Reform the Judicial Nomination Process Now: Five Proposals for a Return to Senatorial Comity

By Donald J. Devine

When a dedicated opponent of Clarence Thomas's appointment to the Supreme Court like *The Washington Post* can say editorially that he has not been treated fairly, it is time to reform the process. It should be done now, when Democratic Senator Dennis DeConcini's shocked cry about Thomas's treatment—it "is inconceivable, it is unfair, and I can't imagine anything more unfair to the man"—still reverberates through the halls of Congress.

It Used To Be Different

For the first 136 years of the American Government, no Justice had ever appeared before a Congressional nominating committee as a condition for appointment to the nation's highest court. Before 1955, only two Supreme Court nominees had ever testified for appointment before the Senate Judiciary Committee.

For nominations, Article II, Section 2 of the Constitution merely says that the President shall nominate "by and with the Advice and Consent of the Senate." This was interpreted to mean that the President should send nominations for the Supreme Court to the Senate and let it work its will based upon the nominee's record. No personal confrontation was deemed necessary and, certainly, no adversarial inquiry composed of Senators sitting as a jury. Unless there were some obvious disqualification or lack of experience, the Senate deferred to the President's judgement.

Even after 1955, testimony of nominees before the Senate Committee was primarily limited to matters of judicial philosophy and legal issues. The first truly politicized nominations, those of Abe Fortas to be Chief Justice by Lyndon Johnson and of Clement Haynsworth and then G. Harrold Carswell by Richard Nixon, centered upon past financial dealings and the reversal rate of decisions while they were already judges, all existing in the record. As heated as were these nominations, they were not primarily determined by probing at the hearings themselves.

The New Nominating Process

At the Thomas hearings, Guido Calabresi, dean of the Yale Law School, remarked upon the basic political fact which shapes a new nominating process today. No Democratic President has nominated a new Supreme Court Justice in 24 years—ironically, the last being the nomination of Thurgood Marshall, whose seat was the focus of the most recent controversy.

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One would have to be obtuse not to notice that recent Court nominations have been generally divided along partisan lines. In today's divided government with a President of one party and a Senate of another, the potential for mindless partisanship is high. This is exacerbated by general expectations among political leaders of both parties that this may be a more-or-less permanent situation, with the Democrats unable to win the presidency and the Republicans unable to wrest control of Congress.

The Bork Catalyst

The nomination of Robert H. Bork by Ronald Reagan in 1987 lit the partisan and ideological match which inflamed the new political environment. The appointment of Bork appeared to shift the Court decisively in a conservative direction, and so became a fierce ideological and partisan firefight for control of a Supreme Court which had become an active and determining force in the policy process.

Televised hearings focused upon philosophical issues from which opposing Senators in sharp questioning implied personal faults on the part of a nominee who had been more forthcoming than any in memory. In addition, determined political foes directly sought any shred of personal data, including investigating what movie rentals the nominee had made. Television advertising magnified the hearings hoopla, even suggesting vaguely immoral acts by the nominee. One swing Senator said he voted against the nominee because "his present lifestyle indicated a fondness for the unusual, the unconventional and the strange," without bothering to specify what precisely met those criteria.

Under this determined and public onslaught, Bork was defeated on a vote of 42 to 58, with 52 of 54 Democrats voting against him.

The Bork Reaction

The next confirmation, of Anthony Kennedy, slid through because both sides had been shocked by how emotional and angry the Bork confrontation had become. Kennedy evaded providing detailed forthcoming answers to hearing questions and opponents pretended not to notice. George Bush's first nominee, David H. Souter, had little on the public record and evaded answering questions directly or forthrightly, yet managed to be confirmed.

The Thomas Nomination

Thomas was schooled by a team of Washington insider lobbyists to "learn" from the Kennedy and Souter successes to be evasive in his answers to questions. Still, before the hearings even began or much information had become available, the Congressional Black Caucus opposed Thomas for his lack of support for affirmative action, Governor Doug Wilder had criticized his religion, and the NAACP, the AFL-CIO, Planned Parenthood, the National Organization for Women, etc. mobilized against him.

For 100 days--including during one week of intensive and probing questioning directly by prosecutorial Senators--reporters, neighbors and disgruntled associates were pressed for unfavorable information on Thomas by zealous senatorial staff. On the 100th day, just as the full Senate was proceeding to vote, a Senate employee leaked an FBI

affidavit made by a female former subordinate employee who accused Thomas of sexual harassment—or something, since there was no physical act nor threatening words according to the accuser, who continued to communicate with Thomas, and even followed him to another job after the supposed harassment—10 years after it had presumably occurred.

As *Post* editorial writer Juan Williams summed it: "This slimy exercise orchestrated in the form of leaks...is an abuse of the Senate confirmation process, an abuse of Senate rules and an unforgivable abuse of a human being named Clarence Thomas." To this must be added the unseemly spectacle of accused and accuser baring their views at a hearing before the nation on television. Clearly, such a process is in dire need of reform.

The Bush Proposals

On October 24, 1991, President Bush, criticizing what he called, "piranha tactics of smearing the individual and ignoring the issue," made several "recommendations for reforming the process." Specifically, he: one, asked that Congress shorten the process to six weeks; two, ordered that the FBI keep possession of investigations, showing them (in the presence of an agent) only to the committee chairman and those members (not staff) he designates; three, requested Congress to establish a mechanism to investigate legislative leaks of documents; four, called upon Congress to submit itself to the laws it imposes upon the population; and, five, supported efforts of some congressmen to reduce the number of committees and subcommittees. While all of these reforms are reasonable, the third was reactive, the fourth and fifth did not deal with the nomination process, and all but the second were simply requests to Congress without Executive Branch teeth. Unfortunately, the process has degenerated to the point that a more active presidential approach is required.

Reforming the Process

One. Return to a confirmation process without hearings. The United States did without Senate judicial confirmation hearings for over a century-and-a-half, and few would argue the judges were of a lower quality. Even most appeals judges do not attend hearings to this day. If the hearings system ever made sense, television, incompetent leadership (the committee chairman said Thomas would make a "solid justice," and then voted against him), and the politicized environment make it impossible today.

The President could assure this reform by announcing he would henceforth submit the nominee's name and documents he considered relevant to the Senate. He would advise the nominee not to make himself available for hearings, nor to provide any further information. The Senate, of course, could obtain public information on its own resources. If the Senate did not approve of the nominee on the basis of the record, or disapproved of the fact that he would not appear before them, a majority could vote not to confirm. Meanwhile, the Supreme Court could continue to act, although with a reduced number of members. Since the present Court has a majority of young justices of the President's party, the waiting game would pressure the Senate to act.

Two. At a minimum, confirmation hearings should not be televised. The Senate has done without television until very recently. Coverage of floor proceedings at least deals with a process the Founders expected of Congress, debate on issues for possible legislation. Committee hearings are (or should be) technical proceedings. Television merely encourages the demagogues and charlatans, who are at least limited by time constraints on the floor. Television of committee confirmation hearings could end quickly if members of the minority party refused to participate if cameras were rolling, or to send only a token single member, highlighting the partisanship of the process.

Three. Senate Rule 29 must be enforced by expelling any member or his staff found guilty of leaking confidential confirmation information. President Bush was correct to request Congressional procedures to investigate leaks but he does not go far enough. Senate Rule 29 requires that Senators guilty of making confidential information public should be expelled and that staff members who do so should be dismissed. To make this rule effective when Congress refuses to act or whitewashes an investigation, the President should instruct the FBI to investigate the matter and report results to the President of the Senate.

If action were still not taken by the Senate within 60 days, the President would give the Attorney General an additional 60 days to determine whether legal action could be taken outside of the legislative process. If the Attorney General finds that there has been wrongdoing but that no non-legislative legal remedy is available, the President would request that the Senate President (the vice president of the U.S.) release the FBI report and the opinion of the Attorney General to the public.

Four. The most important reform proposed by President Bush was setting the principle that FBI reports should remain the property of the Executive Branch. If the President chose to make the FBI report available to the committee, confidentiality clearly demands that responsibility be limited to the minimum number of individuals. The report, therefore, should only be shown to the committee chairman and ranking member in the presence of an Executive Branch representative, who shall retain control of the documents. In no case should the report be made available to staff for, if there is any obligation to Congress to be shown these matters, clearly this does not extend to employees of the legislators.

Five. The President should use only Executive Branch personnel during the confirmation process. The President must end the recent practice of utilizing private sector lobbyists to assist in dealing with Senators during the confirmation process. As George Will has noted, there is a conflict of interest because their first priority is not for the nominee but to their clients who desire access to the White House and Congress. "After all, next month these lobbyists will be lobbying Senators about grazing fees or textile imports or whatever else they are by then being paid to believe." Certainly, there are enough talented political appointees in the White House and agencies to assure that necessary Executive Branch lobbying can be accomplished.

Returning to Comity

The judicial nomination process badly needs a cooling off. The quickest and most effective means is for the President to stop playing patsy in the process. The Constitution gives the President the means to meet the challenge by refusing to let nominees testify and, if challenged, persevering by continually re-submitting qualified and philosophically-compatible individuals until the Senate accommodates or the Court is won by attrition.

Bush was correct to insist that the "advice" power of Congress in the Constitution does "not give a group of Senators veto power over a nominee," and to refuse to surrender his presidential powers to nominate in the name of consultation. But unless the President actively reduces the politicization of the nomination process, that is exactly what will happen. For, if he submits to an adversarial process, the temptation for political posturing and character assassination are overwhelming, especially in the age of television.

This five-point proposal for reform merely re-establishes the status quo ante of 150 years and, as such, is not an executive reach for power. Under this reform, the Senate would retain the power to refuse its consent. But it would be done in a dignified and civil manner. For too long has passion dominated the judicial selection process. It is time for presidential leadership to restore comity to the nomination process, to the procedures of the Senate, and to the country.

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