

July 10, 2005

Section: PERSPECTIVE

Appointment with dignity
THE MORALIST

ANITA L. ALLEN

President Bush has called for a "dignified process" to replace Supreme Court Justice Sandra Day O'Connor. Democratic Sen. Edward Kennedy, meanwhile, has threatened to oppose any candidate whose nomination would amount to an "abuse of power."

But what is a "dignified" process? And what brand of unfairness counts as "abuse" of official power by a proudly partisan Republican president?

Recent history shows that the politics of race, gender and judicial philosophy can undercut the dignity and fairness of the confirmation process. The president and the Senate have a responsibility to act cautiously this time around.

Nearly 14 years ago, Clarence Thomas won a seat on the Supreme Court despite a Senate "advise and consent" battle that was anything but dignified. A dumbfounded nation watched an intelligent, attractive law professor named Anita Hill accuse Thomas of sexually harassing her when she worked as his subordinate at the Equal Employment Opportunity Commission.

Angry that he was expected to appear on national television to answer allegations that he made crude remarks about pubic hairs in a Coke can and harbored a taste for pornography, the man destined to be the court's second African-American justice characterized the hearings as a "high-tech lynching."

The attack on Thomas' workplace ethics led to cries of "foul." So, too, did the less-memorable attacks on his supposed "natural law" world view. From a natural law perspective, conformity to divine or moral principles is what makes just laws truly just. An unjust law is no law at all - or so goes the slogan.

A Roman Catholic by upbringing, Thomas once defended a version of natural law philosophy in a scholarly article. But he never directly applied the philosophy in his judicial opinions to strike down an otherwise legitimate law. On the contrary, since his earliest days as a federal judge, Thomas has been conventional to the point of being dull. That didn't stop his opponents from warning that he might someday ignore the laws laid down by legislatures and substitute his personal values.

The jousting over Thomas' judicial philosophy never reached the bloodbath proportions of the battle over Judge Robert Bork's published views. President Ronald Reagan nominated Bork, a well-known, learned conservative, to the Supreme Court in 1987. But after Bork told his Senate examiners that he did not believe the right to privacy could be found anywhere in the Constitution, his fate was sealed.

The former Yale law professor and federal judge would become synonymous with the occasional savagery of congressional hearings; he "got Borked."

The politics of race, gender and judicial philosophy that marred the Thomas and Bork nominations threaten to get out of hand in the fight over O'Connor's replacement. On the race front, some have argued that it is time for a Hispanic justice on the court and that the Republican Party needs to pacify Hispanic voters.

As for gender, others insist that, since O'Connor was the court's first woman, her replacement ought to be another female. In the category of judicial philosophy, still others are adamant that the nominee not be an ideologue bent on, in the words of Kennedy, "rolling back" Americans' rights and freedoms (read: overturning *Roe vs. Wade*).

The president will do his job responsibly if, first, he nominates a qualified man or woman. This is the easy part, since the search for the next Supreme Court justice is not a search for the best judge in America, any more than the Miss America Pageant is really about finding the nation's prettiest and most talented young woman. There are plenty of experienced, qualified judges.

Second, the president has to nominate someone who is confirmable. This is the tough part; many qualified judges would not be confirmed. The Thomas and Bork nominations led to undignified Senate hearings in part because the nominees went over poorly with liberal Democrats.

In this respect, Bush cannot ignore political realities. He must account for the bitter partisan climate in the nation's capital. Acknowledging the polarized politics of Washington, however, does not mean the president needs to kowtow to anyone.

O'Connor is, in many ways, the model for a justice who is both qualified and confirmable. She has proved to be a red-blooded conservative Republican justice with streaks of true-blue liberalism, feminism and progressivism.

The liberalism was evident in her concurring opinion in the recent Kentucky Ten Commandments case. She opposed a framed copy of the commandments in the courtroom on the classic liberal ground that it gave the government an unfair advantage in the marketplace of ideas.

She opposed minority business set-asides for federal government contractors, but wrote a progressive majority opinion defending affirmative action in admissions to achieve racial diversity at the University of Michigan Law School.

Her feminism was surprisingly evident in her majority opinion in *Planned Parenthood vs. Casey*, the landmark 1992 case that upheld the essence of *Roe vs. Wade* as critical to women's liberty and equality.

I have no doubt that the president will refrain from abusing his power in the strong sense of nominating someone who is obviously unqualified to serve. But he could abuse his power in the weak sense of misusing it: nominating someone whose nomination will result in the very thing he claims he wants to avoid - an undignified process mired in the intractable politics of race, gender and judicial philosophy.