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THE THOMAS HEARINGS, CONFIRMATIONS AND CONGRESSIONAL ETHICS

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The tortured and surreal manner in which the Senate of the United States mishandled the confirmation of Clarence Thomas as Associate Justice of the United States Supreme Court will be analyzed, debated, and remembered for decades. Unfortunately, although it was the most dramatic, the Clarence Thomas episode was just the latest in a series of searing experiences in which our system for selecting judges and executive branch officials has been transformed into a savage ritual calculated to maim, malign and embitter the persons selected to provide leadership in the United States. The long list of victims include Ray Donovan, Brad Reynolds, William Rehnquist, Robert Bork, Doug Ginsberg and John Tower, but there have been many more. I know of no nation in the world that has developed such a sadistic and cannibalistic system for handicapping the individuals selected for leadership roles, that engages in such a calculated and apparently mindless campaign to diminish confidence in government and its officials and institutions, and that so thoroughly discourages those who might otherwise be willing to sacrifice their time, career, fortunes and families for public service.

Our only hope is that the Clarence Thomas experience will be a turning point in American history, because it revealed with unforgettable clarity to the American people how the process has been politicized, debased and perverted. Now is the time to take advantage of that revelation and inspire the public to take steps to stop these unconscionable attacks on the men and women who are considered for positions of leadership in this country and the concomitant poisoning of our system of governance.

In describing what the process has become, we must first recog-

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nize what it is not. In this era of divided government, with a Senate controlled by a political party opposed to the President's policies and antagonistic to his successes, it is misleading to call what we have just experienced a "confirmation process." A substantial block of Senators have powerful incentives to prevent the President's nominees from being placed on the courts or in positions of executive power because the persons he selects are not going to make decisions that will be appreciated by the Howard Metzenbaums, Edward Kennedys or Paul Simons of the Senate or the people who keep them in office. Those Senators just do not want these individuals confirmed under any circumstances and they will do whatever they can get away with politically to prevent the confirmation from occurring. Therefore, to call it a "confirmation process" is to accept the canard that this is part of a constructive process leading toward confirmation. It is not. It is part of a mechanism being misused by a substantial number of Senators for the singular purpose of preventing confirmation. As President Bush once said, "They aim to destroy lives and wreck reputations."[1]

Therefore, perhaps we ought to describe this system as the "rejection process." However, while the result is not always rejection, when the opposing forces are in full cry, it is invariably a damaging, debilitating experience. The candidate is either defeated or, at minimum, suffers some form of psychic, emotional or reputational injury in the process of being confirmed. Therefore, we could also call this the "destruction process" or, more explicitly, the "Senate destruction process."

How does the Senate destruction process work? Consider some of the examples that we have experienced over the last ten years and a relatively clear picture of the strategy and mechanics emerge. The process can be broken down into seven principal elements:

1. *Prolongation.* As President Bush pointed out, the time the process takes is four times longer today than it was in the

[1] Remarks by President George Bush at the Smithsonian Institute, National Museum of American History, Washington, D.C., Oct. 24, 1991, *available in* LEXIS, Nexis library, Fednew File.

time of President Kennedy.[2] In fact, the process for Supreme Court nominees is considerably faster than for other positions. For Clarence Thomas, the torture and uncertainty lasted three and one-half months. For others it is six months or more—sometimes more than a year. The delay serves several purposes. It discourages nominees and disrupts their lives. It is enervating to the White House and tends to dissipate the President's support and enthusiasm—particularly the support of White House staff who must provide continuing comfort and aid to the nominee, but who have many responsibilities and whose attention might be diluted if it must be divided among many people over a sustained interval. Most importantly, delay gives opponents time to amass forces and assemble information harmful to the nominee.

2. *Inquisition.* What could be worse than the civil litigation discovery process? But that monster has been taken to new heights by the Senate Judiciary Committee. The Committee demands copies of virtually every document ever written or spoken by the nominee or by others under his jurisdiction. Even diaries and telephone logs are requested. In Clarence Thomas's case this apparently consisted of 32,000 pages. The Committees also submit detailed intrusive written questions to the nominee on every subject conceivable. *The Wall Street Journal* performed an inestimable public service by publishing a copy of the questionnaire submitted to Clarence Thomas. Many of us would withdraw in despair after reading even a portion of this interrogatory (by the way, the Senate Judiciary Committee's reaction to the outrage generated by their questionnaire was to complain about the leak that allowed their behavior to be exposed—that sounds like the KGB complaining about an invasion of its privacy).

The purpose of this tactic is obvious. It harasses and discourages the candidate and it gives the Committee staff a mountain of material in which to search for an errant word or phrase with which to hang the nominee. It is a win/win situation for the Committee because if the nominee objects or fails to produce every letter, speech, brief or statement ever written, or to answer even the most intrusive or obnoxious question, the candidate can be accused of stonewalling

[2] *Id.*

or coveringup.

3. *Terrorism.* The Senators unleash their staff on the nominee. Heaven knows there are enough of them. Thirty-seven thousand people work for Congress. There are plenty left over from overseeing the executive departments and soliciting campaign contributions to engage in investigations of candidates for judicial or executive positions. What do these people do? As we all know, and as Juan Williams of the *Washington Post* revealed, they spent their summer looking for dirt on Clarence Thomas.[3] I'm not sure whether this is training for post-government jobs with the *National Enquirer* or whether the *National Enquirer* jobs come first. Rumor, gossip, innuendo and speculation was swept up by hundreds of vacuum cleaners and examined under a thousand microscopes. Who among us could survive this process? It is an incredible tribute to Clarence Thomas that these armies were able to produce little in the way of scandal beyond a ten-year-old unasserted charge of sexual harassment involving no touching, no job retaliation and no pressure for dates or sexual favors—and a few shameful expressions of reverence for the Declaration of Independence.

4. *Form Alliances.* Engage the interest groups. There are organizations out there whose existence depends on Robert Borks and Clarence Thomas's. They raise funds and employ lawyers and drum beaters for the primary purpose of invading the privacy and assailing the integrity of people like Clarence Thomas. Naturally they give themselves names like "People for the American Way" and "The Leadership Conference on Civil Rights." The "American Way" they envision certainly contains no civil rights, privacy or sense of fair play for the targets of their campaigns.

5. *Engage Other Organizations.* Retain the American Bar Association. Even if the ABA—whose role in this process was irrevocably tainted by its performance in the Bork confirmation—determines that a candidate is qualified, some unidentified member of the Committee will dissent, thus fa-

[3] Juan Williams, *Open Season on Clarence Thomas*, WASH. POST, Oct. 10, 1991, at A23.

cilitating the claim that the legal profession is "divided." Or the claim will be made that the candidate failed to achieve the ABA's highest rating—which is generally reserved for trial lawyers who are part of the same ABA elite who so vigorously oppose even a modicum of civil justice system reform.

6. *Mobilize the Press.* First, strike from your minds any notion that the press is neutral. The vast majority of the reporters that cover Washington, as any number of surveys have shown, are very liberal—much more liberal than the American public. And we know by hearing what is said in private—not to mention what we see and hear over the airwaves—that the press was in a frenzy this summer to be the first to find and reveal some scandal involving Clarence Thomas. The coverage of the Thomas nomination was so hysterically biased that any effort to conceal it was forgotten. And we saw this summer the synergistic orchestration of press, Senate staff and interest groups working in resonance to bring Clarence Thomas down.

7. *Interrogation.* Sometimes this backfires, as it did with Clarence Thomas. But days of argumentative, confusing, pedantic and demagogic questioning can wear a candidate down, make him look bad, or induce some small mistake. His answers may make his interrogators look stupid, in which case he is perceived as arrogant (and therefore unworthy), or he may appear tired or angry, and therefore be deemed to lack judicial temperament. Or an inconsistency, however small, might be discovered that would provide an excuse for questions of credibility and character, or allow an accusation that the candidate had experienced a "confirmation conversion." Finally, the candidate might make a statement that is pleasing to his questioners, but alienating to his supporters.

I. What is the Inevitable Result of All This?

1. Candidates whose views are strong, penetrating and persuasive will be defeated because they are too formidable. Anyone who has been willing to write or speak a great deal, to engage in the marketplace of ideas, to put one's ideas to the test of scrutiny

and criticism, to explore creative solutions or novel approaches, and to depart from the "politically correct" "mainstream" can easily be savaged. Thus, the exact kinds of persons that we want in public office are defeated precisely because of their robust, energetic involvement in the public arena.

2. No subject is off limits. During the past ten years we have heard allegations, many never proven, many blown completely out of proportion, regarding former spouses; relationships in the workplace; private encounters with drugs, medication, or alcohol; health problems; psychiatric care; private clubs—or sending one's children to private schools; the legal problems of spouses, ex-spouses, children and other relatives; and guilt by association. We even have to explore which movies a candidate sees or books he reads. In Clarence Thomas' case, we even heard critics make snide and despicable comments on the significance of his interracial marriage. The only persons who can go through this process are those who are willing to sacrifice virtually any sense of privacy or who have led a life untainted by *any* exposure to the normal weaknesses that have some effect, some time, on virtually every one of us.

3. It has been fatal to take positions on almost any topic of importance or merit. Being for or against abortion, *Roe v. Wade*,[4] affirmative action, or even the Declaration of Independence can be dangerous. We have now learned that it is just as bad not to have a position on *Roe* v. *Wade* as it is to have one. And if you've ever changed a position, you are disqualified because you are either a liar, a hypocrite, or have experienced a "confirmation conversion."

It was *not* intended to be this way. The Framers did not anticipate that the Senate would use the confirmation process to destroy candidates and bring disrespect on governmental institutions and leaders or to share equally in the appointment power. In Federalist No. 65, entitled "The Senate: Appointments and Impeachments," the entire text is devoted to the impeachment power with the exception of this sentence:

[4] 410 U.S. 113 (1973).

> [I]n the business of appointments the executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department.[5]

In Federalist No. 76, where the subject is discussed under the title "The President and the Appointing Power," Alexander Hamilton explained that the primary and principal power of appointment was to be with the President.[6] It was most emphatically *not* to be a shared power of appointment because:

> [o]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices . . . . A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body . . . . [I]n every exercise of the power of appointing . . . by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party or the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight . . . and it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.[7]

Therefore, the primary power was given to the President, and the Framers did not believe that it was "very probable that [the President's] nomination would often be overruled . . . where there were not *special* and *strong* reasons for the refusal."[8] James Madison stated that the Senate's role was to prevent "any *flagrant* partiality or error."[9]

[5] THE FEDERALIST No. 65, at 426 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).
[6] *Id.* No. 76, at 480.
[7] *Id.* at 481-82.
[8] *Id.* at 482 (emphasis added).
[9] James Madison (July 21, 1787) *in* II THE RECORDS OF THE FEDERAL CONVENTION OF 1787,

As we have seen, the Senate has roamed far beyond the limited check contemplated by the Framers. In fact, it has used its advice and consent role to wrest from the President a substantial part of his power to appoint district court, and to a certain extent, circuit court judges. In the case of cabinet officials and Supreme Court Justices, the process indeed has occasionally become what Clarence Thomas quite correctly described as a "lynching."[10] In Anglo-Saxon England, lynching, called by other names, was not only legal, it was obligatory.[11] If a criminal act was perceived to occur, the community was duty bound to give chase and to kill the culprit.[12] As one author describes it, it is very much like what we have just seen:

> It was more than sport; it was an instrument of government. But it was also sport, and there has probably never been a more popular one. Here was homicide without risk—either from its victim, he being so outnumbered, or from the law, which did not scold, but instead approved, indeed demanded, so that conscience could not spoil the fun.[13]

But what we also see in the Senate destruction process is the modern equivalent of another primitive and cruel process—trial by ordeal. One popular ordeal, called ordeal by water, involved binding the accused and throwing him in a pond.[14] If the accused sank, he was innocent; if he floated, he was guilty.[15] Ordeal by water was very much a no-win proposition, you were guilty and alive—or innocent and dead.[16] Very much like what Clarence Thomas experienced. In many respects, however, it was more fair. Perhaps we ought to consider switching to something like this. At least we would not have a lot of innocent survivors around to re-

at 80 (Max Farrand ed., 1911) (emphasis added).

[10] *See* CHARLES REMBAR, THE LAW OF THE LAND 93 (1980). The term "lynching" does not necessarily have a racial connotation. *Id.* It was derived from Charles Lynch, an American justice of the peace who presided over an extralegal court to punish presumed offenses by tories. *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 103.

[15] *Id.*

[16] *Id.*

mind us of what we have done.

II. What Can Be Done About This?

Probably very little. The only hope is for the American public to rise up and show their disgust with the process and bring about an end to immunized character assassinations. However, while we are holding our breath for this to happen, I have the following additional and equally improbable suggestions:

1. The President's investigation of the candidate, through the FBI, should not be shared at all with the Senate. As Attorney General, and later Justice, Robert Jackson said:

> Disclosure of information contained in the reports [would] be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.[17]

These reports constitute the *President's* investigation of the *President's* nominee and, prior to recent years, were not generally shared with the Senate. Since the sharing process began, it has been systematically abused to inflict grave injury on innocent persons. And this return to the prior model would not justify the Senate establishing its own FBI. The Necessary and Proper Clause cannot be stretched that far.

2. As the President recently suggested, the time between nomination and confirmation should be shortened materially.[18] Even six weeks is too long, particularly where the nominee has been previously confirmed by the Senate one, two or three or four times, as in the case of Reynolds, Bork, Thomas, etc. Perhaps we should have a rule that an appointment is confirmed without a vote if a candidate is not rejected within a certain period. Sort of

[17] 40 Op. Att'y Gen. 47 (1941).
[18] President George Bush, *supra* note 1.

a reverse pocket veto. You can imagine how much the Senate would like that.

3. The President should not let up on Congress until it adopts *laws* that protect privacy and enable criminal law punishment of leaks (not informal rules or standards to be enforced by a Senate or House Ethics Committee—which have never inflicted serious punishment and never will). The notion that this would violate separation of powers is nonsense. Congress has passed laws requiring the Executive to prosecute executive branch officials who violate the prerogatives of Congress. It can certainly allow those same laws to be enforced against its own employees and members.

4. Nominees should be advised that personal and private subjects are off limits and to decline to discuss such matters absent a clear, specific, and credible claim that they may have violated some law. They should also continue to refrain from discussing how they would rule in cases that might come before them.

5. The ABA and all other self-serving interest groups should be deleted from the process. What makes the ABA particularly qualified to judge Supreme Court candidates? And who elects the judicial evaluation committee?

6. I hope that the President will not be reluctant to continue to nominate strong, principled and experienced individuals. Robert Bork, in a losing cause, and Clarence Thomas, in a more successful one, showed that a great deal can be gained by letting intelligent, articulate conservatives appear on television before the American people. The messages they have to convey are potent and persuasive and the President should take advantage of the opportunity these hearings present. For one, I flatly reject the notion that the President should nominate so-called "centrists" or even liberals, as Stuart Taylor advocates in the *American Lawyer*.[19] The debate that will ensue when the President nominates another Bork or Scalia is a splendid opportunity because the more their ideas are heard without the filter of an unsympathetic press, the

[19] Stuart Taylor, *Supreme Disappointment; What's Really Wrong with the Way We Choose Supreme Court Justices*, AM. LAW., Nov. 1991, at 5.

more their ideas will be understood and accepted.

7. In a more generic vein, serious consideration should be given to greater executive branch oversight of the legislature. Is it constitutional to have 107 committees and subcommittees exercising oversight over the Defense Department, but no executive branch oversight over Congress? While such a concept is anathema to Congress, a discussion of this subject might lead to greater attention to the abuses of legislative oversight over the Executive.

In the long run, very little will be done unless the public begins to appreciate what has been done to corrupt and manipulate the process in ways we are beginning to accept as a normal part of the system. We are discouraging qualified and experienced people from seeking public office and we are diminishing the authority of those who survive the process and assume positions of leadership. "Every nation has the government it deserves."[20] If we want a strong and effective government, we must stop trying to destroy our most able and willing leaders. The President should not surrender any more of his constitutionally derived authority to nominate candidates for judicial office to those in the Senate who wish to exercise the Executive's prerogatives, but who do not have the public support necessary to win election to that office.

[20] *Ask the Globe*, BOSTON GLOBE, Dec. 12, 1989, at 44 (citing MACMILLAN DICTIONARY OF QUOTATIONS). Joseph de Maistre (1753-1821), a French monarchist, wrote this pithy pronouncement which first appeared in his *Lettres et Opuscules Inedits* on August 15, 1811. *Id.*