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THE JUDICIAL NOMINATION PROCESS

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The judicial nomination process, including the Senate's role to "advise and consent," works well in the vast majority of cases. When a lower court judgeship becomes available, the President, in consultation with lawyers, members of Congress, and others, nominates someone to fill the position. The Federal Bureau of Investigation and the American Bar Association ("ABA") investigate the nominee's background and abilities. The Senate Judiciary Committee considers the nominee in a hearing as well as through its own investigation. If no questions arise over the nominee's qualifications or suitability for the bench, Committee approval is generally followed by full Senate approval of the nominee. I believe that the result of this procedure in the vast majority of cases is a very fine federal judiciary.

This process has not been followed in recent nominations to the Supreme Court, however. Since 1986, the process has been badly shaken and needs immediate reform. Any doubt as to this point was dispelled by the most recent treatment of a Supreme Court nominee, now-Justice Clarence Thomas. What has happened is that special interest groups, accountable to no one, have been formed specifically to deny the right of the President to choose nominees that reflect his values. In the cases of Presidents Reagan and Bush, the American people had been specifically asked to consider the prospect of Supreme Court nominees when they cast their votes (indeed, Jimmy Carter had raised the specter of Ronald Reagan's appointing Justices as a reason why voters should re-elect Carter).

The first whiff of trouble in the process came in 1986, when Justice Rehnquist was nominated to be Chief Justice. Justice

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Rehnquist had developed a fine record as Associate Justice. There was no question that he was well qualified to be Chief Justice. However, a number of liberal groups were opposed to his elevation purely on political grounds. The precursors of what later was to develop more fully began to emerge. To try and defeat the nomination, the opposition groups raised whatever arguments they could, regardless of logic. So, for instance, Justice Rehnquist was attacked by these self-appointed guardians as being outside the "judicial mainstream," despite the fact that the man nominating him had just carried forty-nine states less than two years earlier. The evidence for their claim: Justice Rehnquist had written more lone dissents than any other member of the Court. This was a transparently specious charge. After all, the first Justice Harlan dissented frequently. Justices Holmes and Brandeis also dissented frequently. The free exchange of ideas was, until 1986, seen as a virtue, and sometimes the force of history could vindicate earlier dissents (interestingly, many of those who opposed Justice Rehnquist now criticize Justice Souter for nearly always joining the majority opinion and rarely writing separately, but I suppose that a foolish consistency is the hobgoblin of little minds).

The Rehnquist hearings also led to the efforts of a large number of people to find whatever minutiae from the Justice's entire life that they might use against the Rehnquist nomination. For instance, someone actually looked up and examined the deed to Justice Rehnquist's home in Phoenix. The restrictive clause contained in the deed was offered as conclusive proof of Justice Rehnquist's prejudice, notwithstanding the fact that such clauses had been rendered unenforceable nearly forty years before and that there was no evidence that he had even read the deed. Although the nomination itself was never really in doubt, the thirty-three votes cast against Justice Rehnquist were the largest number ever received by a successful nominee up to that time. The handwriting was on the wall. Fortunately, the attention was focused exclusively on Justice Rehnquist's nomination. Although Justice Scalia is also conservative, the groups did not attack his nomination, and he was approved by a unanimous vote. The nomination of Antonin Scalia today would have resulted in a bloody battle; the nation might have lost the service of one of the most intelli-

gent, forceful, and original Justices of our time.

By 1987, the Senate was in Democratic hands and Ronald Reagan had been weakened by Iran-Contra. Another Supreme Court vacancy arose. Although Senator Biden had earlier stated that if the President nominated Robert Bork to a vacancy he would have no choice but to support Bork, when that scenario actually arose, the situation was said to have changed. Because Judge Bork had been nominated to replace Justice Powell, a moderate swing vote, the Senate, it was said, could consider ideology. For the first time in our history, ideology was explicitly used as a basis to reject a nominee. I can here only briefly discuss the perversion of the confirmation process and its transformation into a political smear campaign. There were horribly inaccurate television commercials. From the moment of his nomination, there were false accusations made on the Senate floor about Judge Bork's views.

The fact was that Judge Bork was one of the finest nominations in the history of our country. He is a man of uncommon talent and distinguished scholarship in many areas of constitutional law. His views of antitrust law had changed the Supreme Court's treatment of the issue to one much more soundly based in economic reality. Once again, the pressure groups' main charge was that Judge Bork was "outside the mainstream," notwithstanding the fact that the Supreme Court had on several occasions quoted his opinions verbatim in its own, and that he had *never* been reversed by the Supreme Court in five years on the Court of Appeals. The ABA, despite Judge Bork's obvious qualifications, let ideology intrude into its evaluation of the nomination. Despite Judge Bork's brilliant and forthright testimony, and the seminar in constitutional law he provided us all, the interest groups were able to defeat him. This happened only after legions of investigators had invaded his privacy, including checking which videos he had rented. Ironically, some of these same groups had criticized Judge Bork's supposedly restrictive view of First Amendment freedoms and the right to privacy. The Senate's handling of the Bork nomination was a sad affair for our country. The process had been politicized to what was then considered the breaking point. And what did these groups gain? Ultimately, Justice Kennedy's voting record has been very similar to what we can with confidence state

Judge Bork's would have been. However, I believe that what these groups gained was a feeling of invincibility; that the President would have to pay attention to who they believed were acceptable nominees to the Supreme Court or risk defeat. They believed that they had a right to determine who would be acceptable Supreme Court Justices.

Three years later, Justice Brennan retired. To counter the attacks by the interest groups, President Bush took an approach similar to that of President Cleveland after he had difficulty in having a nominee confirmed: Bush nominated an unknown, then-Judge Souter. There was no trail for investigators to scrutinize. Although a handful of negative votes were cast, Justice Souter was confirmed without much difficulty. But recognizing that they could not defeat such nominees, the Judiciary Committee Democrats warned President Bush not to send up another "stealth" nominee.

And in 1991, upon the retirement of Justice Marshall, the President did not disappoint them. He nominated Judge Clarence Thomas, a threat to the very existence of the liberal interest groups. For here was a man who offered African-Americans an alternative to dependency on the paternalism of government, which was the prime message of the civil rights groups and liberal Democrats on these issues. The groups were not about to take that threat lying down. Working closely with Judiciary Committee staff members, they dug and dug to find any dirt that they could use to block the nomination. The media was only too happy to try to find a killer fact as well.

At the "real" confirmation hearings, the nominee did not act as Judge Bork had done. Like Justice Souter and all other nominees who testified before the Judiciary Committee, Judge Thomas declined to give answers to specific questions on many controversial issues of the day. In spite of the tradition that prior nominees not take positions on issues that could come before the Court—both on the grounds of fairness to litigants and separation of powers—the liberal Democrats were angered. They seemed to have forgotten that just ten years earlier, it was they who rose to protect nominee Sandra Day O'Connor from having to answer questions about abortion—put to her by conservatives who were con-

cerned that she was sympathetic to *Roe v. Wade*.[1] And, they failed to recall the nomination of Thurgood Marshall himself—who refused to answer questions about the validity of *Miranda v. Arizona*,[2] then an anathema to conservatives. It was Senator Edward Kennedy who forcefully championed Marshall's responsibility *not* to answer specific questions:

> I believe it is recognized by most Senators that we are not charged with the responsibility of approving a man to be Associate Justice of the Supreme Court only if his views always coincide with our own. We are not seeking a nominee for the Supreme Court who will express the majority view of the Senate on every given issue, or on a given issue of fundamental importance. We are really interested in knowing whether the nominee has the background, experience, qualifications, temperament, and integrity to handle this most sensitive, important, and responsible job.[3]

So ignoring decades of history in the confirmation process, Committee Democrats sought to pin Judge Thomas down to specifics. They scrutinized his paper record. Judge Thomas was asked to respond to quotations taken out of context from speeches he had given long ago. What purpose did this serve? Had he agreed with the statements, he would have been pilloried for the substance of his beliefs. Had he changed them, he would have been accused of a "confirmation conversion." As it was, he was criticized as not believable when he said that those were political statements which would have no bearing on his role as a Justice. In any case, Judge Thomas answered hundreds of questions over a five-day period, more concerning specific topics than any other prior nominee. Yet, many members seemed not to care about his answers. When it came time for their floor statements, they relied on the out of context quotations as if they had never had an opportunity to ask Judge Thomas about them. What is the point of having overly lengthy hearings (Justice White was asked eight questions in his 1962 confirmation hearings) if his answers are not

[1] 410 U.S. 113 (1973).
[2] 384 U.S. 436 (1966).
[3] 113 CONG. REC. 24,647 (1967).

going to be considered?

This time, the nominee's opponents did not hesitate to opine that their role was equally important as the President's in choosing nominees. Balance was essential on the Court, it was said, even though no liberal had argued in 1967 that a conservative was needed to balance the most liberal Court ever. Prior Presidents, it was said, had appointed Justices of the opposite party to the Supreme Court, and President Bush had an obligation to do the same. These Senators neglected to mention that Presidents Kennedy and Johnson had only appointed Democrats to the Supreme Court, all of whom had served in their administrations or were close personal friends. They also failed to realize that even those Presidents that had appointed Justices of different political affiliation did so because of the potential political advantages, such as nominating a Republican Chief Justice, Harlan F. Stone, as the nation was about to join World War II, or an Irish-Catholic Democrat, William Brennan, appointed three weeks before the 1956 election. Those appointments were not made because the President felt compelled to appoint Justices with the idea of "balance" in mind. But it was probably too much to ask these opponents of Judge Thomas to rely only on rational argument. For they knew that voters had shut them out of the political branches. Their only hope was that unelected judges would continue the liberal agenda through judicial activism. That's what was at stake in the Thomas nomination. And as we ultimately learned, they would go to any lengths to sink the nomination.

A few days before the confirmation vote was scheduled, it was clear to all that Judge Thomas would be confirmed, notwithstanding the campaign launched against his nomination. Most of the opponents were resigned to the fact that they had been beaten. But some would simply not allow a nominee opposed by civil rights and labor groups to be appointed to the Supreme Court. We know what happened. The unholy alliance of some Senate staffers, the liberal interest groups, and the media struck again. Staffers encouraged Professor Anita Hill to come forward with allegations of sexual harassment by Judge Thomas. Ultimately, she did so, but only on the condition of confidentiality. Since the charges were anonymous, Chairman Biden quite properly con-

cluded that they could not be publicly investigated. However, the charges were taken very seriously, as evidenced by the FBI investigation that he ordered. The results of the investigation, although inconclusive, were made available to the Democratic members of the Committee (although not all Republicans) before the vote. Any member could have delayed the vote pending further investigation. No one felt that the evidence warranted delay. But one member or staffer knew that the mere existence of the allegations, regardless of their validity, might be sufficient to kill the nomination. So despite the promised confidentiality to Professor Hill, the member or staffer, directly or through one of the advocacy groups, leaked the contents of a confidential statement or perhaps the FBI report to the media. The media was only too happy to report it, notwithstanding the invasion of privacy to both Professor Hill and Judge Thomas, presumably because they felt that the information could block the nomination. As I said on the floor at the time, the treatment of Judge Thomas was the worst I had seen of any nominee in my eleven years in the Senate.

The media continued to be an active participant in the confirmation process when it ran stories that the Judiciary Committee's decision to vote rather than investigate showed that it did not take allegations of sexual harassment seriously. Charges flew that had there been a female member of the Committee, the vote would have certainly been delayed. The issue was turned into men versus women, providing a convenient forum for the liberal women's groups to rail against male insensitivity to sexual harassment. A full Committee investigation was demanded, and the floor vote was delayed when it became apparent that the votes to confirm might well be inadequate.

What happened in the few days beginning with the leak was a national disgrace. Senate rules and the law itself may have been violated by the leak of this information. Two individuals were harmed irreparably. Congress was harmed as well, because its investigations would be compromised if future witnesses refused to cooperate because they simply could not rely on promises of confidentiality. The media was captured by individuals using a terrible charge both as a smear to wreck a nomination and to further broad ideological concerns of sexual harassment regardless of the

validity of the facts in this case. The issue was not whether sexual harassment is a terrible offense, but whether there was actual evidence that sexual harassment had occurred to Professor Hill, two very distinct questions. The claim that the Judiciary Committee had not taken Professor Hill's allegations seriously was repeated over and over. But the Committee did respond. Launching an FBI investigation was a serious response, and one far more likely to discover the truth of the situation than any hearings the Judiciary Committee could hold. Subsequent events proved that. Given the promises of confidentiality, there was no better way to have handled the allegations. But perception overcame reality, and the result was a postponed floor vote to be preceded by Judiciary Committee hearings concerning issues of possible sexual harassment committed by Judge Thomas.

I was disgusted with the breakdown of the process that led to the second set of hearings. I was sickened by the explicit testimony that was televised coast to coast, often at hours when children may have been watching. I was horrified with the effect that these allegations and their public discussion had on Judge Thomas and Professor Hill. And despite it all, the Judiciary Committee—ill-suited to conducting a factual inquiry of this nature—still could not finally determine whether the allegations were true. In the highly unusual circumstances the Judiciary Committee found itself in, Chairman Biden was correct in instructing us, as well as the American people, that doubts—and the hearings raised many more questions than they answered—had to be resolved in favor of Judge Thomas, the accused in this situation.

The Thomas hearings have shown that the confirmation process for Supreme Court Justices must be reformed. First, the Senate must realize that the President has the right to nominate his choices for Supreme Court Justices, and that Presidents will tend to choose nominees who share their judicial philosophy. Nominees should not be rejected for their philosophy unless they would seek to undermine basic rules of American jurisprudence, such as overturning *Marbury v. Madison*[4] or *Brown v. Board of Education*,[5] or if

[4] 5 U.S. (1 Cranch) 137 (1803).
[5] 347 U.S. 483 (1954).

they advocated other forms of judicial activism inconsistent with the sphere of representative government. This approach is what Alexander Hamilton described in the *Federalist* papers, in which he stated that the function of advise and consent was to prevent the President from appointing cronies or political hacks.

Second, the Judiciary Committee hearings should be shorter and concentrate on the overall qualifications of a judicial nominee rather than on his or her responses to questions about a few constitutional issues. We ought to start treating the confirmation of a Justice for what it is rather than debating the political issues of the day, issues that will be supplanted by others over the life tenure of a Justice. Nominees should not be subjected to the inquisitions endured by Judge Bork and Justice Thomas.

Third, the Senate should recognize that it will never be considering a perfect human being as a Supreme Court nominee. Staff, advocacy groups, and the media should respect the nominee's privacy, rather than look for any information they can find that could be used to derail a nomination. While it is very important that nominees to such an important lifetime position be thoroughly investigated, there are limits that should be adhered to. My fear is that after seeing what has happened to decent people like Judge Bork and Justice Thomas during the confirmation hearing, good people will be deterred from aspiring to important government positions. I am also concerned that Presidents, fearing that their nominees will be chewed up and spit out, will refrain from appointing the best available people for a job, for often the best available people have taken positions on some issues that certain Senators may not like. The Senate must remember that it is not its job to select the nominee. During the Thomas process, the Senate and others forgot that fact, and acted unfairly and contrary to their professed principles. The results of that conduct were disastrous. I hope that no nominee, the Senate, or the American people ever have to go through another confirmation process like the one we have just completed. We can and must do better.