THE FAKE TRIAL

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The Senate Judiciary Committee's handling of the charges by Anita Hill against Clarence Thomas had a more than superficial resemblance to a criminal proceeding. At first, there even seemed to be a grand jury—the Senate as a whole—taking evidence to determine whether there was probable cause to believe that a crime had been committed. That body ended up with a decision to authorize a delay and to hold over the vote on Thomas until a "hearing" on the charges could take place.

Then there was a "petit jury," close in size to the traditional body of twelve, composed of the fourteen white men who make up the Senate Judiciary Committee. This body looked like a jury, and made noises that its job was to get to the bottom of the accusation. There were witnesses: the accused (Clarence Thomas), the accuser (Anita Hill), corroborating witnesses for the accuser, and character witnesses for the accused. There were "defense" lawyers, Senators Hatch and Specter (taken from the ranks of the "jurors," to be sure, but no less aggressive for that) who attacked the credibility of Anita Hill and of the witnesses who testified on her behalf. Another of the "jurors," Senator Biden, played the part of "judge" or at least a quasi-judge, who ruled on objections, appeared to set the ground rules, and kept the proceedings moving. One might have remarked upon the absence of a traditional prosecutor, but two other members of the "jury," Senators Heflin and Leahy, had been designated to ask questions of the accused, and did so, albeit gingerly.

But despite the outward appearances, what was going on was nothing like a trial. The Senate as "grand jury" did not deliberate as a secret body. (If it had, it might well have ignored the charges.) Further, the Senate never really had before it any definition of an offense that was supposed to be considered with specificity; no elements were spelled out. Had that body wanted to make reference to the law on sexual harassment, the Senate might have learned about the quantum of proof necessary to sustain a complaint; for instance that the EEOC requires neither

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corroboration of an incident nor proof of a contemporaneous complaint in sexual harassment cases.[1]

Similarly, the Judiciary Committee as "jury" did not stay in role. Jurors do not typically ask questions, and they don't take on the jobs of lawyers and judges. Most importantly, jurors are not supposed to have personal stakes riding on outcomes. But the "Thomas jury" was composed of senators like Biden, trying desperately to look fair, and senators like Specter, trying to appease the right wing of the Republican party for his heresy in voting against the confirmation of Robert Bork. Moreover, the "jury" obviously saw itself as having the responsibility not only to hear evidence and decide on liability, but also to "sentence" by deciding what to recommend that the full Senate should do with the nomination of Clarence Thomas.[2]

Despite the surface appearances, the absence of clearly-defined prosecutors and defense attorneys further deprived the proceedings of real similarities to trials as fact-finding instruments. Two of Clarence Thomas's supporters on the Committee functioned as "defense" lawyers for him and aggressively assailed the credibility of Hill's statements—and then cast their votes for acquittal in their roles as "jurors." The two designated hitters for the "prosecution" were afraid to swing for the fences. They were clearly uncomfortable in their roles, perhaps afraid of seeming to be less than deferential to an almost-Supreme Court justice, and certainly nervous when Thomas played his race card, comparing the "hearing" to a lynching.[3]

Finally, this was a trial without a real "judge." Senator Biden, ostensibly the "judge," had none of a judge's power. He could not really decide on the law, keep out irrelevant evidence, instruct the jury, or take a verdict. Further, the "judge" had been in charge when the Committee had initially decided not to pursue an "investigation" of Anita Hill's charges. Thus, "Judge Biden" had a personal stake. His reputation for

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1. EEOC COMPLIANCE MANUAL 3270 ("While a party's complaint or protest is helpful to charging party's case, it is not a necessary element of the claim."), 3272 ("The Commission recognizes that sexual conduct may be private and unacknowledged, with no eyewitnesses. . . . In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim's allegation.") (March 19, 1990).

2. In the end, the Committee split 7-7, allowing the matter to go to the full Senate without a recommendation. *See, e.g.*, Timothy M. Phelps, *Senate Begins Debate on Thomas*, NEWSDAY, Oct. 4, 1991, at 17.

3. *See, e.g.*, William Schneider, *Not Much Really Changed on Thomas*, NATIONAL J., Oct. 19, 1991, at 2578 (describing Thomas's characterization of the hearing as a "high-tech lynching for uppity blacks"); Robert Shogan, *Bush, GOP Viewed as Big Winners*, L.A. TIMES, Oct. 16, 1991, at A5.

competence as chair of the Senate Judiciary Committee was on the line. As a result, all he could do was make bargains with members of the Committee and then claim them as "governing principles" embedded in legal tradition. Words like "burden of proof" were repeatedly invoked[4] to protect Thomas while at the same time it was insisted that the inquiry was not about any criminal or even civilly illegal behavior. In sum, the television audience saw the trappings of a fact-finding proceeding—what looked like a trial—but none of the basic elements of a real trial was present.

The trial-like atmosphere was not only fake or disingenuous; it had powerful, and harmful, effects that shifted the focus of the hearings in important ways. First, the seeming procedural regularity and apparent role definition camouflaged to some extent the intensely political nature of the event. This is not to say that the participants and the audience were unaware of the politics of the situation. The due process overtones, however, offered a pretense of fairness that was easy to manipulate and to exploit. Clarence Thomas's supporters were able both to characterize the charges as "unfair"[5] and yet to demand strict procedural rules in the name of fairness. His opponents were caught in their effort to maintain an appearance of neutrality. Locked into their juror-judge roles, they never really carried out any semblance of a genuine investigation of the allegations. The confusion of roles and the effort to assume the mantle of judicial fairness prevented the Senate from doing what it sometimes can do, with varying degrees of success: investigate.

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4. *See, e.g.*, Melissa Healy & Edwin Chen, *Thomas Confirmed, 52-48*, L.A. TIMES, Oct. 16, 1991, at A1 (quoting Senator DeConcini as saying during floor debate, "The burden of proof has to be on the person who is making the accusation."); Ruth Marcus, *When Roll Was Finally Called, Thomas Won Benefit of Doubt*, WASH. POST, Oct. 16, 1991, at A19 (quoting Senator Dixon as saying during floor debate, "Under our system, the burden [of proof] falls on those making allegations."); David G. Savage, *Thomas, Backers, Try To Make Him Seem Victim*, L.A. TIMES, Oct. 13, 1991, at A1 (quoting Senator Biden as saying to Judge Thomas at the hearing on Professor Hill's charges, "The presumption [of innocence] remains with you, judge.").

5. *See, e.g., Excerpts: "It's Decision Time and We Can't Punt"*, L.A. TIMES, Oct. 16, 1991, at A8 (quoting Senator Kassebaum as saying during floor debate, "In fact, I believe it would be manifestly unfair for the Senate to destroy a Supreme Court nominee on the basis of evidence that finally boils down to the testimony of one person, however creditable, against his flat, unequivocal, and equally creditable denial."); Paul Bedard, *Bush Questions Timing of Charges Against Thomas*, WASH. TIMES, Oct. 14, 1991, at A6 (quoting President Bush as saying, "And they know it's unfair at the last minute to have a charge like this leveled against a man that . . . [has] been confirmed four times by the Senate."); Juan Williams, *Open Season on Clarence Thomas*, WASH. POST, Oct. 10, 1991, at A23 (quoting Sen. DeConcini as saying of the charges against Thomas, "It is inconceivable, it is unfair and I can't imagine anything more unfair to the man."); Martin Kasindorf & Jack Sirica, *Feminists Call Delay A Victory*, NEWSDAY, Oct. 9, 1991, at 4 (quoting Senator D'Amato as calling the charges "terribly unfair" to Thomas).

In addition to influencing the way members of the Committee acted (mostly postured) before the cameras, the trial-like atmosphere seemed to have had a curious but real effect on how the participants thought about what it was that they were doing. I believe that the focus on the incidents of harassment alleged by Anita Hill drew the Committee's attention away from the primary question that it had been facing—whether Clarence Thomas should be confirmed in light of his entire record—and toward the triple questions of whether the charges were true or false, how to determine truth or falsity, and what to do if (Heaven forbid) there was a finding that Clarence Hill had actually done what Anita Hill said that he had done. The job of determining and dealing with what happened between Clarence Thomas and Anita Hill looked quite different from figuring out whether Thomas's record qualified him to sit on our highest court.

Another troubling aspect of the attempt to put on a convincing "trial" was that there was a palpable air of discomfort about "recalling" this "jury." The case of Clarence Thomas was a case that this jury had already heard. The Committee/jury had conducted a hearing, questioned the candidate, and heard from proponents and opponents about Thomas's qualifications to sit on the Supreme Court. After the hearing, the Committee had deadlocked at 7-7.[6] Thereafter, enough Senators had announced their intentions for the Committee to know that, had the vote occurred before the Hill allegations, Thomas would likely have been confirmed by a vote of 54-46 at the very least.[7] After Anita Hill's allegations, the Committee/jury was being asked to revisit the case in light of new information. And the new information looked like an allegation of gross impropriety: perhaps actionable sexual harassment, perhaps a violation of the law.

In short, before October 7, the Committee, the Senate and the public thought that Thomas "had" the nomination.[8] Thus, the question perceived by the Committee/jury was not "did he do it?" or even "what should be his sentence?" but rather whether or not, in light of the allegations, Clarence Thomas should be *deprived* of something that he already

6. *See supra* note 2.

7. Neil A. Lewis, *Law Professor Accuses Thomas Of Sexual Harassment in 1980's*, N.Y. TIMES, Oct. 7, 1991, at A1 ("At least 54 Senators have declared their intention to vote to confirm Judge Thomas.").

8. *See, e.g.*, Richard L. Berke, *Support for Thomas Inches Toward Approval in Senate*, N.Y. TIMES, Oct. 4, 1991, at A16 (quoting Senator Metzenbaum, an opponent of the nomination, as predicting only "a very slim chance that he'll be rejected" and noting that Thomas's principal supporters predict sixty votes to confirm).

possessed and hence was "entitled" to. The jurors knew that if there was a finding of guilty, Clarence Thomas would not be confirmed.[9]

It was knowledge of the punishment coupled with the knowledge of the prior outcome that led, in my view, to a reluctance on the part of Democratic Committee members to object to the pressured time-frame of the Republicans or even to set up a procedure (such as appointment of special counsel) that would have enabled both additional investigation and serious cross-examination of Thomas. This view of the Committee's sense of Thomas's entitlement meshes well with the general tenet that I believe most politicians hold: that it is the province of the chief executive to appoint whomever he or she wishes to judgeships, assuming basic minimal qualifications. To be sure, the Supreme Court is different, and over the years some candidates have been defeated by the Senate, but the underlying tendency to give the candidate the benefit of the doubt remains. That tendency is supported by a view, rarely stated but widely held, that such appointments are patronage to which elected executive officials have a "natural" claim.

The reluctance of the Committee to take away from Thomas what it thought he had sewn up played itself out in the language of the fake trial. The so-called "evidentiary standard" that the Committee set for judging his conduct toward Anita Hill was about entitlement. Chairman Biden, as well as other members of the Committee, continually repeated that the candidate "deserved the benefit of the doubt."[10] The rhetorical effect of

9. In most cases, juries are not allowed to know what punishment will be imposed if a guilty verdict is returned. The fear is that jurors will let their sympathies or prejudices override their judgment of guilt or innocence.

10. *See, e.g.*, Helen Dewar, *Senate Confirms Thomas by 52 to 48 to Succeed Marshall on Supreme Court*, WASH. POST, Oct. 16, 1991, at A1 (quoting Senator Dole as saying during floor debate, "Give [Thomas] the benefit of the doubt; he deserves that much."); *Hearing of the Senate Judiciary Committee*, FED. NEWS SERVICE, Oct. 11, 1991 (quoting Senator Biden as beginning the hearing by laying down the ground rules, among which is, "Judge Thomas must be given . . . the benefit of the doubt."); Clifford Krauss, *The Thomas Nomination*, N.Y. TIMES, Oct. 11, 1991, at A18 (quoting Senator Biden as saying during a telephone interview, "I must start off with a presumption of giving the person accused the benefit of the doubt."); David Lauter, *Crucial Votes Seem Headed Toward Thomas*, L.A. TIMES, Oct. 15, 1991, at A1 (quoting Senator DeConcini as announcing he will vote to confirm Thomas because "The 'Dennis' standard is that if there's a doubt, it goes to the accused and not the accuser"); *Senate Confirms Thomas to Join Court*, U.S. L. WEEK, Oct. 16, 1991, n.p. (quoting Senator Shelby during floor debate as saying, "If you're going to give the benefit of the doubt, you have to give it to Thomas in a case like this . . . ."); Gaylord Shaw, *Approaches Finale*, NEWSDAY, Oct. 15, 1991, at 5 (quoting Senator Lieberman as saying in an interview on the *Today Show* that Thomas deserves the benefit of the doubt); *Thomas Narrowly Confirmed as 106th U.S. Supreme Court Justice*, FACTS ON FILE WORLD NEWS DIGEST, Oct. 17, 1991, at 769 A1 (quoting Senator Dixon, who backed Thomas because "[t]he accused gets the benefit of the doubt"). *But see* Timothy M. Phelps, *Justice Thomas*, NEWSDAY, Oct. 16, 1991, at 3 (quoting Senator Byrd, voting against Thomas's confirmation, as saying, "Give him the benefit of the doubt? He has no particular

this "benefit of the doubt"—which made all of the difference in the case of Clarence Thomas—was to obscure the realities of political patronage and inter-party etiquette behind a facade of a seemingly procedurally fair fact-finding proceeding, a fake trial.

The initial Thomas hearing, taken together with the Hill-Thomas hearing, brings into sharp focus the relationship, or lack thereof, between confirmation hearings and senatorial input into Supreme Court nominations. Clarence Thomas cannot be called an "outstanding choice"[11] for the Supreme Court. His qualifications, charitably put, are minimal. He did not demonstrate during his initial hearing the breadth of knowledge about, or even interest in, most of the Constitutional issues that he will face. Indeed, he spent most of the hearing trying to distance himself from views he had espoused in writings and in speeches before various conservative groups. Moreover, Thomas did not exhibit judicial qualities in the second phase of his confirmation process. Two examples will suffice. The first is his suggestion that the charges and the hearing were racially motivated,[12] and the second is his charge that Anita Hill's account had been fabricated for her by liberal interest groups.[13] Neither allegation can be supported by any evidence that surfaced during the

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right to this seat . . . ." and noting that Senator Ford said he gave Thomas the benefit of the doubt but voted against him anyway).

11. *See, e.g.*, Linda P. Campbell, *Jurist Shaped by Work Ethic, Racism*, CHI. TRIB., Jul. 2, 1991, at 1C (quoting Senator Danforth's reaction to the nomination: "I believe that he would be an outstanding choice for the Supreme Court."); *Senators For: Resolving Uncertainties in Favor of Nominee*, WASH. POST, Oct. 16, 1991, at A18 (quoting Senator Danforth as saying during floor debate, "I believed on July 1st that [Thomas] was an outstanding choice, and I believe that even more today.").

12. *See, e.g.*, Mitchell Locin & Christopher Drew, *Defiant Thomas Attacks Panel*, CHI. TRIB., Oct. 13, 1991, at 1C (describing Thomas's characterization of the hearing as "a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched, destroyed, caricatured by a committee of the U.S. Senate rather than hung from a tree."); Walter V. Robinson, *Thomas Says He'll Fight to the End*, B. GLOBE, Oct. 13, 1991, at 1 (describing Thomas's accusation that Hill used a sexual stereotype of black males to attack him). *See also supra* note 3 (quoting Thomas's description of the hearing as a "high-tech lynching for uppity blacks").

13. *See, e.g.*, Walter V. Robinson, *Thomas Says He'll Fight to the End*, B. GLOBE, Oct. 13, 1991, at 1 (describing Senator Hatch's charges that Professor Hill's allegations were concocted by "slick lawyers" in liberal interest groups); David G. Savage, *News Analysis: Thomas, Backers Try to Make Him Seem Victim*, L.A. TIMES, Oct. 13, 1991, at A1 (same); David G. Savage, *Some Ask How Thomas Will Treat Opponents*, L.A. TIMES, Oct. 16, 1991, at A1 (noting that Thomas accused liberal interest groups, opposing senators and their staffs of conspiring to "dig up dirt" about him); *Thomas: "This Plays Into the Most Bigoted, Racist Stereotypes"*, WASH. POST, Oct. 13, 1991, at A23 (quoting Thomas as testifying, "Senator [Biden], I believe that someone, some interest group, I don't care who it is, in combination came up with this story and used this process to destroy me. . . . I believe that in combination this story was developed or concocted to destroy me.").

hearing, or that has surfaced since. The allegations themselves demonstrate both a conspiratorial worldview and a readiness to lash out before exercising judgment.

In parallel fashion, neither the Senate hearings on the nominations of Anthony Kennedy nor David Souter shed much light on why either of these two men should be confirmed as a justice of the Supreme Court. After the Bork nomination failed, both men were coached to say as little as possible, and both skated through without having to answer hard questions either about judicial philosophy or about their views on the paramount issues facing the Court.[14]

What is demonstrated by the recent nomination proceedings (including Bork's) is that political patronage and power, rather than soft-pitch inquiry into the quality and philosophy of a particular nominee, determine the outcome. While hearings may provide justifications for rejection, the underlying key has been political power: the votes to oppose a presidential selection. To be fair, the hearings may have a minor positive effect in that they give a level of visibility to a Supreme Court nominee and so might, at least in theory, inspire that person to perform on the Court in accordance with the values and constitutional views that the nominee had publicly claimed. But this small virtue, if it exists, cannot in my view legitimate a process that encourages the Senate to duck its constitutional responsibilities.

The question is whether we should aspire to a Senate that does more than occasionally balk, and then only for political reasons. If the Senate should genuinely participate in Supreme Court nominations—which I believe it should—then the Senate needs to be prepared to confront the Executive and insist on exercising its veto power rather than bowing to a presumption of presidential entitlement. This means that the Senate should not be afraid to veto even nominees who are "highly qualified" by American Bar Association standards,[15] and should not be hesitant in making known the names of those who, in its view, should be nominated. The trial-like mode of confirmation hearings is at the root of the Senate's failure, for the focus is on the individual nominee rather than on the

14. This is not to say that judicial candidates should have to predict how they will rule in specific cases. On the other hand, the Senate should either require candidates to give some exposition of their current views, subject of course to change, or forget about the on-camera hearings in which soft answers and polite evasions are the only fare.

15. The American Bar Association began rating Supreme Court nominees in 1955. Of the twenty-three candidates rated since then, all except Clarence Thomas, Sandra Day O'Connor (1981), William H. Rehnquist (1971), and G. Harrold Carswell (1970) have received the highest rating. *Thomas: The Least Qualified Nominee So Far?*, NAT'L L.J., Sept. 16, 1991, at 5.

shape of the full Court. Instead of the ineffective questioning of individual candidates, the Senate should be committed to confirming a bench that is sufficiently philosophically diverse so that genuine constitutional debate can occur in the Supreme Court.