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The Thomas Hearings

ONE OF the truly unsettled questions in American politics is how a prospective justice of the Supreme Court should be interrogated and judged by those members of the U.S. Senate most responsible for his confirmation. If you doubt this, only recall the hearings held and the arguments generated when the last several nominees were up for consideration. It is still pretty widely accepted that a president has a right to choose justices who reflect his own philosophical predisposition and that if the nominee is to be rejected it should be on some other grounds, grounds of moral, mental or professional disqualification. It is also held, and we think rightly, that the nominee should not be required to tip his or her hand on specific decisions likely to be made in the future. These are the givens. The problem is that there are those who a) don't accept them but b) rarely say so, rarely assert that they just will not vote for someone whose political philosophy they disagree with; so they oppose in other ways.

They try to marginalize, caricature or morally discredit the nominee. Neither political party has a monopoly on this approach—it just depends which is making the nomination and which is called upon to approve it. What ensues are often essentially trick questions, which generate trick answers. Everyone on all sides becomes surpassingly cagey, figuring how the issue or exchange, is going to play, what the public relations traps are and so on. Also across the political spectrum, everyone has gotten pretty practiced and good at all this, which is what accounts for the very gamelike quality of the procedure. It's nobody's fault and everybody's fault, and it has been very much apparent in the Clarence Thomas hearings and the arguments they have inspired in the press and among lobbying groups in the past week, just as it was in the hearings of his recent predecessors.

We don't want to be too hard on the procedure; it is true that in the past week there were some interesting, even illuminating exchanges and that some things became clearer, not murkier as a result. But there was also much adjustment of perspective in keeping with the two sides' new imperatives. It was, for example, said by critics of Judge Thomas that he and his supporters dwelt at far too great length on his personal background, his experience of discrimination and poverty and struggle, as a qualification for the job—as distinct from the requisite legal experience. His supporters, naturally, challenged this complaint. The last time around, they were on opposite sides: the critics of New Hampshire's bookish bachelor, David Souter, had much to say about how his limited life experience would likely inhibit, even deform, his ability to understand the cases before him, never mind the extent of his judicial background—while the Souter supporters took the other line.

Did Judge Thomas modulate, trim, bob and weave during the questioning? Well of course he did. From time to time, it seemed to us he dodged excessively, even though you could construct a defense of his extreme defensiveness in light of some of the traplike questioning. We think the charge of total and instantaneous conversion is not fair, however. For example, some of the things Judge Thomas said on the agitated matter of natural law had been said to this same committee by him at his hearing in February of 1990, when he was appointed to the U.S. Court of Appeals. Specifically he had told the senators: "But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents on those matters."

Our own sense, on the strength of what we know of his record and the testimony given so far, is that Clarence Thomas is qualified to sit on the court. He is surely not the most eminent jurist who could have been selected, but neither have many of his predecessors been. His views, particularly on what are called broad remedies in civil rights cases, are conservative. An administration whose views are also conservative in this area is unlikely to produce any other kind of nominee. It is not clear to us that in every respect these views are wrong or that Judge Thomas's mind is closed, and in any case, in its episodic resistance, the Judiciary Committee has cleared with scant attention or dissent nominees, now justices, whose similar views on the subject are equally strong or stronger.

Nor do we think Judge Thomas comes to the court or this point in his life with a malign or distorted agenda. Quite the contrary. There has perhaps been too much talk about how he beat the odds and rose out of poverty and segregation in rural Georgia 40 years ago. Maybe not even he can be sure of all the effects this had on him. But one thing is sure: He will have a clearer sense of discrimination and its remedies than any other member of the court, any other nominee this administration is likely to send up—and any of the members of the Judiciary Committee now judging him. There seems also to be a streak of individualism in him, a turn of mind that will not easily accede to the prejudices and popular passions that sweep the day. On the strength of the hearings so far, we think he should be confirmed.