleged callous and abusive treatment of particular employees. He described how Kozinski fired an OSC attorney, a 25-year government employee with critically high blood pressure, who was out on sick leave with the full approval of a government-selected physician. In fact, as the Senate later learned, the employee's successful action to obtain reinstatement resulted in U.S. District Court Judge William Bryant's ruling from the bench: "[T]here is no

discernible, valid, legitimate, acceptable, governmental interest in doing anybody [sic] this way."

Another example was that of a long-time clerk typist at the OSC who had recently been hospitalized for cancer. Although she had not formally given any notice of retirement, Kozinski announced her departure without her knowledge and one month before she had indicated that she planned to retire.

An October 19 affidavit of Horace Clark, an attorney at the OSC during Kozinski's tenure, disputes the testimony of Kozinski to the Committee regarding Kozinski's claim of limited responsibility for the Saldana case, the Hatch Act case brought by the OSC against a Democrat that was dismissed by the Administrative Law Judge for failure to produce "any evidence." Kozinski testified that he had authorized the case based on a "routine staff recommendation." Clark, the prosecuting attorney on the case, states in his affidavit that the original staff recommendation was to close the case, that he repeatedly advised his supervisors not to pursue the complaint, and that his supervisor acknowledged that he had advised Kozinski of the staff's opposition to the case.

John Hollingsworth, a former OSC director of administration and programs, and Laura Chin, a former OSC public information officer, provided affidavits alleging Kozinski's unfair, abusive treatment of staff.

The new information did not lead the Judiciary Committee to reopen its investigation or call for additional hearings. It did, however, prompt Senator Carl Levin (D-MI), who was not a

member of the Committee, to initiate a vigorous investigation of Kozinski. In the course of his review, he learned that Kozinski nad solicited help on his confirmation, attaching to his correspondence a copy of an editorial from a Boston radio station stating that GAP is "sponsored by" the Institute for Policy Studies (IPS), which is a "revolutionary group hostile to the U.S. and with ties to terrorist groups." The editorial further suggested that GAP's motivation concerning Kozinski, who is Jewish, derived from its support of terrorism and antisemitism. (The editorial -- and Kozinski -- did not take account of the fact that lawyers working on the nomination at GAP were Jewish, that GAP was no longer affiliated with IPS, that Good Housekeeping magazine listed GAP as the place to contact for potential whistleblowers and that IPS is a research institute which, according to its director, had "spent not one penny lobbying against Mr. Kozinski.")

This and other new information led Senator Levin to request in a letter to Chairman Thurmond and Senator Biden that the Judiciary Committee review the additional information before the full Senate considered the nomination. Chairman Thurmond transmitted Senator Levin's letter to Kozinski, who responded with a 15-page letter. This letter formed the basis for many of Senator Levin's conclusions that Kozinski deliberately misled the Judiciary Committee.

In his letter, Kozinski stated that he was aware of no letters "impugning persons questioning [his] qualifications," although he later admitted that the editorial, which he had

attached to his correspondence, impugned the motives of GAP. He also later acknowledged that the editorial had been written by the husband of one of Kozinski's employees at the Claims Court. In his letter, he also stated that Mary Eastwood had repudiated her charges against him for firing her, when she had never repudiated her charges and had in fact favorably settled her suit, with an award to her of $22,000 in backpay and $10,000 in attorney's fees.

Regarding his actions in the judicial misconduct case, Kozinski supported his order imposing sanctions on the lawyers without notice or the opportunity for a hearing by citing a long string of cases. Yet when later questioned by Senator Levin, Kozinski conceded that -- despite his case references in his letter to the Committee -- he could cite no case which upheld the imposition of sanctions without notice. (In fact, Senator Levin pointed out that the leading case Kozinski cited required notice when sanctions are applied.)

Several groups continued to lobby the Judiciary Committee for additional hearings. Common Cause sent a lengthy letter to the Committee and copies to all Senators describing the inadequacies of the Senate review and the charges against Kozinski and urging the Senate not to vote on the nomination until the issues were resolved -- either for or against Kozinski.

On Wednesday, October 30, Senator Levin, expecting floor consideration of the nomination the next day, circulated a "Dear Colleague" letter to other Senators, explaining his opposition to Kozinski. One, possibly two Senators, from the Judiciary

Committee placed holds on the floor debate, signalling that the debate would be controversial and, in effect, warning against taking up the issue.

That night, Chairman Thurmond agreed to Senator Metzenbaum's (D-OH) request for an additional hearing. Although Senators Thurmond and Hatch objected at the executive session the next morning to permitting Senator Levin to ask questions of the witnesses, (Senator Hatch even offering to ask Senator Levin's questions for him), they apparently later relented.

On Thursday, October 31, with less than 24 hours notice, Chairman Thurmond requested that witnesses provide testimony the next morning. Some important witnesses, including Jesse James, were out of town and could not appear on such short notice. A number of groups protested the inadequate notice and Common Cause asked the Committee to provide a Committee report resolving the issues raised for the benefit of the full Senate.

The hearing on Friday, November 1, lasted the full day and included both supporters and opponents of Kozinski.[16] At the hearing Kozinski did not dispute that he had circulated the defamatory editorial, did not dispute the accounts of his termination of the heart disease and cancer patients, and did not dispute that Mary Eastwood's appeal was settled in her favor. His supporting witnesses disputed some of the allegations made in

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[16]Several of the witnesses were questioned in depth. The two opposing witnesses, former senior staff members for the OSC under Kozinski, were questioned particularly harshly by Senator Hatch.

affidavits and testified, among other things, that he had good relations with many of his staff.

On Monday, November 4 GAP distributed more affidavits challenging statements of supporters at the hearing. The Judiciary Committee issued no Committee report resolving the many controversial issues presented.

On Wednesday, November 6, the full Senate took up consideration of the Kozinski nomination. With the exception of Senator Levin who presented a lengthy analysis of his opposition to Kozinski, most of the speakers were members of the Judiciary Committee. Two of the Republicans, Senators Thurmond and Hatch, defended Kozinski vigorously, refusing to acknowledge any basis for doubts about the nominee. Senator Thurmond said:

> Quite frankly, I thought the charges that had been brought by other people to Senators were some of the puniest, most nitpicking charges that have ever been brought before any hearing I have held.
> . . . [Judge Kozinski] has a fine record as a public servant, and is a man of high character. I support this nomination without reservation.
> (131 Cong. Rec. S14927 (November 6, 1985)).

Senator Hatch commended the Committee for its investigation and castigated those making allegations against Kozinski and seeking additional hearings:

> Judge Kozinski's career was subjected to exhaustive investigation by the Judiciary Committee. . . . It was given the careful scrutiny that is appropriate for those who would hold positions of responsibility in our society. . . . [O]bjections were found to be entirely without merit. They were pushed by a small group whose broader designs, I have noticed, have not gone unremarked in the press. I refer to a coalition whose avowed intent is to delay President Reagan's judicial appointments by whatever means they can contrive.
> (131 Cong. Rec. S14931 (November 6, 1985)).

Many of the Democrats on the Judiciary Committee credited Senator Levin with developing and raising the issues on Kozinski, but made a point of emphasizing the "new" information -- that had not been before them -- that formed the basis for their revised judgment. For example, the next day, the day of the vote, Senator Biden (D-DE), who had not been present at either hearing, said: "Although I was concerned about [Kozinski's judicial temperament] . . . when the Judiciary Committee first considered Mr. Kozinski's nomination I gave him the benefit of my doubts." He also explained his about-face: "[S]ince the Committee reported, without objection, Mr. Kozinski's nomination to the full Senate, Senator Levin, on the basis of new information, raised disturbing issues concerning Mr. Kozinski's candor during his initial confirmation hearing . . . ."

On Thursday, November 7, the full Senate voted on the Kozinski nomination. Although the Judiciary Committee had unanimously approved him, the full Senate confirmed him by a vote of only 54-43, the smallest confirmation vote for a federal judge in many years.