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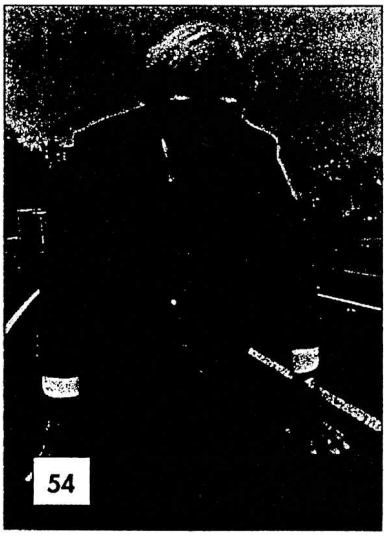

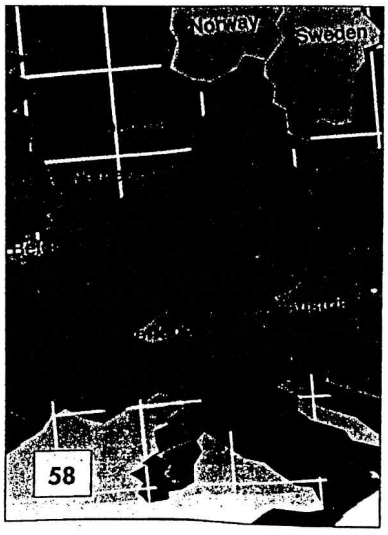

"What's the Alternative?"

A Roundtable on the Confirmation Process

MODERATED BY MARTIN H. REDISH / EDITED BY STEPHANIE B. GOLDBERG

It was clear that something was terribly wrong with the process for confirming Supreme Court justices when, as Sen. John Danforth, R.-Mo., noted, many were clamoring for the nominee, Clarence Thomas, to take a lie detector test to resolve the doubts about his character.

Since then, almost every aspect of the process has been assailed, from the confidentiality of FBI reports to the scope of character inquiries to whether broadcasting the hearings has created a media circus.

Along with the criticisms has come an outpouring of suggestions: Get rid of the handlers, muzzle the special interest groups, beef up FBI investigations, and so on. None of this is likely to solve the fundamental problem, which is whether the Senate has the right to "play politics" and override candidates chosen by the executive branch to implement its own political agenda.

If so, then is a major overhaul necessary to resolve these bitter disputes, or is the existing machinery still serviceable?

In November, while the wounds from the Thomas confirmation were still healing, we asked a panel of scholars to share their impressions of the confirmation process and how it should be changed. Our moderator was Northwestern University Law Professor Martin H. Redish. He was joined by:

▶ R. Lea Brilmayer, who is Benjamin Butler Professor at New York University School of Law;

▶ Duke University Law Professor Walter Dellinger;

▶ Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit; and

▶ University of Chicago Law Professor Michael W. McConnell.

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Redish: Michael McConnell has suggested that the most important event in the Clarence Thomas confirmation process was not the second round of hearings, but the first, which focused on Thomas' background and philosophy.

He believes they have serious implications for judicial independence. Do others see that as the most important issue?

Brilmayer: I don't necessarily agree. The sexual harassment issue also is just as important—not to the confirmation process, but as a general issue in society.

Kozinski: The sexual harassment allegation raises the whole question of character and judicial temperament. Everyone agrees that there are certain things in a nominee's past that should raise doubts about his qualification to sit on the bench. That will and should always be with us. But it becomes troublesome when the character issue is used to disqualify someone for political or philosophical reasons.

Redish: Mike, was that your concern, too?

McConnell: I think there are two ways in which the independence of the judiciary is seriously compromised by the current confirmation process.

First, the adversarial nature of the hearings and their focus on specific legal issues throw the nominee into the arms of the Department of Justice for a two- or three-month indoctrination period.

He receives the department's views on every conceivable legal and constitutional issue and under circumstances when he is at his most receptive, because they are preparing him for a hostile assault.

It is outrageous that each new justice will have undergone that kind of "education."

The second problem is that nominees are inevitably going to be tempted to answer questions, not solely on the basis of their own good-faith evaluation of the legal issues, but according to how their answers will affect the Judiciary Committee and the public at large.

Redish: What's the alternative?

McConnell: We should return to a system in which the principal focus is on the nominee's past public record, including writings, opinions, acts and statements—preferably more formal statements, rather than informal after-dinner speeches.

I would like to see the senators engage, before they ever see the nominee, in a serious substantive discussion of the public record. First of all, they should insist that the nominee show some distinction. Then they should frame their arguments on the basis of what a nominee has done and said.

The appearance of the nominee before the committee, if he appears at all, ought to be a relatively minor footnote. Otherwise the principal attribute being judged is television style rather than a whole career.

Dellinger: I strongly agree. I believe that the hearing has come to play a far too prominent role in the process.

We went for 150 years without having nominees even appear before the Senate Judiciary Commit-

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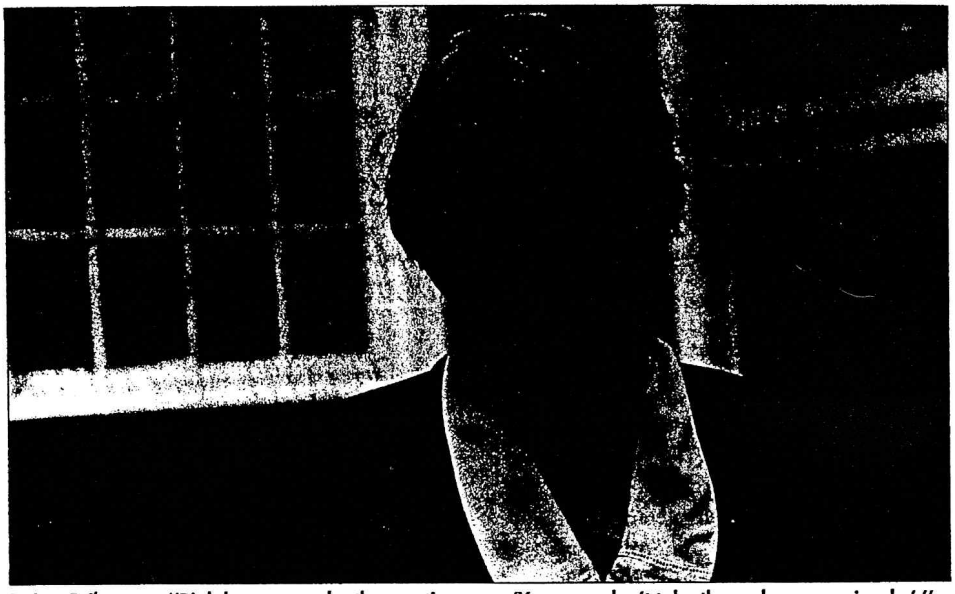
tee, and it did not become a settled practice until the nominations of Justices Stewart and Harlan in the late 1950s.

If I were to suggest a way to straighten out the process, I would have the Senate be more assertive about its policymaking judgments and, in a time of divided government, have it insist on consensus nominees.

I don't think the Senate should assess the worthiness of nominees by the kind of performance they put on for three days on television.

Redish: How would that have worked out in the case of Justice Souter?



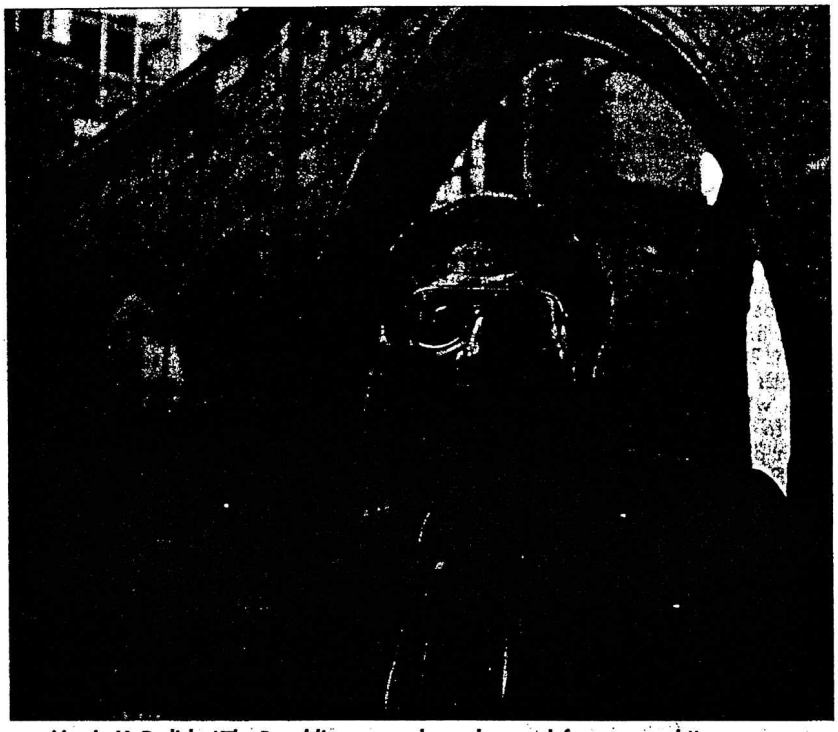
R. Lea Brilmayer: "Rightly or wrongly, the reaction was, 'You guys don't take these charges seriously.' "

Dellinger: Well, he would not have been confirmed unless there had been prior consultation and the Senate had been convinced of his accomplishments. The problem is this: If you compiled an honest list of the truly accomplished lawyers and judges, you'd find that most of them are not acceptable to this administration, although they are confirmable by the Senate.

There are a few exceptions, but generally the president essentially has allowed one part of his party to have a veto over Supreme Court nominations.

McConnell: Walter may overestimate the advantage of an aggressive Senate. We should recognize that distinction and confirmability are two different matters.

The problem is that we can't trust politicians in either branch to care much about distinction. Of course, they'll talk about it, but it's largely a smokescreen for other things.



Martin H. Redish: "The Republicans saw themselves as defense counsel."

Under those circumstances, I'm afraid that a more assertive role for the Senate merely creates the incentive for the president to find people who are non-controversial—hardly a good basis for distinction.

Brilmayer: I agree. It seems that a lot of questions the Senate asked didn't focus on distinction, but what positions the nominees were going to take on cases with political overtones.

Dellinger: Suppose the Senate or some other prominent group in the country suggested a list that included Dean Guido Calabresi, Professor Gerald Gunther, Chief Justice Ellen Peters, Judge Amalya Kearse, and William P. Coleman.

If the president ignored the list and came forward with somebody no one has ever heard of, at least it would put the nomination in perspective.

Redish: Can one argue that it is for the very reason that the judiciary is so independent after appointment that the confirmation process is necessary as the only political majoritarian check in the process?

Presumably, this is the stage where we don't want independence, where the political process is supposed to be performing its function.

And, given the nature of the communications media, isn't it perfectly appropriate to have the nominee appear on television, because the public's reaction is a perfectly sound influence at that time?

Dellinger: I agree that in a country that is otherwise committed to majoritarianism, judicial review is acceptable precisely because of

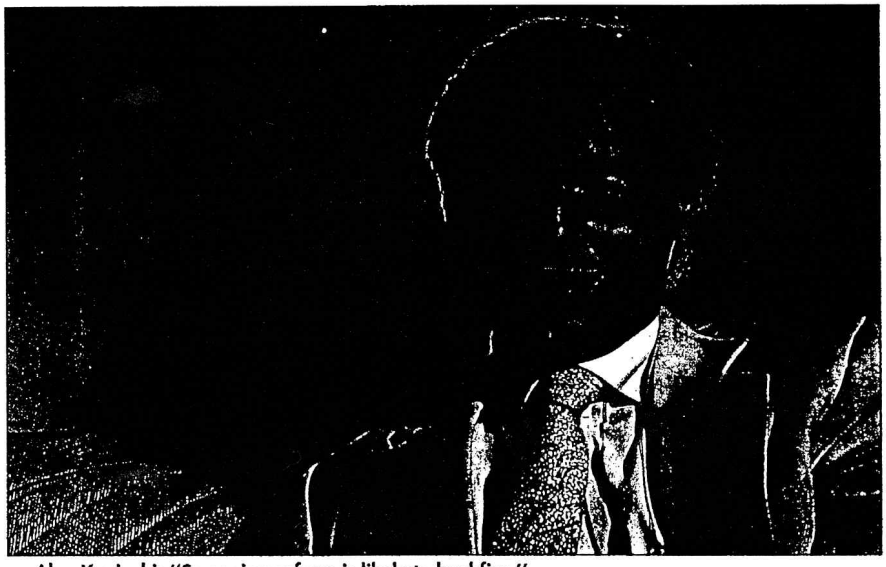
the political nature of the confirmation process.

But I am still troubled by questions that seek to commit the nominee to a particular course of action.

Redish: Even if the commitment is unenforceable?

Kozinski: Even so, I would worry a lot if I were a lawyer appearing before a judge who had made that type of public statement.

Dellinger: Alex, why can't a nominee make any statement that a sitting justice can make? If Justice Stevens or Justice Scalia visits a law school, each is free to express his views on *Roe v. Wade*, although neither would be willing to comment on future cases.



Alex Kozinski: "Sweeping reform is likely to backfire."

Brilmayer: The real problem isn't whether people are going to be making statements that will cabin their judicial discretion, but whether political pressure will force people to make statements they don't actually believe.

Kozinski: When I speak publicly, I try to avoid questions on specific issues that may relate to pending cases in my circuit. I would suggest that Supreme Court justices have even less discretion to speak, because they get so many sensitive cases before them.

Redish: But no one has focused on the costs of not allowing the Senate to inquire in this manner. Walter, you described your ideal world, but what would be left for the Senate to do if it couldn't make those kinds of inquiries?

Dellinger: After the passage of the 17th Amendment providing for the election of senators, it is very difficult to argue that one of the Senate's most important functions should not be made on the basis of a very public record.

Partly, the process would be improved if we moved in the direction of a different nominee—a far more mature, distinguished person entering the final stage of a career.

I would suggest a lawyer who has had a full career, but not necessarily someone who has had occasion to think about burning social issues.

I believe, for example, that Lewis Powell's honest answer to most questions about privacy, abortion or unenumerated rights would have been: "Senator, I've never thought about that in my law practice." And that would be perfectly appropriate.

McConnell: I'd feel a little bit better about advice of that sort if some of Judge Bork's detractors were now saying that the failure to confirm him was a mistake.

To a large extent we are now reaping the unfortunate rewards of the Senate turning down someone of genuine distinction.

Dellinger: I think it's a false lesson to conclude that the Senate will not nominate someone with a major record of accomplishment.

I think the lesson was the Senate was not going to confirm someone who was so conservative that he essentially rejected all of the basic premises of the Warren Court.

It is quite clear that even after the Bork battle, someone like Gerald Gunther would be overwhelmingly confirmed.

McConnell: But it's also clear the Senate will confirm people like Anthony Kennedy, David Souter and Clarence Thomas, but not Robert Bork.

I don't think the difference between those individuals is that one is more conservative than the other three.

Dellinger: I agree.

Kozinski: Let me respond to the comment that we can't eliminate public hearings in a democracy. We don't live in a direct democracy, we live in a representative one. It is based, not only on the principle we can't all get together in a big town hall and make decisions, but also that there are things in government that should not be decided by the rabble, because it does not always operate rationally.

What we saw with Bob Bork was an intrusion of direct democracy into a representative process. It was very troubling to those of us who suspect that, in addition to the full-fledged television campaign against him, Bork was defeated by the way he looks.

Getting back to Justice Thomas, it's equally distressing that the polls exerted as much influence as they did. It seemed to me that the tide turned on the less significant issue, as Michael identified it, but one that really could have defeated the nomination until the polls came out supporting Clarence Thomas over Professor Hill. I don't think that is a good way to conduct public business.

Redish: Why not, Alex? You're clearly correct to say we don't have a pure democracy, but I think Judge Bork would agree that popular sovereignty underlies the essence of our political system.

Why is it inappropriate for, say, Sen. Dixon from Illinois to vote the way his mail is going? Isn't that what the process is really all about?

Kozinski: The Constitution is an anti-democratic instrument. It is a check on absolute and direct democracy. We have built this structure in order to avoid the adverse effect of direct democracy.

Redish: But that's a red herring. This wasn't direct or absolute democracy. This was representative democracy acting in accordance with the structure of the Constitution.

Kozinski: I really don't know how the senators made their decisions, but whether Bob Bork looks

cute should not have mattered.

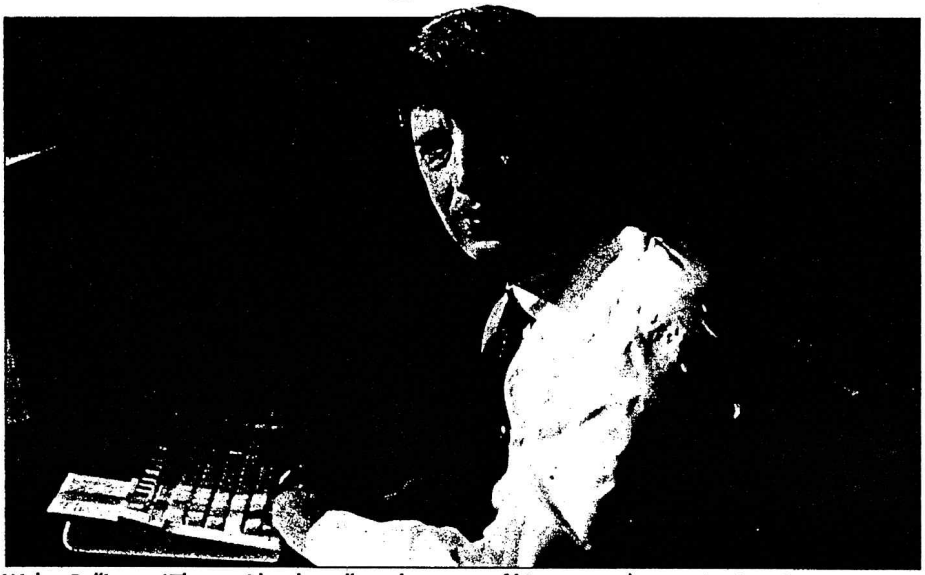
Redish: I really don't think his looks were the major issue.

Kozinski: I heard a lot of comments like 'I just don't trust him.' I think it played a substantial role.

Brilmayer: Could I make a point on whether these things should be televised or not? At the end of the Anita Hill escapade, many people were very unhappy about the way things had worked out, the circus atmosphere and so forth.

But think back to the reaction the week before that when the allegation first surfaced. Imagine if those allegations hadn't come out, if they had been swept under the rug and then came out a year or two later. That would have created an enormous crisis in public confidence in the Court.

One reason it's good to have some publicity is that there were a lot of people in the country who felt they couldn't trust the Senate Judiciary Committee and the Senate to take their interests to heart.



Walter Dellinger: "The president has allowed one part of his party to veto nominations."

Kozinski: If you don't trust your public officials, throw the rascals out.

Brilmayer: How can you do that if the information on their performance is withheld from you?

Kozinski: I don't see how you benefit from holding a televised hearing on Professor Hill's charges. I'm not saying they shouldn't have been looked into. But that's a different question altogether.

Brilmayer: But exactly the point I'm making is that they would not have been looked into, if there were no public outcry.

I also was extremely unhappy about this public spectacle. I don't like the way it turned out. But I'm not talking about whether the hearing should have been private. I'm talking about whether, if the whole proceedings had been private, there would have been any investigation of these charges.

McConnell: By that, you mean the charges would only have been investigated by the FBI.

Brilmayer: Yes.

McConnell: That would have happened even without the leak.

Brilmayer: I'm not standing up for the leak, but if the entire process was secret, people would have to worry about whether this sort of thing was being covered up.

McConnell: Let's not forget who was the victim of the public process after the leak. It was Anita Hill who was the principal victim, after she came to the committee on the understanding that her name would not be made public.

The committee staff egged her on to tell her story to them and the FBI on that basis. And then they turned around and leaked it in order to flush her out and put her in a situation where she could not maintain her privacy. I see no virtue in that at all.

Brilmayer: I don't disagree with most of what you said.

But can you imagine a confirmation process in which it would be possible for somebody to come forward with allegations without any public pressure to take the allegations seriously?

Rightly or wrongly, the reaction of most women was, "You guys don't take these things seriously because you're a bunch of men." I think that's a cost to be considered.

Dellinger: Do we all agree that a Senate Judiciary Committee is not a very effective forum for evaluating charges based on misconduct? That this should not be a model for the future?

Redish: As compared to what?

Dellinger: I'm inclined to think the only proper way to do it is to have an investigation, which is submitted for resolution to an appropriate body that has prescribed rules.

I understand the inevitability of the Anita Hill hearings. But surely it is not the appropriate forum for evaluating allegations of this kind.

McConnell: This goes way back in our history. As you know, Alexander Hamilton was one of the first to face it, and it's happened repeatedly since then to people from Alger Hiss and Jimmy Hoffa to John Tower and Ollie North.

Redish: But we're talking about a situation in which the alternative isn't a criminal forum, as it was in the Oliver North case.

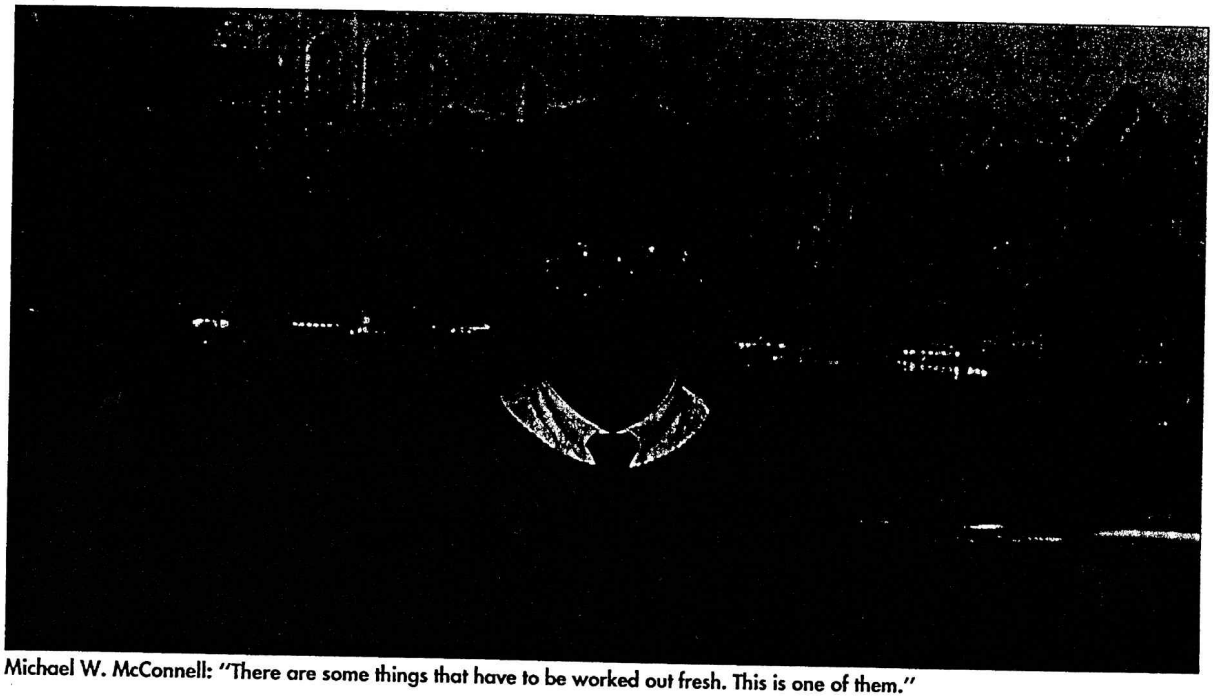
To turn to another question, is it clear the senators properly perceived their roles? It's been suggested that the Republicans on the committee saw themselves as Clarence Thomas' defense counsel, while, as far as anyone could make out, the Democrats saw themselves as fact-finders. Did they correctly understand their roles?

Kozinski: We're used to resolving things by the adversary process. So it was natural, I thought, that those on the committee who supported the nominee would take on the role of advocate, which creates some obvious tension because they're also judges.

Nevertheless, I think it worked fairly well.

Dellinger: I think the dual role of investigation and evaluation was a problem for the committee. It could have been avoided if the bulk of the questioning had been done by majority and minority counsel.

The questioning would have been considerably improved, and the senators could have played a more evaluative function.



Michael W. McConnell: "There are some things that have to be worked out fresh. This is one of them."

Kozinski: What do you mean, "improved"? I thought the questioning was pretty good and I watch a lot of trials.

Dellinger: One problem was the Democrats did not attempt to oppose Judge Thomas as vigorously as the Republicans worked at discrediting Professor Hill.

McConnell: What's wrong with that?

Redish: Can you conceive of any testimony that would have gotten either Sen. Simpson or Sen. Hatch to say, "By God, it's true. He did do it"?

McConnell: I think they viewed their role as defending his innocence up until the point it became untenable.

It reminds me of the Watergate impeachment hearings, where a number of Republicans continued to defend President Nixon up until a certain point, when it became impossible for them.

I don't think that's a mixture of roles. I think that's rather natural. Furthermore, I'm surprised you think the Democrats on the committee did not go on the offensive.

Other than those who attempted to draw as little attention to themselves as possible, it seemed that's exactly what they were doing.

Dellinger: I think that staff counsel doesn't have to worry as much as senators about maintaining an appearance of impartiality or about asking questions that are potentially politically embarrassing. In that respect, I think the questioning could have been a little sharper.

McConnell: I agree the senators were more restrained in questioning Judge Thomas and Professor Hill, but I'm not convinced that is a bad thing.

Redish: Any final points?

McConnell: For the first time the public has been exposed to the kind of process we have, and there seems to be major dissatisfaction.

To some extent, it's misplaced, but I would still love to see the dissatisfaction channeled into genuine reform. The current process threatens judicial independence and undermines the quality of our Court to boot.

We now are in a period of divided government, which hasn't existed for most of our history. There are some things that have to be worked out afresh. This is one of them.

Dellinger: Some of the problems we see in the confirmation process actually originate in the nomination process, which is closed off from public view.

If the president would come forward with individuals whose nomination would be greeted with widespread acclaim, I think you would see a much prettier confirmation process.

Kozinski: Any attempt at sweeping reform is going to be hard to come by and is likely to backfire. I like the suggestion of de-emphasizing the hearings and re-emphasizing the public record.

That, of course, takes care of how you deal with nominees with no public record. Televising the hearings also leads to too much pain and too much unpredictability. I don't think it serves the American public well.

Brilmayer: We're not going to get anywhere with this problem, until we resolve whether we want the Senate to have the same sort of power in the confirmation proceedings as the president does in the nomination process.

Nomination is a quiet and essentially unreviewable process. You have no way of knowing who was passed over and for what reasons.

The Senate would like to have that kind of power also, but the way things are set up strategically, they simply can't do it. So the Senate is trying to reclaim some of the power it feels the president has.

I think I would disagree that it's really a problem of the president coming forward with consensus-oriented candidates. I'm not really convinced that's what the Senate votes for, and I'm also sort of puzzled about where the consensus should be determined.

A lot of the candidates on Walter's list would win a consensus from lawyers and academics, but is that really the group we want to look to?

The problem is I don't think we have a clear sense of what we want out of this process. ■