

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

Judge THOMAS, welcome back this afternoon. Judge, I would like to just go over a couple of points prompted by some of your earlier testimony.

A couple of thoughts occur to me. I was looking over the notes of your responses to Senator Kennedy's questions yesterday. You recall that when he talked about the Lewis Lehrman article, "the Declaration of Independence and the Right to Life," he referred to your statement, in which you called the Lehrman article a "splendid example of applying natural law."

I understand your answer was that you were speaking in the Lewis Lehrman Auditorium, with Lewis Lehrman sitting there, referring to Lewis Lehrman's article, and that you intended to make your conservative audience more receptive to natural law principles as it applied to civil rights. Is that a fair restatement of your answer?

Judge THOMAS. I think with the possible exception of "Lew Lehrman sitting there."

Senator LEAHY. Oh, that is my misconception. He was not there, then?

Judge THOMAS. Not to my knowledge.

Senator LEAHY. OK. Was the rest a fair restatement?

Judge THOMAS. Yes.

Senator LEAHY. Thank you. So, granting that it was a strategic remark for the reasons that you stated, did you believe the article was "a splendid example of applying natural law"?

Judge THOMAS. As I indicated yesterday, Senator, that I did not and do not think that natural law can be applied to resolve this particular issue, I think it is a constitutional matter and it has to be resolved under constitutional law, as a matter of constitutional law.

Senator LEAHY. But that is not precisely my question. My question was, did you believe the article was a splendid example of applying natural law? Just on that narrow line: Do you believe the article itself was "a splendid example of applying natural law"?

Judge THOMAS. Let me explain what I was trying to say. What I was trying to say—

Senator LEAHY. You cannot answer that specific question?

Judge THOMAS. What I am trying to say, so I am not misunderstood, Senator—

Senator THURMOND. Mr. Chairman, he has a right to explain his position.

Judge THOMAS. What I was trying to say is here is a good example—

Senator LEAHY. If Senator Thurmond wishes to join him at the witness stand—but go ahead, Judge.

Senator THURMOND. I would be glad to do it, but he has a right to explain his answers.

Senator LEAHY. Go ahead, Judge.

Judge THOMAS. Thank you, Senator.

My point was that here is an example of one of yours using natural law. I was not commenting on the substance of its use, so it was an example, it was a splendid example in the sense that it was a compliment to him and it is a compliment to someone they be-

lieved in, and I would reaffirm what I said yesterday and I have said consistently, and that is that at no time did I adopt or endorse the substance of the article itself.

My interest in that one sentence, I believe, was to get a conservative audience that was skeptical of a concept to be more receptive to that concept in the area that I wanted to use, in the area of civil rights. That speech is on the treatment of blacks by conservatives, treatment of minority issues in the Reagan administration, and a sort of request and a push or a tug to them to be more receptive in this area and to be aggressive in this area. It was not an endorsement of that article.

Senator LEAHY. Do you feel that your answer today is in any way inconsistent with what you said then?

Judge THOMAS. What I said?

Senator LEAHY. At that time?

Judge THOMAS. Yes.

Senator LEAHY. Thank you. And you understand my confusion in the two answers, but you explain that confusion in that the statement then and your answer today are consistent?

Judge THOMAS. I said that they were consistent.

Senator LEAHY. OK. Then you feel your answer today is consistent with what you said back at the time you spoke in the Lewis Lehrman Auditorium?

Judge THOMAS. Senator, my statement today is consistent with what I intended to do and what I did in the Lew Lehrman Auditorium. My interest, as I indicated to you, and I think I repeated a number of times here, it was in civil rights and finding unifying principles in the area of civil rights.

Senator LEAHY. Well, let me make sure that I understand. Is it your testimony here today and yesterday that you do not endorse the Lewis Lehrman article to the extent that it argues under the natural law principles of the Declaration of Independence that a fetus has an inalienable right to life at the moment of conception? Is that your testimony?

Judge THOMAS. I do not—my testimony is that, with respect to those issues, the issues involved or implicated in the issue of abortion, I do not believe that Mr. Lehrman's application of natural law is appropriate.

Senator LEAHY. Had you read that article before you praised it?

Judge THOMAS. I think I skimmed it, Senator. My interest, again, was in the fact that he used the notion or the concept of natural law, and my idea was to import that notion to something that I was very interested in.

Senator LEAHY. Now, you certainly—

The CHAIRMAN. Excuse me, would the Senator yield? I did not understand one answer.

Did you say that you do not believe that Mr. Lehrman's application of natural law in that article was appropriate?

Judge THOMAS. That's right.

The CHAIRMAN. You do not believe it is appropriate?

Judge THOMAS. That's right.

The CHAIRMAN. Thank you.

Judge THOMAS. I said that my testimony has been that that difficult issue is to be resolved as a matter of constitutional law.

The CHAIRMAN. Thank you.

Senator LEAHY. Well, the chairman has anticipated my next question. When you gave the speech, which was in 1987, as I recall the testimony, did you understand that the consequences of Mr. Lehrman's position were not just that *Roe v. Wade* should be overturned, but that abortion, even in cases of rape and incest, should be banned in every State of the Union? Did you understand that to be the position that he was taking in that article?

Judge THOMAS. Senator, until recently, in reflecting on it, I did not know, I could not recall the entire content of that article until I read recent articles about it. Again, my interest was very, very limited—

Senator LEAHY. I understand—

Judge THOMAS [continuing]. And the—

Senator LEAHY. You have read the article now, though, now that it has been brought up—

Judge THOMAS. I have not re-read it. I have not re-read it.

Senator LEAHY. You have it?

Judge THOMAS. I have not re-read the article.

Senator LEAHY. Do you have the article?

Judge THOMAS. I do not have it with me.

Senator LEAHY. Does somebody want to just—I want to make sure somebody gives it to you, Judge. Let me say that the article, as written, takes a position not just that *Roe v. Wade* should be overturned, but that abortion, even in cases of rape and incest, should be banned in every State of the Union. Assuming that is the thrust or one of the main points of the article, do you agree with that?

Judge THOMAS. Again, Senator, it would be, I think, for me to respond to what my views are on those particular issues would really undermine my ability to be impartial in those cases. I have attempted to respond as candidly and openly as I possibly can, without in any way undermining or compromising my ability to rule on these cases.

Senator LEAHY. Well, let's just go, then, to Mr. Lehrman's positions. Under his theory of natural law, every abortion in this country would be criminalized. Do you understand that to be his position? I am not asking whether it is yours, but do you understand that to be his position in that article?

Judge THOMAS. Again, I would have to re-read the article, Senator. I understand the criticisms that you have of the article, but my point to you here today, as well as in other questioning concerning this article, is that I did not adopt or import anything more from this article than the use of this one notion of natural law.

Senator LEAHY. Might I ask you to do this, then, Judge, because we will have another go-round on this. It would only take about 4 or 5 minutes to read that article sometime between now and the next go-round. Could you please find the time to read it? And if you get crammed with too many things between now and then when I get my next turn around, I will just stop and give you time to read it right then.

Judge THOMAS. OK. Thank you.

Senator LEAHY. Now, Mr. Lehrman drew a parallel between the struggle for liberty by slaves with a struggle "for the inalienable

right to life of the child-in-the-womb—and thus, the right to life of all future generations.” Do you understand the parallel of the struggle for liberty by slaves with the struggle for the inalienable right to life of the child in the womb, and thus, the right to life of all future generations? Do you agree with that comparison?

Judge THOMAS. Again, Senator, I have not re-read this article. I would take you up on your offer to go back and re-read it. My interest was on the issue of slavery, Senator, it was an important issue to me. The concept of liberty and life, et cetera, are very general concepts. I would like to just take the time to go back and re-read it—

Senator LEAHY. Fair enough.

Judge THOMAS [continuing]. And be fair in my response to you.

Senator LEAHY. I absolutely agree.

Judge THOMAS. But let me, if I could say this—my interest in this article was as I have testified before this committee, and I think indicated in some of our prior meetings, it was very important to me to convince conservatives that they should openly support and be aggressive in their support of civil rights.

Senator LEAHY. Judge, does a fetus have the constitutional status of a person?

Judge THOMAS. Senator, I cannot think of any cases that have held that. I would have to go back and rethink that. I cannot think of any cases that have held that.

Senator LEAHY. If somebody were to raise that issue in a court, how would a judge go about making a determination of that? I am not asking you to make a determination, but how would a judge do that? Does he or she go to a medical text, a philosophical text, theological treatises? How does one make such a determination?

Judge THOMAS. Senator, I could only offer this, and I have not made that determination and I have not gone through that kind of analysis, but, of course, one would rely in any case in which one is making a difficult determination, one would rely on the adversarial process to sharpen the issues. One would rely on precedent. One would certainly rely on related areas, such as the area of medicine. In the area of *Roe v. Wade*, I think there was considerable reliance on medical evidence. Again, I am doing that in a vacuum, and I was—

Senator LEAHY. I understand that. Of course, even in the adversarial process, a judge can oftentimes shape and direct in a most appropriate way. Any judge I have ever appeared before—if he or she felt that the adversaries did not present enough evidence to help the judge decide—would certainly have the right to ask the adversaries for more information.

In an area like this, do you rely on theology? Do you rely on jurisprudence? Do you rely on medical information? Or do you rely on experience?

Judge THOMAS. Senator, again, I would like to just simply say that, of course, one could see where medical, certainly experience and one could see where precedent would be relevant. I do not see at this point where theology would be relevant.

Again, I would like to refrain from further speculation in this very difficult area. The point that I am making to you, and I think it is an important point, is that when a judge is engaged in any

kind of an effort to make difficult decisions in any area, a judge tries to examine the relevant evidence and tries to reach a reasoned conclusion and tries to reach a conclusion, without implicating or without involving his or her personal opinions.

Senator LEAHY. Judge, you were in law school at the time *Roe v. Wade* was decided. That was 17 or 18 years ago. You would accept, would you not, that in the last generation, *Roe v. Wade* is certainly one of the more important cases to be decided by the U.S. Supreme Court?

Judge THOMAS. I would accept that it has certainly been one of the more important, as well as one that has been one of the more highly publicized and debated cases.

Senator LEAHY. So, it would be safe to assume that when that decision came down—you were in law school, where recent case law is oft discussed—that *Roe v. Wade* would have been discussed in the law school while you were there?

Judge THOMAS. The case that I remember being discussed most during my early part of law school was I believe in my small group with Thomas Emerson may have been *Griswold*, since he argued that, and we may have touched on *Roe v. Wade* at some point and debated that, but let me add one point to that.

Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator LEAHY. Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe v. Wade*?

Judge THOMAS. Senator, I cannot remember personally engaging in those discussions.

Senator LEAHY. OK.

Judge THOMAS. The groups that I met with at that time during my years in law school were small study groups.

Senator LEAHY. Have you ever had discussion of *Roe v. Wade*, other than in this room, in the 17 or 18 years it has been there?

Judge THOMAS. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have ever debated the contents of it, that answer to that is no, Senator.

Senator LEAHY. Have you ever, in private gatherings or otherwise, stated whether you felt that it was properly decided or not?

Judge THOMAS. Senator, in trying to recall and reflect on that, I don't recollect commenting one way or the other. There were, again, debates about it in various places, but I generally did not participate. I don't remember or recall participating, Senator.

Senator LEAHY. So you don't ever recall stating whether you thought it was properly decided or not?

Judge THOMAS. I can't recall saying one way or the other, Senator.

Senator LEAHY. Well, was it properly decided or not?

Judge THOMAS. Senator, I think that that is where I just have to say what I have said before; that to comment on the holding in that case would compromise my ability to—

Senator LEAHY. Let me ask you this: Have you made any decision in your own mind whether you feel *Roe v. Wade* was properly decided or not, without stating what that decision is?

Judge THOMAS. I have not made, Senator, a decision one way or the other with respect to that important decision.

Senator LEAHY. When you came up for confirmation last time for the circuit court of appeals, did you consider your feelings on *Roe v. Wade*, in case you would be asked?

Judge THOMAS. I had not—would I have considered, Senator, or did I consider?

Senator LEAHY. Did you consider.

Judge THOMAS. No, Senator.

Senator LEAHY. So you cannot recollect ever taking a position on whether it was properly decided or not properly decided, and you do not have one here that you would share with us today?

Judge THOMAS. I do not have a position to share with you here today on whether or not that case was properly decided. And, Senator, I think that it is appropriate to just simply state that it is—for a judge, that it is late in the day as a judge to begin to decide whether cases are rightly or wrongly decided when one is on the bench. I truly believe that doing that undermines your ability to rule on those cases.

Senator LEAHY. Well, with all due respect, Judge, I have some difficulty with your answer that somehow this case has been so far removed from your discussions or feelings during the years since it was decided while you were in law school. You have participated in a working group that criticized *Roe*. You cited *Roe* in a footnote to your article on the privileges or immunity clause. You have referred to Lewis Lehrman's article on the meaning of the right to life. You specifically referred to abortion in a column in the *Chicago Defender*. I cannot believe that all of this was done in a vacuum absent some very clear considerations of *Roe v. Wade*, and, in fact, twice specifically citing *Roe v. Wade*.

Judge THOMAS. Senator, your question to me was did I debate the contents of *Roe v. Wade*, the outcome in *Roe v. Wade*, do I have this day an opinion, a personal opinion on the outcome in *Roe v. Wade*; and my answer to you is that I do not.

Senator LEAHY. Notwithstanding the citing of it in the article on privileges or immunities, notwithstanding the working group that criticized *Roe*?

Judge THOMAS. I would like to have the cite to it. Again, notwithstanding the citation, if there is one, I did not and do not have a position on the outcome.

With respect to the working group, Senator, as I have indicated, the working group did not include the drafting by that working group of the final report. My involvement in that working group was to submit a memorandum, a memorandum that I felt was an important one, on the issue of low-income families. And I thought that that was an important contribution and one that should have been a central part in the report. But with respect to the other comments, I did not participate in those comments.

Senator LEAHY. I will make sure that you have an opportunity to read both the footnote citation and the Lewis Lehrman article before we get another go-round. But am I also correct in characterizing your testimony here today as feeling that as a sitting judge it would be improper even to express an opinion on *Roe v. Wade*, if you do have one?

Judge THOMAS. That is right, Senator. I think the important thing for me as a judge, Senator, has been to maintain my impartiality. When one is in the executive branch—and I have been in the executive branch, and I have tried to engage in debate and tried to advance the ball in discussions, tried to be a good advocate for my points of views and listening to other points of views. But when you move to the judiciary, I don't think that you can afford to continue to accumulate opinions in areas that are strongly controverted because those issues will eventually be before the Court in some form or another.

Senator LEAHY. Of course, as Senator Metzenbaum pointed out earlier today, you have spoken about a number of cases, and I understand your differentiation in your answers to his question on that. But I wonder if those cases somehow fit a different category. The expression once was that the Supreme Court reads the newspapers, and I suppose we can update that today to say that Supreme Court nominees read the newspapers and know that this issue is going to be brought up.

But, Judge, other sitting Justices have expressed views on key issues such as—well, take *Roe v. Wade*. You know, Justice Scalia has expressed opposition to *Roe*. Does that disqualify him if it comes up? Justice Blackmun not only wrote the decision but has spoken in various forums about why it was a good decision. Is either one of them disqualified from hearing abortion cases as a result?

Judge THOMAS. Senator, I think that each one of them has to determine in his mind at what point do they compromise their impartiality or it is perceived that they have compromised their objectivity or their ability to sit fairly on those cases. And I think for me, shortly after I went on the court of appeals, I remember chatting with a friend just about current events and issues. And I can remember her saying to me, asking me three or four times what my opinion was on a number of issues, and my declining to answer questions that when I was in the executive branch I would have freely answered. And her point was that I was worthless as a conversationalist now because I had no views on these issues. And I told her that I had changed roles and the role that I had was one that did not permit me or did not comport with accumulating points of views.

Senator LEAHY. Well, I might just state parenthetically, I have been both a prosecutor and a defense attorney, and I have been before judges who have expressed very strong views on the idea that when they go on the bench, they do not go into a monastery—they still are part of the populace, able to express views. And I have been there when they have expressed views both for and against a position of a client I might be representing, whether it is the State on the one hand or the defendant on another. But I have also felt secure in knowing that they were fairminded people and

would set their own personal opinions aside, as judges are supposed to and as you have testified one should do in such a case.

Let me ask you this: Would you keep an open mind on cases which concern the question of whether the ninth amendment protected a given right? I would assume you would answer yes.

Judge THOMAS. The ninth amendment, I think the only concern I have expressed with respect to the ninth amendment, Senator, has been a generic one and one that I think that we all would have with the more opened provisions in the Constitution, and that is that a judge who is adjudicating under those opened provisions tether his or her ruling to something other than his or her personal point of view.

Now, the ninth amendment has, to my knowledge, not been used to decide a particular case by a majority of the Supreme Court, and there hasn't been as much written on that as some of the other amendments. That does not mean, however, that there—

Senator LEAHY. That is not what I am—

Judge THOMAS. That does not mean, however, that there couldn't be a case that argues or uses the ninth amendment as a basis for an asserted right that could come before the Court that does not—that the Court or myself, if I am fortunate enough to be confirmed, would not be open to hearing and open to deciding.

Senator LEAHY. You are saying that you would have an open mind on ninth amendment cases?

Judge THOMAS. That is right.

Senator LEAHY. I ask that because you have expressed some very strong views, as you know better than all of us, on the ninth amendment. You had an article that was reprinted in a Cato Institute book on the Reagan years. You refer to Justice Goldberg's "invention," of the ninth amendment in his concurring opinion in *Griswold*. And you said—and let me quote from you. You said, "Far from being a protection, the ninth amendment will likely become an additional weapon for the enemies of freedom." A pretty strong statement. But you would say, would you not, Judge, notwithstanding that strong statement, that if a ninth amendment case came before you, you would have an open mind?

Judge THOMAS. Again, Senator, as I noted, my concern was that I didn't believe that—in such an opened provision as the ninth amendment, it was my view that a judge would have to tether his or her view or his or her interpretation to something other than just their feeling that this right is OK or that right is OK. I believe the approach that Justice Harlan took in *Poe v. Ullman* and again reaffirmed in *Griswold* in determining the—or assessing the right of privacy was an appropriate way to go.

Senator LEAHY. That is not really my point. The point I am making is that you expressed very strong views—and you have here, too—about the ninth amendment. My question is: Notwithstanding those very strong views you have expressed about the ninth amendment—pretty adverse views about it—would you have an open mind in a case before you where somebody is relying on the ninth amendment?

Judge THOMAS. The answer to that is, Senator, yes.

Senator LEAHY. But if you were to express similar views regarding the principles and reasoning of *Roe v. Wade*, you feel that



somehow it would preclude you from having that same kind of objectivity as the views you have expressed about the ninth amendment?

Judge THOMAS. I don't believe, Senator, that I have expressed any view on the ninth amendment, beyond what I have said in this hearing, after becoming a member of the judiciary. As I pointed out, I think it is important that when one becomes a member of the judiciary that one ceases to accumulate strong viewpoints, and rather begin to, as I noted earlier, to strip down as a runner and to maintain and secure that level of impartiality and objectivity necessary for judging cases.

Senator LEAHY. Does that mean if you were just a nominee, a private citizen as a nominee to the Supreme Court, you could answer the question, but as a judge you cannot?

Judge THOMAS. I think a judge is even more constrained than a nominee, but I also believe that in this process, that if one does not have a formulated view, I don't see that it improves or enhances impartiality to formulate a view, particularly in some of these difficult areas.

Senator LEAHY. Thank you, Mr. Chairman. My time is up, but I am sure the judge realizes that we will probably have to revisit this subject a tad more. Thank you.

The CHAIRMAN. Thank you very much.

The Chair recognizes Senator Kennedy for a moment regarding a clarification of a quote that was used this morning.

Senator KENNEDY. Thank you, Mr. Chairman. I think there was just one area of clarification.

Yesterday I questioned Judge Thomas, and I used these words:

Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers, needs more time off for personal emergencies, that may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

And then the judge went on and gave his response to that question.

In a response to a question earlier this morning from Senator DeConcini, Judge Thomas said, "There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who has employed a significant number of women, I did not find that to be true and made that very clear."

I would just like to ask consent that the record—I understood what Judge Thomas was trying to say this morning, and—

Judge THOMAS. I did not intend to attribute Professor Sowell's quotes to you. [Laughter.]

Senator KENNEDY. So I would just ask consent that the record reflect that modification at the appropriate point.

Senator LEAHY. I thought that was a little out of character there, Ted.

The CHAIRMAN. Without objection, the record will be corrected.

Senator KENNEDY. Thank you.

The CHAIRMAN. The Senator from Pennsylvania, Senator Specter.