NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 11, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice at 10:05 a.m., in room 325, Senate Caucus Room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge. It is a pleasure to have you back. Let me very, very briefly explain to you, your family, and everyone else the process this morning. I expect that we will have four Senators question before we break for lunch. If I were you, I would probably want to break after 2, but it is up to you. I will go through four Senators until lunchtime unless there is some indication from you or anyone else that you would like to stop and take a break. I will be glad to give you a break to get a cup of coffee or anything else you want.

Now, we need to get started. Do you have a preference, Judge, as to how you would like to proceed? Really, I am not kidding. Any way you want to do it.

Judge THOMAS. We will play it by ear.

The CHAIRMAN. Play it by ear. I agree with you. All right.

Now, we will start this morning's questioning in the same format as before; each Senator will have ½ hour for his questions and your response. We will start this morning with Senator Metzenbaum.

I might add that we do not plan on going beyond 5 o'clock today unless we are very close to finshing. We are going to try to end the hearing today at 5 and we will pick up tomorrow at 10 o'clock no matter what. I expect we will still have questions for the judge if people haven't had their second round.

With that, let me yield the floor to Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Good morning, Judge Thomas. Nice to see you again. You have an extensive record of speeches and published articles. Judge, I have made no secret of the fact that I have serious concerns with many of the things in your record.

Yesterday I thought we would finally get some answers about your views. Instead of explaining your views, though, you actually ran from them and disavowed them.

Now, in a 1989 article in the Harvard Journal of Law and Public Policy, you wrote, "The higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for just, wise, and constitutional decisions."

Judge you emphasized the word "constitutional" by placing it in italics. By that emphasis, you made it very clear you were talking about the use of higher law in constitutional decisions. But yesterday you said, "I don't see a role for the use of natural law in constitutional adjudication. My interest was purely in the context of political theory."

Then in 1987, in a speech to the ABA, you said, "Economic rights are as protected as any other rights in the Constitution." But yesterday you said, "The Supreme Court cases that decided that economic rights have lesser protection were correctly decided."

In 1987, in a speech at the Heritage Foundation, you said, "Lewis Lehrman's diatribe against the right to choose was a splendid example of applying natural law." But yesterday you said, "I disagree with the article, and I did not endorse it before."

In 1987, you signed on to a White House working group report that criticized as "fatally flawed," a whole line of cases concerned with the right to privacy. But yesterday you said you never read the controversial and highly publicized report, and that you believe the Constitution protects the very right the report criticizes.

In all of your 150-plus speeches and dozens of articles, your only reference to a right to privacy was to criticize a constitutional argument in support of that right. Yesterday you said there is a right to privacy.

Now, Judge Thomas, I am frank to say to you, I want to be fair in arriving at a conclusion, and I feel that I speak for every member of this committee who wants to be fair. Our only way to judge you is by looking at your past statements and your record. And I will be frank; your complete repudiation of your past record makes our job very difficult. We don't know if the Judge Thomas who has been speaking and writing throughout his adult life is the same man up for confirmation before us today. And I must tell you it gives me a great deal of concern.

For example, yesterday, in response to a question from Senator Biden, you said that you support a right to privacy. Frankly, I was surprised to hear you say that. I have not been able to find anything in your many speeches or articles to suggest that you support a right to privacy.

Unfortunately, the committee has learned the hard way that a Supreme Court nominee's support for the right to privacy doesn't automatically mean that he or she supports that fundamental right when it involves a woman's right to abortion. At his confirmation hearing, Judge Kennedy told us he supported the right to privacy. Since he joined the Court, Justice Kennedy has twice voted with Chief Justice Rehnquist in cases that have restricted the right to abortion.

Likewise, Justice Souter told us that he supported the right to privacy, and then when he joined the Court, Justice Souter voted with the majority in *Rust* v. *Sullivan.*

My concern is this—and I know I have been rather lengthy in this first question. Your statement yesterday in support of the right to privacy does not tell us anything about whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy. I fear that you, like other nominees before the committee, could assure us that you support a fundamental right to privacy, but could also decline to find that a woman's right to choose is protected by the Constitution. If that happens soon, there could be nowhere for many women to go for a safe and legal abortion.

I must ask you to tell us here and now whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy, and I am not asking you as to how you would vote in connection with any case before the Court.

Judge THOMAS. Senator, I would like to respond to your opening question first and, if you think it appropriate, to consider each of your questions seriatim.

Yesterday as I spoke about the Framers and our Constitution and the higher law background—and it is background—is that our Framers had a view of the world. They subscribed to the notion of natural law, certainly the Framers of the 13th and 14th amendments.

My point has been that the Framers then reduced to positive law in the Constitution aspects of life principles that they believed in; for example, liberty. But when it is in the Constitution, it is not a natural right; it is a constitutional right. And that is the important point.

But to understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body, to get your understanding. But in constitutional analysis and methodology, as I indicated in my confirmation to the court of appeals, there isn't any direct reference to natural law. The reference is to the Constitution and to using the methods of constitutional adjudication that have been traditionally used. You don't refer to natural law or any other law beyond that document.

What I have attempted to do with respect to my answers yesterday is to be as fair and as open and as candid as I possibly can. I have not spoken on issues such as natural law since my tenure as Chairman of EEOC. At that time it was important to me—it was very important—to find some way to have a common ground underlying our regime and our country on the issue of civil rights. I thought it was a legitimate ground. I wondered. I looked back at Lincoln, saw him here in Washington, DC, surrounded by a pro-slave State yet pro-Union, and a Confederate State. And I asked myself what was it that sustained him in his view that slavery was wrong. And it was through that progress that I came upon the central notion of our regime, All men are created equal, as a basis or as one aspect of trying to fight a battle to bring something positive

and aggressive to civil rights enforcement. And I thought it was a legitimate endeavor.

At no time did I feel nor do I feel now that natural law is anything more than the background to our Constitution. It is not a method of interpreting or a method of adjudicating in the constitutional law area.

With respect to your last question—and I assume for the moment that perhaps you don't want me to address each of the underlying questions or specific questions seriatim. I would say this about them, though: I have written and I have been interviewed quite a bit. I have been candid over my career. My wife said to me that to the extent that Justice Souter was a "stealth nominee," I am "Bigfoot." And I have tried to think through difficult issues without dodging them.

As a judge, though, on the issue of natural law, I have not spoken nor applied that. What I have tried to do is to look at cases, to understand the argument, and to apply the traditional methods of constitutional adjudication as well as statutory construction.

I am afraid, though, on your final question, Senator, that it is important for any of us who are judges, in areas that are very deeply contested, in areas where I think we all understand and are sensitive to both sides of a very difficult debate, that for a judge—and as I said yesterday, for us who are judges, we have to look ourselves in the mirror and say: Are we impartial or will we be perceived to be impartial? I think that to take a position would undermine my ability to be impartial, and I have attempted to avoid that in all areas of my life after I became a judge. And I think it is important.

I can assure you—and I know, I understand your concern that people come here and they might tell you A and then do B. But I have no agenda. I have tried to wrestle with every difficult case that has come before me. I don't have an ideology to take to the Court to do all sorts of things. I am there to take the cases that come before me and to do the fairest, most openminded, decent job that I can as a judge. And I am afraid that to begin to answer questions about what my specific position is in these contested areas would greatly—or leave the impression that I prejudged this issue.

Senator METZENBAUM. Having said that, Judge, I will just repeat the question. Do you believe—I am not asking you to prejudge the case. I am just asking you whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy.

Judge THOMAS. Senator, as I noted yesterday, and I think we all feel strongly in this country about our privacy—I do—I believe the Constitution protects the right to privacy. And I have no reason or agenda to prejudge the issue or to predispose to rule one way or the other on the issue of abortion, which is a difficult issue.

Senator METZENBAUM. I am not asking you to prejudge it. Just as you can respond—and I will get into some of the questions to which you responded yesterday, both from Senators Thurmond, Hatch, and Biden about matters that might come before the Court. You certainly can express an opinion as to whether or not you believe that a woman has a right to choose to terminate her pregnancy without indicating how you expect to vote in any particular case. And I am asking you to do that.

Judge THOMAS. Senator, I think to do that would seriously compromise my ability to sit on a case of that importance and involving that important issue.

Senator METZENBAUM. Let us proceed. Judge Thomas, in 1990, I chaired a committee hearing on the Freedom of Choice Act, where we heard from women who were maimed by back-alley abortionists. Prior to the *Roe* decision, only wealthy women could be sure of having access to safe abortions. Poor, middle-class women were forced to unsafe back alleys, if they needed an abortion. It was a very heart-rending hearing.

Frankly, I am terrified that if we turn the clock back on legal abortion services, women will once again be forced to resort to brutal and illegal abortions, the kinds of abortions where coathangers are substitutes for surgical instruments.

The consequence of *Roe*'s demise are so horrifying to me and to millions of American women and men, that I want to ask you once again, of appealing to your sense of compassion, whether or not you believe the Constitution protects a woman's right to an abortion.

Judge THOMAS. Senator, the prospect—and I guess as a kid we heard the hushed whispers about illegal abortions and individuals performing them in less than safe environments, but they were whispers. It would, of course, if a woman is subjected to the agony of an environment like that, on a personal level, certainly, I am very, very pained by that. I think any of us would be. I would not want to see people subjected to torture of that nature.

I think it is important to me, though, on the issue, the question that you asked me, as difficult as it is for me to anticipate or to want to see that kind of illegal activity, I think it would undermine my ability to sit in an impartial way on an important case like that.

Senator METZENBAUM. I have some difficulty with that, Judge Thomas, and I am frank to tell you, because yesterday you responded, when Senator Biden asked you if you supported the right to privacy, validated in *Moore* v. *City of East Cleveland*, by agreeing that the Court's rulings supported the notion of family as one of the most private relationships we have in our country. That was one matter that might come before the Court.

You also responded, when Senator Thurmond asked you whether, following the Court's ruling in *Payne* v. *Tennessee*, families victimized by violence should be allowed to participate in criminal cases. You went on to respond by indicating that the Court had recently considered that matter, and you expressed concern that such participation could undermine the validity of the process.

You also responded to Senator Thurmond's questions about the validity of placing limits on appeals in death penalty cases, the fairness of the sentencing guidelines, which was another one of his questions, and the good-faith exception to the exclusionary rule, which was another one of his questions.

Finally, you responded, when Senator Hatch asked you whether you might rely on substantive due process arguments to strike down social programs such as OSHA, food safety laws, child care legislation, and the like, by telling him that "the Court determined

correctly that it was the role of the Congress to make complex decisions about health and safety and work standards."

Now, all of those issues could come before the Court again, just as the *Roe* v. *Wade* matter might come before the Court again. So, my question about whether the Constitution protects the woman's right to choose is, frankly, not one bit different from the types of questions that you willingly answered yesterday from other members of this committee.

So, I have to ask you, how do you distinguish your refusal to answer about a woman's right to choose to terminate her pregnancy with the various other matters that may come before the Supreme Court, to which you have already responded to this committee?

Senator THURMOND. Mr. Chairman, since my distinguished colleague has mentioned my name several times, I would like to make a brief comment here and take it out of my time when I am called on again. I think it is pertinent to just take a little time, if you have no objection.

Senator METZENBAUM. I did not see fit to interrupt my colleague during his line of questioning. After the Judge——

Senator THURMOND. It is right on this point, you have just mentioned my name——

Senator METZENBAUM. But after the Judge responds, then I would——

Senator THURMOND [continuing]. And if I can take it out of my time, I would like to do that.

The CHAIRMAN. I would be delighted to let the Chair do that, but the witness is about to answer the question. Immediately after Judge Thomas has answered the question, then I will yield to the Senator from South Carolina to make his point, whatever the point is.

Judge THOMAS. Senator, I responded to and discussed, I believe, with Senator Thurmond, questions and concerns that he raised about these particular cases that you mentioned. I do not believe—and I have not had an opportunity to review the transcript—I do not believe that I either indicated that I agreed with the outcome in those cases that I raised with him or not. I simply raised the concerns, the discussions, and the Court holdings, and I believe some of the problems that might occur in some considerations in the future. I tried to discuss it openly with him, without reaching a judgment with respect to the outcome.

With respect to the *Lochner* era cases, I thought that my view was that these are cases that were decided in the 1930's or the post-*Lochner* era cases, and that I do not think the Court is going to revisit that area in the very near future. It is certainly not one that, to my knowledge, is——

Senator METZENBAUM. I am sure you are not suggesting that all of those matters about which Senator Thurmond inquired of you were all decided in the 1930's. Many of them are very pertinent and very much within the last few years.

Judge THOMAS. I may not have made myself very clear, Senator. The questions that Senator Thurmond and concerns that he raised about cases, those were recent cases. I do not believe—again, I have not had an opportunity to review the transcript—that I commented

on or that I agreed with or supported or sustained the judgment or the outcome in those cases.

Senator METZENBAUM. That is all I am asking you on this, to do the same kind of response that you gave Senator Thurmond. I am not asking you to speak about how you would vote on the Court. And just as you commented on those cases, what you thought about presentencing guidelines, habeas corpus matters, and various other questions that the Senator asked you, all I am asking you to do is give me the same kind of response with respect to the woman's constitutional right to choose in the same area.

Judge THOMAS. Senator Thurmond, I do not believe asked me whether I agreed or disagreed with the particular outcome. Again, I have not reviewed the transcript. The point that I am making with respect to the *Lochner* cases, the post-*Lochner* era cases, is that they were decided in the 1930's and that I do not think that they will be revisited.

I am not, nor would I have it suggested—and I think this is an important point, Senator—I think that if there were, if I could retain my impartiality and study those cases and think about them, I think that there would be room for comment. I do not believe that a sitting judge, on very difficult and very important issues that could be coming before the Court, can comment on the outcomes, whether he or she agrees with those outcomes as a sitting judge.

I think those of us who have become judges understand that we have to begin to shed the personal opinions that we have. We tend not to express strong opinions, so that we are able to, without the burden or without being burdened by those opinions, rule impartially on cases.

Senator METZENBAUM. I understand that, Judge, but I want to point out the similarity of this matter as compared to the question I am asking you about a woman's right to choose. Senator Thurmond said to you, "In fact, the Court recently used in the case of *Payne* v. *Tennessee* that the use of victim impact statements in death penalty cases does not violate the Constitution." He goes on to say, "In your opinion, should victims play a greater role in the criminal justice system, and, if so, to what extent should a victim be allowed to participate, especially after a finding of guilt against the accused?"

You responded, "Of course, Senator, that is a matter the Court, as you have noted, recently considered." You go on to say, "My concern would be, in a case like that, we don't in a way jeopardize the rights of the victim. Of course, we would like to make sure that the victim is involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process."

Now, I am not questioning your position. Whatever your position is, that is perfectly fine. What I am saying is that if you were able to respond as you did yesterday to questions from Senators Thurmond, Hatch, and Biden with reference to matters in the Supreme Court or may return to the Supreme Court, and why, Judge Thomas, can't you tell us about a woman's right to choose, which is understandably one of the most controversial issues in the country?

I am not asking you as to how you will vote in connection with that issue.

Senator THURMOND. Mr. Chairman, it is on that very point that I would like to make a statement.

The CHAIRMAN. The Senator is recognized, and the time will not come out of the Senator from Ohio's half hour.

Senator THURMOND. I want to say that no question I asked Judge Thomas to answer in any way required him to comment about how he would rule on a case that could come before the Supreme Court.

My distinguished colleague, Senator Metzenbaum, as a lawyer, must know that the questions I asked the nominee were areas where the law is well settled. I strongly believe it is inappropriate to ask the nominee how he would rule in a particular case. Judges must be impartial. For a judge to have preconceived notions about how he would rule in a case would clearly undermine the independence of the judiciary.

Additionally, I specifically told Judge Thomas, and these are words that you can quote, "If I propound any question you consider inappropriate, just speak out, because I strongly believe a nominee should not be compelled to answer how he would rule on any specific case that may come before the Court."

The CHAIRMAN. Thank you very much, Senator.

I point out that the ruling on victim impact statements was, I think, a 6-to-3 decision, and it is far from well-settled. It is still in controversy, both here and in the Court. Now, I will yield back to the Senator from Ohio.

Senator METZENBAUM. And it overruled previous Court decisions, so it still is in controversy.

Let me go on. Yesterday, you were asked about a 1986 report produced by the White House Working Group on the Family. You testified you had not read a section of the report which criticized as fatally flawed a lien of cases upholding the right to privacy in a woman's right to abortion. Two of the cases criticized by the report were *Roe* v. *Wade* and *Planned Parenthood* v. *Danforth*, both of which protect a woman's right to an abortion.

The report also declared that State-imposed restrictions on a woman's right to an abortion should not be challenged by the Supreme Court. Judge Thomas, it appears to me that you were the highest ranking administration official on the White House Task Force, and this report was recommending policy changes that would have a profound and sweeping impact on the lives of millions of American women.

In the months leading up to your confirmation, this report has been the subject of considerable discussion. As a matter of fact, the Chairman of the Commission is also, as I understand it, chairman of the committee to help promote your candidacy.

How is it possible that, until yesterday, you had never read this section of the report and—well, not guess that I would ask that question.

Judge THOMAS. Senator, I think it is important to understand how the domestic policy shop in the White House worked. What it would do is that it would assemble a group of people who had expressed an interest in an area across the administration, and it would, in essence, use that group as a resource.

My interest during the meetings—and I believe there were three, perhaps four meetings, I cannot remember—was in low-income families, families that I believed were at risk in our society. I submitted to that working group, I believe to the head of the working group, who was not myself, a document, a memorandum on low-income families. The group itself did not meet, nor were we called upon to draft the document.

The document itself was, I believe, circulated and final, although I cannot remember exactly the procedure, but it is not uncharacteristic that, after you have participated in a working group or after one participated in a working group with the White House or with the domestic policy branch, that the report itself would not be made available for comment, and that others would simply finalize the report. Again, I cannot remember how that precisely worked.

My interest was limited to low-income families and I was thankful that certain portions of that was included. I did not have an interest in, nor expressed comment on the other portions of the report.

Senator METZENBAUM. Yesterday, the chairman stated that one of the privacy decisions criticized as fatally flawed in the report was *Moore* v. *City of East Cleveland.* The chairman also noted that the report calls for the appointment of new Justices on the Court, to change the result in the *Moore* case in another decision.

In response to the chairman, you stated that, "If I had known that section was in the report before it became final, of course, I would have expressed my concerns." Judge Thomas, if you had known that the report characterizes two abortion cases as fatally flawed and suggests that these decisions can be corrected, directly or indirectly, through the appointment of new judges, would you have objected to that, as well?

Judge THOMAS. Senator, let me respond to that in this way: I thought that the report—and, based on the submissions, I think this underlines that—that the report should have been focused on how do we help existing families, not debating some of the more controversial and difficult issues in our society. I thought that it would be an opportunity and would be an occasion to find ways to take families that are at risk and families that are having difficulties and to help those families in whatever form we find them.

Senator METZENBAUM. I guess my question is—I will repeat the question: Would you have objected, if you had known that language was within the report, as you indicated you would have objected with respect to the langauge in connection with the *East Cleveland* case?

Judge THOMAS. I think I would have, Senator, raised concerns of the nature and with the underpinning that I just gave you, and that is that I thought it would have been appropriate for the report to have focused expressly on families that were at risk and how we could help families in their current conditions nor out of their current conditions.

Senator METZENBAUM. Well, you told Senator Biden you would have objected to the language with reference to the *East Cleveland* case, and so I am only asking you whether you would have objected to the langauge with respect to the abortion cases.

Judge THOMAS. Senator, I believe—again, I have not reviewed the transcript—I believe I indicated that I would have raised concerns, and I believe that those concerns would have been of the same character and the same nature as the concerns that I would raise in this case. I thought that we had a grand opportunity there to focus governmental policy on existing low-income and at-risk families.

I felt that was very important, and it was very important in this context, it was important to me: It was important, because you had I think about one-third or more of the minority kids in our society being under the poverty limit, and I felt that the administration could have addressed that in a policy that was important to the entire administration.

Senator METZENBAUM. My time is up, but, Judge Thomas, I am really asking you specifically yes or no. You indicated you would have objected to the *East Cleveland* decision, had you known that language with reference to the *East Cleveland* decision, had you known it was in there. So, I am asking you if you had known about the abortion case references, would you have objected, and the answer is just yes or no.

Judge THOMAS. Senator, I would have raised concerns for the reasons I have expressed to you.

The CHAIRMAN. Thank you very much, Senator Metzenbaum.

Dr. Hatch——

Senator SIMPSON. Dr. Hatch?

The CHAIRMAN. Excuse me. I am so accustomed to attempting to avoid the Simpson-Metzenbaum skirmish that I guess it was a reflex action. I do apologize. I was so impressed with Senator Hatch's rehabilitation yesterday that I just wanted to hear more. [Laughter.]

Senator HATCH. With Senator Simpson's permission, I would be really happy to pick up with this.

The CHAIRMAN. I apologize, Senator Simpson. I am sorry. Senator Simpson.

Senator SIMPSON. Mr. Chairman, you have often left the Senator from Ohio and I to our own skirmishes, which we certainly enjoy.

The CHAIRMAN. You will understand if both Senator Thurmond and I just reflexively push our chairs back. If you will notice Senator Thurmond has already started back. I am heading back, too, so you can see one another. [Laughter.]

Senator SIMPSON. I want to get a little eye contact with Howard. Get out of the way, Ted.

Well, let me say that you see one of the great pleasures of being on this committee. It is a splendid committee, and we have a splendid chairman. And the members I think have a comity and a nature of dealing with each other which is something I think that no nonlawyer could understand. It is a little tough for my friend from Iowa; sometimes he will say, "What are you guys up to?" But it is part of the practice of law. You whack around on somebody all day long, and then you go off and have dinner together or visit with each other, and that is the best way to legislate.

I have the highest regard for every single member of this committee, and my spirited friend from Ohio and I had one one time where we were both just standing going toe to toe. I think it was