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

MONDAY, SEPTEMBER 16, 1991

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

The committee met, pursuant to notice, at 9:35 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. As I said, I expect this will be our last day to hang out in this room together. And I know things are moving along, and you have begun to take this process seriously because I have now met your eighth-grade nun. She is here today, which means that we had better end it. I assume that is why you have her here, just in the event that somehow if we couldn't finish, she would remind me of the fact that I said on Friday we were going to finish. So I assure you we have an added incentive to finish today.

With that, why don't we get right to the order of questioning, Judge. Again, anytime that you would think it is appropriate to take a break, we will do so. I think what we should do is sort of play it by ear as to when we have lunch, because I would like to finish before lunch. Lunch may mean 12 or it may mean 1. But let's make that judgment as we go, if that is all right with you.

All right. Where we are now is the next questioner will be the most senior Republican who has any questions, and I yield to Senator Thurmond if he has any.

Senator THURMOND. Mr. Chairman, I have no more questions, and none on our side have any except the distinguished Senator from Pennsylvania. I believe he cares for a third round.

Senator Grassley, did you have any questions on the third round?

Senator GRASSLEY. I have used 6 or 7 minutes of the third round and don't anticipate using any more unless something happens.

Senator THURMOND. So you have no more at this time. Well, then, the distinguished Senator from Pennsylvania.

The CHAIRMAN. We yield to the Senator from Pennsylvania.

Senator SPECTER. I thank the Chair.

Judge Thomas, if you are confirmed and if you join the current revisionist Supreme Court—and I call it a revisionist Supreme Court as opposed to a conservative court because the current court has gone beyond the conservative judgments illustrative of the unanimous opinion of Chief Justice Burger in the Griggs court. I think—I would ask if you would be philosophically attuned more to the Justice O'Connor line or the Justice Scalia line. And I will deal with two cases for illustrative purposes.

When I had finished my questioning, when my time ran out on the second round, I had been asking you about *Rust* v. *Sullivan*. And in *Rust* v. *Sullivan*, Justice O'Connor dissented. That was the case where you had a regulation by the Department of Health and Human Services which had stood from 1971 to 1988 and then it was changed, and the Supreme Court upheld its change on a variety of grounds which I had specified in my last round. But the one which struck me the most peculiarly was the ground that it is appropriate to change a regulation when it is in accord with a shift in attitude. That has related, in part, to your compliment of Justice Scalia in your Creighton speech where he had referred to political considerations on changes in regulations.

Justice O'Connor on the other hand voted to uphold the original regulation and to strike down the new regulation because, as she put it, "It would raise serious constitutional problems and would constitute a serious first amendment concern." But I would ask whether you would side with the O'Connor branch or the Scalia branch of the revisionist court.

Judge THOMAS. Senator, without reference to *Rust*, I think as I attempted to explain when we addressed this last week, *Chevron* v. *U.S.A.* involved an instance in which EPA changed its regulation, an existing regulation concerning the bubble concept. That was a concept that was hotly contested, and EPA had adopted a regulation rejecting the bubble concept, as I remember it.

Subsequent to that, EPA revisited the concept and adopted it, and the question was whether or not this new regulation was a reasonable interpretation of EPA's underlying statute, or the statute in that case. And the Court held that it was, indeed, and upheld the regulation.

That is generally the existing law with respect to deference to agencies' reasonable interpretations in the administrative law area. Whether or not that is easily transported to the difficult case that you have just mentioned or is easily reducible to an instance in which there seems to be just a change and, as you say, shifts in political—shifts of attitudes and whether shifts of attitudes would constitute a reasonable basis for making such a change or that shift in attitude comports with a reasonable interpretation of the underlying statute is, I think, a totally different question.

But the point that I am making is simply that the Supreme Court has permitted—in the leading case in the administrative law area has permitted there to be a change of regulations by the agency, even when the existing regulation had been in place for some time.

Senator SPECTER. Judge Thomas, in *Rust* v. *Sullivan*, the Court concluded that the regulation was acceptable, saying that:

The regulations simply ensure that appropriate funds are not used for activities, including speech, that are outside the Federal program scope.

That ruling gives me enormous concern. It has given many, many people in this country enormous concern in light of the very extensive Federal rule on funding. So that if you have a Federal program which is funding a given activity and you say that no one can speak in opposition to that program, there is an enormous latitude for restricting freedom of speech. And my question to you is: Do you think that it is appropriate when there is Federal funding involved to limit speech when that speech is outside the Federal program scope?

Judge THOMAS. Senator, I think that in this case, with respect to the question, the underlying question in *Rust* v. *Sullivan*, I think it would be, from my standpoint, moving too far to comment on the underlying issues.

Senator SIMON. Why?

Judge THOMAS. As I have indicated in other instances, Senator, in these difficult cases, it is important to me that I not compromise my impartiality should cases of this nature, similar cases be considered by the Supreme Court in the future, if I am, of course, fortunate to be confirmed.

Senator SPECTER. But, Judge Thomas, I am not asking you about any specific issue, let alone any specific case. I am asking you about a very broad—a broad, broad philosophical question. It is as broad as the areas of Federal funding, which are gigantic, and it is as broad as the first amendment freedom of speech, which we hope even exceeds the breadth of Federal funding. And the issue is, just because the Federal Government gets into funding and establishes a scope of a program—and I am not talking about any specific issue—doesn't that give you at least some concern about limitations on speech, if you could curtail speech where Federal funding is involved?

Judge THOMAS. I think as I suggested last week, Senator, I was very concerned in instances in which it appears or in instances in which regulations by the Government curtail our fundamental freedoms, and in this case freedom of speech. I share that concern.

What I am attempting to avoid is offering a judgment on an agreement with a point of view on a very hotly contested and difficult case that could certainly come before the Court again.

Senator SPECTER. Well, Judge, I am really beyond the case, but I will not press it further. Let me move on with my question to you about the revisionist court and, if you join, whether you will be on the Scalia branch or the O'Connor branch, and go back to *Johnson* v. *Santa Clara.* Justice O'Connor takes Justice Scalia to task for his dissent which he says is an academic discussion, and then I think in a very important doctrinal view says that:

Justice Scalia's dissent rejects the Court's precedents and addresses the question of how title VII should be interpreted as if the Court were writing on a clean slate.

You have already stated that you believe the constitutional interpretation is a moving body, depending on the tradition and customs of our society, without being rigidly controlled by original intent. And here you have Justice Scalia taking title VII, as Justice O'Connor says, writing on a clean slate. And Justice O'Connor rejects

that and says that we have to take into account the Court's precedents.

My question to you: Would you choose a preference between the approaches between Justice O'Connor and Justice Scalia on that issue?

Judge THOMAS. Senator, I think it is important for any judge to take into account, even when he or she disagrees with a particular case, to recognize that there is the additional burden and additional question of whether or not this case should be overruled; that is, a question about the doctrine of stare decisis.

I do not think that judges should assume, simply because they disagree with a particular case, that we are operating as though there was no prior case law or there are no precedents and feel free to act as though they are not in any way controlled or restrained or constrained by prior case law.

My sentiments, without expressing a particular judgment on that case, my sentiments would be toward a preference for recognizing that there is significant weight to be given to existing case law and that the burden is on the judge who wants to change that precedent, to not only show why it is wrong, but why stare decisis should not apply.

Senator SPECTER. Thank you. I am going to score that one for Justice O'Connor, which may make it one to one.

Let me move on to the war powers issue, Judge Thomas, a question which has not yet been broached and one that I think is enormously important and one which you and I had discussed in the informal session which we had before the hearings started.

We have just seen a historic event in the course of the past year with the gulf war and the vote by the Congress authorizing the President to use force in the gulf war. In your writings, you have been concerned about congressional activity in many areas; and in your speech at Brandeis University on April 8, 1988, you said:

> In many areas of public policy, including foreign policymaking, Members of Congress can thwart or substitute their will for that of the Executive.

And you focus on foreign policy.

You have been very critical of the Congress, as I had commented earlier, noting that there is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business. And in your speech on September 3, 1987, at the American Political Science association, you quoted with approval a statement by Gary Jacobson that in Congress there is great individual responsiveness, equally great collective irresponsibility.

There are many issues where there is a confrontation between the President and the Congress, which we all know, and I would like your views as to the authority of the Congress under its constitutional, exclusive responsibility to declare war, as opposed to the President's authority as Commander in Chief, which is a very central issue, was a central issue earlier this year.

Let me start with the question that I told you I was going to ask you, and that is whether the Korean conflict was, in fact, a war.

Judge THOMAS. Senator, I, in response to our informal discussions, did attempt to resolve an issue that scholars and political scientists, lawyers, seem to have been debating for the last 40 years

and I recognized, I believe as I indicated to you, the hostilities in Korea and the President's response. Of course, I don't think that there was a suggestion that the President could not respond, but your question at the time went to whether or not there should have been a declaration of war.

Senator SPECTER. Correct.

Judge THOMAS. And the short answer to that is, from my standpoint, I don't know. I have attempted to look at that question, but, again, it is one that scholars haven't resolved and that legal minds haven't been able to resolve. And I think that I would be imprudent to attempt to resolve it in this environment.

Senator SPECTER. Well, Judge Thomas, when I asked you the question at our informal session as to whether the Korean conflict was a war, you said, "You asked that question of Judge Souter." And I said, "That is right." And he ducked, and then I said, "Well, let me give you the weekend." He came back and he said, "I don't know."

Now, I thought that was OK under those circumstances where it was from Friday to Monday, but you and I talked about this on August 1 and now it is September 16. And I don't think that the Korean incident is going to be repeated. It is not asking you to comment on a pending case, and it is well established historically as to what happened. And this is a crucial issue as to whether American troops are going to be committed to combat on the President's word alone as Commander in Chief or whether it is going to require a congressional declaration of war.

So, to the extent that I can push it just a little bit, let me repeat the question. Was it a war?

Judge THOMAS. Senator, this isn't one of the instances in which I am saying that the issue of whether or not the Korean—the hostilities in Korea was a war would be coming before the Court. This is an instance when, as I have indicated to you, I simply don't know.

Senator SPECTER. Well, let me try again. Instead of moving to an easier question, I will move to a harder one.

In early January of this year, there was a lot of debate as to whether the President had the authority to commit troops in the gulf war without a resolution. President Bush asserted he did. And this Judiciary Committee held hearings in early January, and some even suggested, I think ridiculously, that the President would be impeached if he moved ahead without waiting for a congressional resolution. I thought it was ridiculous because Congress had sat on its hands for months and had allowed the United Nations to set a date for the use of force January 15, and finally—finally—Congress acted, started some discussions on January 10 and moved on it on January 12.

I am not going to ask you whether you think the Constitution required congressional action or the President had the sole authority to act as Commander in Chief, because if you won't answer the Korea question, you are not going to answer that one. So let me ask you instead: What would the considerations be that you would work through in approaching that kind of a legal issue?

Judge THOMAS. It is a very difficult issue, Senator. I have addressed whether or not—in the War Power Act, resolution, of course, is very complex and has a variety of reporting provisions,

as well as the more difficult provision involving the withdrawal of troops.

I think that, as I may have alluded to in our conversation earlier in private, the whole issue of what the President's authority is, as opposed to the authority of Congress, seems to be one that is more amenable to the kind of process that this body and the Executive went through or engaged in the Persian Gulf conflict; that is, one in which the conflict is resolved in the political context.

I don't think there is certainly not very much in the way of judicial precedent or judicial consideration of this particular issue. And as I have noted before, there is an ongoing debate among scholars on both sides of the issue. I for one, just as I have viewed the issue, as I have looked at it, it seems to be one of those instances in which the differences, particularly when there is an existing conflict, are better worked out in cooperation between the executive and the legislative branches.

Senator SPECTER. Well, Judge Thomas, I agree with you totally that it is better to work them out, but that issue could come before the Court. And a concern which I have expressed is your statements suggesting a lack of wisdom in the Congress, and I know you have already said that you will be fair and impartial and that what you had said in the past was as an advocate as opposed to where you stand as a judge. So I don't think there is any use in pursuing that one any further.

Let me turn to a specific case which you have decided, Judge. Although you did not write the opinion, it is a case of some significance involving the *United States* v. *Jose Lopez*. It is a case which involves the interpretation of socioeconomic status under the Uniform Sentencing Guidelines which have been enacted to try to bring uniformity on sentences in criminal cases. Those guidelines say that socioeconomic status should not be considered on the sentencing issue.

The facts in this case were very compelling about Mr. Lopez in terms of his own background, where, as the opinion of the court said, the tragic circumstances involved the death of his mother by his stepfather murdering her, his own threats that he had to leave town to avoid problems, his growing up in the slums of New York and Puerto Rico, and of not fitting in because of his dual background.

The U.S. attorney prosecuting the case on behalf of the Government in asking for a tough sentence argued that—and this is also from the opinion:

> The Government urges that a focus on particular life experiences would permit every defendant to distinguish himself from all others, and this would undermine the purpose of the uniformity of sentencing procedures.

You were on the panel which upheld an expansion of the sentencing guidelines which prohibited considering socioeconomic circumstances. And my question to you is: How far do you think it is appropriate to go in that line? And was the U.S. attorney prosecuting the case, in asking for a tough sentence, really totally wrong in the concern expressed that it would permit every defendant to distinguish himself from all others and thus undermine the purposes of uniformity in the guidelines?

Judge THOMAS. The concern—as you indicated, Senator, I didn't write the opinion, and——

Senator SPECTER. But you joined in the opinion.

Judge THOMAS. I joined in the opinion. After awhile, you learn that when you don't—after about 150 or 200 of these cases, they are a little hard to recall. But this case was a difficult case. It is one that took into account the notion or the concern that this body had that sentences be uniform, that there not be wide disparities in sentences.

At the same time, the question was when there is an individual, such as Mr. Lopez, who has had very difficult and traumatic circumstances in his or her life, is this a factor that is not socioeconomic. Even though it may have resulted from socioeconomic status—that is, where he lived—are these factors that should be considered?

I think what the court did in that case—and I haven't had an opportunity to review that opinion—is to wrestle with that difficult issue, but also to recognize that there was in the uniform guidelines a prohibition against considering socioeconomic status and I think ultimately feeling compelled to comply with that requirement.

Senator SPECTER. Judge Thomas, the issue of the death penalty has not arisen in these proceedings except for one reference earlier to Federal court habeas corpus, but that is a very important subject. There are deep-seated differences of opinion on the matter. I was a district attorney in Philadelphia for many years and believe the death penalty is a deterrent. Philosophically, is there anything about the application of the death penalty which would bother you from upholding it, if confirmed for the Supreme Court?

Judge THOMAS. Philosophically, Senator, there is nothing that would bother me personally about upholding it in appropriate cases. My concern, of course, would always be that we provide all of the available protections and accord all of the protections available to a criminal defendant who is exposed to or sentenced to the death penalty.

Senator SPECTER. Well, since *Furman* v. *Georgia*, there have been elaborate circumstances set up for consideration of all the mitigating circumstances. But there has been a concern beyond the imposition of the death penalty in terms of its not violating the eighth amendment to cruel and unusual punishment. And I frankly am pleased to hear your answer that you would support it in the appropriate case.

There has been another concern about the tremendous delay, in some cases as long as 17 years, an average of 8½ years. And there are proposals pending which I have authored which would set time limits within the Federal system to give an opportunity in the Federal court for a full hearing, but to make it a priority case because it is really watched by so many people as to whether law enforcement is really serious in carrying out penalties.

One of the legislative provisions calls for a time limit in the Supreme Court to decide these matters within 90 days, unless the case is so unusual that it requires an extension of time, in which event the Court could take longer on a stated reason.

But I have two questions for you. One is—and people said this was too much for Congress to do because the Court didn't sit in the summertime, and the response to that was, well, the Court could sit in the summertime like other courts do. And my question to you is: Do you think that Congress has the authority to establish a timetable—as we have under the Speedy Trial Act, for example—and, second, to try to abbreviate it, whether 90 days is a reasonable time? Or if not, what time limit would be?

Judge THOMAS. Of course, there is precedent, as you have alluded to, Senator, for establishing timeframes. Whether or not Congress has the authority to do it in this particular case I have not had an opportunity to think about. But Congress certainly has established timeframes in a procedural way that governs the way Federal courts at the district court level, certainly in our Rules of Civil Procedure that govern the way that we do business. The Speedy Trial Act I think is the best example, the one best example.

The question as to whether or not 90 days is the appropriate time, I don't know. My concern would be this: I know that there is the attitude that we must move on, that you must clear these cases from the docket. We feel that way. We certainly feel that pressure as judges. But I think that there can be instances in which 90 days is not enough. There can be instances in which it may take more time to assure oneself that a particular defendant has been accorded all of his or her rights.

I would be reluctant to say that I endorse a particular cookie-cutter approach, but at the same time, I have no alternative to offer as to what is an appropriate length of time. But my concern would always be that we do not put ourselves in the position of adopting an approach that would ultimately in some way curtail the rights of the criminal defendant.

Senator SPECTER. Moving, Judge Thomas, to the Voting Rights Act, you have criticized Supreme Court decisions there and have, as noted in your Wake Forest speech back on April 18, 1988, referred to the individual right to vote as opposed to protecting some ethnic group with sufficient clout. But the Voting Rights Act has been very carefully tailored to try to provide that there is organization of voting districts so that a specific group does have some clout, as opposed to a large representation or a configuration which deny a group of some meaningful participation in the electoral process.

My question to you is: Don't you think, aside from the generalization of individualism, that there is some very important objective to be reached through the Voting Act to have a group with an adequate meaningful participation in the political process?

Judge THOMAS. Yes, I agree with that, Senator. My concern—I think when I wrote that, these speeches on individual rights versus group rights, I believe, and that was a one-paragraph example. I was using this general example, and it is the general concern that I have had throughout my speeches, and that is in according group rights that you don't overlook individual rights. I was not—I loosely, I think, referred to the voting rights cases, but the debate that I was referring to was the school of thought when—I remember in the early 1980's there was some suggestion and some feeling that the Supreme Court cases prior to the amendments of the Voting

Rights Act required proportional representation. And, of course, there were denials to that, but there was that school of thought.

My attitude was that if, indeed, there is proportional representation that that presupposes—I think that is the word I used in that speech—that presupposes that all minorities would vote alike or all minorities thought alike. And that is something that I have—those kinds of stereotypes are matters that I have felt in the past were and continue to feel are objectionable.

Senator SPECTER. Thank you, Judge Thomas.

I know my time is up, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you very much, Senator.

Our next questioner would be Senator Kennedy, but I understand he is prepared to yield to Senator Metzenbaum because Senator Metzenbaum is also required to be at the Gates hearing and to question there.

Senator METZENBAUM. Thank you, Mr. Chairman, and thank you, Senator Kennedy.

Good morning, Judge Thomas. It is nice to see you again.

Judge Thomas, your testimony before this committee has touched upon the subject of economic rights several times. This is an area of concern because over 50 years ago, the Supreme Court used economic rights arguments to strike down laws that were designed to protect workers' rights and establish a minimum wage.

In a 1987 speech to the Business Law Section of the American Bar Association, you stated that, "The entire Constitution is a Bill of Rights and economic rights are protected as much as any other rights."

You also stated that, "Legislative initiatives such as the minimum wage in Davis-Bacon provided barriers against black Americans entering the labor force." You went on to say, "It is amazing just how little attention has been paid to these outright denials of economic liberties."

Frankly, Judge Thomas, I am amazed to hear you say that legislative initiatives such as the minimum wage provided a barrier against black Americans. I would say percentage-wise in my opinion—I don't have the statistical data, but I would guess that percentage-wise no group of Americans benefited more from the fact that employers could not pay them less than $3.35 an hour. And, of course, it has gone up since that time.

But, Judge Thomas, in this 1987 speech you characterized the minimum wage as "an outright denial of economic liberty," and you stated that, "Economic rights are as protected as any other rights in the Constitution."

My question to you is: In 1987 did you believe that the minimum wage law violated economic rights which you thought were protected by the Constitution?

Judge THOMAS. No, Senator. And I think I have made myself clear here, and I have discussed it here. I don't have a copy of the speech in front of me.

The point that I was making with respect to minimum wage was a policy point, not a constitutional point. But let me address the constitutional point first.

I have indicated that I believe that the Court's post-*Lochner* decisions are the correct decisions; that those cases were appropriately