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THOMAS'S SUPREME UNFITNESS—A LETTER TO THE SENATE ON ADVISE AND CONSENT

Gary J. Simson†

October 15, 1992

Dear Senators:

When you voted 52-48 last October to put Clarence Thomas on the Supreme Court, my initial reaction was one of surprise. I had diligently watched the hearings on television (even when opposite the baseball playoffs) and had practically devoured *The New York Times* each day. But when the final vote was tallied, I felt much as I did after the first time I saw “The Big Sleep.” Surely at some point the projectionist must have forgotten to show a reel!

Today marks a full year since your vote, and I believe I am now able to view the vote with greater perspective. But not with greater equanimity. The more I think about it, the more I am persuaded that the process of appointing Supreme Court Justices is in need of a basic overhaul. In writing to you today, I hope to convince you that Thomas’s appointment was so indefensible that the process must be fundamentally flawed. I also hope to get you to think seriously about some rather substantial changes that I have in mind.

In the interest of full disclosure, I probably should mention before going any further that Clarence Thomas and I were in the same graduating class at Yale Law School. Having said that, however, I should add that we did not know one another at all well in law school, we have had no contact since, and nothing that I have to say about him in this letter is based on our very slight personal acquaintance.

A brief note on organization is also probably in order at this point. Although letters usually don’t have footnotes, this one does. Much as it would please me no end for you simply to accept as true

† Professor of Law, Cornell Law School. B.A. 1971, J.D. 1974, Yale University. I am grateful to Kevin Clermont, Cynthia Farina, Barbara Holden-Smith, David Lyons, Edward Rubin, Steven Shiffrin, and Rosalind Simson for many helpful comments, and to Heather Bedenko for exceptional research assistance.

Due to the long delay in publishing the Thomas hearings, testimony in the hearings is cited to *The New York Times* and to a Senate Judiciary Committee publication consisting of a brief report issued by the Committee after the first set of hearings and the views of individual members.

my rendition of particular cases, articles, testimony, etc., I expect that some of you might like to have a look at a number of these sources for yourselves. Rather than clutter the letter with these citations, I have put them in footnotes. I promise you, though, that I will spare you the agony, regularly inflicted by law professors, of having to keep jumping from text to textual footnote and back to text in order to understand fully the author's point. Everything I have to say is in the text. There are no textual footnotes to be found.

CLARENCE THOMAS, SUPREME COURT NOMINEE

I find your vote to confirm Clarence Thomas so clear a signal that something is fundamentally wrong because, on the merits, he did not present a close case. Very simply, I have no doubt that if each of you had voted based on your considered judgments of whether appointing Thomas was in the nation's best interests, you would have overwhelmingly voted "no."

To try to prove my point I would like to analyze the Thomas nomination for you in terms of an approach to Senate confirmation of Supreme Court nominees that I suggested not long ago in a law review article.¹ I argued in the article that Senators seeking to vote on Supreme Court nominees in a way consistent with the nation's best interests should give special attention to the significance that a nominee's appointment is likely to have with respect to three subjects: the outcome of cases of major national importance; public confidence in the Supreme Court; and the fairness and efficiency of the Supreme Court's decisionmaking process. These three subjects are especially relevant to confirmation decisions because they are inherently matters of substantial national importance and because appointments are apt to have great significance for them.

1. *Case outcomes.*—I believe that at the conclusion of the hearings any of you who thought seriously about the available evidence could have said a fair amount about how Thomas would be apt to vote if given a seat on the Supreme Court. Although his "paper trail" was not as wide-ranging as Robert Bork's, it was frequently as revealing.

Consider, for example, Thomas's remark in a speech that Lewis Lehrman's article, *The Declaration of Independence and the Right to Life*,²

¹ Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 *CONST. COMM.* 283 (1990).

² Lewis E. Lehrman, *The Declaration of Independence and the Right to Life*, *AM. SPECTATOR*, Apr. 1987, at 21.

was “a splendid example of applying natural law.”³ Despite its brevity, this remark was about as probative a piece of evidence of a likely vote to overrule *Roe v. Wade*⁴ as you could ever hope to find. In case some of you never bothered to look at the Lehrman article, let me assure you that it makes, with a remarkable lack of subtlety, the point that abortion is murder and fundamentally at odds with the basic principles on which our nation and Constitution are premised. No one who read more than a sentence or two of its three magazine pages could fail to get the message, and Thomas’s singling it out for praise certainly implies that he read substantially more than that.

Furthermore, anyone who for some reason felt the need for additional evidence that Thomas would vote to overrule *Roe* had it at hand in the report produced by Thomas and the other members of the Meese-appointed White House Working Group on the Family.⁵ In the course of identifying various “fatally flawed” acts of “judicial activism” that in recent decades have “eroded [the family’s] special status considerably,” the authors of the report listed (in impeccable right-to-life jargon) the Court’s decisions invalidating “State attempts to protect the life of children in utero [*Roe*], to protect paternal interest in the life of the child before birth [*Planned Parenthood v. Danforth*], and to respect parental authority over minor children in abortion decisions [*Danforth*].”⁶ Need I go on? With Thomas’s vote to overrule *Roe* already having become a reality in his very first year on the Court,⁷ anyone who believes that the evidence I have cited was not extremely telling has a lot of explaining to do.

Not surprisingly, evidence that Thomas would vote to invalidate affirmative action measures at every opportunity existed in abundance. After all, opposition to affirmative action had long been Thomas’s calling card—the stance that endeared him, as a black, to conservative Republicans and earned him a berth on the Reagan team.⁸ A chapter that he contributed to a book looking back on the Reagan era was especially revealing. In the chapter Thomas attributed the “failure of the Supreme Court to deal adequately with race-related issues” to a misguided preoccupation with group, rather

³ Clarence Thomas, *Why Black Americans Should Look to Conservative Policies*, Speech to the Heritage Foundation (June 18, 1987).

⁴ 410 U.S. 113 (1973).

⁵ WHITE HOUSE WORKING GROUP ON THE FAMILY, *THE FAMILY: PRESERVING AMERICA'S FUTURE* (1986).

⁶ *Id.* at 10-12. (The cases indicated in brackets—*Roe* and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)—are cited in footnotes to the quoted material.)

⁷ See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2855, 2873 (1992) (indicating Thomas’s concurrence in two opinions that call for overruling *Roe*).

⁸ See Neil A. Lewis, *From Poverty to U.S. Bench*, N.Y. TIMES, July 2, 1991, at A1.

than individual, rights.⁹ Zeroing in on specific instances of Supreme Court malfeasance, Thomas minced no words in expressing his contempt for various Court decisions upholding race-based or gender-based group preferences. According to Thomas, *United Steelworkers v. Weber*¹⁰ was an "egregious example" of the Court's willingness in these cases to engage in "rather creative interpretations of equal protection and legislative intent,"¹¹ and *Fullilove v. Klutznick*¹² established that the constitutional guarantee of equal protection is "irrelevant" as a check on even "crude" group preferences enacted by Congress.¹³

Although the Court's docket during Thomas's first year did not provide him with an opportunity to demonstrate his predictability on affirmative action questions, a case left over from his days on the D.C. Circuit did. In a long-delayed opinion—some would say conveniently long-delayed¹⁴—for a divided three-judge panel, Thomas struck down in *Lamprecht v. FCC*¹⁵ an FCC comparative licensing preference for women. He held that the preference failed to satisfy the standard that the Supreme Court had adopted in *Metro Broadcasting, Inc. v. FCC*¹⁶ for determining the constitutionality of congressionally mandated preferences for racial minorities. This "middle-tier" standard, which the Court had applied for a number of years to all gender-based laws,¹⁷ was designed to be substantially easier to meet than the "strict scrutiny" standard that the Court applied to all laws disadvantaging racial minorities¹⁸ and to any state-mandated minority preferences.¹⁹ For Thomas to invalidate the program in *Lamprecht* under the *Metro Broadcasting* standard was no mean feat. After all, the Court in *Metro Broadcasting* had upheld an FCC minority preference program identical in operation to the gender preference program here, and it had emphasized the impor-

⁹ Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest, in ASSESSING THE REAGAN YEARS* 391, 392 (David Boaz ed., 1988).

¹⁰ 443 U.S. 193 (1979).

¹¹ Thomas, *supra* note 9, at 395.

¹² 448 U.S. 448 (1980).

¹³ Thomas, *supra* note 9, at 396.

¹⁴ See Garry Sturgess, *Thomas Strikes FCC Preferences for Women in Unreleased Ruling*, THE RECORDER, Sept. 26, 1991, at 1 (reporting that "sources at the D.C. Circuit" have revealed that, prior to his nomination to the Supreme Court, Thomas had "written and circulated" an opinion for the court in *Lamprecht v. FCC*; the "long delay has raised concerns both inside and outside the courthouse that Thomas may have withheld the opinion because of its potential political impact on his confirmation").

¹⁵ 958 F.2d 382 (D.C. Cir. 1992).

¹⁶ 497 U.S. 547 (1990).

¹⁷ See *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁸ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁹ See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

tance of deference to Congress in the course of doing so. Thomas's application of *Metro Broadcasting* reaffirmed what his prenomination record gave you no reason to doubt: that as a Justice he would prove to be an unwavering opponent of affirmative action. Free as a Justice to vote to abandon the *Metro Broadcasting* standard that he applied so grudgingly as a court of appeals judge in *Lamprecht*, there could be no real question whether he would vote to abandon it and call for adoption of the nearly insuperable strict scrutiny standard in its stead.

The book chapter mentioned above was also one of various indicators that Thomas would be a staunch defender of presidential power in his votes on the Court. In the chapter Thomas praised Oliver North's testimony before the Iran-contra committee as proof that it is still possible to defend "limited government."²⁰ The committee, according to Thomas, "beat an ignominious retreat before North's direct attack on it and, by extension, on all of Congress."²¹ Some of you may be wondering how Oliver North was defending "limited government" by claiming a right—indeed, a duty—to pursue presidential policies without regard to limitations imposed by Congress or the Constitution itself. The key is to understand that when Thomas says "limited government" he thinks "limited *congressional interference with presidential government*." His ideal of "limited government" is hands off the commander-in-chief.

Thomas's strong criticism of the Supreme Court's decision upholding the special prosecutor statute²² also gave you good cause to expect that he would be a solid vote on the Court for expansive presidential authority. One might have thought that the presence on the other side of Chief Justice Rehnquist—certainly no President-basher²³—would have caused Thomas to ask himself whether allowing for court-appointed counsel to investigate possible executive branch lawlessness was really so serious an encroachment on executive authority after all. But if Rehnquist's vote and authorship of the majority opinion produced any such doubts, Thomas did not let on. Instead, he charged that "conservative heroes such as the Chief Justice failed not only conservatives but all Americans."²⁴ In a similar vein, recall Thomas's comment, almost Nixon-like in tenor, that the "numerous congressional investigations in recent years . . .

²⁰ Thomas, *supra* note 9, at 399.

²¹ *Id.*

²² *Morrison v. Olson*, 487 U.S. 654 (1988).

²³ See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 545 (1977) (Rehnquist, J., dissenting).

²⁴ Clarence Thomas, *How to Talk About Civil Rights: Keep It Principled and Positive*, Keynote Address to the Pacific Research Institute (Aug. 4, 1988).

seem little more than attempts to embarrass the White House.”²⁵ Circle the wagons! The President is under siege!

You may have noticed that, in discussing Thomas’s likely votes on abortion, affirmative action, and presidential power, I made no mention of his testimony on these issues at his confirmation hearings. I want to assure you that this was no accident. For purposes of predicting Thomas’s likely votes on the Court, I don’t think his testimony warrants serious consideration.

As you recall, Thomas spent several days explaining to the Senate Judiciary Committee why his prenomination writings and speeches were far less indicative of his likely votes on the Court than a number of his interrogators on the Committee seemed to believe. His explanations took a variety of forms—in particular, those words don’t mean what you think they mean, I cited (or signed) that but I didn’t really read it, I said that just to please my audience, and I said that before I became a judge. Yet, however varied in form, the explanations were remarkably consistent in one respect: their unpersuasiveness. Several of you on the Committee expressed to the nominee your disbelief and exasperation with his explanations.²⁶ You did so in what seemed to me exceptionally respectful and polite terms. I can appreciate your restraint under the circumstances, but in retrospect I wonder whether the nomination might have collapsed of its own weight if you had greeted some of these explanations with the peals of laughter they deserved.

Later in this letter I will discuss a number of these explanations in the course of analyzing the likely significance of Thomas’s appointment for public confidence in the Court and for the Court’s decisionmaking process. For now, however, I would like to comment briefly on what seems to me Thomas’s most far-reaching, most all-purpose type of explanation—“I said that before I became a judge.” According to Thomas, becoming a judge is “an amazing process. You want to be stripped down like a runner.”²⁷ Furthermore, after his appointment to the federal bench in 1990, he strived so successfully to “shed the baggage of ideology” that old friends came to regard him as a “worthless conversationalist.”²⁸ Thus, to use the statements of Clarence Thomas, executive branch official, to try to predict how Clarence Thomas, judge, is apt to vote on the

²⁵ Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 69 n.33 (1989).

²⁶ See, e.g., Neil A. Lewis, *Thomas Undergoes Tough Questioning on Past Remarks*, N.Y. TIMES, Sept. 12, 1991, at A1.

²⁷ Linda Greenhouse, *In Trying to Clarify What He Is Not, Thomas Opens Question of What He Is*, N.Y. TIMES, Sept. 13, 1991, at A19 (quoting Thomas’s testimony).

²⁸ *Id.* (quoting Thomas’s testimony).

Supreme Court would be not only unfair but contrary to common sense.

It seems unnecessary for me to take the time now to refute Thomas's notion that people are supposed to cast aside their ideological leanings when they become judges and essentially transform themselves into blank slates. Frankly, the idea is so silly, so contrary to the lessons of history²⁹ and human nature, that I doubt that it requires serious rebuttal. In any event, it seems enough for now to focus on the credibility of Thomas's claim of personal transformation. Here is a man who spent the bulk of his career stridently, often sneeringly, arguing for interpretations of the Constitution and federal statutes that would warm the hearts of conservative Republicans. Here is someone whose ideological self-righteousness and rigidity earned him the Quayle-like role of Administration ambassador to the party's right wing. Yet, we are somehow to believe not simply that after many years as a judge this man may relinquish some of his ideological "baggage"—no small leap of faith in Thomas's case—but that after scarcely more than a year on the bench his transformation to a paragon of impartiality is virtually complete. Please!

Abortion, affirmative action, and presidential power were not the only important issues for which you had enough evidence to make a rather confident prediction about Thomas's likely votes. At this point, though, I don't think there would be much value in continuing to review such evidence with you. In fact, given the fairly modest nature (at least in my view) of the conclusion that I am going to offer about how much Thomas's likely votes should have turned you against him, I think any more discussion here of likely votes would be overkill, more of a distraction than a help. Instead, I am hoping that, based on the above discussion of likely votes and your own knowledge of Thomas's speeches and writings, you will agree with me on the following point: that, at the time of the confirmation vote, you should have expected that Thomas would vote in cases of major national importance in a way that rarely would disappoint the most orthodox of Reagan Republicans.

If we can agree on this point, the question becomes: how should this expectation have affected your vote? I think the answer rather obviously depends upon your individual ideologies. For the Reagan-style conservatives among you, Thomas's likely votes should have been cause for dancing in the streets. As far as likely votes, he was everything you were denied when your colleagues re-

²⁹ See HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (3d ed. 1992).

jected Robert Bork, plus he promised, at 43 years of age, to give you Bork-like votes for many more years than Bork was apt to serve.

For those of you ideologically most at home in the center, Thomas's likely votes should have been a strong, though probably not conclusive, reason for voting against him. There was a substantial difference between Thomas's likely votes and the votes that you believe would be in the nation's best interests. In addition, Thomas's vote might well be decisive in the near future in overturning at least two major precedents that you think should stand—*Roe* and *Metro Broadcasting*—and his vote would generally shift farther to the right the balance of a Court already not as close to the center as you would like. Furthermore, it was reasonable to expect Bush to nominate someone whose likely votes would come quite a bit closer to the ones you would like to see. In nominating Thomas, Bush had made no discernible effort to meet the Senate ideologically half-way. Altogether, you should have been sufficiently unhappy with Thomas's likely votes to vote against him unless you found him extremely promising in other respects.

The liberals among you should not have been unhappy with Thomas's likely votes; you should have been inconsolable. Having surveyed his likely votes, you should have made up your mind that this guy had to go. The gap between his likely votes and the ones you feel would be in the nation's best interests was more like a chasm. Also, his vote threatened to create a Court majority to overrule major precedents such as *Roe* and *Metro Broadcasting* that seem to you the minimum the Court should be doing to protect individual rights. In your view, *Roe* should not simply be allowed to stand, but rather should be restored to what it was before the Court began chipping away at it;³⁰ and the *Metro Broadcasting* standard should be extended to apply to all government-mandated affirmative action programs, state and federal alike. Thomas's vote would add rightward momentum to a Court that already seems to you far too conservative for the nation's good. When Justice O'Connor was nominated, Congressman Udall commented: "My Democratic friends ought to be grateful. . . . It's almost inconceivable to me that they could do any better. Ronald Reagan isn't going to appoint liberal Democrats."³¹ You couldn't expect George Bush to appoint liberal Democrats either. But Clarence Thomas is no Sandra Day O'Connor. Gone is any real promise of moderation. For you to accept her was realism; for you to accept him would be capitulation.

³⁰ See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Maher v. Roe*, 432 U.S. 464 (1977); Gary J. Simson, *Abortion, Poverty, and the Equal Protection of the Laws*, 13 GA. L. REV. 505 (1979).

³¹ Morris K. Udall, *A Master Stroke*, WASH. POST, July 13, 1981, at A13.

This time you could do better, and you should have been sufficiently irate over Thomas's likely votes and Bush's uncompromising approach to demand better by voting no.

The ideological spectrum that the hundred of you represent obviously has more shades than I have described. Even those among you who regard yourselves as members of the groups named may not share all the beliefs that I ascribe to your group. I don't think, though, that any of you should have great difficulty locating yourself on the spectrum relative to the three positions I have described and then deciding, based on the position or positions to which you are closest, how you should have responded to Thomas's likely votes.

What does all this mean for Thomas's chances for confirmation? Based on my impression of the ideological spread among you, I think it means that a substantial majority of you should have considered his likely votes a strong or conclusive reason for voting against him. That may sound pretty bleak, but it's almost sunny compared to what else I have to say about how you should have viewed his possible appointment to the Court.

2. *Public confidence in the Court.*—Public confidence is a precious commodity for all government institutions, but especially for the Supreme Court. Unlike the President and members of Congress, the Justices can't point to their election as a source of legitimacy for their decisions. Also, lacking the enforcement mechanisms of the President and Congress, the Court is particularly dependent on public respect for its effectiveness.³²

As the hearings came to a close, I believe that each of you, regardless of ideology, should have had sufficient doubt about Thomas's personal integrity, objectivity, openmindedness, and dedication to conclude that his appointment was not viable because of its implications for public confidence in the Court. An explanation of why you should have doubted Thomas's objectivity, openmindedness, and dedication can wait until I discuss the implications of his appointment for the Court's decisionmaking process. For now it seems sufficient to examine his personal integrity. Public confidence in the Court depends greatly, perhaps more than anything else, on a sense that the Justices are individuals of the highest personal integrity. I think you should have had such serious doubts about Thomas's personal integrity that you should have been able to resolve to reject him based on these doubts alone.

To begin with, his chairmanship of the Equal Employment Opportunity Commission had to fuel some such doubts. During his

³² See THE FEDERALIST NO. 78, at 503-04 (Alexander Hamilton) (Mod. Lib. ed. 1937); Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 796 (1957).

years as chairman, the Commission allowed the statute of limitations to run on thousands of complaints under the Age Discrimination in Employment Act. Thomas later described this agency inaction as "embarrassing and inexcusable," but maintained that it reflected "bad management" at the district level rather than high-level indifference.³³ Many others were not so charitable.³⁴ Also very troubling were various well-documented charges by highly reputable sources to the effect that the Commission under Thomas's leadership had been indefensibly lax in enforcing the laws protecting women and minorities from employment discrimination.³⁵ How close is the connection between charges of agency irresponsibility and its chairman's personal integrity? Very close, as Thomas himself conceded in testimony before the Senate Special Committee on Aging: "To suggest that we are derelict in our duties is an ad hominem attack that impugns my integrity and the agency's."³⁶

Also raising doubts about Thomas's integrity was the inconsistency between his strident public opposition to race-based preferences and his willingness to accept such preferences for himself. Did he really believe that his appointments as Assistant Secretary for Civil Rights in the Department of Education in 1981 and as Chairman of the EEOC in 1982 were made without regard to the fact of his race? Was he really persuaded that he was selected because he was seen as the best person for the job—or at least the best conservative for the job—and that his being black did not provide an important boost? Particularly in light of the fact that he had no significant background in civil rights work before these appointments to high posts specializing in civil rights,³⁷ it is hard to imagine that the answers to these questions are yes. Even assuming, though, that they are, is there even the minutest possibility that he believed that his nomination to the Supreme Court was color-blind? If so, I think

³³ See Robert Pear, *Court Nominee Defied Labels As Head of Job-Rights Panel*, N.Y. TIMES, July 16, 1991, at A1 (quoting Thomas).

³⁴ See, e.g., *Nomination of Clarence Thomas to Be a Judge on the United States Court of Appeals for the District of Columbia: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 119-21 (1990) (testimony of Dr. Daniel Thursz, President, The National Council on the Aging, Inc.); SENATE COMM. ON THE JUDICIARY, 102D CONG., 1ST SESS., REPORT ON THE NOMINATION OF CLARENCE THOMAS TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, TOGETHER WITH ADDITIONAL AND SUPPLEMENTAL VIEWS 80-82 (Comm. Print 1991) [hereinafter SENATE JUDICIARY COMM.] (additional views of Sen. Metzenbaum).

³⁵ See, e.g., NAACP, A REPORT ON THE NOMINATION OF JUDGE CLARENCE THOMAS AS ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 6-7, 31-47 (1991); WOMEN'S LEGAL DEFENSE FUND, ENDANGERED LIBERTIES: WHAT JUDGE CLARENCE THOMAS' RECORD PORTENDS FOR WOMEN 1-2, 12-48 (1991).

³⁶ EEOC Officials Defend Agency's Enforcement of Age Bias Act, Daily Lab. Rep. (BNA) No. 175, at A-8, A-9 (Sept. 11, 1987).

³⁷ See Lewis, *supra* note 8.

it's fair to say that he may be the only person around who took President Bush seriously when Bush made that claim.³⁸ When asked at the time of his nomination how he would respond to people who would say he was chosen only because of his race, this long-time preacher of the evils for blacks of preferential treatment³⁹ put everything in proper perspective when he replied: "I think a lot worse things have been said. I disagree with that, but I'll have to live with it."⁴⁰

Though hardly insubstantial, the doubts about Thomas's integrity generated by his record at the EEOC and his acceptance for himself of race-based preferences seem modest compared to those generated by his testimony in the first set of hearings—the set that concluded before Anita Hill's charges became public. In the past, nominees sometimes have responded to the Senate Judiciary Committee's questions in ways that seemed less than entirely honest. To the best of my knowledge, though, none of them could hold a candle to Clarence Thomas as far as showing obvious contempt for the truth. Time and again he responded to questions in ways that all but dared some of you on the Committee to call him a liar—something he knew was not apt to happen. A number of his supporters on and off the Committee already had made clear that they stood ready to shout "racist" at anyone treating Thomas less cordially than the Committee had treated nominee David Souter the year before.⁴¹ I see no need to discuss all of the many statements by Thomas in the first set of hearings that undermined his claim to personal integrity. I think a discussion of several will suffice to show how drastically his testimony in those hearings undercut this claim.

Among the most outrageous of Thomas's statements were those that denied the common-sense meaning of particular excerpts from his speeches and writings. Real standouts in this regard were his responses to questions quoting excerpts in which he was obviously endorsing the use of natural law in constitutional interpretation. Thomas undoubtedly recognized that if he admitted that he had endorsed natural law (often referred to as "higher law") as a basis for interpreting the Constitution, he would give his opponents

³⁸ *Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14.

³⁹ See, e.g., Clarence Thomas, *Climb the Jagged Mountain* (excerpts from commencement speech given at Savannah State College, June 9, 1985), N.Y. TIMES, July 17, 1991, at A21; Thomas, *supra* note 3.

⁴⁰ Maureen Dowd, *Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat*, N.Y. TIMES, July 2, 1991, at A1, A15.

⁴¹ See Linda Greenhouse, *Sticking to the Script*, N.Y. TIMES, Sept. 12, 1991, at A21; Neil A. Lewis, *Thomas to Win High Court Seat, Senators Predict*, N.Y. TIMES, Sept. 14, 1991, at 1.

ammunition to argue that he was a serious threat to make unprincipled use of the Constitution in behalf of conservative political ends. Natural law is a sufficiently ill-defined and amorphous concept that they could credibly argue that Thomas would use it as a cover to read his personal value preferences into the Constitution.⁴² Confronted with his past endorsements of natural law in constitutional interpretation, Thomas of course might have tried to explain why he believed natural law could be applied in a principled way. Or perhaps he might have tried to convince you that he had changed his mind and no longer believed that natural law should have a place in constitutional interpretation. Neither of these tactics might have proved particularly persuasive. Neither of them, however, would have been nearly as demeaning to Thomas or as insulting to your intelligence as the one he took: denying that his statements endorsing natural law in constitutional interpretation did anything of the sort.

A series of exchanges between Thomas and Committee Chair Biden illustrates the tactic well. Biden first read aloud to Thomas the following statement that Thomas had made about the writings of Stephen Mesito, a leading advocate of natural law interpretations of the Constitution that would give expanded protection to property rights: "I find attractive the arguments of scholars such as Stephen Mesito who defend an activist Supreme Court that would strike down laws restricting property rights."⁴³ Biden then asked Thomas to explain what he found attractive about Mesito's arguments, and Thomas responded:

My interest in the whole area was as a political philosophy. . . . I don't believe that in my writings I have indicated that we should have an activist Supreme Court or that we should have any form of activism on the Supreme Court. . . . I found his [Mesito's] arguments interesting, and I was not talking particularly of natural law, Mr. Chairman, in the context of adjudication.⁴⁴

When Biden then pointed out that in the quoted statement Thomas had claimed to find Mesito's arguments "attractive," rather than simply "interesting," and that Thomas had explained their attractiveness in terms of adjudication ("striking down laws"), rather than intellectual stimulation, Thomas didn't budge. He responded as if

⁴² See Laurence H. Tribe, 'Natural Law' and the Nominee, N.Y. TIMES, July 15, 1991, at A15; David Margolick, *Sizing Up the Talk of 'Natural Law': Many Ideologies Discover a Precept*, N.Y. TIMES, Sept. 12, 1991, at A22. See generally John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 22-32 (1978).

⁴³ *Excerpts From Senate's Hearings [of Sept. 10, 1991] on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A22.

⁴⁴ *Id.*

repetition might somehow magically transform his statement about Mesito into something it plainly was not:

I don't see a role for the use of natural law in constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory. I was interested in that. There were debates that I had with individuals, and I pursued that on a part-time basis. I was an agency chairman.⁴⁵

Instead of pressing Thomas further about this one prior statement, Biden tried to get him to concede that he had endorsed the use of natural law in constitutional interpretation by showing him that the evidence that he had done so was too abundant to deny. Biden read aloud other prior statements by Thomas on natural law, concluding with one that Biden probably thought so unambiguous in its endorsement of natural law in constitutional interpretation that Thomas would have no choice but to yield: "The higher law background of the American Government, whether explicitly appealed to or not, provides the only firm basis for a just and wise constitutional decision."⁴⁶ But if this was Biden's thinking, Thomas soon showed how badly Biden had underestimated the depths to which Thomas was willing to sink in his quest for a seat on the Court. When asked to reconcile these excerpts with his current claim that he had never advocated using natural law in constitutional interpretation, Thomas continued to deny the undeniable:

I was interested in the political theory standpoint. I was not interested in constitutional adjudication. I was not at the time adjudicating cases.⁴⁷

Apparently nothing was too obvious to deny if it seemed advantageous to do so. (These denials were so demonstrative of a lack of integrity that I confess some difficulty understanding how Thomas could have perceived them as advantageous. The answer seems to be that they were part of an overall strategy of limiting at all costs the scope of substantive debate. According to a news report, Thomas's White House-donated handlers "believed that the nominee could only harm his chances by engaging in any open-ended debate or discussion with committee members over issues."⁴⁸ Quite a vote of confidence in Thomas's legal prowess! But more about that later.)

Probably no one statement in the first set of hearings undermined Thomas's general credibility as much as his assertion that he

45 *Id.*

46 *Id.*

47 *Id.*

48 Lewis, *supra* note 41, at 7.

had never discussed the merits of *Roe v. Wade* with anyone.⁴⁹ The assertion was so obviously at odds with so many realities—*Roe*'s controversiality among the public, Thomas's words of praise in a speech for Lehrman's strongly antiabortion article,⁵⁰ the important place in Thomas's upbringing of a religion firmly opposed to abortion, etc.—that it could not help but provoke widespread hilarity,⁵¹ and I don't think I need to take the time to comment further on it here.

Though not as eye-catching as his claim that he had never seriously discussed *Roe*, Thomas's attempt to explain away his praise for the Lehrman article as simply a means to please his audience may be equally as damning. When asked by Senator Biden to explain what he meant when he told an audience that Lehrman's article was "a splendid example of applying natural law," Thomas responded:

What I was attempting to do in the beginning of that speech was to make clear to a conservative audience that blacks who were Republicans and the issues that affected blacks were being addressed and being dealt with by conservatives in what I considered a less-than-acceptable manner. . . . I was speaking in the Lou Lehrman Auditorium of the Heritage Foundation. I thought that if I demonstrated that one of their own accepted at least the concept of natural rights, that they would be more apt to accept that concept as an underlying principle for being more aggressive on civil rights. My whole interest was civil rights enforcement.⁵²

This explanation is so damning not because it is unpersuasive—in fact, it is unpersuasive, but no more so than various other explanations he offered—but because it reveals how impoverished a sense he has of what constitutes ethical behavior. Although Thomas offered this explanation with no apparent misgivings, it was far from neutral. You don't need a Ph.D. in ethics to know that it is wrong to tell people things that you don't believe, but that they would like to hear, in order to get them to do things you want. Yet, this is precisely what Thomas blithely claimed he had done in his speech before the Heritage Foundation. If any of you had any question as to whether his responses in the hearings conformed more closely to what he really believed or to what he felt would be most likely to get a majority of you to vote for him, this endorsement of opportunism should have answered it.

49 SENATE JUDICIARY COMM., *supra* note 34, at 108-09 (quoting Thomas's testimony of Sept. 11, 1991); Lewis, *supra* note 26, at A21 (reporting Thomas's testimony of Sept. 11, 1991).

50 See *supra* note 2 and accompanying text.

51 See, e.g., Russell Baker, *Curses, Foiled Again!*, N.Y. TIMES, Sept. 28, 1991, at 19.

52 *Excerpts From Senate's Hearings [of Sept. 10, 1991] on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A22.

Up to this point I have avoided saying anything about the second set of hearings—those devoted to Anita Hill's allegations. I have done so because I believe that what those hearings have to tell us about Thomas's integrity can't be fully appreciated until the lessons of the first set of hearings are understood. To put the matter more bluntly, a big reason for thinking Thomas was not telling the truth in the second set of hearings was that he had made such a habit of not doing so in the first set.

The second set of hearings was so riveting partly because it presented diametrically opposed accounts. This was plainly not a case of mixed signals, where one person said something that he intended to mean one thing and the other person interpreted it to mean something else. Hill claimed Thomas made various offensive, graphic statements, and Thomas denied that he had ever said anything to her remotely of the sort. Both could not be telling the truth, and since Hill claimed that Thomas made all the alleged statements to her when no one could overhear, deciding which of the two was being truthful meant deciding who was the more credible witness.

I am not going to take you through the second set of hearings point by point in order to prove to you that the more credible witness was Anita Hill. Frankly, I don't think the matter was even arguably a close call.

On the one hand, you had Anita Hill, someone not known to you before these hearings but a person whose past (as presented in the hearings) inspired confidence in her credibility and whose performance in the hearings—patient, dignified, and thoughtful, by any measure—did so as well. Although some Thomas supporters on and off the Committee suggested possible motives she might have had for fabricating charges against Thomas, all of these suggestions were pure speculation.⁵³ The fact that she had communicated years before to friends the substance of the allegations ultimately made to the Committee gave credence to her account. By the same token, despite what some Thomas supporters would have had you believe, none of her actions during or since her years working for Thomas detracted from the credibility of the account. Some that may seem puzzling, such as following Thomas to the EEOC and continuing to have some contact with him after leaving the EEOC, become much more understandable if you are willing to recognize that not only men but women as well often take risks and make personal sacrifices for the sake of a career. Others, such as taking years to make public

⁵³ See Maureen Dowd, *With Each Round of Testimony, The Mood at the Hearing Sways*, N.Y. TIMES, Oct. 14, 1991, at A1; Andrew Rosenthal, *White House Role in Thomas Defense*, N.Y. TIMES, Oct. 14, 1991, at A1.

her allegations, are much easier to understand if you listen to what experts on sexual harassment have to say. In fact, if the Committee had allowed such experts to testify, it would have been obvious to everyone that, far from being atypical for a victim of sexual harassment, Anita Hill's behavior during her years with Thomas and after was so typical as to be virtually a textbook case.⁵⁴

On the other hand, you had Clarence Thomas, appearing before you fresh off of a performance in the first set of hearings that left his credibility in tatters. Having so recently heard him make one disingenuous statement after another and endorse opportunism in speaking to others, you had every reason to question whether he would tell you the truth about Hill's charges if doing so would be to his disadvantage; and there couldn't be the slightest doubt that if the truth was what Hill claimed, it would be to Thomas's enormous disadvantage to admit it. But, you had to ask yourselves, was Thomas really so lacking in integrity that he could (1) while serving in a civil rights capacity in the Department of Education and as the nation's top employment discrimination official at the EEOC, act toward an employee in the offensive and degrading ways described by Hill, and then (2) stand before a Senate committee and a national television audience and perjure himself by denying it? If his testimony in the first set of hearings and other prior behavior left any doubt in your mind that the answer was yes, his testimony in the second set of hearings surely should have dispelled it.

Some testimony shamelessly appealed for sympathy, such as his revelation that his mother was "confined to her bed, unable to work, and unable to stop crying"⁵⁵ and his various other attempts to portray himself and his family as persons all but destroyed by opponents and a confirmation process unfair and heartless from the moment of his nomination.⁵⁶ Other testimony—in particular, his use of a racial lynching metaphor to describe his situation—appealed to emotion in ways far worse.

According to Thomas, the second set of hearings was a "high-tech lynching,"⁵⁷ and he was not going to "provide the rope."⁵⁸

⁵⁴ See Louise F. Fitzgerald, *Science v. Myth: The Failure of Reason in the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1399 (1992). See generally BARBARA A. GUTER, SEX AND THE WORKPLACE (1985); U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981); U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE (1988).

⁵⁵ Judge Clarence Thomas: 'My Name Has Been Harmed', N.Y. TIMES, Oct. 12, 1991, at 10 (text of Thomas's opening statement at hearings of Oct. 11, 1991).

⁵⁶ See, e.g., *id.*; *Excerpts From Senate's Hearings [of Oct. 11, 1991] on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at 14.

⁵⁷ *Excerpts From Senate's Hearings [of Oct. 11, 1991] on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at 14.

⁵⁸ Judge Clarence Thomas: 'My Name Has Been Harmed', *supra* note 55.

The racial lynching metaphor was wildly inapt. Black men were not lynched for anything they allegedly did to women who, like Anita Hill, were black.⁵⁹ In fact, although Thomas seemed intent on making everyone forget that Anita Hill is black, the truth is that the group to which Hill belongs—black women—has hardly been privileged historically by comparison with black men, having had to experience invidious discrimination on the basis not only of race but of gender as well.⁶⁰ Furthermore, it is difficult to imagine a group of people bearing less resemblance to those who lynched blacks than the group accused by Thomas of a lynching mentality. This group, which appeared to include not only the seven members of the Committee who were already on record against his nomination but also others in active opposition to the nomination, was largely made up of people, white and black, who for years had been at the forefront of the battle for racial justice.

The racial lynching metaphor was also terribly inflammatory. As Thomas was well aware, nothing was so likely to turn the entire proceedings into a free-for-all and divert the search for truth as a charge of racism. For any nominee to make so reckless and irresponsible a charge would be strong evidence of lack of integrity. For Clarence Thomas to make this charge was even more damning than that. Having spent years sternly telling blacks that they must pull themselves up by their bootstraps and stop claiming racism as an excuse for their failures,⁶¹ Thomas was all too quick to charge racism when the claim came in handy for him.

Am I saying that it is absolutely certain that Thomas did what Hill claimed? Of course not, but absolute certainty is not the issue. Relative likelihood is. Particularly in light of Thomas's official responsibilities at the time Hill was working for him, the allegations, if true, were very damning as far as Thomas's integrity. Although it was not entirely clear at the time that the sort of verbal harassment alleged was unlawful under federal employment discrimination law—it, of course, has since become clear⁶²—there could not have been any question whether Hill might feel extremely humiliated and degraded by such behavior. In addition, if the allegations were true, then Thomas had clearly perjured himself throughout the second set of hearings and, in so doing, had further demonstrated grave

⁵⁹ See Estelle B. Freedman, *The Manipulation of History at the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1361, 1362-63 (1992).

⁶⁰ See Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992); Freedman, *supra* note 59.

⁶¹ See, e.g., Thomas, *Climb the Jagged Mountain*, *supra* note 39.

⁶² See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986); Christine A. Littleton, *Dispelling Myths About Sexual Harassment: How the Senate Failed Twice*, 65 S. CAL. L. REV. 1419 (1992).

lack of integrity. Under the circumstances, even if there were no more than, say, a 40% chance that Hill's allegations were true, I believe you should have regarded them as a serious strike against Thomas. But the odds that Hill's allegations were true were much higher than 40%—so much higher in my view that I believe you should have concluded that the allegations were enough to disqualify him for the job.

Some of you may feel this last point overstates the case. I honestly don't believe it does, but I see no need to press the matter. Instead, I ask you to think about the doubt cast on Thomas's integrity by Hill's allegations, together with the doubt cast on it by his controversial record at the EEOC, his self-serving exception for race-based preferences, his many disingenuous statements and endorsement of opportunism in the first set of hearings, and his shameless and inflammatory appeals to emotion in the second set of hearings. If you do this, I think there is no escaping the conclusion that Thomas's integrity was in such overwhelming doubt by the end of all the hearings that you should have been prepared to reject him on that basis alone. Proper respect for the importance of public confidence in the Court and for the vital part played by the Justices' integrity in shaping public confidence in the Court required no less.

Before turning to the implications of Thomas's appointment for the Court's decisionmaking process, I probably should discuss briefly a factor that is important in determining public confidence in the Court and that a number of you argued was a plus in Thomas's case: the Justices' representativeness of different groups in society. With Justice Marshall's retirement, the Court of course lost its one black member. It was reasonable to suppose that the failure to appoint a black to replace Marshall would leave the Court sufficiently nondiverse as to undermine public confidence in its fairness and impartiality. After all, not only are blacks a sizable enough percentage of the population to have some claim on a seat simply by virtue of proportionality, but also their history is so unique and the current experience of being black in America is so distinctive that it is highly unlikely that their perspectives are adequately represented by others.

Senator Specter reasoned basically along these lines in explaining his vote for Thomas in the Judiciary Committee at the end of the first set of hearings:

I think he brings a very, very important measure of diversity to the Court. I think it's very important that an African-American be on

the Court now, within the chambers of those nine Justices; that they hear the views of African-Americans in this country.⁶³

The Senator's concluding remark, however, highlighted the difficulty of applying this reasoning to Clarence Thomas:

[I]n essence, I have more confidence and I pay more attention to his roots than to his writings⁶⁴

Very simply, the mere fact that someone is black is no guarantee that he or she will significantly serve the type of representative function that is important to public confidence in the Court. The key is the extent to which the individual will approach the issues that come before the Court from a perspective that reflects points of view widely shared among blacks. In some cases this may be very difficult to predict. In the case of Clarence Thomas, it was not. Unless, like Senator Specter, you were willing to try to forget the many writings and speeches in which Thomas expressed views widely shared among Reagan Republicans but rejected by the great majority of blacks, you could not sensibly find that he "brings a very, very important measure of diversity to the Court."⁶⁵ (The fact that many blacks, particularly in the South, appeared to favor Thomas's confirmation⁶⁶ doesn't suggest otherwise. As Roger Wilkins has pointed out, typically these supporters either did not fully appreciate how much Thomas's views diverged from their own or else they supported him in spite of his views out of an "instinctive reaction" to support one of their own.)⁶⁷

In short, Thomas's appointment promised to be at best a very modest plus in terms of the Justices' representativeness of different groups in society. Whatever it may have seemed likely to contribute in this regard to public confidence in the Court was insignificant alongside the threat to public confidence posed by his highly questionable integrity.

3. *The Court's decisionmaking process.*—The fairness and efficiency of the Supreme Court's decisionmaking process, so vital a concern because of its importance to the orderly and sound devel-

⁶³ *Excerpts From Remarks by Members of Senate Judiciary Panel on Thomas*, N.Y. TIMES, Sept. 28, 1991, at 8.

⁶⁴ *Id.*

⁶⁵ See, e.g., Derrick Bell, *The Real Clarence Thomas: A Radical Double Agent*, N.Y. TIMES, Sept. 9, 1991, at A15; Haywood Burns, *Clarence Thomas, A Counterfeit Hero*, N.Y. TIMES, July 9, 1991, at A19; John Hope Franklin, *Booker T. Washington, Revisited*, N.Y. TIMES, Aug. 1, 1991, at A21; Roberto Suro, *Jackson Assails Thomas*, N.Y. TIMES, July 11, 1991, at A17 (reporting remarks of Jesse Jackson).

⁶⁶ See R.W. Apple Jr., *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle; 'Time for Healing,' Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1.

⁶⁷ See Peter Applebome, *Despite Talk of Sexual Harassment, Thomas Hearings Turned on Race Issue*, N.Y. TIMES, Oct. 19, 1991, at 8 (quoting Wilkins).

opment of nationwide law, depends on a wide range of personal characteristics on the part of the Justices. When the time came for you to vote on Thomas, each of you should have had serious doubts about his adequacy in terms of most, if not almost all, of the characteristics most significant in this regard. In fact, you should have had such serious doubts that these doubts alone should have been enough to persuade you to vote against him.

Objectivity and openmindedness are probably mentioned more often than any other characteristics as desirable in a Supreme Court Justice.⁶⁸ They obviously are crucial to the quality and fullness of the Justices' deliberations and debate. Thomas's numerous one-sided, highly partisan speeches and writings gave you good reason to expect him to be unsatisfactory in both respects. His reputation as an ideologue was hard-earned. In the first set of hearings, he asked you to forget the old Clarence Thomas and see instead a man "stripped down like a runner" and now the ultimate in objectivity and openmindedness.⁶⁹ At the time it would have been absurd for you to do so. After the second set of hearings, it would have been even more absurd. His proud admission that he had not even bothered to watch Anita Hill's testimony⁷⁰ hardly inspired confidence that on the Court he would strive to understand both sides of every question and to keep his personal views from clouding his judgment. Even more telling were his inflammatory appeals to emotion. They showed flagrant disrespect for the fair and impartial administration of justice—a disrespect that belied any genuine commitment on his part to objective and openminded adjudication.

The Justices' ability to empathize with individuals whose background or circumstances are significantly different from their own also greatly affects the richness of their deliberations and debate. Thomas's notorious remarks about a sister who was on welfare were reason enough for you to have serious doubts about his ability in this regard, and I'll limit my discussion to them.

In the course of a speech in 1980 at a conference of black conservatives, Thomas said of his sister Emma Mae Martin:

She gets mad when the mailman is late with her welfare check. That is how dependent she is. What's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation.⁷¹

68 See Simson, *supra* note 1, at 299 n.62.

69 See *supra* note 27 and accompanying text.

70 *Excerpts From Senate's Hearings [of Oct. 11, 1991] on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at 14.

71 See Karen Tumulty, *Sister of High Court Nominee Traveled Different Road*, L.A. TIMES, July 5, 1991, at A4 (quoting Thomas's 1980 speech).

It is difficult to imagine anyone with any real capacity for seeing things from other people's perspectives feeling so little compassion for his own sister's situation and adding public humiliation to her miseries by belittling her in a public forum. Probably even more indicative of Thomas's lack of empathy, though, was the disparity between his remarks and the reality of his sister's situation. She did not come close to fitting the stereotype that Thomas described. After her husband deserted her, she worked two jobs to support herself and her young children. At times ill health forced her to stop working and rely on welfare, but she never remained on welfare for any substantial period of time until 1977, when an aunt who had helped raise her suffered a stroke. The aunt asked Martin to care for her, and to do so Martin had to stop working and go on welfare. After the aunt's death in 1981, Martin returned to work.⁷²

Although Thomas could not have known when he spoke in 1980 that his sister would return to work in 1981, he should have known at the time he spoke that she was the sort of person who would return to work at the first available opportunity. His inability to understand even his own sister reasonably well was strong evidence of his inability to get at all outside his own perspective, one in which self-help is the road to salvation and dependence on others is the root of all evil. In the news conference called to announce Thomas's nomination to the Court, President Bush called him a person of "great empathy."⁷³ Compared to whom? I couldn't guess.

For the Court's decisionmaking process to operate smoothly and effectively, the Justices need to engage one another candidly in debate. The probability that Thomas would bring a healthy measure of candor to the Court was slim at best. Even if you don't think Thomas was lying about his behavior toward Anita Hill, you had overwhelming evidence of his lack of candor. His performance in the first set of hearings—denying the obvious meaning of past statements, claiming that he had never seriously discussed *Roe*, etc.—provided an almost endless supply.

Another basic requirement of a fair and efficient decisionmaking process is that the individual Justices analyze rigorously the issues and facts of the cases that come before them. Thomas's publications and speeches gave you little reason to believe that he would provide such analytical rigor and much reason to fear that he would not. The legal analysis that they offer suggests that Thomas

⁷² This account of Martin's life is drawn from Tumulty, *supra* note 71, and Martin Gottlieb, *Ways of Older South Linger in City of Thomas's Boyhood*, N.Y. TIMES, Aug. 8, 1991, at A1.

⁷³ *Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14.

is not someone who thinks through matters deeply, with careful attention to detail and relevant distinctions. It typically is conclusory and superficial.

A good example is Thomas's analysis of a well-known theory of the Ninth Amendment in the chapter that he contributed to a book on the Reagan era. (The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.")⁷⁴ Referring to Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,⁷⁵ the contraceptive case that paved the way for *Roe*, Thomas posed the question: "Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court certain powers to strike down legislation?"⁷⁶ The answer, as Thomas saw it, was simple: "That would seem to be a blank check. The Court could designate something to be a right and then strike down any law it thought violated that right."⁷⁷ He then speculated that the Court might "discover a right to welfare" and order Congress "to raise taxes to enforce this right."⁷⁸

You don't need to be a fan of the Goldberg opinion to agree that Thomas's critique dealt with it in an extremely superficial way. Basically, Thomas created a straw man and knocked it down. He entirely ignored Goldberg's attempt in the opinion⁷⁹ to provide criteria for deciding which unenumerated rights deserve a high level of judicial protection. Although Thomas was happy to assume otherwise, Goldberg and the two Justices, Warren and Brennan, who joined his opinion were hardly so naive as to overlook the dangers of giving judges the sort of "blank check" that Thomas so readily found. In fact, in offering his criteria, Goldberg emphasized that "judges are not left at large to decide cases in light of their personal and private notions."⁸⁰ Thomas's speculation that Goldberg's theory might lead to a Court-ordered tax hike to fund a right to welfare may be the type of argument that made Thomas a favorite on the conservative lecture circuit, but it is a sorry excuse for legal analysis. Having made no effort whatsoever to explain how the Court could reasonably justify recognizing a right to welfare under Goldberg's criteria—something that it is not at all obvious the Court

⁷⁴ U.S. CONST. amend. IX.

⁷⁵ 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring).

⁷⁶ Thomas, *supra* note 9, at 398-99.

⁷⁷ *Id.* at 399.

⁷⁸ *Id.*

⁷⁹ 381 U.S. at 493-94.

⁸⁰ *Id.* at 493; *see also id.* at 494 n.7.

could do⁸¹—Thomas had no basis for citing possible consequences of recognizing such a right as an argument against Goldberg's approach. Probably most telling, though, as far as Thomas's analytical rigor, was not the weakness of the criticisms he leveled at the Goldberg approach. Instead, it was his apparent obliviousness to the ease with which these criticisms could be turned around and used against him. The amorphous natural law mode of constitutional interpretation that Thomas had been championing in his speeches and writings⁸² offers judges about as blank a check as you'll ever find.

It is probably not fair to expect Supreme Court nominees to provide affirmative proof of their analytical rigor in their confirmation hearing testimony. After all, the setting is hardly one conducive to studious reflection. But I do think nominees can fairly be expected *not* to provide in their testimony the sort of positive proof of lack of analytical rigor that Thomas provided. His testimony not only failed to dispel the doubts about his analytical rigor aroused by his writings and speeches; it compounded them. The following exchange illustrates why:

Senator Leahy. Other sitting Justices have expressed views on key issues such as—well, take *Roe v. Wade*. You know, Justice Scalia has expressed opposition to *Roe*. Does that disqualify him if it comes up? Justice Blackmun, who not only wrote the decision but has spoken in various forums about why it was a good decision. Are either one of them disqualified from hearing abortion cases as a result of that?

Judge Thomas. Senator, I think that each one of them has to determine in his mind at what point do they compromise their impartiality or it is perceived that they have compromised their objectivity or their ability to sit fairly on those cases.⁸³

Now I think we can all agree that the scope of a judge's obligation to recuse himself or herself from hearing a case is not always a clearcut matter.⁸⁴ But the fact that there is a gray area here—perhaps even a very substantial gray area—does not mean that there are no instances clearly requiring or clearly not requiring recusal. Are Justices Scalia and Blackmun arguably disqualified from hearing

⁸¹ Cf. Gary J. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 698-99, 701-06 (1977) (discussing the Justices' shared premise that government has no affirmative obligation to offer welfare benefits to anyone but incurs obligations of equal treatment when it opts to offer benefits to some people but not others).

⁸² See, e.g., Thomas, *supra* note 25.

⁸³ *Excerpts From Senate's Hearings [of Sept. 11, 1991] on the Thomas Nomination*, N.Y. TIMES, Sept. 12, 1991, at A20.

⁸⁴ See John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Steven Lubet, *Advice and Consent: Questions and Answers*, 84 NW. U.L. REV. 879 (1990).

abortion cases because they have taken firm positions on the validity of *Roe*? The proper answer is so obviously "no"⁸⁵ that Thomas's response indicating that he would answer "yes" should have made you wonder how deeply and carefully he analyzes any legal issue. Aside from everything else, this was hardly the first occasion that Thomas had ever had to give serious thought to the issue of recusal. He had been obliged to give it serious thought from the moment he took a seat on the court of appeals.

The work of the Supreme Court is far too demanding to be handled well by someone who does not participate in the decisionmaking process with a great deal of dedication. Thomas's responses to various questions in the first set of hearings should have made you very skeptical that he would show such dedication on the Court. Some responses indicated a rather profound lack of interest in the work of the Court. Others suggested a lax attitude toward important aspects of the decisionmaking process.

Since Thomas had spent the summer cramming for the hearings with the help of a team of lawyers sent by the White House,⁸⁶ the least that could be expected was that he would answer adequately questions that required little more than a description of what the Court had done in the past. For the most part, he did provide adequate, even if rather uninspiring, answers to such questions. At times, though, his answers were so amazingly inadequate that you had to wonder how keen an interest he had in legal analysis in general and in the work of the Court in particular.

A prime example was his answer to the question whether a fetus is a "person" for purposes of the Constitution:

Senator, I cannot think of any cases that have held that. I would have to go back and rethink that. I cannot think of any cases that have held that.⁸⁷

Perhaps he should have tried to think of cases holding that a fetus is *not* a person. One that comes immediately to mind is *Roe v. Wade*. In defending its abortion laws in *Roe*, Texas relied heavily on the argument that a fetus is a "person" under the Fourteenth Amendment; and the Court's opinion expressly rejected this argument after detailed discussion.⁸⁸ Thomas claimed in the hearings that he

⁸⁵ See Greenhouse, *supra* note 41 (noting Thomas's "surprising suggestion" that "Justices who had written opinions on abortion might not be impartial enough to decide future abortion cases").

⁸⁶ See Neil A. Lewis, *A Rehearsed Thomas Is Set for Hearings*, N.Y. TIMES, Sept. 9, 1991, at A12.

⁸⁷ *Excerpts From Senate's Hearings [of Sept. 11, 1991] on the Thomas Nomination*, N.Y. TIMES, Sept. 12, 1991, at A20.

⁸⁸ *Roe v. Wade*, 410 U.S. 113, 156-59 (1973).

had never discussed the merits of *Roe* with anyone.⁸⁹ That doesn't seem credible, but it doesn't seem hard to believe that he never took the trouble to read the case with any care. (Incidentally, doesn't it seem odd that this glaring gap in his knowledge was not remedied by the briefing books his legal coaches supplied him or by the mock hearing sessions they had with him? Do you suppose they left *Roe* out of his preparations on the thought that he didn't have to know it well because the plan was for him to refuse to testify about it? Or do you think they simply couldn't imagine that anyone nominated to the Supreme Court could possibly need instruction on the basic reasoning in *Roe v. Wade*?)

Also remarkably inadequate was Thomas's response to a question asking him to name "a handful of the most important cases that have been decided by the Supreme Court since you became a law student twenty years ago":⁹⁰

Judge Thomas. Senator, to give you a running list, I would have to go back and give it some thought. But I certainly think that during the time that I was in law school, two of the cases that were considered the most significant cases, or among the most significant cases, would have been certainly *Griggs*, which was decided while I was in law school. . . . And certainly I think *Roe v. Wade*. . . .

Senator Leahy. Are there some other cases that come to mind in the last twenty years?

Judge Thomas. There would be others, Senator. I can't off the top of my head. As you mention them, perhaps I could accord some weight to them. Just not off the top of my head.⁹¹

That's it? Two cases, neither after 1973 and one of which he claims never to have seriously discussed? Things sure have been dull at the Supreme Court in the past twenty years—at least from Thomas's perspective. Thomas's answer was so outlandish that you had to consider the possibility that it was simply strategic—a reflection of his handlers' strategy of avoiding open-ended debate about legal issues. After all, if Thomas named a case, he risked being asked to explain its significance; and who knows where such a discussion might lead! But even if the answer was strategic, it was strategic with a cost, because you certainly couldn't write off the possibility that Thomas really meant what he said. His less than dazzling display of legal acumen throughout the first set of hearings left you no real choice about that.

⁸⁹ See *supra* note 49 and accompanying text.

⁹⁰ *Excerpts From the Hearings [of Sept. 13, 1991] on the Thomas Nomination*, N.Y. TIMES, Sept. 14, 1991, at 6.

⁹¹ *Id.*

You undoubtedly recall the uproar when Robert Bork testified at his confirmation hearings that he wanted to be on the Court because the experience would be an "intellectual feast."⁹² Granted, that was not the ideal reason for him to give; it would have been nice to hear that he wanted to be on the Court so he could do more to serve society, not so he could do more for himself. But Bork's statement was hardly as outrageous as some of his opponents claimed. It is important that the Justices be people who have genuine intellectual curiosity and excitement about the Court's work. By the close of the first set of hearings, you should have had serious doubts whether Thomas was such a person.

In the first set of hearings Thomas claimed that his praise for the Lehrman article did not mean that he really endorsed the article's strong pro-life and pro-natural law positions because, among other things, he might only have skimmed the article before the speech in which he mentioned it.⁹³ In other words, even if it sounded like an endorsement, it couldn't have been one because Thomas really didn't know what he was praising. Thomas offered a similar excuse when he tried to persuade you not to make much of his having served on the White House working group that turned out a report that in one section sharply criticizes *Roe*. According to Thomas, he signed the 50-page report but never read it.⁹⁴ In short, since he didn't know what he was signing, surely he shouldn't be held to what it said. I don't find either of these excuses particularly credible, but that's not why I mention them to you now. Instead, I would like you to consider how troubling these excuses are in and of themselves. Thomas offered them to you as if they described perfectly neutral behavior. But the behavior they described was hardly neutral. If he indeed publicly praised an article without knowing its contents or blindly signed onto a report, he acted irresponsibly. The fact that he seemed to regard such behavior as acceptable was good cause for concern that he might readily lapse into similar behavior on the Court. How conscientious would he be about matters such as whether the cases and articles cited in his opinions stand for what he claims they do or about whether an opinion that he joins fairly reflects his views? Coupled with the evidence of his lack of analytical rigor and a record at the EEOC casting doubt on his sense of responsibility to duty, these two excuses left little room for optimism.

⁹² *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 854 (1987).

⁹³ See Lewis, *supra* note 26, at A21 (reporting Thomas's testimony of Sept. 11, 1991).

⁹⁴ See SENATE JUDICIARY COMM., *supra* note 34, at 24 (quoting Thomas's testimony of Sept. 10, 1991).

Finally, it is important to consider what Thomas promised to bring to the Court in terms of collegial abilities. Did he appear likely to engage in discussion and debate in a way that would tend to move his colleagues toward consensus or away from it? Despite his generally affable demeanor throughout the first set of hearings⁹⁵ and Senator Danforth's rather surprising claim in introducing him at the start of the hearings that he has "the loudest laugh I have ever heard,"⁹⁶ the evidence was actually quite one-sided that Thomas would add further friction to a Court already⁹⁷ too fractious for its own good. In his public statements and writings, he often was not content simply to attack other people's views but gratuitously attacked them personally as well. A classic in this regard was his complaint to a *Washington Post* interviewer in 1984 that, rather than try to work with the Reagan Administration to solve social and economic problems, black leaders have done little more than go to the press to "bitch, bitch, bitch, moan and moan, whine and whine."⁹⁸ By far the most probative evidence, though, that Thomas would be a divisive force on the Court was his performance in the second set of hearings. Justice Harlan was once eulogized for his ability as a member of the Court to "disagree without being disagreeable."⁹⁹ After witnessing Thomas's shameless and inflammatory appeals to emotion and hearing him recount self-righteously that he had not even bothered to listen to Anita Hill's testimony, you could have felt confident that, if Thomas was confirmed, no one would ever pay him a similar compliment. In fact, after the second set of hearings, you had to wonder whether Thomas was someone who could even be expected to *agree* without being disagreeable.

POWER POLITICS

After Thomas was confirmed, I couldn't help thinking that, if only some things had been done differently, the vote would have gone the other way. If only the Committee had questioned Thomas more aggressively. If only the Committee Chairman had not announced early in the second set of hearings that Thomas deserved

⁹⁵ See Richard L. Berke, *Sense of Humor Helps Thomas in His Trial by Committee*, N.Y. TIMES, Sept. 14, 1991, at 6.

⁹⁶ Senator Danforth's Remarks on Behalf of Court Nominee, N.Y. TIMES, Sept. 11, 1991, at A23.

⁹⁷ See Linda Greenhouse, *Name-Calling in the Supreme Court: When the Justices Vent Their Spleen, Is There a Social Cost?*, N.Y. TIMES, July 28, 1989, at B10; Brenda Jones Quick, *Whatever Happened to Respectful Dissent?*, 77 A.B.A. J., June 1991, at 62.

⁹⁸ See Juan Williams, *EEOC Chairman Blasts Black Leaders*, WASH. POST, Oct. 25, 1984, at A7 (quoting Thomas).

⁹⁹ Earl Warren, *Mr. Justice Harlan, As Seen by a Colleague*, 85 HARV. L. REV. 369, 370 (1971).

the benefit of the doubt.¹⁰⁰ If only the Committee had called expert witnesses on sexual harassment. And so on.

Maybe I was right, but the bottom line is that the outcome never should have turned on matters of this sort. As I hope I've demonstrated to your satisfaction, on the merits this was an open-and-shut case. Although I would like to think that I've done a pretty nice job of pulling together for you the available evidence about Thomas, I don't think any of the weaknesses I've identified should come as any great surprise. To be blunt, each of you who voted for Thomas either tried not to see his shortcomings or didn't allow yourself to take them very seriously, or both.

I know that's not a very neutral thing to say. I say it less, though, as an accusation than as a statement of fact. Those of you who voted for Thomas *were* remiss in your duties, but you were not entirely to blame. Much of the blame belongs to George Bush. I believe that many of you—perhaps almost all of you—voted for Thomas largely because you felt that the President had left you no choice. He had made his strong support of Thomas absolutely clear to the public,¹⁰¹ and you knew that it is usually costly at the polls to go against the wishes of a popular President,¹⁰² which is what Bush very much was at the time.¹⁰³ Also, the President obviously was not bashful about letting individual Senators know that he dearly wanted this nomination to go through and that he was prepared to make full use of the various means¹⁰⁴ of personal persuasion at his disposal to ensure that he got what he wanted.¹⁰⁵ No one who had witnessed Arlen Specter's performance in the Bork confirmation process could fail to appreciate how persuasive this President could be. During the second set of Thomas hearings, it was difficult to believe that the Specter of the Bork hearings and the one now before us were one and the same. Gone was the independent-minded Republican Senator who had questioned Bork rigorously but fairly and who ultimately, by breaking ranks with a Republican President and opposing the nominee, helped trigger Bork's de-

¹⁰⁰ See R.W. Apple Jr., *Confirmation Battle*, N.Y. TIMES, Oct. 15, 1991, at A21 (noting Senator Biden's remarks).

¹⁰¹ See, e.g., Andrew Rosenthal, *Bush Emphasizes He Backs Thomas in Public Meeting*, N.Y. TIMES, Oct. 10, 1991, at A1.

¹⁰² See GEORGE C. EDWARDS III, *PRESIDENTIAL INFLUENCE IN CONGRESS* ch. 4 (1980); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* ch. 5 (rev. ed. 1990).

¹⁰³ See Adam Clymer, *Most Americans Are Undecided on Court Nomination, Poll Finds*, N.Y. TIMES, Sept. 10, 1991, at A1, A16.

¹⁰⁴ See EDWARDS, *supra* note 102; BARBARA KELLERMAN, *THE POLITICAL PRESIDENCY* (1984); NEUSTADT, *supra* note 102.

¹⁰⁵ See, e.g., Rosenthal, *supra* note 101; Andrew Rosenthal, *Thomas's Edge Steady, Vote Due Today*, N.Y. TIMES, Oct. 15, 1991, at A1.

feat.¹⁰⁶ In his place was the ultimate company man, a Senator who seemed intent only on proving his partisan loyalties. As I watched him resort to one after another dubious tactic in an effort to cast doubt on Anita Hill's credibility,¹⁰⁷ I couldn't help but wonder what the Arlen Specter of the Bork hearings would have said.

Although it may be tempting to try to write off Thomas's confirmation as a sort of aberration—perhaps in a class by itself because race was involved so much more prominently than usual—the history of Supreme Court appointments in the twentieth century strongly suggests that it would be foolish to do so. This modern history is one of unprecedented presidential domination of the appointment process. Since 1900, the Senate has rejected Supreme Court nominations at a rate of only one out of ten;¹⁰⁸ prior to 1900, the rejection rate was much higher—approximately one out of four.¹⁰⁹ (In keeping with standard practice,¹¹⁰ I count as “rejections” not only nominations voted down by the Senate but also ones withdrawn by the President or not acted on by the Senate.) The ease with which Justices Scalia, Kennedy, and Souter were confirmed in recent years underlines how close the President's power of nomination has come to being a power of appointment. All three arrived at their confirmation hearings having publicly said and written little—in Souter's case, almost nothing¹¹¹—that shed light on their views on the major constitutional issues of the day; all three left their hearings having added relatively little illumination in this regard;¹¹² and you overwhelmingly approved all three for seats on the Court, even giving Scalia and Kennedy unanimous votes. It may not have been obvious from the modern history of Supreme Court appointments that the President could push a nominee as weak as Thomas through a Senate that had a 57-43 Democratic majority, but a close vote was probably the least that should have been expected. Thomas's confirmation simply showed how far an obvious trend had gone. (No, I haven't forgotten about your rejection of

¹⁰⁶ See ETHAN BRONNER, *BATTLE FOR JUSTICE* 265-73, 311 (1989).

¹⁰⁷ See Anthony Lewis, *Time of the Assassins*, N.Y. TIMES, Oct. 14, 1991, at A19; Rosenthal, *supra* note 53.

¹⁰⁸ See Simson, *supra* note 1, at 323 n.139 (and add the two subsequent, successful nominations).

¹⁰⁹ See *id.* at 324 n.143.

¹¹⁰ See JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 302-03 (1953); Robert B. McKay, *Selection of United States Supreme Court Justices*, 9 U. KAN. L. REV. 109, 130 (1960).

¹¹¹ See Steven A. Holmes, *A Window to Souter's Way of Life*, N.Y. TIMES, Aug. 15, 1990, at A25; Claudia MacLachlan, *A Product of His Conservative Community*, NAT'L L.J., Aug. 6, 1990, at 45.

¹¹² See Linda Greenhouse, *Senate Panel Approves Judge Kennedy*, N.Y. TIMES, Jan. 28, 1988, at A10; Greenhouse, *supra* note 41 (commenting on the Scalia and Souter hearings).

Bork. But that was nothing more than the exception that proves the rule. So many factors eased the way for you to vote "no" on Bork—Bork's lengthy and highly controversial "paper trail,"¹¹³ Reagan's waning popularity,¹¹⁴ lame duck status, and less than overwhelming show of support for the nominee,¹¹⁵ Bork's not-ready-for-prime-time beard, etc.—that his rejection can scarcely be seen as any sort of declaration of independence on your part. It's also worth remembering that, although the nomination was defeated, 42 of you—hardly an insubstantial number and only eight short of the number needed for the nomination to succeed—supported the President's choice. If a couple of influential borderline "no" votes had been "yes" instead, Judge Bork might well have become Justice Bork.)

Thomas's appointment illustrates three major difficulties of an appointment process as dominated by the President as ours is today. Most obviously, there is not enough protection against appointments not in the nation's best interests. Too much turns on the President's dedication to the common good. Whether the President in selecting a nominee gives priority to the nation's best interests or to personal or partisan advantage, the nominee is almost certain to be confirmed. The current presidential domination of the appointment process also is very troubling because it threatens the Court's independence. The President has so much leeway to place on the Court people to the President's ideological liking that the line separating the executive and judicial branches can become perilously blurred. Finally, this presidential domination enhances the possibility that the Court will exercise its judicial review authority in a manner dangerously at odds with the will of the majority. The process by which the Justices are appointed is probably the principal source of protection against this possibility. However, the protection provided by the process is significantly less if appointments depend only on the President's ideological preferences than if they depend on some sort of compromise between the President's preferences and the Senate's.

If these difficulties do not persuade you that the current distribution of authority in the appointment process is unsound, I should emphasize that they are more than policy objections. They have constitutional significance as well. As I argued at some length in the

¹¹³ See *Nomination of Robert H. Bork to Be Associate Justice of the United States Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 1st Sess. 6180-6285 (1987) (Senate Judiciary Committee report on the nomination); Ronald M. Dworkin, *The Bork Nomination*, 9 CARDOZO L. REV. 101 (1987); Stephen Gillers, *The Compelling Case Against Robert H. Bork*, 9 CARDOZO L. REV. 33 (1987).

¹¹⁴ See BRONNER, *supra* note 106, at 101; Clymer, *supra* note 103, at A16.

¹¹⁵ See BRONNER, *supra* note 106, at 200, 264, 309-12.

article discussed at the beginning of this letter,¹¹⁶ these difficulties together with the language of the Constitution's Appointments Clause and the history of the clause's adoption strongly indicate that the Senate was intended to play a very substantial checking role in the appointment process. The Senate, no less than the President, was intended to make an informed and unencumbered judgment as to whether a particular appointment would be in the nation's best interests. I won't repeat here the various arguments that I made in the article to establish the constitutional basis for a forceful and independent Senate role. I hope, though, that any of you not yet convinced of the importance of changing the current allocation of authority in the appointment process will turn to the article for them.

Over the years some people have questioned the wisdom and legitimacy of a forceful and independent Senate role in the appointment process by claiming that your adopting such a role would have certain adverse effects. Probably the charges heard most often are that it would lead to prolonged vacancies, lower quality appointments, and an unduly political conception of the Court. My short answer to these charges is that none of them is well-founded. My much longer answer is set out in the article I've been touting.¹¹⁷ If any of you are hesitant because of these charges to adopt an enhanced role, I urge you to turn to the article for this discussion as well.

PROPOSED REFORMS

The following suggestions for reform have a common objective: to reestablish an appointment process in which the President's and the Senate's judgments about the desirability of a particular appointment to the Supreme Court have roughly equal weight. Some of these suggestions are rather dramatic, but so is the existing imbalance of power in the appointment process. If you have reservations about them, I hope you will at least recognize the need for strong measures and come forward with some of your own.

1. *Proportion of votes necessary for confirmation.*—If a Supreme Court nominee were required to win the approval of two-thirds of the Senate rather than simply half, the Senate's voice in the process of appointing the Justices would be considerably greater than it is now. Except in the unlikely event that the President's party has substantially more than half the seats in the Senate, the President would be obliged in selecting a nominee to reach out to a fair number of

¹¹⁶ Simson, *supra* note 1, at 306-15.

¹¹⁷ *Id.* at 315-23.

Senators other than those¹¹⁸ whose membership in the President's party makes them exceptionally vulnerable to presidential persuasion. (If any proof was needed of this special vulnerability, the 41-2 Republican vote on Thomas surely supplied it.) A two-thirds requirement would also fit in nicely with the way in which your terms are staggered. As you well know, all other things being equal, a Senator who does not face reelection for four or five years is in a much better position to resist presidential pressures than one who must run again in a year or two. (Is there any doubt that the fact that he would face reelection in 1992 had much to do with Senator Specter's radically different behavior in the Bork hearings in 1987 and the Thomas hearings in 1991?)¹¹⁹ If a nomination were to meet with stiff resistance from the one-third of the Senate whose four-plus years before facing reelection gives them a certain immunity from presidential pressures, it would have a great deal of difficulty getting the two-thirds majority needed for confirmation.

Although a change to a two-thirds majority requirement can be defended as a means of bringing the distribution of power in the appointment process more into line with original constitutional intent, I doubt that it could be accomplished without a constitutional amendment. The constitutional text does not explicitly say that a simple majority is all that is required, but it rather obviously says so by implication.¹²⁰ Is an amendment of this sort a realistic possibility? Thanks to the Thomas appointment, I think it is. As I have argued, the appointment provided a vivid demonstration of the nightmarish results to which presidential domination of the appointment process can lead. In addition, I think many people were simply appalled to realize that, under the existing system, a nominee could be confirmed to a lifetime seat on the nation's highest court even though half of the Senate might regard the nominee as unfit for *nonideological* reasons, such as lack of personal integrity or dedication.

The fact that the Constitution calls for more than a simple legislative majority for very few purposes doesn't seem to provide grounds for serious objection. The two-thirds Senate majority needed to approve a treaty¹²¹ and the two-thirds majorities of both Houses needed to override a presidential veto¹²² and propose an

118 See GEORGE C. EDWARDS III, *AT THE MARGINS: PRESIDENTIAL LEADERSHIP OF CONGRESS* chs. 3 & 5 (1989).

119 See Gwen Ifill, *After Judging Thomas, Senators Face the Public: A Split Decision on Specter's Role*, N.Y. TIMES, Oct. 21, 1991, at A14.

120 See U.S. CONST. art. II, § 2, cl. 2.

121 *Id.*

122 U.S. CONST. art. I, § 7, cls. 2, 3.

amendment for state ratification¹²³ obviously reflect the judgment that decisions to do these things have such important implications that the legislature should not decide to do them unless it has a special measure of conviction that they are right. In light of the national significance of the issues decided by the Justices, the final and nationwide effect of their decisions, and the Constitution's virtual guarantee to them of life tenure,¹²⁴ a decision to confirm a Supreme Court nominee is sufficiently important in its implications to be paired with those decisions for which a two-thirds majority is already required.

Although it is realistic to expect that an amendment requiring a two-thirds majority may be adopted, it is also realistic to recognize that the amendment process is so difficult that such an amendment may well fail or at least not be adopted for some time. It is no accident that since the adoption of the Bill of Rights in 1791, the Article V requirement of two-thirds majorities in both Houses and ratification by three-fourths of the states has been met only 17 times.¹²⁵ The history of the ultimately unsuccessful Equal Rights Amendment illustrates how formidable the Article V requirements may be even for a proposal with widespread and vocal support.¹²⁶

With the difficulties of amending the Constitution in mind, I suggest that, at least until an amendment requiring a two-thirds majority is adopted, you adopt a rule that the Senate cannot act on a Supreme Court nomination unless two-thirds of the Senate Judiciary Committee has voted to approve the nominee. I don't see anything in the Constitution's simple-majority requirement for Senate confirmation that prevents you from adopting such a rule of self-restraint. Although I like the rule less than an amendment because the Senate Judiciary Committee vote may not be very representative of the general Senate reaction to a nominee, I think it would be a step in the right direction as far as correcting the imbalance of power in the appointment process.

2. *Benefit of the doubt.*—During the second set of Thomas hearings and the subsequent floor debate, a number of you stated that Thomas deserved the "benefit of the doubt" as to whether Anita Hill's allegations were true.¹²⁷ To some extent these statements

¹²³ U.S. CONST. art. V.

¹²⁴ U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

¹²⁵ See 1992 U.S.C.C.A.N. F5 (reporting certification of the 27th amendment on May 18, 1992, and providing its text).

¹²⁶ See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); DEBORAH L. RHODE, *JUSTICE AND GENDER* ch. 4 (1989).

¹²⁷ See, e.g., Apple, *supra* note 66 (quoting various Senators); Andrew Rosenthal, *Thomas's Edge Steady, Vote Due Today*, N.Y. TIMES, Oct. 15, 1991, at A1 (same).

may have been prompted by the hearings' superficial resemblance to criminal proceedings.¹²⁸ (Yes, *superficial* resemblance. Despite Thomas's cries of a lynching, he wasn't on trial for his life or liberty or even to see whether he would have to pay damages to Anita Hill. Like any Supreme Court nominee, he was simply being examined to decide whether he deserved the rare privilege of sitting on the nation's highest court.) But many of you have expressly or implicitly applied the notion that a nominee deserves the benefit of the doubt to matters of a very different sort. Some have applied it, often quite expressly, to the ultimate question of whether the nominee should be confirmed.¹²⁹ Less obviously but no less importantly, numerous of you have applied it—almost always without acknowledging doing so—to a nominee's views on issues of constitutional law: if the record is ambiguous or silent as to where a nominee stands on a constitutional issue, you assume that the issue can't be a basis for opposing the nominee and move on to the next. This benefit-of-the-doubt mentality in assessing a nominee's views on constitutional issues was apparent at times in the first set of Thomas hearings, such as when various of you expressed frustration with Thomas's refusal to comment on certain issues or with his efforts to cloud the record on others.¹³⁰ It was even more clearly on display, though, during the Souter hearings. Aside from some grumbling to the press about being asked to confirm a "stealth" candidate, many of you acted as if the dearth of information about Souter's substantive constitutional views essentially made those views a nonissue in the confirmation decision.¹³¹

¹²⁸ See, e.g., 137 CONG. REC. S14626 (daily ed. Oct. 15, 1991) (remarks of Sen. Dixon) ("I think we have to fall back on our legal system and its presumption of innocence for those accused. . . . Under our system, the person being accused gets the benefit of the doubt."); *id.* at S14653 (remarks of Sen. Murkowski) ("Under our system of justice the benefit of the doubt must belong to the accused."); *id.* at S14660 (remarks of Sen. Kassebaum) ("[Judge Thomas] will either advance to our Nation's highest court under a cloud of suspicion he can never fully escape. Or, he will return to the circuit court with the equivalent of a guilty verdict stamped on his resume.").

¹²⁹ See, e.g., 137 CONG. REC. S14297 (daily ed. Oct. 3, 1991) (remarks of Sen. Fowler) ("I have tried to insist on every judicial nomination of every President, that I would give both the President and his nominee the benefit of the doubt."); Clifford Krauss, *On Eve of Vote for Thomas, a Senator Grapples for Answers*, N.Y. TIMES, Oct. 15, 1991, at A18 ("[Senator Shelby] said if it weren't for the sexual harassment charges, there is no doubt how he would vote. . . . [He had] concluded that 'maybe he was inexperienced, but he had a good education. I was going to give him the benefit of the doubt.'").

¹³⁰ See Neil A. Lewis, *Frustrated Thomas Panel Ends Hearings with Talk of Overhaul*, N.Y. TIMES, Sept. 21, 1991, at 7; Neil A. Lewis, *High Court Nominee's Testimony Continues to Frustrate Democrats*, N.Y. TIMES, Sept. 13, 1991, at A1.

¹³¹ See Richard L. Berke, *Senate Committee Endorses Souter*, N.Y. TIMES, Sept. 28, 1990, at A1; Linda Greenhouse, *The 'Not Bork' Test*, N.Y. TIMES, Sept. 17, 1990, at A18; Tim Smart, *Souter's Opponents Still Don't Have Him in Their Sights*, BUS. WK., Sept. 17, 1990, at 34.

The idea that the benefit of the doubt goes to the nominee has no place in confirmation proceedings. It should be abandoned by those of you who hold it, because it gives disproportionate weight to the President's judgment about the nominee. Each time you give the nominee the benefit of the doubt on a matter on which his or her record is ambiguous or silent you are deferring to the President's tacit judgment that the nominee is acceptable in that regard. You are not exercising your own considered judgment on the matter, which is something you obviously need to do if the appointment process is to reflect in fairly equal measure the President's judgment and your own.

Depending on the particular matter in question, if a nominee's record is ambiguous or silent, it may make perfect sense not to disregard the ambiguity or silence but to count it against the nominee. Rather than giving the nominee the benefit of the doubt, you should be asking yourselves (1) how much doubt exists about a particular matter and (2) how acceptable is it that this amount of doubt exists for this particular matter. For example, public confidence in the Court is so important a value and so dependent on the public perception that the Justices are individuals of the highest personal integrity that even a moderate amount of doubt about a nominee's personal integrity probably should be counted heavily against him or her. On the other hand, the existence of substantial doubt whether a nominee would vote to uphold a particular Supreme Court precedent almost certainly deserves little or no weight if the precedent is one of rather limited national importance.

3. *Scope of questioning of nominees.*—The first set of Thomas hearings illustrated how asking nominees about their views on issues that the Court is likely to decide during their years on the Court can make it difficult for you to vote in accordance with your best judgment of the nominee. When you questioned Thomas in this way, you gave him a golden opportunity to pressure you to ignore or give little weight to the very significant indications in his prior speeches and writings as to his likely votes on the Court. By claiming openmindedness and denying that his speeches and writings discussing certain issues were as indicative of his future voting patterns as they seemed, Thomas put you in a serious predicament. He essentially forced you to call him a liar or publicly treat him like one if you wished to base your prediction of his likely votes primarily on the most reliable evidence of those votes—his speeches and writings. Particularly with a nominee put forward by a popular President, this clearly was a politically unpalatable thing for you to do, and many of you obviously resisted doing it or did it with great reluctance.

You don't have to believe that nominees are generally as lacking in integrity as Thomas to recognize the wisdom of not questioning any of them about their views on issues that they would be likely to face on the Court. I certainly don't hold nominees in general in such low esteem, but I do believe that they are human. Even nominees of far greater integrity than Thomas are a serious threat to answer such questions in a way that compromises your ability to arrive at an informed and independent judgment. A seat on the Supreme Court can be a powerful incentive for nominees to be intentionally less than completely candid when the truth might lessen their chances for confirmation. In addition, even the most scrupulous nominees may not be able to resist believing that they are more openminded about an issue than they really are when professing openmindedness would ease their path to confirmation.

If questioning nominees about their views on issues apt to come before the Court had substantial benefits, I might not be so ready to propose abolishing the practice. But I frankly can't see that it has. In general, such questioning produces unreliable evidence of likely votes when the questions relate to issues that the nominee previously has discussed in a speech or publication, and it produces remarkably uninformative evidence of likely votes when the questions relate to issues that the nominee previously has not publicly discussed. When questioned about issues of the latter sort, nominees often refuse to respond on the ground that doing so might prejudice or appear to prejudice their ability to decide cases raising such issues if they are confirmed.¹³² On the other hand, if they do respond, they typically do no more than either explain why the issues raised are important or complex or announce their commitment to certain broad principles that virtually no one would contest.¹³³ If, as I proposed earlier, you change your thinking about benefit of the doubt, it is quite possible that nominees generally may become more forthcoming in their answers when asked about issues that they have not discussed in their speeches and writings. If so, rather than generally uninformative answers, you can expect to get ones of the same dubious reliability as you now get when you ask nominees about issues that they previously have publicly discussed.

If you stop questioning nominees about their views on issues likely to come before them on the Court and also go along with my proposal about benefit of the doubt, Presidents may decide that it is best to forgo stealth candidates in favor of candidates who have a

¹³² See William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109, 125-39, 152-56 (1987).

¹³³ See *id.* at 157-62, 168-71.

substantial "paper trail." Although, as Justice Souter seems intent on proving,¹³⁴ some stealth candidates may turn out to be splendid additions to the Court, I would regard such a development as an unqualified good. There is a lot to be said for having a reasonably good idea of what you are getting, and you can make a reasonable prediction as to how candidates with substantial paper trails are generally apt to vote. I would be concerned about biasing the process in favor of candidates with substantial paper trails if having a substantial paper trail meant having such well-formed positions on many issues that one's mind is basically closed. Bork notwithstanding, there is no necessary correlation between the two. There are many people who speak out on the issues in a way that suggests that their minds are hardly closed to reasonable persuasion. On the other hand, as exemplified by Justice Scalia,¹³⁵ the fact that a candidate has a rather modest paper trail is no assurance at all that he or she does not have rather fixed views. Silence is not necessarily golden.

One cost of no longer questioning nominees about their views on issues likely to come before them on the Court may appear to be the loss of a valuable source of insight into such personal characteristics as analytical rigor and dedication. Thanks, though, to the extensive coaching that has become a staple of the appointment process (and that, after the defeat of the one recent nominee (Bork) who rejected it, almost certainly will remain so),¹³⁶ this sort of questioning yields much less insight into these personal characteristics than might be expected. The fact that Thomas's lack of analytical rigor and dedication shone through brightly in the first set of hearings despite a summer's worth of coaching simply attests to his extraordinary weakness as a candidate—weakness that should have been more than apparent to you even before you began asking him any questions.

If at this point you are still not persuaded to stop questioning nominees about their views on matters apt to come before them on the Court, I perhaps should remind you that I am not asking you to do anything unprecedented. What I am asking you to do conforms to Senate practice until 1955.¹³⁷ Until 1925 the Senate not only refrained from asking nominees questions of this sort; it did not even

¹³⁴ See Linda Greenhouse, *Souter: Unlikely Anchor at Court's Center*, N.Y. TIMES, July 3, 1992, at A1.

¹³⁵ See generally Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991).

¹³⁶ See Lewis, *supra* note 86; Neil A. Lewis, *As Hearings on Thomas Approach, Attention Focuses on Foes' Strategy*, N.Y. TIMES, July 29, 1991, at A12.

¹³⁷ See Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157-63 (1988); Ross, *supra* note 132, at 116-23.

ask them to appear at the hearings. For the next thirty years nominees appeared sporadically but were not asked their views on issues that they might decide on the Court.

Finally, let me ask you to keep in mind a consideration discussed earlier in this letter: public confidence in the Court. If, in response to your questions, nominees suggest or appear to suggest that they will vote certain ways and then vote differently within a few years of confirmation, public confidence in the Court can't help but be undermined. Consider, for example, the harmful effect of Thomas's concurrence this past June in a dissenting opinion by Justice Scalia that, among other things, trashed the Court's "*Lemon* test"¹³⁸ for Establishment Clause issues.¹³⁹ Less than a year earlier, Thomas had stated in his confirmation hearings that he had "no personal disagreement" with the *Lemon* test.¹⁴⁰ Even responses claiming openmindedness can be problematic in terms of public confidence in the Court. Take, for example, Thomas's claim in the hearings that he had an open mind about *Roe v. Wade*.¹⁴¹ (In case you don't recall, although Thomas repeatedly refused to comment with any specificity on the reasoning in *Roe*, he did assure you that he had not made up his mind as to *Roe*'s validity.) By making this claim of openmindedness in the face of evidence that he was a sure bet to vote to overrule *Roe* and then voting within a year to overrule *Roe*,¹⁴² Thomas debased in the public eye not only himself but also the Court on which he sits.

4. *Questioning by professionals.*—For you to cast an informed and independent vote on a nominee, it is important that the hearings reveal as clearly and fully as possible information relevant to whether the nominee should be confirmed. Not only do you obviously need for yourselves the information that hearings can supply; you also need for the public to have it so that if you vote in accordance with your best judgment of the nominee, you can have some confidence that your decision will be respected and understood. I

¹³⁸ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987).

¹³⁹ *Lee v. Weisman*, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White and Thomas, JJ.).

¹⁴⁰ See SENATE JUDICIARY COMM., *supra* note 34, at 154 (quoting Thomas's testimony of Sept. 11, 1991); see also Neil A. Lewis, *High Court Nominee's Testimony Continues to Frustrate Democrats*, N.Y. TIMES, Sept. 13, 1991, at A1, A19 (reporting Thomas's testimony of Sept. 12, 1991, that he accepted the *Lemon* test).

¹⁴¹ See SENATE JUDICIARY COMM., *supra* note 34, at 25, 59 (quoting Thomas's testimony of Sept. 11, 1991); Neil A. Lewis, *Thomas Declines Requests by Panel for Abortion View*, N.Y. TIMES, Sept. 11, 1991, at A1, A23 (reporting Thomas's testimony of Sept. 10, 1991).

¹⁴² See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

know it won't endear me to many of you—particularly not those of you on the Senate Judiciary Committee—to say this, but experience shows that as long as Senators are the ones who will be asking the questions, the hearings are not going to be as informative as you need them to be.

On the whole, Senators are not well-suited in three respects to do the questioning in confirmation hearings. First, although all of you have a general understanding of constitutional law issues and the work of the Supreme Court, few of you have the sort of in-depth understanding of these matters needed to explore thoroughly through questioning the available evidence of a nominee's likely votes on the Court. The problem is not that those of you on the Committee never ask any good questions bearing on a nominee's likely votes. With the assistance of your staffs, you come into the hearing room with quite a few. Rather, the problem is that you often fail to ask follow-up questions that do a good job of probing a response's ambiguities and implications.¹⁴³ If you adopt my proposal not to question a nominee about his or her views on issues apt to come before the Court, this problem will become somewhat less serious, because the witness who would be expected to be by far the most evasive in responding to questions bearing on the nominee's likely votes will not be answering such questions at all. It would still be very helpful, though, to have questioners with greater expertise in constitutional law and the ways of the Court than almost any of you can offer. Without legally sophisticated questioning to guide them, even witnesses who are not trying to be evasive can't be counted on to communicate clearly to you and the public as much as they could about the nominee's likely voting patterns on the Court. And let's be honest with one another here. After the various dizzying discussions of natural law in the first set of Thomas hearings,¹⁴⁴ how many of you not on the Committee can really contemplate with equanimity the prospect of your colleagues questioning *anyone* about complex issues of constitutional law?

A second respect in which Senators are generally not well-suited to conduct the questioning in confirmation hearings is that your cross-examination skills tend to be rather limited.¹⁴⁵ The problem mentioned above of weak follow-up questions reflects not

¹⁴³ See, e.g., John P. MacKenzie, *The Trouble with Hearings*, N.Y. TIMES, Sept. 24, 1991, at A30; *What Verdict for Judge Souter?*, N.Y. TIMES, Sept. 21, 1990, at A30 (editorial).

¹⁴⁴ See, e.g., *Excerpts From Senate's Hearings [of Sept. 11, 1991] on the Thomas Nomination*, N.Y. TIMES, Sept. 12, 1991, at A20; *Excerpts From Senate's Hearings [of Sept. 10, 1991] on the Thomas Nomination*, N.Y. TIMES, Sept. 11, 1991, at A22.

¹⁴⁵ See, e.g., F. Lee Bailey, *The Thomas Hearings: Where Was the Crucible? The Cross-Examination That Wasn't*, 78 A.B.A. J., Jan. 1992, at 46; Anthony Lewis, *Lessons of Thomas*, N.Y. TIMES, Sept. 30, 1991, at A17.

only a lack of particular legal expertise but this deficiency as well. With rare exception, you have not had the training generally needed for effective cross-examination or have not had sufficient opportunity to practice cross-examination to keep your skills sharp. As illustrated by the Thomas hearings, the absence of highly skilled cross-examination makes confirmation hearings less illuminating than they need to be in various regards. Not only are the nominee's likely voting patterns not exposed as clearly as they might be, but the same may be said for crucial personal characteristics such as the nominee's integrity and dedication.

The third and perhaps most significant respect in which Senators typically leave much to be desired as questioners in confirmation hearings is captured by a reporter's comment after the second set of Thomas hearings: "In their questions to the nominee, the Democrats tiptoed around him as if he were an undetonated mine."¹⁴⁶ Granted that those hearings were unusually politically sensitive—Thomas certainly did his best to ensure that—I still think they demonstrate that you are too vulnerable to political inhibitions to be counted on to ask the tough questions whenever they are needed.

The solution? Obviously I feel you should step aside and let other people do the questioning. I feel less strongly as to exactly who these people should be. I am inclined to think that highly respected lawyers with government experience but not currently in government are the most promising group of candidates, but I don't rule out other possibilities such as the Senate Judiciary Committee staff. The key is whether the individuals selected are strong in the respects in which I suggest you generally come up short. You may even want to give some thought to using different questioners at different times in the hearings if the hearings are the sort that call for detailed questioning in two or more rather specialized areas. Constitutional law and sexual harassment are two such areas that come to mind.

5. *Expert witnesses.*—If no one called to testify at the hearings can speak with authority on an important matter in issue, even the best questioning in the world may be of very limited value in helping you cast an informed and independent vote on the nominee. The second set of Thomas hearings illustrates my point. Experts on sexual harassment—in particular, experts on its psychological aspects—could have testified authoritatively on the credibility of Anita Hill's

¹⁴⁶ Walter Goodman, *Clear Picture of White Power and Black Achievement*, N.Y. TIMES, Oct. 17, 1991, at A22.

account.¹⁴⁷ By deciding not to call such experts as witnesses,¹⁴⁸ the Committee invited each of you as well as each member of the public to judge the credibility of her account by whatever psychological theory seemed most agreeable, however discredited or simply downright lunatic the theory might be by professional standards.

I can't understand how the Committee could have allowed this to happen (or, I should say, how the Democrats on the Committee could have allowed this to happen. The Republicans on the Committee were obviously only too happy to keep the door open to wild theorizing).¹⁴⁹ It's not as if no one on the Committee recognized the need for expert testimony. In questioning Hill, Senator Heflin more than once showed an awareness of this need. Rather remarkably, though, he seemed to proceed on the view that Hill was capable of filling it:

Senator Heflin. Well, the issue of fantasy has arisen. You have a degree in psychology from University of Oklahoma State University?

Professor Hill. Yes.

Senator Heflin. Have you studied in your psychology studies when you were in school and what you may have followed up with the question of fantasies? Have you ever studied that from a psychology basis?

Professor Hill. To some extent, yes.

Senator Heflin. What are the traits of fantasy that you study as you remember?

Professor Hill. As I remember

. . . .

Professor Hill. . . . I think that he wanted to see me vulnerable, and that if I were vulnerable that he could extract from me whatever he wanted, whether it was sexual or otherwise. That I would be under his control.

Senator Heflin. Now as a psychology major, what elements of human nature seem to go into that type of a situation?

Professor Hill. Well, I can't say exactly. I can say¹⁵⁰

Even if prior to the above exchanges the other members of the Committee were confident that they could do without experts, I can't believe that some of them didn't have the urge to rush out to get some afterward.

¹⁴⁷ See *supra* note 54 and accompanying text.

¹⁴⁸ See Maureen Dowd, *Republicans Gain in Battle by Getting Nasty Quickly*, N.Y. TIMES, Oct. 15, 1991, at A1, A18.

¹⁴⁹ See Rosenthal, *supra* note 53.

¹⁵⁰ *Excerpts From Senate's Hearings [of Oct. 11, 1991] on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at 14.

I haven't tried in any systematic way to go through the transcripts of past confirmation hearings to see how often expert testimony was needed and secured. Obviously, experts on constitutional law have testified with frequency in recent years,¹⁵¹ and I was somewhat heartened to find that the leading expert on judicial ethics was asked to testify in the Haynsworth hearings about the nominee's controversial failure while an appellate judge to recuse himself from a particular case.¹⁵² On the other hand, I suspect that, as in the Thomas hearings, the Committee has been slower to recognize the need for nonlegal expertise than for legal expertise. In any event, whether the expert testimony needed is legal or nonlegal, I hope that the Committee will be more alert in the future to the need for it than it was during the hearings on the Hill allegations.

6. *Hearings on the appointment process.*—My final proposal, holding hearings on the appointment process, does not call for change in any particular aspect of the appointment process. Instead, it attempts to make it easier for you to adopt particular changes by increasing public awareness of the need for change. The hearings that I envision would examine not only particular proposals for change but also, more broadly, the practical importance of enhancing the Senate's role in the appointment process and the constitutional basis for doing so. Granted, such hearings would be unlikely to top the Nielsen ratings of the second set of Thomas hearings. But thanks to the recent controversies over Bork and Thomas, I think that, as long as such hearings are held in the near future, a substantial portion of the public would follow them closely enough on television or through the newspapers for them to serve an important educational function.

On the final day of the first set of Thomas hearings, Committee Chairman Biden called attention to many Senators' expressions of dissatisfaction and frustration with the hearings and promised to hold hearings to consider ways of improving the appointment process.¹⁵³ A year later such hearings are yet to be held. Any sense of urgency apparently has dissipated. The need, though, has not. Hearings of the sort promised are long overdue.

¹⁵¹ See, e.g., *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. viii-xix (1987) (listing the witnesses at the Bork hearings, including numerous constitutional law scholars); Neil A. Lewis, *Thomas Is Unsuitable, 4 Academics Say*, N.Y. TIMES, Sept. 18, 1991, at A16.

¹⁵² See *Nomination of Clement F. Haynsworth, Jr., of South Carolina, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 110-36 (1969) (testimony of John P. Frank).

¹⁵³ See Lewis, *Frustrated Thomas Panel Ends Hearings with Talk of Overhaul*, *supra* note 130.

7. *A proposal not proposed.*—Since Thomas's confirmation, enough people have proposed that the process be changed to require the President to consult with the Senate before making nominations¹⁵⁴ that I probably should explain why I don't propose this change as well. I think I can do so most clearly by examining the ways in which these people would alter the process to mandate consultation. They all seem to want you to commit yourselves to voting on principle against confirmation if you haven't been properly consulted about the nominee.¹⁵⁵ In addition, most but not all prescribe a particular form that such consultation should take—for example, the Senate must receive from the President a list of possible nominees and may strike off the names of nominees whom it finds unacceptable,¹⁵⁶ or the Senate presents the President with a list of possible nominees from which the President must choose.¹⁵⁷

Proposals that don't call for a particular form of consultation (but instead call for "genuine" consultation or the like)¹⁵⁸ seem to me too likely to produce only token gestures of consultation to warrant serious discussion. On the other hand, proposals that do call for a particular form of consultation seem to me quite certain to have a substantial impact on the process, and I have serious reservations about the impact that they are apt to have. Basically, they ask the Senate to do things that it does not seem well-suited to do. I believe that the Senate is very capable of arriving at an independent and reasoned decision as to whether a nominee's appointment would be in the nation's best interests. Such a decision draws heavily on one of the Senate's greatest strengths: the ability to engage in wide-ranging deliberation and debate. By the same token, I seriously question whether the Senate is well-suited to compile a list of possible nominees from which the President must choose or to strike names off of a list compiled by the President, because these activities draw most heavily on abilities that are not among the Senate's strengths. Consider, in particular, the Senate's rather limited

¹⁵⁴ See, e.g., Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 992 (1992); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1514, 1518 (1992); Christopher H. Schroeder, *Low Roads to the High Court: Executive Extremism*, N.Y. TIMES, Oct. 23, 1991, at A23.

¹⁵⁵ For a slight variation on this theme, see 138 CONG. REC. S8863-64 (daily ed. June 25, 1992) (remarks of Sen. Biden) (stating that, if a nomination is not preceded by "genuine consultation between the White House and the Senate," he will oppose the nominee "immediately" upon nomination, unless the choice of nominee reflects an effort by the President to compromise ideologically with the Senate).

¹⁵⁶ See, e.g., Strauss & Sunstein, *supra* note 154, at 1514.

¹⁵⁷ See, e.g., Gerhardt, *supra* note 154, at 992.

¹⁵⁸ See, e.g., Schroeder, *supra* note 154. See also the Biden approach noted *supra* note 155.

abilities to investigate informally but efficiently and to act promptly and decisively in choosing among a range of alternatives. (Even if the Senate delegates to a committee the job of compiling the list of possible nominees or narrowing the President's list, I doubt that the job is apt to be done very well; and delegation would raise the question of whether it is being done in a way that fairly represents the thinking of the entire Senate.)

Some who argue that the President should have to consult with the Senate before making nominations cite in support of their position the mention in the Appointments Clause of the Senate's "advice."¹⁵⁹ In fact, though, the language of the clause is so incompatible with their position that a good argument can be made that proposals mandating that the President consult with the Senate on nominations can't be adopted without a constitutional amendment. This language strongly suggests that the framers regarded the Senate as best suited to provide substantial input into the process only after the nomination has been made. According to Article II, Section 2, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."¹⁶⁰ If the framers intended to require the President to seek the Senate's advice before deciding upon a nominee, they did an awful job of saying it. On its face, the clause requires the President to seek the Senate's advice only after deciding upon a nominee. What value could the Senate's advice have for the President at that point? Most obviously, such advice—whether formal, in the form of Senate hearings or floor debate, or informal—could persuade the President to withdraw a nomination before the Senate votes on it. In addition, this advice conceivably might persuade the President not to appoint a confirmed nominee. As you may recall from *Marbury v. Madison*¹⁶¹ (though this was obviously one of its less majestic points), the Senate's vote to confirm does not have the effect of appointing a nominee; the President must still sign the nominee's commission. No President has ever been sufficiently impressed by Senators' advice critical of a nominee to refuse to sign a confirmed nominee's commission. But you shouldn't have to strain to think of an instance in which such critical advice, coupled with a very narrow margin of victory in the Senate, gave a President more than enough reason to refuse to sign.

159 See, e.g., Strauss & Sunstein, *supra* note 154, at 1512, 1514.

160 U.S. CONST. art. II, § 2, cl. 2.

161 5 U.S. (1 Cranch) 137, 155 (1803).

SUPREME COURT APPOINTMENTS AND THE NATION'S BEST INTERESTS

As you've probably noticed, the nation's best interests play a big part in my thinking about the Thomas appointment and the appointment process in general. Although it may not be sensible to expect you and the President to decide everything with the nation's best interests foremost in mind, I believe it is entirely appropriate to expect you and the President to make decisions about Supreme Court appointments in this way. Decisions of this sort implicate important national interests more significantly than most decisions that you and the President make. In addition, thanks to the Constitution's virtual guarantee of life tenure to successful nominees, these decisions have a finality that your decisions and the President's typically do not. While legislation can be amended or repealed if it proves ill-advised, Supreme Court appointees, however deeply flawed, are basically with us to stay.

In closing, then, I appeal to your sense of duty to do all you can to ensure that the nation's best interests are far better served in the appointment process than they were served by the appointment of Clarence Thomas. In case, though, you need any additional incentive, let me also appeal to your sense of survival. Supreme Court nominations receive so much publicity and public attention today that, simply from the perspective of trying to ensure your longevity in office, it pays to worry about whether particular appointments and the process in general serve the nation's best interests well. As some Thomas supporters among you already have learned or will learn the hard way,¹⁶² even though Supreme Court appointees unsuited for their high office may be virtually immune from removal, the elected officeholders who put them there definitely are not.

Sincerely yours,

Gary J. Simson
Professor of Law

¹⁶² See, e.g., Isabel Wilkerson, *Illinois Senator Is Defeated by County Politician*, N.Y. TIMES, Mar. 18, 1992, at A19 ("Ms. Braun was drafted into the race in the divisive aftermath of the hearings on the Supreme Court nomination of Judge Clarence Thomas in the fall. Mr. Dixon voted in favor of Judge Thomas's nomination to the Supreme Court, angering many women who vowed to get even at the polls.").

