

The CHAIRMAN. Thank you very much.

Senator BROWN would be next, if he were here, but I yield to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Judge Thomas, I am told that, at least for your testimony, the end is near—a matter that I was going to say you probably see with mixed emotions, but I doubt that would be a fair statement. You are probably happy to have it end. I hope you and your family had a pleasant weekend.

I must admit, while I was up in Vermont this weekend with my family, I heard more discussion about you than I have heard—well, ever since your nomination. Many people came up to me in grocery stores and at gas stations and on the street, virtually every place I was—in fact. And I believe that all but one person I talked with during the weekend mentioned you, and their views either for or against your confirmation.

I told them what I have told others here; that I have been here for virtually all of your testimony. I have done this so that I might know you better. I am one who spends the time here with you. For many of those who will speak either for or against you, I will read their statements, but they are not the ones about to be voted on one way or the other. You are. And so I have been here to get to know you better.

I want to know how you think, what you consider most important in the law or cases, what kind of Justice you would be if confirmed, how qualified you are. In many ways I don't really have those answers. I probably never will, even at the time you finish testifying today. Apparently the judgment has been made, either by you or your advisers or in conjunction with each other—I don't know—not to answer many questions, for whatever reason. And you have stated in a number of instances—when people suggested you weren't answering the questions—you have stated your reasons why. So I will re-read the transcript to see if a better view of you develops.

One of your advisers, Senator Danforth, feels he knows you very well. I am sure he does. He has had years and years of getting to know you, and all of us on both sides of the aisle have the greatest respect for Senator Danforth. But we haven't had that experience with you, so every Senator has had to make up his or her mind based on what you said or have not said here.

I said to somebody this noon that I wanted to look into the window of your soul, if I could, although I find the shade down quite a ways. And that may be me. That may be ineptitude on my part. That may be design on yours. That may be the ships in the night. I don't know.

Let me ask you a few more questions. While I could ask dozens and dozens more beyond the ones I will ask, I suspect that I might not know any more than I do now if I were to ask them. So let me just take a few.

Even though you have been asked a number of questions on natural law, I find that I still get asked a lot of questions about that. Again, when I was home in Vermont, people would ask just exactly what is meant by natural law, or what you mean by it. You have testified here that natural law plays no role in constitutional adju-

dication. You told Senator Hatch on Tuesday, I believe it was, that a constitutional amendment was required to outlaw slavery. Does that mean that you believe that the *Dred Scott* case, which was decided before the 13th and 14th and 15th amendments were enacted, was correctly decided?

Judge THOMAS. I don't think I—

Senator LEAHY. At the time it was decided.

Judge THOMAS. No, I don't think I have suggested that and didn't analyze it in that way. But I believe the question there was whether or not—since he was not an escaped slave, the question was whether or not he enjoyed the privileges and immunities of a citizen, and I think it would have been analyzed a bit differently. But my own reaction to that is that it was not correctly decided, and I have not gone back and redecided it.

Senator LEAHY. Have you not argued that Justice Taney failed to take into consideration the natural law principles in the Declaration of Independence, particularly those that all men are created equal?

Judge THOMAS. I don't have that before me, and I don't have the analysis before me, Senator. But I think that I could be wrong on this. I think that was a privileges and immunities case.

Senator LEAHY. But did you argue that Justice Taney failed to take into account natural law principles in the Declaration of Independence?

Judge THOMAS. No, I think I—and, again, I don't have that before me, but I think the reference was to the Founders' understanding of natural law and what they were including in the Constitution.

Senator LEAHY. Did you tell Senator Hatch that a constitutional amendment was required to outlaw slavery?

Judge THOMAS. I did. But the issue there was a different issue. I think the issue was a black individual who had been taken to a nonslave territory rather than having escaped to that territory. That would have been the similar arguments that were made by individuals who were free blacks and what their rights were.

Senator LEAHY. Should Justice Taney have used natural law in the *Dred Scott* case?

Judge THOMAS. I think he should have, again, read the Constitution and attempted to discern what the Founders meant in drafting the Constitution.

Senator LEAHY. But if he did that before the 13th, 14th and 15th amendments, would he not have had to uphold slavery? I mean, slavery was allowed at the time the Constitution was drafted.

Judge THOMAS. I think the separate issue is, the individual and complicating issue is if you are in a State that does not have slavery or in which slavery is outlawed.

Senator LEAHY. Judge, let me quote from a couple of your speeches. At Wake Forest in April 1988, you said, "I thought that Ollie North did a most effective job of exposing congressional irresponsibility. It forced their hand, revealed the extent to which their public persona is fake." You said then a year later, "Lieutenant Colonel Oliver North made perfectly clear last summer that it is Congress that is out of control."

Now, I don't want to debate the issue of how you felt and what you said at those times, but I take those particular statements because last year, as a judge on the court of appeals, you ruled in favor of Colonel North in his criminal case. You voted, in effect, to sustain the opinion of the panel which had overturned his conviction on the ground that it was tainted by the use of congressionally immunized testimony.

Now, the reason I mention your vote in that case in which you were with a substantial 8-2 majority, as well as your earlier statements, is because I have heard you say over and over again, during your testimony, that you were concerned that in giving us an answer you might affect your judicial impartiality. You said, in effect, that you did not want to recuse yourself from cases that might come before the Supreme Court because of what you said here.

Did you ever consider disqualifying yourself from sitting in judgment on Colonel North's case on the grounds of either the strong support that you expressed for him in 1988 or your criticism of the Iran-Contra congressional hearings?

Judge THOMAS. Senator, first of all, let me address the statement itself. As I have indicated, my statement was in reference to something that happens sometimes with respect to oversight hearings, or I guess in the political environment, and that is that hearings, substantive hearings become overly publicized or over politicized. And in this instance, I indicated—and this is the way I felt in giving that speech. Colonel North exploited that to his own advantage. I at no time expressed—and, in fact, in reflecting on my feelings toward him during that time, my own view was that if he lied to Congress or if he had engaged in any kind of unlawful conduct, then he should suffer the consequences. At no time did I condone that.

On the court of appeals, the issue was a rehearing petition, whether or not that case should be reheard en banc. And I didn't feel that I was in any way less—in any way or anything other than impartial in considering that.

Senator LEAHY. So the answer to my question is "no."

Judge THOMAS. I did not. I felt that I had not expressed any opinion on his culpability or on his criminal conduct.

Senator LEAHY. I want to make sure I understand the answer. The answer to my question is "no"?

Judge THOMAS. That is right.

Senator LEAHY. Do you think that there is a core of political speech that is entitled to greater constitutional protection than other forms of speech?

Judge THOMAS. I think that, Senator, the value that we place on speech, whether it is freedom of the press or whether it is freedom to engage in discussions about politics or whether it expressive conduct, we see those as—and the Court has treated those as—fundamental rights and has protected those accordingly.

Senator LEAHY. Is all speech the same, though? Is all speech given exactly the same constitutional protection?

Judge THOMAS. Well, I think that the Court, of course, has not accorded the same protection of speech to commercial speech, for example. But the issues that have faced the Court have usually in-

volved whether or not—the difficult issues have involved expressive conduct as opposed to pure speech. And—

Senator LEAHY. What about—I am sorry.

Judge THOMAS. And the exercise that the Court has gone through has, in essence, been whether or not the Government or the State can in any way regulate that expressive conduct and under what circumstances, in cases, for example, like *O'Brien* or the cases such as *Texas v. Johnson*, the flag-burning case.

Senator LEAHY. You are not saying, then, by any stretch, that only political speech is protected? I mean, there is a lot of other speech beyond political speech that is protected by the first amendment.

I realize what you said about the expressive forms of speech.

Judge THOMAS. Senator, I have not analyzed every single speech case, but my own value would be to protect the entire amendment in all of its fullness and not to find ways to creatively read out that protection. I think it is important that we protect all of the amendment.

Senator LEAHY. Now, for example, if you had non-political speech, like say a scientific debate, that would be protected by the first amendment? I am not trying to get you to a specific case. You understand, Judge. I just want to make sure we differentiate between the types of speech. But a scientific debate, first amendment protections?

Judge THOMAS. Well, I think that speech, we value all of our speech. What I am trying to say is I don't limit and see no reason and haven't seen the Court limit our freedom of speech to whether or not we are talking about science or whether we are talking about politics. Certainly the Court has attempted to accord protection to speech such as, for example, the most recent case being *Texas v. Johnson*, the flag-burning case.

Senator LEAHY. Now, in that case, that was a 5-4 decision, as I recall. The Court refused to uphold a conviction on the basis that flag burning was a political statement. Is that a fair shorthand—

Judge THOMAS. No. It was expressive conduct.

Senator LEAHY. Expressive conduct?

Judge THOMAS. Expressive conduct, that the individual was making a statement, a political statement in burning the flag, and that was protected by the first amendment. And the analysis normally is whether or not the Government can in some way control the conduct or regulate the conduct; whether the Government, if it is expressive conduct, has a compelling interest in regulating that conduct.

Senator LEAHY. Do you agree with the *Johnson* case?

Judge THOMAS. Again, Senator, I have not—I think it is inappropriate for me to express agreement or disagreement, but I agree that we certainly should—that expressive conduct should be protected by the first amendment. And I think that the difficulty for the Court has been to what extent can it be regulated, not whether or not it should be protected.

Senator LEAHY. Would it be safe to say you would draw the line at certain kinds of expressive conduct? Suppose somebody says, "I am going to make a political statement by driving 95 miles an hour

down Constitution Avenue." Might you say that that might stretch the first amendment guarantees a tad far?

Judge THOMAS. I think the analysis would be along the lines of whether or not the Government has an interest, a compelling interest in regulating this conduct. And I think that we would probably both—and that is an extreme example. We would both have some difficulty with the Government not regulating someone speeding down Pennsylvania Avenue at 95 miles an hour, although at times you feel in some cabs that you are going 95 miles an hour along Pennsylvania Avenue.

Senator LEAHY. In *New York Times v. Sullivan*, which I think we would all agree is the benchmark libel case, the Court held that a public official could not recover damages unless he could prove that the defamatory information was made with actual malice. Does that standard provide sufficient protection for public figures in your mind?

Judge THOMAS. I guess I haven't looked at it from that standpoint. You know, I think all of us who have found our names occasionally in the newspaper would like to feel that we have—

Senator LEAHY. Never happened to you, has it, Judge?

Judge THOMAS. Well—but as I was telling my wife during this process, no matter how badly it turned out as far as the publicity, I think that the freedom of the press is essential to a free society. And she sort of looked at me, because we were going through the midst of it, sort of, Are you out of your mind? But I believe that, and I believe that even as I was going through it and even as I am going through it.

But I think what the Court was attempting to do there was, of course, to balance the first amendment rights, the freedom of the press as we know it, and to not have that in a way impeded by one's abilities to sue the media or to intimidate the media, and applied a standard of actual malice and struck a balance by protecting the rights of the individual with the standard of actual malice.

That is something, of course, that one could debate, but I think it is demonstration, a clear demonstration on the Court's part that the freedom of the press is important in our society, is critical in our society, even though individuals may at times be hurt by the use of that right.

Senator LEAHY. Do you see any need to change that standard?

Judge THOMAS. I at this moment certainly have not thought about changing that standard and have no agenda to change that standard. I think the Court is—my view, as I have attempted to express here, is that we should protect our first amendment freedoms as much as possible.

Senator LEAHY. When you were at the EEOC, you spoke often about preparing our young people for the high-technology jobs of the future. You mentioned especially minorities. I totally agree with you, and I would hope that more and more Government officials would continue to say the same thing and that more and more people in the private sector would say it, because I don't believe we are doing anywhere near enough.

I also know that as new technologies come along, we need to look at some of the civil liberties questions they bring up. One scholar even suggested a 27th amendment to explicitly extend civil liber-

ties, including freedom of speech, privacy, and protection against unreasonable search and seizure, and apply it to these new technologies. I am not endorsing that proposal, but it raises the questions that come up all the time about how we interpret the Constitution in light of technologies that were totally inconceivable at the time the Constitution was written, and some that were inconceivable even 50 years ago.

Do you have any comment on the adequacy of constitutional protection for computer and new telecommunications technologies?

Judge THOMAS. Senator, I think perhaps some of the same questions were raised with respect to search and seizure and certainly addressed by the Court when telephonic communication became an important part of our way of life, and I am certain many of the cases or many issues will arise as to tapping in the computer data bases, as well as issues involving such things as caller ID.

I have not explored all of those issues. I certainly have seen our laws, particularly our constitutional laws, moving and developing, as those technologies move and develop. It certainly has done that in the past, and I would have no reason to believe it won't have that capacity in the future.

Senator LEAHY. We have talked to you about specific issues here, on civil rights, on relations between the Federal Government and States, *Roe v. Wade*, and a number of others. On some of those specific issues, you have said that you did not want to discuss them or you had certain parameters beyond which you would not discuss them, because they might come up again.

Let me ask you, then, in the abstract, about your basic sense of *stare decisis*. Say a case comes before you, you have to make a judgment in deciding whether you should overrule a decision. You feel that the case law that might otherwise control was wrongly decided. The new case you have now is perhaps on all fours, and you have to decide whether to overrule the earlier decision.

Tell me the kind of weight that you would give to these various points. How much weight would you give to the Supreme Court's acceptance of the basic principles of the case—subsequent acceptance—after the Court had decided the earlier case, which you happen to think was wrongly decided?

Judge THOMAS. Senator, it is hard to say exactly and precisely how much weight you would, in judging a case, I give to a particular component. I think, though, that when you have a precedent that has been relied on in the development of subsequent Supreme Court law, it is not one that was simply there and has never been relied on by the Court, but I think that you would give significant weight to repeated use of that precedent and repeated reliance on that precedent. I think that is very important.

Senator LEAHY. Do you give weight also to changed circumstances? Suppose we have changed substantially, as a country even, since the earlier case was decided. Is that something that can at least be considered or should be considered?

Judge THOMAS. I think what the Court does, and it depends on a particular case, Senator, is if a precedent or a rule becomes unworkable, the circumstances change to a point that it is no longer a useful precedent and it is one that is not applicable—I can't think

of one off the top of my head right now, but I think the Court could revisit a precedent when it becomes unworkable.

Senator LEAHY. What about the importance of stability, and adverse consequences that might result from overturning a case that people had relied on up to that point?

Judge THOMAS. I think what is critical there, Senator, is this, that one of the reasons in our case-by-case system of adjudication for having stare decisis is to provide for that continuity, and I think that continuity is a basis for the stability of our system. It is certainly a basis around which institutions can develop, it is a basis around which people can develop some sense of predictability in our system, it is a basis upon which I think people can react in a positive way to our system. I think that the continuity and the stability is important.

Again, let me just add and underscore the factors that you are isolating here, by saying that I think the burden is on those who would change a precedent to show more than simply that they disagree with the underlying opinion. I think there is that additional burden, which would include an analysis or would certainly include the factors that you set out here.

Senator LEAHY. Absent changed circumstances, does the lapse of a significant amount of time weigh heavily in such thinking, or should it?

Judge THOMAS. I think that to this extent and perhaps in this way, I think that in two ways, at least, that the passing of time will certainly have some relationship to the manner, maybe not directly, but the way that the Supreme Court has used that precedent, whether it has cited that precedent over a long period, whether it has built a body of case law around that precedent.

The other point is that, over time, an important precedent could be a basis upon which or around which institutions develop and grow, expectations develop and grow, and I think that those would certainly be taken into consideration, so in that sense I think time is important. But I add this, though, that there have been precedents in our time, for example, *Plessy*, which was overruled, which had been around for quite some time, and certainly I don't think there is any argument that that should not have been revisited, notwithstanding the significant time that it had been around, but I only use that as a caveat.

Senator LEAHY. But in *Plessy v. Ferguson*, there were, of course, at least to some extent in our society, changed circumstances, or were there?

Judge THOMAS. Well, society had changed somewhat, not totally. I think that sometimes we think that it changed more than it actually had and we hope that—

Senator LEAHY. Some might ask if it has changed all that much since then.

Judge THOMAS. Well, some do ask rhetorically.

Senator LEAHY. How do you feel?

Judge THOMAS. Senator, the fact that I am sitting here engaged in a discussion with you at a confirmation hearing for the Supreme Court of the United States indicates that there is some change, but throughout there has been much discussion about my speeches and interviews, but you would find a common theme running through-

out them, and that is this, that there may have been changes, but there is still so much yet to change.

There are so many individuals who are left out of our society who deserve and should have a central role or full participation in our society and all that it has to offer, and that is something that I believe in, it is heartfelt, it is something that I have reiterated over the years, and, notwithstanding the changes, there needs to be more.

Senator LEAHY. Let's go through all the different things we have talked about: Changed circumstances and what you said about that; the length of time the case has been on the books, weight to be given to what a change or overruling a case might do to practice that may or may not have become accepted practice.

What if, after you have gone through all of that analysis, in your heart you look at that decision and you say "I don't like it. I read that decision, I disagree with it." Preceding from all the questions of changed circumstances, the affect of time on society, acceptance, et cetera, you Judge Thomas sit there—if you have been confirmed as a Supreme Court Justice, you sit there as Justice Thomas—and you say "I don't like that case, I disagree with that case in my heart, morally, politically, emotionally, legally, whatever the reason is, I disagree with it." What weight does that carry, as compared to all the other things we have talked about?

Judge THOMAS. Senator, there is Justice Marshall's dissent in *Payne v. Tennessee*, I think is a very important admonition, and that is that you cannot simply, because you have the votes, begin to change rules, to change precedent. That is not a basis for doing it. I think it is a very stern and necessary admonition to everyone, all of us who are judges.

On a personal level, as a judge, I at the end of the day, if I made a decision in a case that way, that willfully, I could not say to myself in the mirror that I have acted consistent with my oath and the way that I see my obligations as a judge. I do not think that it is appropriate to just simply say, as a judge, this is the way I feel and that overrides everything else. I don't see where we have order to our system, and I certainly don't see where that is consistent with the discharge of my obligations under my oath as a judge.

Senator LEAHY. Thank you.

Mr. Chairman, I thank you. I have many, many more questions, that I do not anticipate going through.

Judge I commend you for being here and I hope you won't think it inappropriate if I also commend your wife and the rest of your family who have been here. I mentioned to your son last week that I admire his aplomb and his ability to stay there, and you would be pleased in his response of why he was willing to do that for you. Thank you, Judge.

Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you.

We will break for 10 minutes.

[Recess.]

The CHAIRMAN. The Chair recognizes the Senator from Alabama, Senator HEFLIN.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge Thomas, your explanation of the—