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A Call for Integrity

By RAY FORRESTER*

It was Bismarck who said it's better that the people not see how sausage and laws are made. Today in America, he might say that it's better that the people not see how sausage, laws, and justices are made. Now the people have witnessed the confirmation process and the question is whether the confirmation process of Supreme Court Justices can be improved. The answer, obviously, is Yes. The only real question is, How?

President Bush addressed the subject in a speech on October 24, 1991. He sharply criticized the Senate process. He had very little criticism of the Presidential side of it. He said that he was in favor of consulting with the Senate, but that he would not give the Senators a "veto power" over nominees before a nomination is made. "I will not surrender power," he said. This seems to reject one of the ideas I'm going to promote, namely, Presidential use of advice before nomination, advice particularly on the part of the Senate.

He went on to say that leaks should be stopped, and he made an interesting proposal that FBI reports go only to the chairman of the Senate committee and such other members of the committee as the chairman directs. The President does not want the Senate staff to receive the FBI reports. He also proposed that the reports be returned immediately to a waiting FBI agent after they are read. Evidently, no copies of the report are to be made. He gave no recognition of the fact that in the recent case, the question of sexual harassment, evidently, would never have come to public attention in the absence of the leak. Whistle-blowers and people who furnish leaks have been the public's only effective watchdogs in some famous government scandals. Surely, some have acted out of self-interest, party politics, and personal advancement, while others seem to have acted on good conscience for the nation's benefit.

Bush also suggested a time limit of six weeks for the Senate process after the nomination is submitted. This is a short period unless thorough prior work is done.

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On October 24, 1991, Senator Leahy of Vermont also spoke on the confirmation process. To no one's surprise he criticized the White House.

Bush and Leahy did agree on one thing — that the process should and must be changed for the better. The soundness of their conclusion is strongly underscored by a Gallop poll, reported on October 16, 1991, showing that the confidence of Americans in the Supreme Court is at thirty-nine percent — the lowest rating in Gallop history and nine percentage points lower than Gallop's last measurement in March, 1991. The latest poll was conducted in the midst of the recent confirmation hearings.

Public confidence in the Supreme Court is essential to the rule of law in America. It is upon such confidence that the Court depends for acceptance and public obedience when the Court decides critical national issues.

What are my suggestions for the improvement of the confirmation process? I have two principal proposals. First, with reference to the President: His role in the process comes first. He takes the initiative and obviously the quality of his performance is most critical. He can improve the process and the end result quickly and dramatically simply by seeking out the very best qualified candidates in the nation, the best qualified in fact, not in mere bald political hyperbole. The position is too important to be based on politics, as it usually is. Justices retain power long after Presidents leave office. The President should rise above politics in choosing candidates for the Supreme Court. At times, Presidents have done so in the past.

There are some remarkably good and able people in this nation. I've known a few that are so good in fact, that as members of the Supreme Court, I would trust my life, my family, and my country to their ability, sound judgment, and character. There are not many of these people, but there are a few. I've known some in the practice of law, and, believe it or not, even some among law professors.

The President should fulfill his responsibility and conduct a painstaking and conscientious search for these truly superlative human beings who do indeed exist, often in relative public obscurity. Specifically, he should assemble a list of approximately five prospects and submit these names to the Senate, not for confirmation initially, but for advice. The Constitution expressly requires the advice and consent of the Senate. Currently, the President only obtains the consent of the Senate. The list should be made public so that all of us can know what is going on and can aid in the investigation and the giving of advice. The President

should also consult the Senate at the beginning of the process. There is no reason why persons of good faith cannot narrow the selection to at least one mutually acceptable, highly competent nominee, thereby reflecting substantial national consensus from the very beginning. This would avoid the spectacle we have witnessed on more than one occasion in the past — a spectacle of partisanship too often based on selfish politics, with scant regard for the general welfare of the nation, one actually designed at times to conceal the real qualities of the candidate, rather than to reveal them.

My second suggestion concerns the Senate process. Senator Dixon of Illinois was quite right when he said recently that the Senate is “ill-suited to determine the truth in cases like this.” Yet the Senate is expressly required by the Constitution to give advice and consent regarding Supreme Court nominations. In performing these duties, the Senate can delegate some of the special tasks to more qualified, well-suited persons. The present form of committee proceedings on adversary party lines, in which the primary objective appears to be to defeat the other side at all costs, should be abandoned.

The Senate should delegate its investigatory and fact finding process to a blue ribbon commission composed of esteemed citizens devoted to the general welfare, rather than to party politics. Blue ribbon commissions have been used with excellent results in several critical national crises. For example, when our Social Security system, which is so essential to the nation, faced financial disaster a few years ago, a select commission was assembled and delegated the task of studying and recommending a solution to the problem. Its ultimate recommendations were adopted and proved successful. The commission was composed of outstanding citizens possessing the wide respect and confidence of the American people. Again, there are such persons to be found.

The investigation and ultimate interrogation of the nominee and the witnesses should be conducted by independent counsel of proven integrity and ability who would pose well-prepared questions to the witnesses, questions that would be brief, to the point, and fair. A nonpartisan chairman of the commission should preside with impartiality and authority on the basis of rules of procedure carefully crafted by experts beforehand. The mission and tone of the proceedings should be judicious, and confined to bringing forth all relevant information regarding the character and the fitness of the nominee. There should be no benefit of the doubt in favor of the nominee or the witnesses. The process is not a trial, civil or criminal.

The nominee is, in fact, a candidate for a position. The nominee is applying for a job, one that requires a highly qualified person free of corruption, or even the appearance of corruption. The *basic* issue is what is fair and best for the future of the nation, not what is fair to the nominee or the witness. The issue also is whether the American people respect and have confidence in the nominee. As in selecting any applicant for an extremely critical job, the search must be for the very best, not for the merely adequate. If one nominee does not carry the respect and confidence of the people, for whatever reason, common sense tells us we should look for another prospect who will meet this test. Again, there are highly qualified people to be found, and in truth it is not that difficult to find them if the will is there.

Stated simply, the stakes are too high and far too crucial for anything less. The burden of proof is on the nominee, as it is for anyone who seeks a public position. After all, the nominee is free to withdraw at any time if the proceedings become too hard to take.

Incidentally, the President also might enlist the aid of a blue ribbon commission in compiling his initial list of the best qualified prospects. The commission could coordinate the Senate's advisory function with the President prior to the President's formal nomination of a candidate for Senate consent.

The procedures of a commission would, of course, need to be tailored to fit the particular mission.

In conclusion, honesty in government is the overall basic problem. The nation's overriding flaw is in the quality, the character, and the accepted practices of too many, not all, of our politicians in both parties. We have become so accustomed to humbug, flimflam, manipulation, vote buying in Congress by PACs and other special interests, contributions, as well as outright dishonesty, that our collective sense of shock and rejection is dulled to the point of passivity, and yes — sheer amusement. The practical fact of the matter is that this process has become a game. Brit Hume of ABC called it "a dirty game," one that draws a bigger audience in the media than the World Series. We know what's going on and that it is tragic for the country, but too many of us have decided that we can't individually do anything of consequence about it. In fact, the game has become a major source of free entertainment, and the public is addicted to it.

In some way, some peaceful way, politicians must be brought to realize that we won't take it anymore, and that a government without honesty, basic integrity, and unselfish idealism is the road to ruin for all of us, including the politicians themselves. We must do better, and I believe

that in time we will do better through the democratic and free process of self-correction. I say this hopefully and with confidence to you young lawyers-to-be, who will assume the positions of responsibility of this country, and the opportunity to correct our present practices and social values. Good luck to you in that essential mission.

