The Clarence Thomas Dilemma: Nomination and Confirmation

By Robert Gaudet, Jr.

Looking back to the Clarence Thomas confirmation hearings, one must reconsider the entire nomination process—from Thomas's laments of "high-tech lynching" to senators' frustrations with his evasiveness, in order to make sense of deliberations that seemed "out of control" (Senators A19) to most Americans. An examination of past nominations can also help us answer the questions, "What was wrong with the confirmation picture?" and "Whose fault was it?" The Senate, that white monolith of indifference, suffered from a damaged reputation as much as Anita Hill or Clarence Thomas. The only winner, it appears, is President George Bush. Bush and the Republican Party got their man confirmed.

The Senate suffered on multiple counts. First, as Senator Edward Kennedy stated, a "tidal wave of anger among the women of America" *(Other)* erupted upon the discovery that little had been done, originally, to investigate Anita Hill's sexual harassment charges. This reinforced the Senate's image of white male insensitivity. Second, the Senate was not nearly as charismatic or photogenic for Clarence Thomas as during the Gulf War debates:

> *For every occasion when a Senator seemed to be pressing to understand the truth, there were two or three more when a lawmaker came across as a self-important windbag.* (Senate's A20)

For all their persistence, senators have the darndest time getting a nominee to answer their questions. Like a military strategist, Thomas pulled out all the moves: coached by the Commander-in-Chief's Administration, he evaded questions on his personal beliefs, retreated from potentially damaging thoughts he held in the past, and went on the attack against senators for making a circus of the hearings. During the David Souter hearings, senators had difficulty extracting a response from Souter concerning abortion rights. The complete lack of candor directing many candidate's responses seems to violate the intent of the hearings, yet also appears necessary forwinning approval. Senator George Mitchell observed

> *it is now widely believed that a nominee who agrees with the President on abortion and is willing to say so cannot be confirmed [and, as a result,] with each nomination the process has become more elaborate and less informative.* (Excerpts A18)

While Senator Byrd expressed distaste for Thomas's "stonewalling the committee" (A18), no senator was able to penetrate the rhetorical wall that Thomas and the Administration built to hide Thomas's personal ideology. Since the President undoubtedly chooses his nominees on the basis of the nominee's personal beliefs, the Senate should be allowed the same considerations in deciding confirmation. Senator Edward Kennedy (D-MA) was frustrated by Rehnquist's evasiveness in the 1986 hearings, proclaiming

> *it is historical nonsense to suggest that all the Senate has to do is to check the nominee's IQ, be sure he has a law degree and no arrests, and rubber stamp the President's choice.* (Mason 8)

No matter what Senators Byrd and Kennedy may feel, nominees will probably continue stonewalling their Senate questioners. And to make Thomas's confirmation matters worse, our Senate lacked control. Described by the *New York Times* as being "as raw as it gets" (Senate's A1), the confirmation debate pitted senator against senator.

Like Thomas, Justice William H. Rehnquist claimed an ability to reject his past, when questioned in

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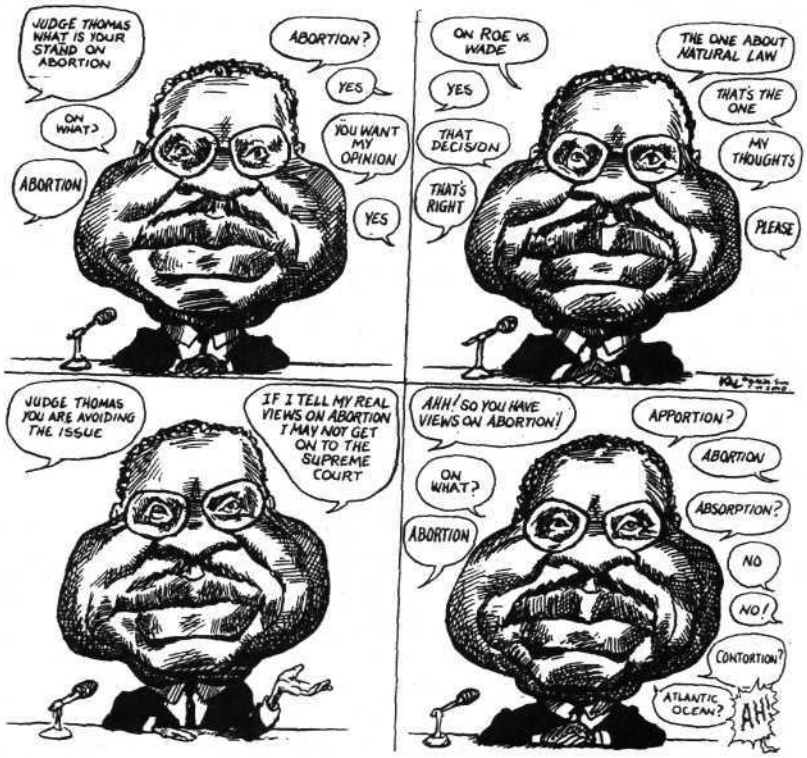
1971 hearings for Associate Justice: "My fundamental commitment, if I am confirmed, will be to totally disregard my own personal belief." (Mason 5) If this remark was intended to comfort any senator's fears, it must have worked; Rehnquist was approved 68-to-26 in a contested confirmation process. In his 1986 confirmation hearings for the vacated Chief Justice seat, Rehnquist, like Thomas, was also targeted with unproven allegations (of intimidating Phoenix voters in 1962and 1964 as a worker for the Republican Party), but he too denied the charges. Senator William Cohen's (R-ME) feelings about Hill's accusations may illuminate the thoughts of senators' deliberating accusations against Rehnquist in 1986:



> *[to] allow doubt itself sown by a single individual to be reason for rejecting a nominee [would] set in motion a process that holds the potential for undermining or destroying any nominee for public office.* (Senators A19)

Thus, unproven doubts should not block confirmation—our ideal of innocent until proven guilty. Thomas's opponents reasonedjust the opposite; if there is any doubt concerning Thomas, they would err on the side of caution by rejecting his nomination rather than risk placing a "pornographilic" sexual harasser on our nation's most venerable Court.

The nomination process of filling vacant Supreme Court seats can be likened to a game between the President and the Senate, with rules established by Article II, Section Two of the United States Constitution:

> *The President...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court.*

The Senate's "Consent" is apparently obligatory, but whatever happened to "Advice"? By requesting the Senate's advice on nominations, the President could reduce the chances of an embattled process and eliminate the risk of his candidate's rejection. President Richard M. Nixon struck out twice with Clement Haynsworth and G. Harrold Carswell before finally nominating a successful candidate, Harry A. Blackmun, in 1970. Haynsworth and Carswell are not alone: of 141 Supreme Court nominations between 1789 and 1986, 26 were not approved (12 confirmed nominees declined to serve). (Mason 8) A politically-empowered President like Bush or Reagan may choose to push his nominees through the Senate, regardless of the risk. Even so, Reagan's first two nominees, Robert Bork and Douglas Ginsburg, were not confirmed. Since Bush, like Taft, Franklin Roosevelt, Nixon, and Reagan, knows that Court appointments effectively extend a President's ideology beyond the four-year term, he chooses nominees that fit the conservative Bush mold. Vice-Dean of the Columbia School of Law Vivian Berger says "Bush should stop daring God" with controversial appointments and refrain from deliberate "court-packing" of conservative ideology. (Professors 6) Both the President and the Senate are aware that the nomination process is not a one-shot deal, but rather an attempt to fill a vacated seat. The entire process of nomination and rejection could theoretically go on forever.

But doesn't anyone care about qualifications? Critics charged Thomas with being underqualified, and even the American Bar Association refrained from marking Thomas "highly qualified"—not a good sign for a **Supreme** Court nominee. Qualifications are usually based upon the American Bar Association's scores of the candidate in conjunction with the nominee's published Law Review articles and literary contributions, and the length of his or her judgeship. According to Senator George Mitchell:

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> *Judge Thomas is not the best qualified American to be on the Supreme Court, as claimed by the President. Judge Thomas is not the best qualified African-American to be on the Supreme Court.* (Excerpts A18)

Then perhaps the President should only offer perfect nominees, such as "senior politicians...or widely admired judges" (The Week in Review, K) in order to reduce confirmation difficulties; a highly-qualified candidate would offer one less sticking point. Exogenous effects such as the President's popularity, and whether or not the party that dominates Congress is the party of the President, may provide further ground-rules in the nomination game of qualifications, confirmations, and rejections.

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While it is possible to create a smoother confirmation process, disagreement may be desirable. According to Phillipa Strum, CUNY Graduate Center political science professor:

> *TheJudicary Committee and the Senate become arenas in which political differences are expressed, sometimes bitterly. Lack of disagreement may indicate only that the nominee has views that are largely unknown.* (Senate, Editorials/Letters)

The "political differences" engage debate over the nominee's merits. Mr. Strum offers the confirmation hearings of Louis D. Brandeis (which lasted for six months up till his 47-to-22 confirmation) as evidence that the inherent problems lie in a

> *committee that is unable or unwilling to ask nominees and witnesses the right questions and to insist on answers, and in a President who cynically chooses a nominee so far from the best.* (Senate, Editorials/ Letters)

Others believe that politics should not be a consideration in the confirmation hearings, but rather that senators should rely on their own best judgement—regardless of public opinion polls for their states. Senator Harry Reid (D-NE) chose to disregard the immediate politics of his constituency:

> *The polls in my state heavily favored him; every newspaper in my state editorialized for him. From a political standpoint, I badly wanted to vote for Clarence Thomas. However, my conscience wouldn't let me do it* (Senators A19)

While Senator Reid raises the question of politics within the Senate, other critics have charged President Bush with wrongly emphasizing political idealogy over qualification. Senator Mikulski complained:

> *the Administration and their senators made a decision to treat the nomination of Clarence Thomas as a political campaign and not a nomination process...[They attempted to] mask the convictions and obscure the beliefs of Judge Thomas. He himselfrefused to answer questions or gave answers that were simply, plainly unbelievable.* (Excerpts A18)

Senator Mikulski, one of three women in the Senate, was outraged with both the perceived insincerity of the nominee and the political motivations (neither of which was new to the Thomas hearings) that marked the confirmation process.

Beginning with Rehnquist's 1986 nomination, and erupting in Bork's hearings, "hesitations expressed...over close scrutiny of a nominee's judicial philosophy all but disappeared." (Mason 10) Senators were not afraid to question Thomas on judicial philosophy, even though they got no answers. During Bork's hearings, the Leadership Conference on Civil Rights led the opposition while 2,000 law professors (40 percent of

US faculty) signed a petition for his rejection. (Mason 10) Thomas was also opposed by the Leadership Conference on Civil Rights, as well a group of black American professors who signed a petition authored by Columbia Assistant Professor of Political Science Carlton Long and Vassar Scholar-in-Residence Luke Charles Harris denouncing Thomas's claims of racial persecution during the hearings. (Professors 1) Thomas's "injection of racism into these hearings," according to Senator Byrd, may have been "an attempt to fire the prejudices of race hatred [and] shift [the hearing] to a matter of race." *(Justice)* According to Senator Barbara Mikulski (D-MD), Thomas's "backers and handlers" wanted "to win at all costs." (Excerpts A18)

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Whether or not they supported Thomas (most did), many Americans are trying to keep hope alive with thoughts that Thomas may not turn out to be so bad after all. Senator Bill Bradley praised Thomas for treating Anita Hill with "the greatest respect during the hearings," noting that Thomas was "considerate when he spoke of her amidst the anger that he spewed at the committee." (Justice A24) A16 October *New York Times* editorial also praised Thomas's "restraint," saying that "there is reason to hope, after the pain and after the joy, for civility, precision, and justice." Even during the proceedings, Americans hoped that a Justice Clarence Thomas might remember his roots and not destroy decades of civil rights progress. Senator Exon went so far as to say the hearings made Thomas a tougher, better person, and hoped that "he will not turn out to be the doctrinaire idealogue on the Court that he is projected to be." (Excerpts A18) Once they are finished hoping, perhaps Americans will nip the confirmation difficulties in the bud by taking Preseident Bush to the polls.

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