REVIEW ARTICLE*

Capitol Games: Clarence Thomas, Anita Hill, and the Story of a Supreme Court Nomination by TIMOTHY M PHELPS and HELEN WINTERNITZ (United States: Hyperion, 1992), pp xvii + 437. Hardcover recommended retail price US$24.95 (ISBN 1-56282-916-5).

In the recent climate of opinion in this country regarding the judiciary, it is not uncommon to hear calls for a more transparent system of appointment for its members. As is so often the case in any number of fields of human endeavour, Australians have been turning to the US and wondering whether we should adopt their institution - in this case, confirmation of nominees to judicial offices by the Senate, or perhaps, in our case, by Parliament as a whole.

Capitol Games, a journalistic account of the events surrounding the 1991 confirmation of Clarence Thomas to the Supreme Court of the United States of America, should be read by anyone who might be tempted by such a course. This is not to say that such a sensational and unseemly spectacle would be likely to be repeated in this country (though of course we cannot be too confident that it would not), but it does draw attention to the dynamics of the process whereby the electorally accountable sit in judgment of the potentially non-accountable. Insofar as it highlights the issues that can arise, it can be very useful in informing debate on the system of appointment we might adopt in this country.

Clarence Thomas' nomination itself was quickly identified as a political ploy. Since Ronald Reagan's second term as President, his Republican administration and that of his successor George Bush had made no secret of their plan to 'stack' the Supreme Court with ultra-conservative judges, who could achieve on the Court the implementation of the social agenda which 'liberal' Congress had frustrated at

* Elizabeth Handsley, BA LLB (UNSW), LLM (Northwestern), Lecturer in Law, Murdoch University.

the executive level. And having suffered a crushing defeat in 1987 when the Senate rejected Robert Bork on the ground of his views regarding the place of the Constitution in the American political structure, the Republicans were determined to choose carefully. Thus, when Justice Thurgood Marshall, the only African-American on the Court, announced his retirement, the administration seized its golden opportunity; to replace him by a young (Thomas was only 43) arch-conservative of the same ethnic background.

President Bush, in the defence of a choice which clearly smacked of tokenism, or of his hated racial quota-ism, insisted that Thomas was chosen simply because he was the best person for the job. Very few people, least of all the authors of this book, were convinced by that. The nomination was correctly identified as a clever strategy for appointing a politically sympathetic judge who would not be vigorously opposed by the country's powerful civil liberties interests. Phelps and Winternitz give some detail on the soul-searching that went on in such groups as the National Association for the Advancement of Colored People after Thomas' nomination. They were faced with a nominee who would doubtless have a tendency to decide cases in ways which were detrimental to their programmes, yet would provide an important example of what a Black man could achieve. It would be difficult for them to hold themselves out as champions of African-Americans and at the same time to oppose the appointment of one of their number to one of the most powerful positions in the country. The civil rights community was essentially paralysed, forced to watch more or less passively as one of its great heroes (Marshall being famous for arguing *Brown* v *Board of Education*, the ground-breaking school desegregation case) was replaced with an 'Uncle Tom' who opposed affirmative action.

The Democrats in the Senate were likewise placed between a rock and a hard place. They are too dependent on the Black vote to be able to afford any but the gentlest resistance to the confirmation. The nomination of Clarence Thomas was a master stroke for the Bush administration.

After hearings before the Senate Judiciary Committee, in which Thomas was quizzed on his political and legal views, he looked fairly certain to be confirmed by a vote of the Senate. But days before the vote was scheduled, the story broke that he was accused of sexual harassment by a woman who had worked for him ten years before. Thus began the bizarre series of events which had the nation riveted to television sets, brought the Senate into serious disrepute and ripped apart the Black community.

Thomas' accuser was Anita Hill, a thirty-five-year-old African-American law professor from Oklahoma. She had worked with Thomas at the Department of Education and then at the Equal Employment Opportunity Commission, where he was Chairman. The charges she levelled against him included various forms of verbal harassment including discussing with her the size of his penis, and pornography, and pretending in her presence that someone had put a pubic hair in his can of soft drink. (Hill and just about everyone else was rather mystified by

this, until it was pointed out by Catharine MacKinnon that it is not uncommon in pornographic films for women to be penetrated by soft drink cans.)[1]

The Senate Judiciary Committee already knew of the allegations, as an FBI investigation had been carried out earlier in the confirmation process. It was only when the story began to appear in the media, however, that the Senate decided to take any action. It was with some reluctance that the decision was made to delay the vote in order to look into the charges.

It was certainly unfortunate that these kinds of allegations were being made against an African-American man, for they seem to feed just a little too neatly into the stereotype of the sexually hyperactive Black man. On the other hand, the existence of an offensive stereotype relating to a group should not immunise its members from accusations of consistent behaviour. Furthermore, they were being made by an African-American woman, who would surely have no interest in the perpetuation of the stereotype. Such allegations, coming from another African-American, deserved to be treated as motivated by something other than racism.

Yet it was of racism that Thomas accused Hill and her supporters. In his angry opening statement in this section of the hearings, he likened this turn of events to a "high-tech lynching".[2] In that statement he appeared oddly fatalistic for one so angry:

> No job is worth what I have been through, no job. No horror in my life has been so debilitating. Confirm me if you want. Don't confirm me if you are so led, but let this process end. Let me and my family regain our lives. I never asked to be nominated. It was an honor. Little did I know the price, but it is too high.[3]

Thus, Thomas insisted that his only concern was to clear his name; he no longer cared about the position on the Supreme Court. His supporters in the Senate and in the administration, however, felt differently and were determined to have him confirmed at any cost - even to the life and reputation of Anita Hill.

Hill was a credible witness. No party succeeded in establishing that she had any motive to lie. She had no direct interest in the outcome of the proceedings; unfounded allegations that she was part of a conspiracy of left-wing groups failed as surely as they deserved. Her character was flawless, and the most assiduous efforts had failed to turn up any but the smallest amount of criticism from those who knew her. That left Thomas' supporters with no choice but to attempt to establish that she is prone to fantasies about men to whom she is attracted, and that that was all that was happening here; she had come to believe that Thomas had paid her that kind of attention because she had wanted it so badly. There was absolutely no hard evidence for this thesis, so Thomas' supporters were driven to some tactics which were desperate, to say the least.

They called as a witness a Texan lawyer who was a contemporary of Hill's at Yale Law School and who claimed that she had taken him aside at a party and

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1 TM Phelps, H Winternitz, *Capitol Games: Clarence Thomas, Anita Hill and the Story of a Supreme Court Nomination*, Hyperion (1992) p 388.

2 *Ibid*, pp 332, 340.

3 *Ibid*, p 301.

admonished him not to lead women on, the implication being that he had disappointed her. He claimed never to have shown any interest in her, but that they had attempted to arrange a dinner date, at her suggestion, and never succeeded in agreeing on a time. Hill denied having given him the admonition, but even if she had, and even if she had mistakenly thought that he had shown an interest in her, it is a fairly large step from there to the kind of pathological fantasising that Thomas' supporters were attempting to establish.

It was only with this testimony, which came at the very end of the proceedings, that the Democrats swung into action to attack the Republicans' case. But by then it was too late. Thomas had spoken first, and although Hill's testimony had been corroborated by no less than five witnesses (one who had been subjected to similar treatment, four to whom she had made an 'early complaint'), he had set the tone for the proceedings. The consensus by the end was that it was a question of her word against his, in spite of this corroboration and his motive to lie - that is, his desire to 'clear his name' as well as, of course, getting the job.

The story of the hearings is a shocking one for a lawyer trained in the adversarial system to read. It should give serious pause to anyone who might occasionally be tempted by the inquisitorial style of legal proceedings, although hopefully there are at least some procedural safeguards where that type of proceeding is the norm. No such safeguards exist in Senate confirmation hearings, where participants are potentially free to introduce any evidence or innuendo they wish, no matter how irrelevant or inflammatory. The testimony of the Texan lawyer was only the most egregious example of this; the proceedings in general were littered with unfounded accusations, badgering of witnesses, speechifying in the guise of questioning, opinion evidence from non-experts and attempts to stain the reputation of those whose only wrong was to claim to have been wronged. The proceedings are a grim reminder of the not-so-distant past when women who complained of sexual misconduct by men could expect character assassination in court. The ease with which the Senators swung into blame-the-victim mode against Anita Hill is a clear indication of how shallow the grave is where the rules allowing that type of treatment are buried. There are still people in power, in the United States at least, who see discrediting of the complainant - by any means available - as the appropriate response to a complaint of sexual misbehaviour.

It is in this context, where nothing resembling rules of evidence applied, that some of the arguments preceding the final vote begin to look completely bizarre. After the most fundamental safeguards of the American (and our) system of justice had been dispensed with, senators argued for confirming Thomas on the basis of the presumption of innocence. In the words of Democrat Senator Alan Dixon of Illinois:

> Since both [Hill and Thomas] were credible... I think we have to fall back on our legal system and its presumption of innocence for the accused... That isn't a legal loophole, it is a basic, essential right - a right of every American. If we're not to become a country where being charged is equivalent to being found guilty, we must preserve and we must protect that presumption.

> In this case, that means that Judge Thomas is entitled to a presumption of innocence. Since the Judiciary Committee hearing did not overcome that presumption, that means Professor Hill's allegations cannot be used to justify a vote against Judge Thomas.[4]

It should be glaringly obvious to any lawyer that this argument is disingenuous, to put it kindly. Thomas was not accused, he was not trying to prevent the Committee from punishing him. (If he had been, one might have expected that he would at least listen to Hill's testimony, which he refused to do.) He was trying to convince the Committee to bestow a benefit - an honour, as he said - upon him. As such, he was the person trying to effect a change in the status quo, and therefore the burden of proof should have been upon him. It is not surprising that the Thomas affair lowered the Senate significantly in the estimation of the American people, for the Senate effectively equated being kept off the Supreme Court with being thrown in jail.

At least one senator, however, picked up on this anomaly. The conservative Democrat Senator Robert Byrd of West Virginia pointed out the great power wielded by a Supreme Court judge and said:

> Give him the benefit of the doubt? He has no particular right to this seat. No individual has a particular right to a Supreme Court seat. ...
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> If we're going to give the benefit of the doubt, let's give it to the court. Let's give it to the country.[5]

Anita Hill's courage in coming forward was not wasted, even though Thomas was confirmed by a majority of 52:48. In their epilogue, Phelps and Winternitz build a convincing case that the affair changed the American political landscape permanently. It is to the anger of women all over the country at Anita Hill's treatment that the authors attribute the election of three more women to the Senate in the next elections (one of whom replaced Senator Dixon, whose statement invoking the presumption of innocence was quoted above). The affair is also widely credited with forever raising the profile of sexual harassment in the community, increasing the level of acceptance among American men that it happens and that it is a serious invasion of women's personal integrity.

Looking at the affair as a whole, even given these positive outcomes, it is difficult to avoid thinking of it as a bizarre kind of circus. Phelps and Winternitz refer to it as a "national soap opera"[6] and the description is fitting. Not only did the proceedings involve a dramatic and unlikely mixture of issues - race, sex, revenge, power, politics and so on - but they were viewed by millions on prime-time television. In fact, Phelps and Winternitz believe that the outcome might have been different if the Thomas camp had not had the best viewing times.

Phelps and Winternitz also discuss in the epilogue some of Thomas' early judgments, in which he "showed himself to be every bit as extreme as the much-

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4 *Ibid*, p 404.
5 *Ibid*, p 410.
6 *Ibid*, p 415.

maligned citizens groups had said he would be".[7] They included a decision that a retributive beating of a prisoner by guards was not cruel and unusual punishment and the victim therefore was not entitled to the $800 damages awarded to him in the court below; a couple of decisions refusing stays of execution of prisoners on death row in the face of new exculpatory evidence; and a refusal to hear the appeal of some Haitian refugees who were faced with forcible repatriation. The American people have, potentially, decades of similar decisions to look forward to.

What are the lessons of the Thomas-Hill affair for observers in Australia? Would we risk similar painful episodes if we were to introduce a system of legislative confirmation of judicial appointments?

There are of course some key differences between the US system of government and our own, the most important of which is the comparison between our system of responsible government (and the concomitant strict party discipline) and the US separation of powers between the legislature and the executive. If it were a question of confirmation by the Lower House, or even (in most cases) Parliament as a whole, the confirmation could be expected to be little more than a rubber stamp, though the Opposition could be expected to raise some issues in some cases, in a more or less responsible way, depending on the political climate. If confirmation were left to the Upper House however, where the government does not necessarily have a majority, and where minor parties are likely to hold the balance of power, we could expect some lively battles, in some cases at least.

It is difficult to predict just how the Opposition and the minor parties in this country would respond to the opportunity to frustrate a judicial appointment. Perhaps they would provide vigorous opposition, either because they saw that as their duty or because it would be a good way to win political points. Perhaps, however, this country's tradition of deference to authority and the mystique which still surrounds the judiciary here would distinguish the Australian experience from that of the United States. Perhaps the legislative minorities would simply not feel comfortable 'digging up dirt' on a nominee in the conditions of these traditions.

On the other hand, recent events, particularly widespread publicity in 1993 about sexist comments by judges, have already gone some way to demystifying the judiciary in this country. Indeed, it is this very demystification which appears to have generated the calls for a more transparent appointment process. If the process of demystification were to continue, as arguably it would have to as a precondition to the introduction of new procedures, we could well find that oppositions and minor parties were willing to mount attacks on judicial nominees similar to those against Bork and Thomas. And if that were the case, we could expect similarly spirited defences by the government.

In other words, there is a symbiotic relationship between heated confirmation debates and frank recognition of the power wielded by judges. Once one recognises their power and the stakes that are involved in an appointment, one must begin to reflect upon the kind of person we want to hold such a position. From this, it would

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[7] *Ibid*, pp 427-8.

seem to follow as a matter of course that nominees will be thoroughly investigated and examined in the confirmation process. This investigation and examination has the effect of further demystifying the judiciary, both as individuals and as an institution, and so on.

It would take some time for debate in this country to reach the level of near-hysteria that some confirmations have reached in the US. However, we would have to be careful in the introduction of any confirmation procedure for judicial appointments, to avoid inviting the institutions involved to behave in a manner which would be likely to bring them into disrepute. One very important condition, as the Thomas-Hill affair shows, would be the imposition of procedural safeguards or at least some kind of guidelines which could give a clear picture of what the process was about and what theory underlay it. It would be very disappointing in this country to see a situation whereby candidates could, like Clarence Thomas, have it both ways - that is, have their champions mercilessly demolish their detractors and then demand a right to the presumption of innocence.

Either the confirmation process is a political one, and the political interests involved need to be frank and open, or it is a quasi-judicial one, in which case all the interests involved need to be protected. These issues all need to be thought through and resolved in advance.

Of course the Thomas confirmation hearings raised other issues than procedural ones and were not merely a party-political brawl. They were, particularly in the phase relating to Hill's accusations, about sexual politics. They were about the way that powerful men respond when one of their number is accused of an abuse of his power. This is another issue which must be addressed if Australia is to adopt a legislative confirmation system, as it is entirely possible that an Australian Anita Hill would be similarly vilified and suspected of everything from conspiracy to fantasy to perjury. This is because the attitudes which fuelled the Senate's treatment of Hill are attitudes which are very much alive and well in this country.

These attitudes appear to be animated by a peculiar logical twist, which goes something like this: sexual harassment is a very serious charge and one which can seriously harm a person's reputation. Therefore, anyone who would make such a charge must be vindictive and the reputation of the accused must be protected. Thus, because sexual harassment is such repugnant behaviour, no-one wants to believe anyone who has suffered from it. The hatefulness of the behaviour makes the accusation hateful.

This, of course, is a relatively benign assessment of the motivation of the Senate. Others might say that it was sheer misogyny; if Clarence Thomas was subjected to a high-tech lynching because he was a Black man, Anita Hill was subjected to a high-tech rape because she was a Black woman.

The analogy with rape is not a casual one. Sexual harassment is on a continuum with rape as a means of terrorising and controlling women, especially Black women. (Indeed, sexual harassment sometimes takes the form of rape.) Thus although sexual harassment is new as a legal category, it inherits all the attitudes which have informed the traditional legal handling of rape, including the idea that it

is a charge too easily made to believe complainants without corroboration, the idea that it happens only to 'good' women and so the complainant's history is relevant to the truth or falsity of the allegations, and so on.

Similar twisted logic to that described above appears to apply to rape; it is a heinous crime, so heinous that we don't want to convict anyone of it. This is the attitude which, from a reading of Phelps' and Winternitz' account, appears to have formed the basis for Anita Hill's treatment in the Senate and for the agreement of two-thirds of the American people that she was not to be believed.

What is even more depressing than the prospect of a sexual harasser on the Supreme Court is the prospect of politicians, mostly male (in the case of the Senate Judiciary Committee, exclusively male), succumbing to the temptations of these well-worn and comfortable attitudes when judging him fit for office. That is the true outrage of this story, and any scheme in this country which sought to set up similar processes should address this very real possibility.

Capitol Games is a work by journalists and written from a journalist's point of view. Not surprisingly, therefore, in spite of its lively pace and readability it does not contain much in the way of legal analysis. However, it does contain a very detailed description of the events surrounding the nomination and confirmation, including numerous quotes from participants in the hearings, and the level of political analysis is by no means shallow. To a reader who is interested in the legal ramifications of the episode - even in the broader sense of legal culture - it might appear a little long in description, particularly of the biographical details of the participants. On the other hand, as the discussion above should indicate, the chapters on the events following upon the publication of Hill's allegations (the last seven of the twenty) contain valuable information and analysis of the last round of the hearings, which has valuable lessons for Australians. The book shows a good deal more sympathy for the Hill camp than that of Thomas, and for that reason is open to the charge of partiality. On the whole, however, it is fortunate indeed for those who are interested in judicial power and judicial accountability that the story has been told in so much detail.