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

TUESDAY, SEPTEMBER 10, 1991

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

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

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

OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

The CHAIRMAN. The hearing will come to order.

Good morning, Judge.

Judge THOMAS. Good morning, Senator.

The CHAIRMAN. Welcome. Welcome to the blinding lights. It is a pleasure to have you here.

Let me begin also by indicating that the morning is going to be painless, Judge—or maybe the most painful part of the whole process because you are going to hear from all of the committee who have an opening statement, and then a half a dozen Senators who are going to introduce you. So you will hear from about 20 Senators before you get to speak. It could be the most painful part of the process.

But let me begin today, Judge, on a slightly more serious note. This committee begins its sixth set of Supreme Court confirmation hearings held in the last 5 years, a rate of change that is unequaled in recent times. If you are confirmed, Judge Thomas, you will come to the Supreme Court in the midst of this vast change.

In 4 years, Justices Powell, Brennan, and Marshall will have been replaced by Justices Kennedy, Souter, and Thomas. Because of these changes, many of the most basic principles of constitutional interpretation of the meaning that the Supreme Court applies to the words of the Constitution are being debated in this country, in a way they haven't for a long time, in a manner unlike anything seen since the New Deal.

In this time of change, fundamental constitutional rights which have been protected by the Supreme Court for decades are being called into question. In this time of change, the Supreme Court's

self-restraint from interference in fundamental social decisions about the regulation of health care, the environment, and the economy are also being called into question.

Judge Thomas, you come before this committee in this time of change with a philosophy different from that which we have seen in any Supreme Court nominee in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that natural law philosophy should inform the Constitution. Finding out what you mean when you say that you would apply the natural law philosophy to the Constitution is, in my view, the single most important task of this committee and, in my view, your most significant obligation to this committee. This is particularly true because of the period of vast change in which your nomination comes before us.

Judge, to explain why this is such an important question, at least to me, we need only look at the three types of natural law thinking which have, in fact, been adopted by the Supreme Court of the United States in the past and which are being discussed and debated by constitutional scholars today.

The first of these views: Seize natural law as a moral code, a set of rules saying what is right and what is wrong, a set of rules and a moral code which the Supreme Court should impose upon the country. In this view, personal freedom to make moral choices about how we live our own lives should be replaced by a morality imposed on the conduct of our private and family lives by the Court.

The Supreme Court, as you know, Judge, actually took such an approach in the past, holding in 1873, for example, that women could not become lawyers because it was not, in the Court's phrase, "in their nature."

Now, no one wants to go back to 1873; no one wants to go back that far today. But there are natural law advocates who extol the 20th century version of this philosophy, for they believe that it is the job of the courts to judge the morality of all our activities, wherever they occur, paying no respect to the privacy of our homes and our bedrooms. They believe the Court should forbid any activity contrary to their view of morality and their view of natural law.

Those who subscribe to this moral-code view of natural law call into question a wide range of personal and family rights, from reproductive freedom to each individual's choice over procreation, to the very private decision we now make about what is and what is not a family. They want to see the Government make these choices for us by applying, to quote one report, "their values and norms"; or, if the legislature doesn't do it, by judges applying their values and norms.

Needless to say, Judge Thomas, this sort of natural law philosophy is one which I believe this Nation cannot accept. But it is not the only radical natural law philosophy that is being debated as we sit here today—it is being debated in the law schools and among the philosophers of this country—for there is another group that wants to reinvigorate another period of the Supreme Court's past.

When the Court used natural law to strike down a whole series of Government actions aimed at making the Nation a better place for Americans to live, those natural law rulings struck down such

laws as the child labor laws, minimum wage laws, and laws that required safe working conditions. They held that the natural law of freedom of contract and the natural law right to property created rights for businesses and corporations that rose above the efforts of Government to prevent the ills they created. They put these so-called economic rights into a zone of protection so high that even reasonable laws aimed at curbing corporate excesses were struck down.

Now, again, no one is proposing to take us all the way back to the so-called Lockner era. But there are those who wish to employ the same reasoning that was used in that era. Today, natural law proponents of what they term new economic rights and new property rights have called into question many of the most important laws enacted in this century: Laws protecting the environment, our water and our air; laws regulating child care and senior citizen facilities; and even called into question the constitutionality of the Social Security system.

Now, Judge Thomas, you have made it abundantly clear that you do not subscribe to the most extreme of these views. But you have said that you find some of these views, to quote you, "attractive," and that you support the idea "of an activist Supreme Court that would strike down laws regulating economic rights."

Again, this is a vision of natural law that we have moved far beyond and that most Americans have no desire to return to.

And there is a third type of natural law, Judge. It is the one that mirrors how the Supreme Court has understood our Constitution for the bulk of this century, and it is the one that I believe most Americans subscribe to. It is this view of natural law that I believe—I personally, to be up front about it, think is appropriate. In this view of natural law, the Constitution should protect personal rights falling within the zone of privacy, speech, and religion most zealously. Those rights that fall within that zone should be most zealously protected. These personal freedoms should not be restricted by a moral code imposed on us by the Supreme Court or by unjust laws passed in legislative bodies.

Indeed, the Supreme Court has protected these freedoms by striking down laws that would prohibit married couples from using contraception, deny the right of people to marry whomever they wish, or laws that tell parents that they could not teach their children a second language or could not send them to a private school. They struck down those legislative initiatives in the past.

While recognizing that natural law and our Constitution protect these rights, the same Court has also recognized that Government must act to protect us from many of the dangers of modern life, that Government should stop polluters from polluting, stop businesses from creating unsafe working conditions and so on.

Yes, these Government actions do limit freedom. They do limit freedom. They limit the freedom to contract. They limit the freedom to use one's property exactly as they would wish. They limit the freedom to pollute. They limit freedom. Or, as we saw in North Carolina recently, they limit the freedom of a factory manager to lock his employees into a building where 25 of them perished in a fire.

But this limitation on property, recognized as constitutional by the Court, is a balanced liberty that we have come to expect our Government to provide. This is the balance, in my view, that the Framers of our Constitution enshrined in that great document. They wanted, to use their words, "an energetic Government." But they also wanted a Government to protect fundamental personal freedom, and today we have achieved that balance by having the Supreme Court extend great protection to personal freedom while declining to block laws that reasonably regulate our economy, our society, our property.

Now, adopting a natural law philosophy that upsets that balance, either by lessening the protection given those rights falling within the zone of personal and family privacy and speech and religion or adopting a natural philosophy that lessens the power of Government to protect the environment, lessens the power of Government to regulate corporate excesses, or lessens the power of Government to create institutions like Social Security, would, in my view, be a serious mistake and a sharp departure from where we have been for the last 40 years.

Judge Thomas, there are signs in your writing and speeches that you accept the present balance, but there are also signs that you would apply natural law to effect changes in the balance I have just referred to; changes to replace our freedom to make personal and family choices without Government imposing their moral code, and to thrust the Court into economic and regulatory disputes that it now stays out of.

Judge, if this committee is to endorse your confirmation to the Senate, we must know—in my view, we must know with certainty that neither of these radical constitutional departures is what you have in mind when you talk about natural law. So, Judge, over the course of these hearings, I will be asking you about how your natural law philosophy applies to each of these areas, both to the areas of personal freedom and to the areas of economic issues. We will take some time to cover it, Judge, and some of it, as you know as well or better than I, is somewhat esoteric. But cover it we will, and we will cover it carefully.

In closing, Judge Thomas, I want to return to where I started: the importance of your nomination. Some people say that the Supreme Court is already conservative, and they ask what difference it makes to have an additional conservative on the bench. Well, I think that is the wrong question. I reject that argument.

First of all, I do not deny the President the right to appoint a conservative. As a matter of fact, I would be dumfounded if he didn't. And so I fully expect the Supreme Court to be a more conservative body after Justice Marshall's successor is confirmed than before Justice Marshall retired. But such an additional move to the right, which I expect, pales in comparison to the radical change in direction some are urging on the Court under the banner of natural law; pales in comparison to some of the changes that some of the people who are your strongest supporters have been urging on the philosophic thought and the notion of constitutional interpretation for the past decade.

Thus, we are not seeking here to learn—at least I am not seeking here to learn whether or not you are a conservative. I expect no

less, and I believe you when you say you are. Instead, what we must find out is what sort of natural law philosophy you would employ as a Justice of the Supreme Court, for that Court is in transition and if you are confirmed, you will play a large role in determining what direction it will take in the future.

Judge, because of your youth and, God bless you for it—I never thought I would be sitting here talking about the youth of a nominee to the Supreme Court, but I am. Heck, you are 6, 7 years younger than I. I am 48. How old are you, Judge? Forty-two? Forty-three?

Judge THOMAS. Well, I have aged over the last 10 weeks. [Laughter.]

But I am 43.

The CHAIRMAN. Forty-three years old. Because of your youth, Judge, you will be the first Supreme Court Justice the Senate will ever have confirmed, if it does, that will most likely write more of his opinions in the 21st century than he will write in the 20th century. To acknowledge that fact alone, Judge, is to recognize the unique significance of your nomination and the care with which this committee must look at it.

In closing, Judge Thomas, let me say that this committee's obligation is to be open and to be fair, and I hope you believe we have been that way thus far. We have many serious questions to ask you, Judge, and it will take time to get them all answered. So anytime you need a break, anytime you just get tired sitting there, let us know because we are testing the content of your mind, not your physical constitution to be able to sit there for a long time.

In welcoming you to these hearings, Judge, I welcome you also to a dialog, I believe, that will have historic impact on the Supreme Court, the country, and a historic impact for all Americans. We are pleased to have you join us here today, Judge, in what I consider to be a great endeavor and the most serious obligation this committee can undertake.

Again, welcome, and I will now yield to my senior colleague from the State of South Carolina and the ranking member, Senator Thurmond.

[The prepared statement of Senator Biden follows:]