ASSEMBLY-LINE APPROVAL:

A Common Cause Study of Senate Confirmation of Federal Judges

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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.