

That has been one of the most touching aspects and rewarding aspects of the past 10 weeks in reading and hearing.

But those conclusions that people form about you were not—about me were not the real Clarence Thomas. I am the real Clarence Thomas, and I have attempted to bring that person here and to show you who he was, not just snippets from speeches or snippets from articles. The person you see is Clarence Thomas. I don't know that I would call myself an enigma. I am just Clarence Thomas. And I have tried to be fair and tried to be what I said in my opening statement. And I try to do what my grandfather said, stand up for what I believe in. There has been that measure of independence.

But, by and large, the point is I am just simply different from what people painted me to be. And the person you have before you today is the person who was in those army fatigues, combat boots, who has grown older, wiser, but no less concerned about the same problems.

Senator HEFLIN. I believe my time is up.

The CHAIRMAN. Thank you. I think we will continue to go, and we will move to Senator Brown, and then we will break for lunch after Senator Brown finishes.

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, I must confess this morning's testimony has helped me understand you a great deal better, particularly your comment about why you chose English. If I heard it correctly, you said it was because it was painfully difficult for you. It does help me to understand why you would want to undergo a fifth confirmation hearing, if nothing else.

I am sure you appreciate the reason for this extended confirmation hearing and the multitude of questions. Some have alleged that the Senate is made up of 100 Secretaries of State, but I have long thought it was more like 100 Justices of the Supreme Court than Secretaries of State. And it is obvious that we have a fascination and a continued interest in the work that you may well take on.

Over the course of our hearings, you have declined to indicate how you would rule on specific cases, and clearly that is in line with what both Democrats and Republicans on this committee have indicated is the practice and, in effect, the canons of ethics for judges, to not rule on a case without hearing the facts and listening to it.

The media advise us that you had a meeting with the President, however, up at Kennebunkport, and I am wondering if in your discussions with the President you took a similar position. Did you decline to discuss with the President or indicate to the President how you would rule on specific cases?

Judge THOMAS. Senator, after I arrived in Kennebunkport, somewhat bewildered and not knowing exactly what was going to happen—in fact, not knowing what was going to happen—the President asked me to chat privately with him, and he said that he had two issues that he wanted to discuss. The first was: If you are nominated, will your family be able to sustain or to survive this process, because it will be a difficult process? Not knowing really what would come, my answer was yes. In retrospect, I might adjust

that a little bit and certainly would have conversed with him more at length about it.

The second question that he asked me was—and I think this is almost verbatim: Can you call them as you see them? And then he went on to indicate that if he did not agree with me, were I to be confirmed and sit on the Supreme Court, that I would never see him criticizing me in public, even if I disagreed with him or he disagreed with me. And I assured him that I could call them as I saw them and that I would as honestly as I could and to the best of my abilities. And he indicated that he was going to nominate me at 2 o'clock and suggested that we have lunch.

Senator BROWN. Since that meeting, have you had any discussions with the President where you have committed how you would vote on a particular case or a particular legal doctrine?

Judge THOMAS. No, Senator.

Senator BROWN. In other words, you have given the President the same ethical treatment you have given us?

Judge THOMAS. Well, I have tried to be consistent across the board, Senator.

Senator BROWN. Earlier, Senator Heflin had mentioned property rights, and we discussed a great deal about various theories of protecting property and individual rights. If I understand the cases correctly, our courts protect personal rights like abortion and others with a standard called "strict scrutiny"—that is, the Government has to have a compelling Government interest for any restrictions on those rights—but that a different standard applies for the protection of property rights, called the "rational basis test," "rational relationship test," protected by requiring some rational relationship between the legitimate, not necessarily compelling, purpose and means chosen to achieve that purpose.

At least in my mind, I think there are a number of reasons why this distinction between personal rights and property rights simply doesn't hold water, is artificial.

First, it strikes me that the property rights are of obvious concern to the Framers of our Constitution. They are named specifically in the Constitution with explicit references both to contracts and property.

Second, I believe that property is simply an extension of personal rights and vice-versa, that to separate them, to assume that they are different somehow, really reflects, I think, a distorted view of how our society works.

Third, the political and moral values that we all hold dear strike me as dependent upon private property and the freedom to contract.

When I first decided to run for the State legislature, I was very dependent on a job. My boss was a very liberal Democrat who was active in the Democratic Party. If I had lost my income to support my family, if I had lost my job, I think it would have had a major effect on my freedom of speech and my political rights. And for the courts or this country to pretend that somehow your right to property is inferior or isn't integrated with your personal rights, I think is ignoring the reality of our society.

I must say I am troubled by the artificial distinction that has been discussed. To provide a lower level of protection for property

rights I think endangers personal rights, and perhaps the opposite is true.

I raise this because I think that artificial distinction, that different treatment, the second-class protection that some have advocated strikes me as a real problem. We have talked a lot about a zoning case, the *Moore* case, calls it to mind. It strikes me that that was as much a violation of the right to use property as it was a violation of the personal rights of the individuals involved. And it seems to me it is an insult to the American people to somehow think that you can protect one without protecting the other or that there is a second class of rights even though they are specifically mentioned in the Constitution.

Well, I mention that because I want to ask you about that again. Professor Tribe is one who has great credibility, I think, with many members of this committee, and many members have quoted the professor. I thought it would be worthwhile to quote him in this case on this subject.

Here is a quote of what he wrote:

The attempt to distinguish between economic rights and personal rights must fail.

He later wrote:

It will not do to draw a bright line between economic and civil liberties or between property and personal rights. As Justice Stewart observed, the dichotomy is a false one. Property does not have rights. People have rights. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. That rights in property are basic civil rights has long been recognized.

The question, Judge, is this: Do you find laid out in our Constitution language that calls for a second-class level of protection for property rights?

Judge THOMAS. Senator, I think that we have certainly—as we have discussed in these hearings, I have said in my own writings that there should be a recognition of property rights—economic rights, and I was talking in that case more about my grandfather and his ability to, as you say, earn his living, not be denied that.

But I think what the courts have done in the regulation of the social and economic affairs of our country has been—and I think appropriately so. As I have noted, I have no quarrel with the equal protection analysis that the Court uses. The Court has tried to defer to the decision of the legislature. In other words, the balances should be struck by this body or by the political branches and not second-guessed by the courts.

I have no reason to quarrel with that approach. It recognizes that the considerations are very complex and involve any number of factors that are best left to the legislative branch.

Senator BROWN. In relation to the comments by Professor Tribe—by phrasing it this way, I am not suggesting that I want you to become an adherent of the good professor. But on this subject, thinking about the comments of Professor Tribe and Justice Stewart, when they conclude that the dichotomy between personal rights and property rights is a false one, would you agree with that? Do you find yourself in agreement with that? Do you have any observations about that?

Judge THOMAS. Senator, I think certainly I have not re-examined that or looked at that as a judge. It would require me to sit here

and attempt to formulate an opinion on that. Of course, I think we all at bottom feel strongly that we should have the freedom to work and to support our families or to provide a part of the support for our families and for ourselves. And we certainly don't feel that—that is one of the reasons why this body passed title VII of the Civil Rights Act of 1964 and made those difficult choices. But it is also reasons why you protect individuals in the work force so that they are not harmed in a variety of ways by the conduct of their employer or the environment itself.

I think that those are complicated decisions. We value our ability to own property and to engage in work. But there is a balancing that must take place, and I think that the courts have appropriately chosen to defer to the Congress or to the legislature, the political branches, in making those balances.

Senator BROWN. Well, I appreciate that comment. I must say from my own point of view, at least my judgment in society, those that are extremely wealthy don't have to worry about this very much. They have got theirs. But a right to work and save and have an opportunity to keep a fair share of what you produce in this world is darn important to somebody who starts off in life without much, because it is one of the ways they go from the bottom to the top. And I would hate to think in this country that we would assign second-class treatment to someone's ability to go from the bottom to the top, to acquire property, to save, to reinvest, to have a chance to protect the things that they produce for themselves.

I for one think a distinction, an artificial distinction between those rights misses the whole point and perhaps jeopardizes that fundamental ability to be a mobile society, to move up.

A couple other areas that I want to invite you to comment on. I appreciate that these are areas that the Court may take up, but if you have observations you would care to make, I would like to have them on the record.

The interstate commerce clause is one that has critical impact in terms of Congress and its ability to direct the States and others in this society. Over the years we have had a wide variety of decisions regarding the extent of the interstate commerce clause. One of the landmark cases in the early 1940's basically indicated almost anything we do in any way can affect interstate commerce.

I would be interested in your view of the interstate commerce clause and how philosophically you would approach the questions that deal with it.

Judge THOMAS. I think that you are right in the sense that the Court has read those provisions rather broadly. But I make this point, and I underscore that by saying I don't have any objection or basis to object or at this point any quarrel with the way that the Court has interpreted the interstate commerce clause.

But I make this point—and I have heard some academic objections from time to time. But I can remember reading, I believe the *Heart of Atlanta Motel* case which challenged, I believe, the accommodations provisions in the Civil Rights Act of 1964, which is based on the interstate commerce powers. And one of the factors that was used there was that blacks who traveled across the country were impeded from traveling because of the lack of accommodations.

What that brought to mind was that when I was a kid and we would travel occasionally—I think two or three times during my childhood—by highway from Savannah to New York, my grandfather would go through this long exercise of making sure that the car was working perfectly, that you had new tires, that we had a trunk full of food, et cetera, because there were no accommodations. And should you break down, you would be met with hostilities. That was the reality. So there was indeed some, I would consider significant, impediment on the ability of us to travel and certainly, by extension, on the flow of commerce or travel in our society.

I have no quarrel, Senator, with the approach that the Court has taken and certainly have had no opportunity to review all of the cases.

Senator BROWN. Thank you.

The ninth amendment has come up a great deal in the hearing, and I think continues to be an evolving area of the law. Some have viewed the ninth amendment as providing a limitation on the powers of the Federal Government over the individual. Others have viewed the ninth amendment as a provision that, in effect, mandates governmental activity of a certain nature.

Would you share with us your thoughts on that particular amendment?

Judge THOMAS. Senator, as I have indicated earlier, I think that whatever we do with open-ended provisions such as the ninth amendment, that we make sure as judges that those decisions are fettered to analysis or something other than our own predilections or our own views. That would be the concern, the generic concern, as I have said before, with any of the open-ended or more open-ended provisions.

The Court, to my knowledge, has not used the ninth amendment, a majority of the Court, to decide a particular case. And there has been debate about what the purpose of the ninth amendment is.

There could be a time when there could be an asserted right under the ninth amendment that would come before the Court in which there could be found to be a basis for that right in the ninth amendment. I don't know. But as scholars do more work and certainly as individuals begin to assert rights and the Court begins to consider those, I wouldn't foreclose that from occurring.

Senator BROWN. One last question—and I think I still have time. There has been a great deal of discussion about antitrust policy in the last several decades. I end up viewing antitrust policy as essential for helping guarantee a competitive economy. It is one of the features about America that is somewhat unique. While many other countries have sanctioned monopolies, sanctioned conglomerate control over the markets, the United States has really been a pace-setter in demanding that we have competition within our marketplace.

There have been many challenges to those concepts of antitrust statutes in recent years. I can appreciate that you do not want to deal with specific cases, but I would be interested in your view of the antitrust concepts and any remarks you would like to make about their merit.

Judge THOMAS. Senator, my grandfather was a small businessperson, one oil truck, an ice truck, and a vacuum cleaner to clean stoves, and two little kids to run with him and also to help answer phones.

I think that competition in the private sector is healthy in our society. It is healthy not only from the standpoint of the businesses themselves, particularly the smaller businesses, but it is also healthy from the standpoint of products, quality of products that are brought to consumers, as well as prices.

I think that our economy and our country expands and provides opportunities to absorb individuals who otherwise would not have a chance. It is one that is very interesting. After growing up in a household where there is a small business, literally not a separate office, it is the house, you get the feeling of how important it is to have this opportunity to be a part of this competition and to not be foreclosed by certain individuals monopolizing an entire area. So, just reacting as a person, I think that it is important that we have healthy competition in the economic arena.

Senator BROWN. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you very much.

It is 20 minutes to 1 now. Do you want to keep going? Actually, I think that we should break for lunch, and come back at quarter to 2. We will recess until quarter to 2.

[Whereupon, at 12:45 p.m., the committee recessed, to reconvene at 1:45 p.m., the same day.]

The CHAIRMAN. The hearing will come to order, please.

We will attempt to finish tonight, but I want to emphasize that if Senators continue to have questions, we will not. I still think that it is possible to finish. All of the Senators were told at the beginning of these hearings that we would not go late today, and I want to be able to accommodate those Senators who made plans in their home States. Since deregulation, I know you can't catch a lot of planes to a lot of places other than at specific times.

Our good friend from Wyoming has such a commitment based on the assertion the Chair made that we would not go late on Friday. My two colleagues from Illinois and Wisconsin, who have not yet had a second round, have been gracious enough to yield to him for a third round or part of a third round so that we can try to meet the twin obligations.

Just as the Court always has to balance things, Judge, we are having to balance needs here, and we are going to apply a strict scrutiny test after Senator Simpson asks his questions to determine whether he met it.

But, at any rate, all kidding aside, the Chair recognizes Senator Simpson, and then we will go in order, Illinois and Wisconsin.

Senator SIMPSON. Mr. Chairman, I do very much appreciate that. I do have to catch a plane. There are others, and you have accommodated us all on both sides of the aisle, but particularly I want to thank my friends, Paul Simon and Herb Kohl, I appreciate that very much. And I really intend to just do 2 minutes, and then that will conclude my activities. Thank you for your courtesies on that.

My remarks I wanted to share, I think the committee would be interested. I became so intrigued as to the EEOC issue that I went down to the EEOC. I had seen our colleague from Missouri go