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TEDDY AND HOWIE ARE BACK: THE RETURN OF THE JUDICIAL NOMINATION PROCEDURE, PART VI

ANN H. COULTER*

Although the past forty or so years of judicial tyranny must have given pause to the most devoted constitutional cultist, the nation is at last on the verge of reaping the benefits of its brilliant Constitution. For a long while, the Constitution's division of powers and its checks and balances seemed to have been outwitted by the body charged with deciding cases under that document. Not only was the Supreme Court rapaciously seizing powers that properly resided with other branches of government and, most often, with the states, but also it seemed impervious to the Senate's power of impeachment under the Constitution, despite public indignation reaching record highs.¹

But despite the Justices' manifest understanding of their powers, they are not, after all, immortal. Where the threat of impeachment was ineffective, replacement is not. And as the Justices cash in their chips, the pent-up indignation of the silent majority—or technically, the silenced majority—that once found expression only in impotent highway billboards demanding Earl Warren's impeachment, now constitutes a relevant political force. So relevant a force is it, that conservatives are virtually guaranteed ultimate triumph in the war for the courts. Liberal factions

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¹ U.S. CONST., art. 1, §3, cls. 6 & 7. That the Constitution erected barriers to the easy removal of judges was evident to the principal theoreticians of the Constitution, who defended the insularity of the judiciary, along with the provision for life tenure of judges, on the grounds that independence was indispensable to an effective judiciary. THE FEDERALIST No. 79 (Alexander Hamilton). Importantly, however, the judicial branch was also said to "have neither force nor will as did the other two branches, "prov[ing] incontestably that the judiciary is beyond comparison the weakest of the three departments of power." *Id.* No. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Consequently the prospect of tyranny by the judiciary was dismissed as "the imaginary danger of a superannuated bench." *Id.* No. 79, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

may win occasional battles, such as their defeat of Judge Bork, but in the long run, victory belongs to conservatives. Judicial "precedents" grounded on illegitimate power grabs are not built to last.

Not only have the long-time losers become invincible winners, but the terms of the battle have radically changed. Indeed, it is because the instruments of war have changed that the once defeated are now ascendant. Moreover, the panzers are no longer on one side only. Not long ago, the wish list of the American Civil Liberties Union became the law of the land with no more fuss and bother than was required to pilot a legal dispute to the Supreme Court. Defeating judicial nominations of conservatives, however, takes more than a five vote majority on the Court.

The process by which new judges are made is admittedly not a pristine model of participatory democracy but nor is the decision made in secrecy by nine elites and then zapped down like a thunderbolt from Mount Olympus. Senators who reject a nominee chosen by the popularly elected President cannot waltz away from their votes without some explanation to constituents. The novelty of the governed having some influence on their governors has made the judicial nomination process a captivating spectacle full of brilliant ironies and sophistries.

One of the many ironies surrounding the process is that the invidious "strict constructionists"—people who attempt to assign meaning to the passages of the Constitution, as opposed to randomly assigning constitutional passages to meanings they like—openly accord a broader role to the Senate under the "advice and consent" rubric of Article II, Section 2 of the Constitution than do the foes of strict constructionism, who ought to have opposed every nominee to the Supreme Court since John Paul Stevens. After all, these later nominees threatened to at least cite provisions of the Constitution, rather than Henry David Thoreau, in their opinions.²

Article II of the Constitution gives the President the "Power, by and with the Advice and Consent of the Senate . . . [to] appoint

² See *Papachristo v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (citing Henry David Thoreau, for proposition that ambulatory activities are "historically part of the amenities of life" in overturning municipal vagrancy law).

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. . . Judges of the supreme Court”³ The Senate’s “consent” is thus explicitly required. No grounds upon which consent may be withheld are mentioned nor is there any other indication that sheer political opposition is beyond the pale. Indeed, it would seem to require the sort of linguistic machinations deftly produced by artisans Brennan and Blackmun to torture a definition of “consent” that would exclude political disagreements.

Peculiarly, however, the same people who could see as plain as day a right to abortion in the sarcoids on the tumors of various constitutional amendments and who opposed any nominees who did not have similar powers of discernment, suddenly act as if they are circumscribed by the Advice and Consent Clause from opposing a judicial nominee for reasons other than “judicial temperament,” “qualifications,” or fabricated charges of moral turpitude. One suspects that something other than the language of the Constitution is responsible for the extraordinarily demure interpretation certain Senators have given their role in the nomination process.

But, of course, the Senators and citizens who dread the dismantling of “constitutional” doctrines assembled by the will of judicial activists in the last several decades cannot forthrightly state their opposition to the Reagan and Bush nominees on that ground for the exact same reason they fear a conservative court: they realize that a majority of Americans oppose much of what the Court has enacted under the aegis of “constitutional law.” Were it otherwise, life tenured, unelected elites would not be so exclusively depended upon to enact the liberals’ social agenda.

Suppose in lieu of judicial fiats, national referenda had been held on every relatively important decision between 1954 and 1988 concerning, for example, the Free Speech and Establishment Clauses of the First Amendment, the Search and Seizure Clause of the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment, and the penumbras and emanations clauses of indeterminate amendments. In what percentage of these cases would the results have been substantially the same? Ten percent would be an extremely charitable estimate. Not for

³ U.S. CONST. art II, §2.

nothing, the whole point of these cases was to toss out the laws of state legislatures, which are composed of democratically elected representatives. Whatever may be said about democratically elected state legislatures, they are certainly a more plausible barometer of the public interest than is Harry Blackmun.

Although conservative judicial nominees do not threaten to impose their own policy preferences on the nation in the guise of interpreting the Constitution—and even if they did, Warren Court lovers would not be in much of a position to protest—they do promise to remove the flotsam dumped by the Court in the way of democratically determined laws concerning issues outside the dictates of the Constitution. Thus, even the liberal imagination has not presumed to concoct charges that conservative nominees will misconstrue actual provisions of the Constitution itself, or, indeed, Supreme Court rulings for the first three-quarters of the Constitution's history. Rather, all that has been suggested is that conservative Justices will not hew to various "precedents" invented by the Court in the last quarter of that body's existence. Deference to the Constitution over the recent fabrications of Brennan & Co. is what is meant by "judicial activism on the right."

Obviously though, were these widely popular rulings, there would be no danger because the holdings would be swiftly reincarnated as statutes. Senators opposed to conservative nominees are in the unenviable position of fighting to preserve judicial precedents that, it must be assumed, could never have made their way into this world as statutes, that, in other words, a majority of Americans do not much like.

So the Senator who draws campaign contributions from People for the American Way is in a bit of a pickle. He must oppose any nominee who poses a threat to the judge-made law that could never have been enacted through normal democratic processes, but the reasons he gives for his opposition must not jeopardize his own position—which he owes to the normal democratic processes. Consequently, instead of announcing that they opposed the nominations of, for example, Judges Bork and Thomas because their ascension to the high Court would likely send issues such as abortion, school prayer, pornography, and school districting back to

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state legislatures, the lion's share of Senators in opposition claimed to have rejected these men on the basis of qualifications, judicial temperament or questions of character. Remember this the next time someone accuses Clarence Thomas of dissembling under oath.

Besides being disingenuous though, the putative reasons that have been offered for opposing conservative nominees are transparently ludicrous. To begin with, this fixation on the qualifications and character of the nominees is droll, at best, in light of the qualifications and character of other men who have been elevated to that post. Moreover, doubt about "qualifications" is a spurious claim in the case of Thomas and a laughable one leveled at Bork; questions of "judicial temperament" and "character" are asinine vis-a-vis Bork and demonstrably absurd in the case of Thomas—as was so demonstrated.

Not only would it be political suicide for the majority of Senators to be explicit about which "precedents" they do not want overruled, but also several decades of judicial activism have largely sapped our legislative branch of courageous men. With few exceptions, most congressmen have convictions about nothing beyond their right to be re-elected. Those legislators who loathe the fall of *Roe v. Wade* surely do so not out of a deep abiding commitment to abortion, but out of a deep abiding commitment to their never having to take a stand on a controversial issue. And this, the Supreme Court has made easy—indeed, inevitable—by issuing judicial edicts covering the most volatile issues of the day.

Questions such as whether one's town will feature porn shops and strip joints; whether there shall be prayer in the local schools; whether abortion should be outlawed as murder or permitted, perhaps *funded*, as a vital medical procedure; and whether the death penalty is an appropriate punishment for certain crimes are far more important to the average American than any questions in those areas of the field the Court did not close to legislation by actual legislatures. It is the ordinary aspects of everyday life rather than global concerns that almost uniformly have been raised to "constitutional" issues by the Court, and it is the mundane that is most arresting to normal people. Consider this: what is likely to upset a person more—100,000 people dying in an earthquake in

India or his dog dying? The question is absurdly rhetorical. This is why the confirmation hearings of Supreme Court nominees rather than tedious, droning budget debates receive around-the-clock coverage by CNN.

Consequently, the principal activities of our elected representatives often seem to consist exclusively of designating honorary weeks ("National Gerontologist Appreciation Week") and striking postures on the deficit. Even the apparent wrangling over the deficit is a non-issue. Once President Bush broke his pledge not to raise taxes, partisan bickering over "the budget" became precisely as important and relevant as two imbeciles wrestling for the right to milk a he-goat: the only question being debated was how much our taxes—and their salaries—would be increased. Moreover, the deficit has never been a big issue with voters. Having run on the deficit for about forty years with little voter response, Republicans were noticeably delighted when the Democrats first picked up the deficit as a campaign issue in the 1984 election.

This is not to say that candidates for national, state, and local legislatures have had no issues on which to take positions and differentiate themselves, but they have certainly not been the sort of issues to get any but the most devoted political animal to join in pamphleteering, door-to-door solicitations, rallies, or really any great effort on behalf of a particular candidate. Indeed, the issues that have permitted distinctions among candidates have apparently not been sufficient to persuade a nontrivial number of people to bother voting. While massive campaigns are waged to increase voter registration,⁴ little thought has been given to the perfectly rational reason for the voters' ennui.

Not surprisingly, many of the most hotly contested issues in congressional and other legislative elections are those the Su-

⁴ A recent effort in this cause is Kentucky Senator Wendell Ford's bill, S. 250, 102d Cong., 1st Sess. (1991) that would compel the states to adopt a panoply of measures designed to increase voter registration. The bill's mandated registration methods would include automatic registration upon applying for a driver's license, unless specifically refused by the applicant; registration by mail; and distribution of registration applications at local welfare and other public offices. When substantial segments of the population are more likely to queue up for driver's licenses and welfare benefits than to exercise their right to vote, a right people are literally dying for in many parts of the world just now, there are problems with our system of representative democracy more profound than complex registration systems.

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preme Court has already usurped from the states and Congress. A candidate's position on crime, racial issues and, most obviously, abortion, continue to be some of the most important campaign issues. And that is in spite of the extremely limited number of ways a congressman can affect any of these concerns. It is these issues, especially abortion, that inspire political action committees, fund-raising groups, protests, and letter-writing campaigns. And as retirement season has gotten underway for our octogenarian Justices, the impact an elected official is presumed to have on the replacement choice has become a crucial, often *the* crucial, election issue.

Thus, in the wake of the Thomas confirmation, several feminist organizations vowed to target certain Senators for defeat in future elections solely on the basis of their votes in favor of the nominee—and no one found this unusual. But why should they? The sort of Supreme Court nominee a President is likely to tap and a Senator likely to approve is one of the few remaining issues which distinguish the democratic and republican candidacies.⁵ In fact, what may be most striking about the feminists' warning is that even as a threat it is futilely distant from the real levers of power. So what if they could defeat the handful of Senators on their blacklist? Each Senator is responsible for only one of one hundred votes and, even then, the best that can be hoped for is to defeat a Bork and a Ginsberg only to wind up with a Justice Kennedy.

Representative democracy has devolved to the point that the only way a citizen can hope to influence decisions about the things that concern him most is not through his vote in mayoral, gubernatorial, state legislative, or even, particularly, congressional or senatorial elections, but in the presidential election. And this is only because the winning candidate may have a chance to replace one or two Justices on the Supreme Court. That body, the nation's super-legislature, will then determine whether every state, municipality, and village in the nation will or will not be permitted to: provide the death penalty; have prayer in its schools or creches in its parks; outlaw abortion; restrict access to pornography; allow

⁵ Of late, the parties' other distinguishing features have begun to fade away: the Cold War is over and neither party seems able to resist raising taxes.

the use of a variety of evidence in criminal trials; indeed, even determine whether and what types of "psychological pressure" police may apply to criminal suspects to induce confessions.⁶

This is why it was absolute insanity for conservatives to pretend to have been shocked and hurt by the massive political campaign waged against Robert Bork. *Of course* there was going to be a blood bath: Judge Bork would have given a fifth vote essentially to the Republicans in the most powerful body in the land. To be sure, conservative Republicans had steadfastly opposed the judicial encroachments and outright pillage of the powers that properly resided with the other branches and more frequently, the states. Under the Republicans', and concededly, most Democrats', conception of the Supreme Court, the confirmation hearings of candidates nominated to this "least dangerous" branch⁷ ought to be noncontroversial, largely tedious affairs. This conception of the Court, however, had not been carrying the day for approximately four decades.

Patently there should not be political battles over Supreme Court nominations. But just as obviously there should not be Supreme Court rulings having *anything* to do with abortion, contraception, pornography, and a myriad of other subjects the Court has uninhibitedly expounded upon in the past.⁸ After forty years of Court opinions that read like Norman Lear's belief system, to nominate the man who would be the fifth "conservative" vote on the Court and then sit back and petulantly complain that liberals were politicizing the Court by campaigning against him is on the

⁶ See *Brewer v. Williams*, 430 U.S. 387, 404-05 (1977) (police officer's speech to murder suspect describing desire of victim's parents to locate victim's body in order to give it Christian burial, which persuaded suspect to lead police to body, held violative of Sixth Amendment right to counsel).

⁷ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.

Id.

⁸ If Congress were to outlaw, for example, speech on behalf of a right to abortion, the Court would of course be within proper bounds in declaring the law unconstitutional. But that would be a decision about speech, not abortion. There is a Free Speech Clause; there is not an Abortion Clause, an IUD Clause, or a Screw Magazine Clause.

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order of taking Ted Bundy to task for not thanking his date for a lovely evening after decapitating her. The Supreme Court has no more been what it ought to be than Ted Bundy was what a date should be.

Although Republicans were silly, Democrats, or more properly, liberals, have been the big losers. Instead of Judge Bork, they got Anthony Kennedy, mild-mannered Clark Kent during the confirmation hearings turned right-wing Superman on the Court. By all accounts Justice Kennedy's record is, if anything, more conservative than Bork's would likely have been.⁹ Furthermore, although many Americans briefly considered Judge Bork capable of the most carnal evils, by about the seventh or eighth week that Bork's book was on the *New York Times*' best seller list, the realization set in that they had been hoodwinked.

The Bork experience induced sufficient cynicism in the populace that by the time of the Thomas hearings, the period of enlightenment had been shortened to roughly forty-eight hours. If getting Kennedy rather than Bork on the Supreme Court was still a base hit for conservatives, the sexual harassment hearings were a home run. In the course of one weekend, almost every important organ of the liberal establishment had been exposed as never before: the media, the feminists, the civil rights establishment, the special interest groups, and the ultra-liberal Senators on the Senate Judiciary Committee.

Because of the extraordinary, lurid nature of the charges against Thomas, all of America was witnessing, first-hand, the actual event while simultaneously observing the media's presentation of it. No amount of mere skepticism about the press could have equivalently revealed the media's persistent drumbeat in favor of Anita Hill and against Clarence Thomas. The *New York Times*/CBS poll—taken evenhandedly and objectively after all of Hill's witnesses had appeared but before *any* of Thomas's

⁹ See, e.g., *Maryland v. Craig*, 110 S. Ct. 3157, 3163 (1990) (Justice Kennedy voting with majority in opinion that held Confrontation Clause did not require face-to-face confrontation with child witness charging defendant with child abuse). Noticeably, Justice Scalia dissented on grounds that would have been persuasive to Bork—that the language of the Constitution made no such exception. *Id.* at 3171 (Scalia, J., dissenting).

had¹⁰—showed that sixty-two percent of Americans believed that Clarence Thomas was telling the truth and fifty-eight percent believed Anita Hill was lying.¹¹ And this was *before* J.C. Alvarez and the indomitable Phyllis Berry, among others, had testified. Yet the major media not only assumed the truth of Hill's charges from the outset, but rushed in with excuses and explanations for each additional crack in Hill's story.

Maureen Dowd's "news" report on the front page of the *New York Times* the day after Thomas was confirmed is synecdochical of the press's presentation of the story. Under the headline "Image More Than Reality Became Issue, Losers Say," Dowd's news report commented of the Senate that had just confirmed the nominee:

This is the sort of deliberative body, after all, where Richard C. Shelby, the Democratic Senator from Alabama who had been getting calls running 9 to 1 in favor of Judge Thomas, decided to vote his conscience live this morning with Katie Couric on the NBC program "Today." He decided to vote in favor of confirmation.¹²

A companion piece, just above Dowd's report, interpreted votes *against* the nominee with somewhat less cynicism: "Three [Senators], all of them Democrats, admitted by switching their votes that they had found the record of the [sexual harassment] confrontation clear-cut and convincing."¹³ At least Anna Quindlen had possessed the grace to precede one of her many op-ed polemics in favor of Hill with the observation that "[t]he good thing about writing an opinion column is that you can have an opinion."¹⁴ The distinction between opinion and nonopinion pieces

¹⁰ Also evenhanded and objective was the decision of every A.M. band radio station broadcasting to New York City, to cut what had been continuous coverage of the sexual harassment hearings approximately thirty minutes into the testimony of Thomas's witnesses.

¹¹ Elizabeth Kolbert, *The Thomas Nomination; Most in National Survey Say Judge is the More Believable*, N.Y. TIMES, Oct. 15, 1991, at A1.

¹² Maureen Dowd, *The Thomas Confirmation; Image More Than Reality Became Issue, Losers Say*, N.Y. TIMES, Oct. 16, 1991, at A1.

¹³ Adam Clymer, *The Thomas Confirmation: Senate's Futile Search for Safe Ground*, N.Y. TIMES, Oct. 16, 1991, at A1.

¹⁴ Anna Quindlen, *Public & Private; An American Tragedy*, N.Y. TIMES, Oct. 12, 1991, §1,

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was not readily apparent during the sexual harassment hearings.

To be sure, the liberal bias of the media was not likely to be a shocking new discovery for most Americans. What was unusual about the sexual harassment hearings was not only that all of America was watching both the unraveling of the story line as well as the media's version of that story, but that the liberal clique in the press had an unusually fevered pitch this time. Tendentiousness like this does not result from honest journalists inadvertently allowing their prejudices to show; this was the handiwork of the feminists.

Until the sexual harassment hearings, feminist theories about the oppression of women have remained in the ghettos of academia without ever having been subjected to any critical examination by the population at large. Indeed, the snippets and phrases of feminist causes that have made their way into popular discourse sound utterly noncontroversial. "Date rape" ostensibly refers to a man who straightforwardly rapes his date; "sexual harassment" conjures images of a boss demanding sex from his subordinate; "comparable worth" seems to demand no more than that a woman receive the same pay as a man for performing the identical job. Occasionally, the more representative aspects of feminist theory slip into public, such as the "substantial ferment within the feminist community over . . . whether a reasonably clear line can be drawn between forced heterosexual encounters . . . and mutually chosen heterosexual encounters."¹⁵ But these are presumed to be merely fringe elements of an otherwise mainstream pro-women movement, rather than the very heart of feminist theory.

Thus, for example, contrary to uneducated opinion, "date rape" is not defined as a man who rapes his date—that would be "rape" unqualified,¹⁶ but rather describes a scenario indistinguishable from the typical manner in which most couples first have con-

at 29.

¹⁵ Mary Irene Coombs, *Crime in the Stacks, or A Tale of A Text: A Feminist Response to a Criminal Law Textbook*, 38 J. OF LEGAL EDUC. 117, 124 n.44 (1988); see also ANDREA DWOR-KIN, *INTERCOURSE* (1987); SUSAN ESTRICH, *REAL RAPE* (1987).

¹⁶ Although feminists would have one believe that they invented the crime with which William Kennedy Smith was charged, Smith was accused of rape, technically "sexual battery," not of "date sexual battery." The former has been unlawful for some time now.

sensual premarital sex, but for the female's inscrutable state of mind.¹⁷ And "sexual harassment" as defined by the feminists need not be threatening—mildly annoying will do. Most insidious though, is the feminist article of faith that once a charge of sexual harassment, date rape, or, of course, real rape has been leveled, it must be accepted as true without possibility of disproof. This is not just a presumption of guilt until proved innocent, which itself would turn notions of justice and fairness upside down. The accusation is true by virtue of being made.

These feminist innovations in the law made a resounding debut during the Thomas hearings. When Hill's charges first hit the airwaves, many of those unfamiliar with the mores of the judicial activism devotees, and also unfamiliar with Thomas, must have tentatively assumed the veracity of the accusations. There is a natural inclination—of humans, if not the American judicial system—to believe people are guilty as charged. While the press and the court may refer to "the accused" and "the suspect," the casual observer thinks "the murderer," "the rapist," or "the robber." But the story has to work, it must maintain some intuitive believability. Hill's story was at its apogee of plausibility when first announced. After that, it became less and less believable at every turn. Why would she continue to work with a man whose vulgarity upset her to the point of hospitalization? Most peculiar, why would she move with him from the Department of Education to the Equal Employment Opportunity Commission ("EEOC")?

Rationalizations abounded for Hill's extraordinary decision to follow her harasser, as well they should have. If he really said all these things in the sinister manner she described, neither Hill nor any person would have switched jobs so as to continue working under Thomas. But Hill's explanation that the harassment seemed to have stopped is inconsistent with her depiction of the harassment, her claimed reaction to it, and her raising the charges with

¹⁷ Date rape generally entails a girl consenting, perhaps slowly or grudgingly, to at least the first several steps of a romantic tussle with her date, which then leads to sex. She need not vocally object to sex, provided she never explicitly consents to it. Having brunch with the putative date rapist the next morning, or even going on another date with him does not disqualify such a scenario from constituting "date rape." Written contracts of consent are to be recommended. *See generally* Tamar Lewin, *Tougher Laws Mean More Cases Called Rape*, N.Y. TIMES, May 27, 1991, at 1, 8.

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the Federal Bureau of Investigation (“FBI”). She stated: “it wasn’t as though it happened every day. But, I went to work knowing that it might happen.”¹⁸ If there were only five to ten incidents during a four-year period though, how long a lapse would it take to annihilate her claimed fear “that it might happen”?

And even assuming that any lapse could be long enough to wholly eliminate the unpleasant anticipation of yet more such incidents, Hill did not claim that Thomas’s comments merely embarrassed her or upset her for a day or so—she said she was traumatized by them. So pervasive was her resulting distress that she was hospitalized for five days with acute stomach pains putatively on account of the harassment.¹⁹ Even if she could have known to a moral certainty that no more harassment would ensue, it is highly implausible that she would relish the company of a man whose behavior was capable of traumatizing her to this degree.

Finally, she reported the harassment to the FBI during its background check on Thomas. By providing her story to the FBI she indicated that she believed what he did to be wrong and so indicative of bad character that, even though she would never have to work with Thomas again, the Senate should have been made aware of his behavior before confirming him for a position of some stature and importance. It would seem to be wholly irrelevant to Hill’s move with Thomas to the EEOC, therefore, that the harassment appeared to have stopped. She believed he was a bad man for ever having done it.

Perceiving the obvious inadequacy of her own explanation, Hill’s claue in the media quickly set about manufacturing their own excuses for her improbable behavior. It was said she was uncertain about her position at the Department of Education and pessimistic about her prospects elsewhere. The fact that she was not a political appointee and consequently possessed total job security was dismissed on the grounds that she might not have realized it—a risible claim to anyone who has ever worked for the

¹⁸ *Hearings on the Supreme Court Nomination of Clarence Thomas, Committee on Judiciary, United States Senate, 102d Cong., 1st Sess. (1991)* [hereinafter *Thomas Hearings*] available in LEXIS, Legis library, Fednew file (all references to testimony etc., from the *Thomas Hearings* have been taken from this source).

¹⁹ *Id.*

federal government in any capacity.

Alternatively it was posited that her fear was inspired by President Reagan's desire to abolish the Department of Education. Yet Hill's division within the Department of Education is secured to the same statutory anchor as is the EEOC—the 1964 Civil Rights Act. Because that Act requires that some federal outpost monitor nondiscrimination by recipients of federal grants irrespective of whether those grants are distributed by a separate Education Department,²⁰ Hill's particular position at the Department of Education could have been abolished only by repeal of the 1964 Civil Rights Act. Such a repeal, however, was not only wholly implausible, but would have also eliminated her subsequent position at the EEOC in any event. Moreover, if the actual facts, like the difference between a political and career position, are not something Hill may be credited with knowing, it bears mentioning that the EEOC was no more immune from the Reagan Administration's war (rhetorical, as it turns out) against the federal Leviathan, than was the Department of Education.

Most wonderful of all was the fact that absolutely no one in the press would so much as acknowledge the problem her double victimhood posed to claims of professional insecurity. All of America knew that a black woman who graduated from Yale Law School in 1980 would have precisely as much trouble landing any number of well-paying prestigious jobs in 1982 as the President of the United States would have being seated at Maison Blanche. But the media considered this point too gauche to mention and therefore proceeded to blather about Hill's tenuous employment prospects without a blush. Ultimately, there was no satisfactory explanation for just this single discrepancy in Hill's story and there were too many—far too many—unsatisfactory ones.

The question could not be avoided: What objective indicia *would* Hill's boosters in the press accept as evidence of Thomas's innocence? That she not only arranged a transfer to the EEOC with the putative harasser but continued to place social calls to him up until his marriage to Virginia Lamp? That no one else

²⁰ Thus, prior to the creation of the Department of Education in 1980, the agency resided in the Department of Health, Education, and Welfare.

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stepped forward to testify to similar experiences, whereas thirteen women who had worked with Thomas testified that they did not believe it possible? That coworkers said they detected no discomfort in Hill during her contacts with Thomas? That Hill told no one, either at the time of the harassment that allegedly culminated in her hospitalization or at any time thereafter, anything about these traumatizing events beyond vague allegations of “sexual harassment”—nothing about pubic hair, “Long Dong Silver,” sex with animals, women with large breasts, or even a meager “he’s talking to me about pornography”? That another man claimed Hill had accused him of leading her on and that on that basis he believed her to be “somewhat unstable” and that in his case “she had fantasized about [his] being interested in her romantically?”²¹ What else could have been shown that would finally prompt the sexual harassment mavens to cry uncle, to admit that Thomas had been falsely charged, or, really, to own up to even a touch of gray concerning Thomas’s guilt?

It is impossible—there is nothing. “Why else would she have made the accusations” is all that was said and all that can be said.²² And that sentiment is not only disingenuous—the reasons were obvious and have only become more so, now that she has

²¹ *Thomas Hearings*, *supra* note 18.

²² The only other somewhat subjective evidence briefly supporting Hill’s credibility was the detail she gave concerning the alleged discussions of pornography. Thus, for the first twenty-four hours of the hearings, Hill supporters demanded to know how else an apparently prim law school professor could have possibly come up with “Long Dong Silver” or the pubic hair line.

In the abstract, the only answer did seem to be that *someone* had said these things to Hill, very possibly in a vulgar and harassing manner. And unlike the other straws grasped at by the Hill clique, this query was at least founded on the rational concept of circumstantial evidence rather than purely mystical intuition. Yet despite the wide currency immediately gained by this apparent enigma, when Senator Hatch stunningly revealed alternative avenues by which even a prudish law professor would very likely have happened upon references to Long Dong Silver—a sexual harassment case in Lexis and Westlaw databases from a court sitting in Hill’s home state—and the pubic hair line—almost a verbatim quote from the enormously popular book and movie *The Exorcist*—Hill supporters quietly dropped the question and smugly feigned perplexity as to what could have prompted Hatch to mention these sources in the first place. Thus, as the hearings grow more distant, one such Pecksniffian has described Hatch’s *coup de grace* to the how-else-could-she-have-known line as part of the “Republicans’ attack [on] Professor Hill’s credibility and character—suggesting she may be . . . under the pornographic influence of *The Exorcist*.” Mark Becker, *An Inside View: How the Senator and His Counsel Tried to Find Out Who Clarence Thomas Is*, NAT’L L.J., Dec. 30, 1991, at S12, S15.

begun her collection of awards, speaking engagements, and standing ovations—but also amounts to an admission that a charge of sexual harassment must be accepted as true without possibility of disproof. That part of the feminist agenda that dispenses with fairness, objectivity, and rationality and that demands a finding of guilt whenever a woman accuses a man, was finally laid bare before all of America.

Like the feminists, the race relations industry makes the most headway when confined to the realm of popular mythology. And also like the feminists, actual facts tend to explode these myths. The seemingly endless parade of talented and conservative blacks testifying before the Judiciary Committee during the sexual harassment hearings rather conclusively gave the lie to the civil rights coterie's portrayal of black America as nearly monolithic, and refuted as well the grudgingly negative opinion of Clarence Thomas apparently held by the monolith. Phyllis Berry is the victim of no one; Nancy Fitch is hardly a candidate for affirmative action bonus points; John Doggett is neither an oppressed unfortunate nor an idealized super hero—his marvelous arrogance theatrically illustrated that blacks are capable of the same foibles as whites. And all stood behind Thomas and against the liberal establishment with a fierce loyalty that made the spurious posturing of an Al Sharpton and the other media-invented black celebrities despicable by comparison.

Not only the media, the feminists, and the race relations industry but every component of the liberal establishment, even those not directly involved in the hearings in any way, was dealt a blow by Hill's eleventh-hour allegations like never before. With liberals and conservatives locked in a heated war over the Supreme Court, everyone knew the Thomas nomination would instigate hostilities but no one knew when or how. So while liberal groups called everyone who had worked for—or incidentally bumped into—Thomas, rummaged through his garage, dug up his divorce papers, scrutinized his wife's background, and generally scoured the nation for dirt on Thomas, all that conservatives could do was wait and wonder what character assassination would ensue this time around.

Bork had been routed with calumnies that he would single-

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handedly revive back-alley abortions and segregated lunch counters; Ginsberg was brought down with the revelation that he had smoked marijuana; Rehnquist was reviled, though not defeated for Chief Justice, with allegations of race-baiting; and for a different post, John Tower had been finished off by a leak of womanizing reported in his FBI files—a leak that failed to include the FBI's dismissal of these charges as unfounded.

Timing and strategy alone accounted for the relatively bloodless nominations of Antonin Scalia, Anthony Kennedy, and David Souter. Scalia would not constitute the fifth conservative vote on the court and, in addition, was a sort of sacrificial lamb to give credibility to the attack on Rehnquist. Kennedy was nominated in the wake of the defeat of Bork and Ginsberg. Souter appeared to have spoken to no one over the years other than his mother—who fortunately was not a member of People for the American Way (and for this, he was depicted as a Norman Bates sort of psychotic in a full-page advertisement in the *Village Voice*).

It was like viewing the fourth of a series of horror movies that had previously featured beheadings, poisonings, ax murders, and torture. What would it be this time? Conservatives sat on the edges of their seats, waiting, waiting, waiting. What could be next? After all, Thomas was even better than a stealth nominee, as Kennedy and Souter had been called. He was the Arnold Schwarzenegger of nominees. While Thomas was openly, not to say aggressively, conservative, he seemed invincible by virtue of his impeccable character, jolly demeanor, and stereotypical victimhood. Who would play the predator and when would he or she strike?

It is precisely because the onslaught, or rather *some* onslaught, was entirely anticipated that the sexual harassment allegations from their inception seemed disingenuous to many. The demand to know why Hill had not filed charges at the time of the alleged harassment reflected not the incorrect assumption that charges are invariably filed in cases of sexual harassment but the correct assumption that the liberal special interest hit squads were intent on detonating some sort of ideological time bomb against the conservative nominee and this was it.

Thomas had endured the real hearings without giving his politi-

cal foes any nonpolitical grounds for rejecting his nomination. Something had to be done. Thus, that a decade had passed since the claimed harassment raised fewer eyebrows than the fact that the Senate Judiciary Committee hearings had *just* passed, and Thomas remained unscathed. It was the inevitability of a liberal assault against the nominee that made Hill's accusations seem precisely as staged as the sixteenth murder in a horror film. Except that at the movies, the victims are actors and the blood is not real.

If it was conservatism rather than any particular character defect of Thomas's that the liberal predator sought to destroy, it was irrelevant which of the various special interest groups was to be deployed against Thomas for that purpose. Of course, as Thomas was black himself, stern lectures from Senator Kennedy on the plight of blacks in America would be somewhat unseemly—though, come to think of it, no less unseemly than Kennedy's participation in a tribunal on sexual harassment. Still, aside from race-baiting, any of the liberals' favorite bogeymen could have been conjured up as easily as sexual harassment. Instead of Long Dong Silver and pubic hair, Anita Hill might as well have alleged that Thomas had privately made scathing remarks about homosexuals, the homeless, or the noble porpoise.

Admittedly, these pet victims do not induce the same resonance in the American people as do the liberals' Most Favored Causes, Race and Sex. But the Aryan precision with which the Left has attempted to sandbag every conservative judicial nominee assures that whatever quarter the charge was to emanate from, the reaction would have been identical: Senator Metzenbaum would have been every bit as venomous, Senator Biden just as unctuous, the media precisely as tendentious, and the special-interest-group-of-the-day comparably sanctimonious. It may have been plausible to some Americans that Bork's opponents truly believed he was a loose cannon, that Ginsberg was defeated because he had smoked marijuana, and that Tower's detractors were morally offended by his womanizing. By the time Justice Marshall resigned from the Court, startling revelations about any nominee's past would have been greeted with some skepticism. By the end of the sexual harassment hearings, the entire liberal establishment had been discredited.

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Even the puny Pyrrhic victory that might have been claimed by the Left after the real hearings was forfeited during the sexual harassment hearings. In addition to giving all of America a crash course on feminism, the civil rights lobby, and special interest groups in general, as well as a refresher course on the media, the sexual harassment imbroglio must also have had its effect on Thomas—Justice Thomas, that is.

The judicial nomination hearings are largely surplusage because the nominees properly refuse to answer inappropriate questions, and the nominees' responses to the inappropriate questions are all that the Senators want to know: Will he cast his vote to preserve or strike down the liberal social policies created by the Court over the past several decades? Plainly, judicial nominees chosen by Republican Presidents tend not to be keen on judicial activism. Thus, the sole purpose of the hearings is to terrorize the President into sending up judicial candidates who are at least capable of moderating their enthusiasm for overruling recent precedent, and to harangue and browbeat the nominees that do appear before the Committee.

This latter function of the Committee is presumably not without result. The nominees that have survived the Committee's trial by fire do seem to have been somewhat cowed by the experience. Thus, for example, Justices Scalia,²³ Kennedy²⁴ and Souter²⁵ did

²³ For examples of the increasingly conservative voting record of Justice Scalia, compare *Arizona v. Hicks*, 480 U.S. 321, 324-29 (1987) (holding that police officer's movement of expensive stereo equipment in order to record serial numbers was illegal search under Fourth Amendment where police legally entered defendant's premises to search for firearms and victims, after gun discharged from defendant's apartment injured man in apartment below) and *Hitchcock v. Dugger*, 481 U.S. 393, 397-99 (1987) (overturning death sentence because trial judge refused to consider "mitigating circumstances" beyond those set forth in state statutes) with *Walton v. Arizona*, 110 S. Ct. 3047, 3058-59 (1990) (Scalia, J., concurring) (concurring in opinion that gave states greater authority in death sentence proceedings in evaluating mitigating or aggravating circumstances, specifically criticizing Court's capital sentencing jurisprudence for being unduly interventionist in state death penalty proceedings) and *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring) (characterizing Court's refusal to reconsider *Roe* as "needlessly prolonging] [the] Court's self-awarded sovereignty over a field where it has little proper business").

²⁴ Compare *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989) (Kennedy, J., concurring) (joining Justice O'Connor's concurrence that differed with Justice Scalia's majority opinion only in its far more expansive reading of Court's power to create "fundamental rights" qualifying as "liberal interests") with *Presley v. Etowah County*, 112 S. Ct. 820, 831 (1992) (holding voting rights act not violated by transfer of decision-making authority from

not produce their most outspokenly conservative opinions until after their first few terms on the Court. If nothing else, it must be psychologically difficult to spend several weeks expressing no opinion on *Roe v. Wade* and then to turn around one month later and cast a vote to overrule the case as a legal abomination based on nothing in the Constitution. Any such moderation Justice Thomas may have been imbued with during the real hearings was surely purged from him by the sexual harassment hearings. And with the Left's luck henceforth in the Thomas affair, the odds are better than even that Thomas is the sort of man to hold a grudge.

The Left is shadowboxing the apocalypse with its ludicrous position of having to persuade the American people that freedom is doomed unless every important issue of the day is conclusively decided for them by the majority vote of nine unelected elites. This will prevent them from stymieing the realignment of constitutional powers that flows naturally from the replacement of social legislators on the Court with Justices who interpret their own powers more conservatively. Until the realignment is complete, however, the stakes will remain high—the entire liberal social agenda is in the balance. With apologies to the Great Man, ten Bork defeats would be worth an occasional sexual harassment hearing along the way.

electd representative to official appointed by majority). Although Justice Kennedy's voting record may show the least ideological evolution, his nomination hearings were also uniquely pro forma and noncontroversial among Reagan-Bush appointees.

²⁵ Although Justice Souter has not been on the Court long enough for a realistic comparison of his early voting record with a later voting record, Justice Thomas has clearly outstripped Justice Souter in the number of opinions and significantly, of dissents he has written. During Souter's first full calendar year on the Court, he wrote thirteen opinions, two of them dissents. Search of LEXIS, Genfed library, U.S. file (April 1, 1992). From January to the end of March, Thomas's first year on the Court, he has written twelve opinions, three of them dissents. *Id.* Most strikingly, compare all three Justices early voting records with Justice Thomas's votes in *Hudson v. McMillian*, 112 S. Ct. 995, 1005 (1992) (arguing in dissent that Eighth Amendment not violated by single incident of force by prison guards against inmate because no significant injury) and *Dawson v. Delaware*, 1992 U.S. LEXIS 1536, at *19 (Mar. 2, 1992) (sole dissent stating admission of gang membership evidence during sentencing phase in death-penalty case violated Fourth Amendment because not relevant).