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HIGHLIGHT:
The Thomas confirmation hearings reveal little about the nominee -- but a lot about a ritual process that's become a caricature of itself

BODY:
Just imagine what the Soviets must have thought if they were watching the Clarence Thomas hearings on CNN last week.

Behold! In the crucible of the Capitol, in the marbled splendor of the Senate Caucus Room, was the world's oldest democracy in action, weighting who in the land should sit on the U.S. Supreme Court. Here is what a free people seemed to get for their faith in their government: an evasive, overcoached nominee; a cynical, manipulative White House; a windy collections of senators. And in the corridors just outside the hearing room were platoons of interest groups eager to characterize what Thomas was saying before he even said it; there haven't been so many spin cycles since the last Maytag convention. It was not exactly a glorious display of the American political process, notwithstanding how painfully accurate it may have been.

For the better -- and worst -- part of the four days of confirmation hearings last week, Clarence Thomas did all he could to disavow every controversial position he's ever taken. On abortion, on affirmative action, on natural law -- no speech or article was sufficiently tame not to repudiate. He didn't read it, he didn't mean it, he wouldn't do it as a judge. On a few matters, such as church-state relations and gender discrimination. Thomas committed himself in broad strokes to a centrist position. But on the question of Roe v. Wade, the 1973 court decision creating a constitutional right to abortion, Thomas went so far as to say that he had never discussed the case with anyone, even in private. "I can't imagine any lawyer in the last 17 years having no opinion on Roe," said Sen. Patrick Leahy, a Democrat.

All along, the administration maintained publicly that its nominee to the high court was the best man for the job and was selected for nonracial reasons. The latter claim, of course, can't be serious. Indeed, White House officials acknowledge privately what is clear circumstantially: picking a black conservative with a rags-to-robes life story was a political bonus. The former claim is undercut by the fact that Thomas wasn't even the runner-up in 1990, when David Souter was nominated. The American Bar Association last month gave Thomas its lowest approval rating, in part because of his lack of judicial experience. His unfamiliarity with constitutional law was highlighted last Friday when Leahy asked him to name "a handful of the most important cases"

decided by the court since he entered law school in 1971. After a long pause, Thomas mentioned only Roe and one other case. Leahy repeated the question twice, but Thomas came up empty.

Despite Leahy's foray, most senators were a study in docility. Except for the prosecutorial Arlen Specter, the Republican members of the Judiciary Committee saw themselves as speechifying cheerleaders for the nominee. Orrin Hatch asked Thomas this mind twister: "When you become a justice on the U.S. Supreme Court, do you intend to uphold the Constitution of the United States?" At times, Alan Simpson didn't bother with questions; on Wednesday he went on for 15 minutes seemingly without even indicating where one sentence stopped and the next one began.

The Democrats promised better. Ever since Thomas was named, they warned that this time they wouldn't let a nominee slide by without answering specific questions about abortion and the right to privacy. They said they had learned their lesson over the past five years by confirming Antonion Scalia, Anthony Kennedy and Souter -- only to see reticent nominees become Hard Right loyalists on the high court. The result? Some senators certainly have pressed Thomas. Joe Biden of Delaware scolded him, calling one answer "the most unartful dodge I have heard." No one, though, would confuse any of the interrogators with Perry Mason. And nothing close to a committee majority has indicated that Thomas's evasiveness would cost him when it comes down to a vote; Thomas is expected to win committee approval by a 9-5 or 10-4 vote. With that lack of fight, the senators will have little power to influence whom the White House nominates for the court in the future.

Much of the hypocrisy from the Senate, the White House and Thomas himself is based on a set of myths about the confirmation process that were trotted out yet again last week:

Answering questions about current issues compromises a nominee's impartiality. Thomas has used this bromide to avoid discussing Roe (just as Thurgood Marshall did at his confirmation hearings 24 years ago, when he was asked by conservatives about Miranda warnings). Even Thomas's toughest questioner, Sen. Howard Metzenbaum, insisted (unpersuasively) that his questions were merely about privacy and not a specific case. The platitude has visceral appeal; after all, judges wouldn't seem able to rule fairly on matters they've already worked out. The fallacy, though, is that nominees presumably have thought about the vital constitutional issues of the day. (If they haven't, it suggests they've been practicing law on Neptune.) Why are those ruminations less prejudicial simply because they remain unspoken? And what about the objectivity of, say, Justices Harry Blackmun or Scalia, who already have taken extreme, opposite positions on the viability of Roe? Should they be required to recuse themselves from future abortion cases? The truth is that nominees refuse to answer controversial questions because they're concerned about hurting their confirmation chances, not their veneer of impartiality.

A nominee's personal views have nothing to do with his or her constitutional philosophy. Thomas refused last week to divulge even nonlegal opinions on abortion. He said such views were "irrelevant" to any court decisions he would reach. While that sounds great, the days are long past since we believed jurists were special beings endowed with the power to reach into the sky and pull out neutral principles to resolve dispute. Seventy years ago, Benjamin

Cardozo, later to become a justice, put it well. Judges "do not stand aloof on these chill and distant heights," he wrote, "and we shall not help the cause of truth by acting and speaking as if they do." In 1981, at her confirmation hearings, Sandra Day O'Connor said she personally opposed abortion.

There is a presumption in favor of the president's pick. This, obviously, is the view of all presidents. But it has support in neither the text of the Constitution nor the words of its authors. The purpose of the Senate's "advice and consent" role is to act as a check on the chief executive, not simply ratify his choice based on a review of credentials. In the modern era, the test has become whether the nominee is woefully incompetent (G. Harrold Carswell, rejected in 1970) or way out of the philosophical mainstream (Robert Bork, rejected in 1987).

Don't worry. You never can tell what kind of justice you'll wind up getting. Thomas's supporters have tried to show their man has a libertarian streak and could wind up voting with the court's liberals (both of them) sometimes. True enough, even Scalia isn't a robot; for example, he voted in favor of a protester's right to burn the flag. Still, presidents typically get what they want. Their justices are their legacy. All five appointed by Ronald Reagan and George Bush have been consistently conservative.

Politics is a dirty word. The process of filling Supreme Court vacancies surely contemplates politics: cajoling, calculating, counting Senate heads. That's why the two dominantly political branches were given the joint power to pick justices. Politics can produce consensus, compromise and even wise policy on occasion. But before the Bork summer of 1987, confirmation hearings rarely resulted in the sideshow we now take for granted. "The process isn't working well," Sen. Herbert Kohl, a Democrat, told NEWSWEEK. Because the nominee prepares so long with politicians rather than scholars, "We are almost assured of getting a less-than-totally candid performance." Hatch laments the process, too, but blames "single-issue politics," meaning abortion.

Both explanations ring true, but neither is complete. The problem is perception: What is the Supreme Court about? In the past, presidents and senators paid at least some attention to the stature of nominees and the prestige of the court as the principled branch of government. A Cardozo wasn't required, but some distinction and diversity in public life or academe or the judiciary was usually a prerequisite. Today, ideology drives all actors in the process, and it usually takes us down the low road. Until that changes, confirmation hearings like Thomas's will remain a September charade.

The Abortion Side Step

Democratic Sen. Howard Metzenbaum: "I must ask you to tell us here and now whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy."
Clarence Thomas: "I think that to take a position would undermine my ability to be impartial."

Democratic Sen. Patrick Leahy: "Have you ever had a discussion of Roe v. Wade, other than in this room?"
Thomas: "If you're asking me whether or not I've ever debated the contents of it, the answer to that is no, Senator."