

But his history of struggle and his past openness to argument, together with his capacity to make up his own mind, make him a much more likely candidate for growth than others who have recently been appointed to the Supreme Court and who, whatever they may have said at their confirmation hearings, had in fact been set in their ways and immovable back to their lack school days.

Such a capacity for growth, as a Justice develops his or her own constitutional philosophy, is essential if a person is to become a truly great Justice. None of the great Justices of the past, not Justice Black, nor Justices Harlan or Stewart, not Justice Holmes nor Justices Brandeis or Cardozo, not even Justice Frankfurter, for all his years of teaching constitutional law, came to the Court fully formed.

The Court itself, and the individual cases that came before them, shaped them, even as they shaped the Court. In the end, it was a combination of character, ability, willingness to work really hard, and openness to new views that made them great Justices. These qualities, if there truly is openness, matter far more than past positions. Many a Justice has changed his mind dramatically since going on the Court. I hope and believe that Judge Thomas has these qualities, and that is why I am here today.

I would like to close with one anecdote about Judge Thomas as a student. Judge Thomas had a fine law school record. But early on he did get a poor grade, though clearly passing grade, from one of the toughest teachers in the school. When that happens, most students stay as far away from such a professor as they possibly can. Not Judge Thomas. He not only went back to the same teacher for another course, but chose to do his senior essay, his dissertation, for that teacher, and this time he received an honors, the highest grade given in the school. The quality this demonstrates has stood Judge Thomas well in the past. It will stand him well in the future.

Thank you.

The CHAIRMAN. I want to note, Dean, that you are being watched. Look to your right, and eagle-eye Danforth, your former student, is over there. I just did not want—

Mr. CALABRESI. He was a good student.

The CHAIRMAN. He is a good Senator, as well.

I do not have any questions for you, because you have stated your views very bluntly, and you have said it and you have summed it up.

Quite frankly, although some of us have not fully decided how we are going to vote, we have to vote, as you well know, and I think all of us share what I would only characterize as an aspiration you have, and that is that his character and tenacity and willingness to work hard, coupled with his basic sound intellect, will overcome what seem to be some preposterous notions he has asserted in the past. That is my words, not yours. I used the word "preposterous."

Believe me, Dean, whether or not I vote for Judge Thomas, I pray you are correct, because I, like you, disagree with a number of his previously asserted positions. But I, like you, also believe that, for a 43-year-old man, with his limited experience, not in life, not in dealing with the problems of life, but limited experience in law,

and it is limited, notwithstanding the fact he is on the Bench, the notion that he would have a fully informed view of constitutional law would be premature.

I hope, at a minimum, that preparing for this process has informed Judge Thomas as to what he does and does not know, and also has done what it does for anyone who goes through the process of having to represent one of the three branches of Government, the President, a Member of Congress or the Court. We all have our elections, if you will, and we hope that they are designed not only for us to let our views be known to the people, but let the people's views be known to us. I have never known a candidate who was not more informed when the process was over than before he or she ran. I have never known a President, and I have known five now, who did not have a clearer notion of the needs of the country after having campaigned in every nook and cranny of the country, than before he campaigned.

I am hopeful that that process works as well in this situation because this is the equivalent of a campaign for a Supreme Court Justice, in my view, as it should be. I can see one of your former graduates coming in. If you want to respond to that, I will yield.

Mr. CALABRESI. I just want to say that this is an extraordinary time in the history of the Court. It has been 24 years since a Democratic President has nominated a Justice to the Supreme Court.

The CHAIRMAN. That has not been lost on some of us.

Mr. CALABRESI. And that is as long a time, perhaps as there has ever been in the history of this country, certainly since the Civil War, from 1860 to 1884 was a period of equivalent time.

At other times when there has been such an extended period of time, the President has attempted to name people to the Court whose views are very different from his own. Presidents Roosevelt and Truman, for what seemed an eternity but was only 20 years, named all the Justices and made a point of naming some Justices who were very conservative and some from the other party. Justice Reid and Justice Burn were Democrats and very conservative; Justice Burton was a Republican.

The CHAIRMAN. I doubt whether we are ever going to see that enlightenment in this administration.

Mr. CALABRESI. This administration and the past administration have not done so. Under these circumstances, they have continued to name people whom they thought would share their views, and that is their right in the first instance. But under those circumstances, I think that we have to hope that the people they have named at least have the capacity for growth, which some of the previous people who were nominated and who had, in my judgment, a less distinguished—Dean Griswold was quite candid in saying that some at least were with no more distinguished a record than Judge Thomas—but those people did not have a capacity for growth which Judge Thomas has.

I hope that in the future the administration will be more open to other views, but in the meantime, I think we are bound to hold people to the standard you have held in the past, especially when this is a nominee who has some capacity for growth which I did not discern in some of the earlier ones.

The CHAIRMAN. Well, I respect you very much, Dean, as thousands and thousands of lawyers across the country do, and I mean that sincerely. Of all the testimony that has been received, yours is the most persuasive to me, in the sense that if I do not factor in what you are talking about, I quite frankly find it hard to find a sufficient rationale to support Judge Thomas, because, as has been pointed out by you, other Presidents in similar periods have understood the wisdom of having the third branch reflect a diversity of view on the great issues of the day. I do not see that occurring and, as you know, as a student of history, and the one thing I can say—it sounds self-serving, but I have become a student of the history of the Court—

Mr. CALABRESI. You have indeed.

The CHAIRMAN [continuing]. After having to do so many of these, and have spent a great deal of time with your colleagues and professors of the law and legal scholars. I know for certain that in all those instances where the Presidents have attempted to remake the Court in their own image, they are the instances and essentially only the instances in which the U.S. Senate has said all right, if that is the way you are playing the game, then we must play it the same way.

I yearn for the day, especially if I remain chairman of this committee, I yearn for the day when the President, Democrat or Republican, picks a nominee simply based upon his or her overall instinct about what the nominee's intellectual capacity is, and not on what his or her views are.

I trust President Bush. I believe he is an honest man. But I doubt whether there is a single American out there who believes that President Bush said:

By the way, just go find me a nominee who has an open mind, just find me a nominee who has integrity, just find me a nominee who is schooled in the law, I ask no more.

John Sununu would have had an apoplexy, if that were the call. I just cannot fathom that having happened.

Mr. CALABRESI. I cannot imagine that happened, either, Senator. On the other hand, it would be ironical, if the test were the one which you are now proposing, and that were applied for the first time to someone who has more promise of growth, who at least has experienced life in a way that the previous nominees had not, who knows these things and who, insofar as he is showing these views of the administration, is in that particular also at odds with many of the friends that he made all through his growing up, that is, that the person who is doing this has shown more independence, although an independence in a direction that I do not share. So, it would be quite ironical to find that person being turned down for this, when the others just got through with all sorts of people, even people who are opposing this one, clapping their hands.

The CHAIRMAN. Although I have more time, I do not wish to take more time now, but at some point after this is over, I would really enjoy having an opportunity to sit down with you and discuss this, not Judge Thomas, but this whole process. Because, as you know, this is a cumulative process.

Mr. CALABRESI. It is indeed.

The CHAIRMAN. If this were the first time a person was put on the Bench, if he or she is the first ideologue of a Republican President leaning to the right, I think that is fine. I say fine, there should be people on the Bench who share that view, even if it is further right than I would agree to.

The second one, I say it is less fine. When it gets to the point where it looks like the attempt for the entire Court, all nine members to be that, then the standard will and, I will argue, intellectually must change, must change, not will, but must. One is fine, two is okay, three is okay. Four, five, six, seven, eight nine—it gets to the point where you are talking about 40 years of Supreme Court Justices, and that does make us all think. And I am sure, because you are a man of great intellectual honesty and integrity, you are sitting there saying I hope to God I am right about this guy.

Mr. CALABRESI. Of course I am.

The CHAIRMAN. We share the same concern. I wasn't being solicitous. Yours, to me, because of where I am on this nominee, is probably the most compelling testimony that I have heard in the entire—

Mr. CALABRESI. It may come to the point, Senator, that it came with President Hoover when, I am told, that Senator Borah went to President Hoover and said, "There is one person whom this committee will confirm, and that is Benjamin Cardozo." It may come to the point where the committee will have to take a leadership role in suggesting names rather than simply listening if the administration does not do its part. But that is different from what one can do when a name has been sent.

The CHAIRMAN. I agree, and we may be approaching that point. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Calabresi, I want to welcome you here. Wasn't there a Governor of Ohio by the name of Celebrezze?

Mr. CALABRESI. He spelled his name differently and was not related to me. His name was—

Senator THURMOND. He wasn't related to you?

Mr. CALABRESI. No. He arrived in the United States, or his family did, long before I did. I arrived 52 years ago yesterday.

Senator THURMOND. It is almost the same name, isn't it?

Mr. CALABRESI. Almost the same name. Almost the same.

Senator THURMOND. I think he was a Cabinet member down here at one time, too.

Mr. CALABRESI. He was a Cabinet member (HEW) in President Johnson's administration.

Senator THURMOND. He had two S's in his name?

Mr. CALABRESI. He had several Z's in it, I think.

Senator THURMOND. Well, how long have you been dean at the law school?

Mr. CALABRESI. This is my seventh year, and I am surprised to have survived that long—Dean Griswold, of course, being dean at Harvard, was able to survive much longer.

Senator THURMOND. How long did you teach there before you became dean?

Mr. CALABRESI. I have been teaching at Yale Law School since 1959, Senator.