

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

THURSDAY, SEPTEMBER 12, 1991

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

The committee met, pursuant to notice at 10:22 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. Let's officially begin the hearing with Judge Thomas.

Judge, welcome. We are delighted to have you and Mrs. Thomas back. We will follow, business as usual, and begin with the Senator from Wisconsin, Senator Kohl who will have one-half hour of dialogue with the witness.

Senator Kohl.

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

Good morning, Judge Thomas.

Judge THOMAS. Good morning, Senator.

Senator KOHL. Glad to see you this morning.

Judge Thomas, Monday's New York Times said that you were "involved in mock committee sessions in which your answers were tried out in front of lawyers pretending to be committee members."

My question is three-fold: First, who played me? [Laughter.]

Was it Kevin Costner or Mel Gibson? Second, I would like to know who played Senator Metzenbaum? [Laughter.]

Senator HATCH. Nobody would have that—

Senator KOHL. Third, Judge Thomas, I would like to know who could possibly have played Senator Simpson?

Judge THOMAS. That is a good question, Senator. I don't remember precisely, but I think that it may have been Senator Danforth who played all three. But I can't remember precisely.

Senator KOHL. All right. Judge Thomas, I would like to ask you why you want this job.

Judge THOMAS. Senator, being nominated to the Supreme Court of the United States is one of the highest callings in our country. It is an opportunity. It is an entrustment, an entrusting of responsibility by the people of this country, by this body, to make some of the most difficult and important decisions in our country.

It is an opportunity to serve, to give back. That has been something that has been important to me. And I believe Senator, that I can make a contribution, that I can bring something different to the Court, that I can walk in the shoes of the people who are affected by what the Court does.

You know, on my current court, I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload. And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I.

So you feel that you have the same fate, or could have, as those individuals. So I can walk in their shoes, and I can bring something different to the Court. And I think it is a tremendous responsibility, and it is a humbling responsibility; and it is one that, if confirmed, I will carry out to the best of my ability.

Senator KOHL. All right. That is good.

Judge THOMAS, if I understand you correctly, you are going to leave behind almost all of your views about what type of society we ought to be and what type of policies we ought to apply. Two questions. First, why after 20 years in the forefront of these battles do you want to leave all of this behind? And the second question is: If you do leave so much of this behind, what is left?

Judge THOMAS. Though it may sound rather strange to some individuals, the kind of fighting and the in-fighting and certainly the difficulties of battles, those kinds of battles in the political process I think are wearing. So it is not the confrontation that I ever relished or enjoyed. In fact, that is the opposite of my personality. I like to try to find consensus. So I don't miss and have not missed on this court having those kinds of battles. We have reasoned, constructive debate on the court.

But with respect to the underlying concerns and feelings about people being left out, about our society not addressing all the problems of people, I have those concerns. I will take those to the grave with me. I am concerned about the kids on those buses I told you. I am concerned about the kids who didn't have the strong grandfather and strong grandparents to help them out of what I would consider a terrible, terrible fate. But you carry that feeling with you. You carry that strength with you. You carry those experiences with you. I don't think you have to carry the battles with you. It is a difficult weight.

Senator KOHL. Judge, I would like to come back to a question about preparation. When I was running for the Senate, I worked with people who helped prepare me for debates, so in my mind there is nothing wrong with getting some advice and help in preparing for this hearing. But I would like to ask you some questions about the process.

When you were holding practice sessions, did your advisers ever critique you about responses to questions in a substantive way? Did they say, for example, "You should soften that answer," or "Don't answer that question, just say that you can't prejudge an issue that may come before the Court"?

Judge THOMAS. Senator, the answer to that is unequivocally "no." I set down ground rules at the very beginning that they were

there simply to ask me and to hear me respond to questions that have been traditionally asked before this committee in other hearings and to determine whether or not my response was clear, just to critique me as to how it sounded to them, not to myself, but not to tell me whether it was right or wrong or too little or too much.

Senator KOHL. Good. Judge Thomas, most Americans believe that the Supreme Court should have a fierce independence. Do you see any problem in terms of the system of checks and balances, and separation of powers in having members of the executive branch detailed to assist in the confirmation of a member to the Supreme Court? Do you think that such assistance creates an appearance of impropriety, because it blurs the lines between the branches of Government?

Judge THOMAS. Senator, the process of confirmation, as you can imagine, is a difficult one. The last 10 weeks have involved my answering countless questions, responding to significant document requests that I personally could not respond to, and information that was contained in the executive branch.

Traditionally, individuals in the executive branch have assisted, but, again, there I made it clear what my rules were. They were to do nothing more than provide me with information such as case law, documents that I needed to prepare myself at my request. They in no way did anything more than provide that information.

For example, they would be more in the order of what I would have my law clerk do, provide me with the material that I need.

Senator KOHL. But it is said in the *New York Times*—perhaps they were misquoting—that there were mock sessions between you and people from that branch during which questions were asked and answers were given. That is entirely different from what you just said.

Judge THOMAS. To my knowledge, there was one individual from the—there were a number of individuals from the executive branch, that is right. I thought you were talking about the individuals who assisted me with the documents, not the individuals in mock sessions.

Senator KOHL. No, no. We are talking about the whole process, the preparation, the involvement, the fact that the executive branch and you have been working together on this nomination in all the various ways, including preparation for this hearing. And I am asking you not whether or not you have the right to do it. You do. I am asking whether or not that blurs the separations that are supposed to exist as between the branches of Government.

Judge THOMAS. I am sorry I was not responsive. I think that there would be certainly be no more conflict than one would have when a clerk from your staff argues before you in the subsequent years. I do not think there would be, Senator. I can see the concern, but I do not think that there would be at all.

Senator KOHL. All right.

Judge THOMAS. And the preparation is dearly needed, the help, the assistance is dearly needed.

Senator KOHL. Good. Judge Thomas, I would like to talk to you about the right to privacy for just a minute. Yesterday, you told Senators Leahy and Metzenbaum that you had no opinion, either personally or professionally, about the legal issues raised in *Roe*,

and that you have never had an opinion and never discussed it. That is a very strong statement to make to this committee and to the American people.

I would like to ask you a related, but nonlegal question. As Clarence Thomas the man, a human being, do you have a personal view on whether society ought to provide women with the option of having an abortion?

Judge THOMAS. Senator, I would essentially reply as I have yesterday, and that is this or in this way: I think that in this area that the need for a judge such as myself to maintain impartiality is critical. I think that whether or not I have a view on this important issue is irrelevant to being an impartial judge and having one could undermine or create a perception that could undermine my impartiality. That is very important to me, and I think it is critical, if not important to any other judge.

Senator KOHL. That is fine, but the question I asked is whether you have, as a human being, a personal view on this subject.

Judge THOMAS. Senator, I understand the concerns on both sides of the issues. I am certainly a citizen who attempts to keep abreast of the news and to be aware of the issues in this country. But as I indicated before, whether or not I have one I think is irrelevant to my being impartial or considering this issue as a judge.

Senator KOHL. Judge Thomas, yesterday you reminded us that the panel that is judging you is all white and all male. Do you think that your responses on this question would have satisfied a panel composed of 14 women, instead of 14 men?

Judge THOMAS. I don't know, Senator. I would hope that the manner in which I am judged, in a fair and impartial manner, does not depend on the gender or the race of those judging me.

Senator KOHL. In 1987, Judge Thomas, you said that you believed, and I quote, "Our civil rights policy should be based on fundamental principles and the assumption that Americans are basically decent, and that they prize fairness." Yet you told Juan Williams, for an article in the *Atlantic Monthly*, that you believe that the white world is wrought with racism. "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do, you will never be seen as equal to whites."

Judge Thomas, those are contradictory statements and I would like to ask you: First, how you can oppose most forms of affirmative action, if America is basically racist; and second, how can you support any type of affirmative action, if Americans are as basically decent and fair as you have suggested?

Judge THOMAS. Senator, it is clear from the testimony that I have given you here about where I grew up, that I understand the realities of our country. It should be clear from my biography that I understand that racism exists. Throughout my speeches, I have made it clear that there is unfairness, in speeches at commencements of Savannah State College, Compton, wherever, places that I have had occasion to speak to minority students and to others, I have pointed out this unfairness, but I appealed.

There is an individual I heard recently who said that we can seek revenge or prosperity. I have tried to appeal to that which is good. I have been there where I have been angry and upset, and I

understand what it means to be angry and upset. But what I have tried to do during my tenure at EEOC, during my public life, recognizing that there are these contradictions in our society, I have tried to appeal to what is good, what can move us forward, not backwards.

With respect to affirmative action programs, I tried to explain yesterday the tensions between the notion of fairness to everyone and this desire to help people who are left out. There is a tension, and how far do you go in trying to include people who are left out, and not be unfair to other individuals, and it is one that I had hoped that we could wrestle with in a constructive way. But as the debate went on, unfortunately, we were not able to, and the rhetoric was heated.

But I have initiated affirmative programs, I have supported affirmative action programs. Whether or not I agree with all of them I think is a matter of record. But the fact that I don't agree with all of them does not mean that I am not a supporter of the underlying effort. I am and have been my entire adult life.

Senator KOHL. All right. Judge Thomas, I would like to talk about a subject which is somewhat sensitive, but it seems to me we ought to address it openly. In the article by Juan Williams, you said you were troubled with the possibility of being selected for a position because of your race. In that instance, you were speaking about your appointments to the head of the Office of Civil Rights at Education, and also to head the EEOC. Did you have similar thoughts when you were nominated for the Supreme Court, Judge Thomas?

Judge THOMAS. Senator, my concerns were in being selected for the two positions that you stated, was that I sensed that it was automatically assumed that, since I was black, these are the positions for me, it is expected that I would go to that sort of a position, as opposed to the Energy Department, for example.

The President indicated that he nominated me as a result of his search, as limited or as broad as it may have been among those individuals, he felt that I was the best qualified. I take him at his word, but I also believe that there is a need in all of our institutions, on the Supreme Court and elsewhere, in diversity. I think it is important to our society.

Senator KOHL. Well, are you troubled by what mainstream periodicals have been saying now for several weeks. I quote just one, U.S. News & World Report. They said you were "picked from a pool of one to fill a quota of one." That has been said in some way by half a dozen or a dozen mainstream periodicals around the country. Does that bother you?

Judge THOMAS. Senator, there is much that has been said over the past 10 weeks that has troubled me. To say that is the most troubling thing that has been said, I think would not be accurate, but that would trouble anyone, and also I think it is inaccurate.

Senator KOHL. Judge Thomas, you have had some harsh things to say about Congress—so have I and so have most of the American people. But unlike most of the American people, you have worked in the Congress. In fact, you have worked in the executive, legislative and the judicial branches. I would like to ask you a few questions about your experience in these areas.

In a 1988 speech at Wake Forest, you said that legislators "brow-beat, threaten and harass agency heads." In the Wake Forest speech and in another 1988 speech, you said that Congress was, and I quote, "a coalition of elites which failed to be a deliberative body, which legislates for the common or the public interest," and that Congress was "no longer primarily a deliberative or even a law-making body."

So, Judge THOMAS, why would a man like you, with strongly held ideas about public policy, ever want to work in this branch of government, the courts, where you have an obligation to uphold the bad laws that you say Congress makes?

Judge THOMAS. First, let me go back to the position that I was in as a member of the executive branch. As I indicated yesterday, there is tension between the two branches, and particularly in the oversight process. I felt, as the head of an agency who had been called to the Hill on a number of occasions in some very difficult circumstances, that particularly some of the staffers went too far in micromanaging the agency and made it very, very difficult.

I think that the legislative role of Congress, as well as the oversight roles of Congress, are very, very important. It is a little easier to see, when you are not the object of an oversight hearing.

In my current job, our role is to determine the intent of Congress. I believe that I have done that fairly and impartially. I have stated very clearly that my job is not to engage in a policy debate with Congress. I am out of that role. I am not in the political branch. I am in the neutral branch, and my job is to remain neutral.

When I was in the political branch, I think I fought the policy-making battles, and I am sure that individuals on this side has some—

Senator KOHL. That is all right. I just want to go back and quote to you what you said, and ask you, do you remember saying it? Is it true? And do you believe it? You said that "Congress was a coalition of elites which failed to be a deliberative body that legislates for the common good or the public interest," and you said that "Congress was no longer primarily a deliberative or even a law-making body." Is that how you feel?

Judge THOMAS. Today?

Senator KOHL. Today. [Laughter.]

Here, sitting before 14 of us who are going to vote.

Judge THOMAS. I can't, Senator, remember the total context of that, but I think I said that and I think I said it in the context of saying that Congress was at its best when it was legislating on great moral issues. Now, I could be wrong. I think I have turned over 138 speeches, and I can't remember the details of all of them, but I did say and I do remember saying that Congress was at its best when it was deliberating the great moral issues of our time, such as, for example, our involvement in the Persian Gulf conflict.

Senator KOHL. All right. Judge, I would like to briefly follow up on Senator Simon's church-state questions. During your appellate court confirmation hearing, we discussed your views on school prayer and I asked you about your 1985 statement where you said, "As for prayer, my mother says when they took God out of the schools, the schools went to hell. She may be right. Religion cer-

tainly is a source of positive values, and we need to get as many positive values in schools as possible." You said that was your personal view, but of no consequence; that as an appellate judge, you would be bound to follow Supreme Court precedent.

Now, however, you are being considered for the Supreme Court and you will be in a position to set precedent. Your personal views are of great consequence, so I would like to ask you this: The Supreme Court has repeatedly ruled that prayer in the schools violates the first amendment. Given your statement in 1985, could you explain your views on prayer in school today?

Judge THOMAS. Senator, as I indicated yesterday, my comments there were not taken to in any way reflect on the legal rulings on the establishment clause or the free exercise clause. As I indicated yesterday, that from my standpoint, as a citizen of this country and as a judge, that the metaphor of the Jeffersonian wall of separation is an important metaphor. The Court has established the *Lemon* test to analyze the establishment clause cases, and I have no quarrel with that test.

The Court, of course, has had difficulty in applying the *Lemon* test and is grappling with that as we sit here, I would assume, and over the past few years, but the concept itself, the Jeffersonian wall of separation, the *Lemon* test, neither of those do I quarrel with.

Senator KOHL. All right. In your view, Judge, what is the current state of the law with regards to the establishment clause of the first amendment?

Judge THOMAS. The Court now, in the application of the *Lemon* test, that is that there be a secular purpose to the legislation or the action, that there be no primary sectarian effect and there be no unnecessary entanglement of government in the affairs of religion. It has been difficult for the Court, as I noted, to apply. The Court has been split between I think those who feel that there should be some accommodation and those who think there should be an absolute separation.

Justice O'Connor, of course, has offered some movement in the area, as well as Justice Kennedy I think has applied a coercion test. I think the judges are grappling at, when church and the government are inexorably in contact with each other, how much separation can there be and how do you draw the line.

I think it is difficult. It has been difficult for the Court. We see it in the cases with the Christmas displays and the Court has not resolved it, but I think the analysis, the *Lemon* test, as well as the understanding that the separation must be there is important, but, in practice, it is difficult.

Senator KOHL. How do you reconcile your willingness to discuss this area of the Constitution, which is still unsettled law, with your unwillingness to discuss another area of the Constitution, which is the woman's right to choice?

Judge THOMAS. Senator, I think what I have attempted to do is, to the best of my ability, without judging or prejudging the case, to simply set out in an area that you have requested the analysis of what the Court has done and where it has gone.

I have indicated and I think it is important to indicate that the area of *Roe v. Wade* is a difficult, it is a controversial area. Cases

are coming before the Court in many different postures. And I think it would—and I think it is a judgment that each member of the judiciary has to make. I think it would undermine my ability to impartially address that very difficult issue, if I am confirmed, to go further than I have gone.

Senator KOHL. All right. Finally, Judge, with respect to all the things that you have said and written in the past and the things that you have asked us to discount today—I am thinking also about the meeting we had in my office when you said that we should for the most part forget about what we have read and written about you—you said that the real Judge Thomas would come out at the hearings. My question is, Why is it inappropriate for us to make an evaluation of your candidacy based upon all the things that you have written and said—particularly in view of the fact that you have been on the court for only 16 months? If we are going to make an informed judgment on behalf of the American people, why are your policy positions not important? How are we supposed to make a judgment on you? Is it fair for you to say to us, for the most part: members of the panel, just view me on what I am saying here this week; don't view me on what has been written about me—about my speeches, the things that I have said? Does that give us the most complete opportunity to make the evaluation that we need to make on behalf of the American people?

Judge THOMAS. Senator, I think that I have turned over in responding to requests, as a result, I think 32,000 pages of documents. I have spent the last decade in the Government. I think that the material is there. I think that a fair reading of my record is a reading which indicates that I am one person who has attempted to be involved and attempted to do some good, who did not hide, who did not sneak away from the problems, who tried to grapple with them, who tried to take them head on, and who tried to make a difference. I think the record is relevant, but I think it has to be understood that when I was in the executive branch, I was in the executive branch. I am a member of the judiciary, and I think it is a fair question from me to you is to see whether or not my policy positions have tainted my role as a judge.

Senator KOHL. Well, you have only been on the court for 16 months, and so we are not in a position to see how your policy positions are, either consistent or not consistent with the things that you have done on the court. But in many areas, you are asking us to recognize that, some of the policy positions that you have taken in the past, were just that—policy positions—and they don't have any relevance to your court experience or the kind of experience or expertise that you will bring to the Supreme Court.

For example, you say you turned over 32,000 pages to us, and yet when we come back to you and say, well, what about this or what about that, you are saying that doesn't count or that doesn't count. In your opening statement, for example, for the most part you said that you are an example of a person who has pulled himself up by the bootstraps, who is a good, honest, decent, hard-working, effective, intelligent man—which you are. And I think to an extent this approach troubles me. Your hearing has been a continuation of that kind of experience and you have encouraged us to judge you on that. But I think that we and the American people, Judge

Thomas, should be given the full opportunity to judge you on the whole range of your life experiences, which does include the things that you have said and written and done, just like it does for the rest of us.

When I ran for office, I wasn't able to say don't consider this or don't consider that. The voters wouldn't allow that. And they consider everything I have done, everything I have said. And I think that that is the way the process should work in a democracy. And to the extent that you think I am exaggerating, I would be interested in your response, and then I am finished.

Judge THOMAS. Senator, I think that if this were an oversight hearing and I could go back and discuss all the policies and tell you that, yes, it is relevant to me going back and running my agency, running the agency that I have been asked to run or permitted to run.

When one becomes a judge, the role changes, the roles change. That is why it is different. You are no longer involved in those battles. You are no longer running an agency. You are no longer making policy. You are a judge. It is hard to explain, perhaps, but you strive—rather than looking for policy positions, you strive for impartiality. You begin to strip down from those policy positions. You begin to walk away from that constant development of new policies. You have to rule on cases as an impartial judge. And I think that is the important message that I am trying to send to you; that, yes, my whole record is relevant, but remember that that was as a policy maker not as a judge.

Senator KOHL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge, before I begin my questioning, I would like to point out for the record there are 32,000 pages of documents, but I would guess 31,000 pages of those have nothing to do with what you have written, nothing to do with what you said. They are agency documents. So the implication should not be left here that anybody has questioned you on even a remotely large part of those 32,000 pages.

All you have been questioned on so far and all I think the Senator was making the point about is that we are trying to figure out, as you said, how you would rule—we don't want to know how you would rule on cases. We want to know how you think about ruling on it. And all the questions asked of you, none of them thus far have had anything to do with 32,000 pages of documents. They have to do with probably—if you added up all the speeches you gave that would give us insight into how you think, maybe there is 1,000. Maybe there is 500; maybe there is 1,200 pages. But that is what we are talking about. I know you know that. I just want to make sure that the public doesn't think you have to go back and look over 32,000 pages of documents and analyze it. That is sort of the Wall Street Journal argument. You know, this has nothing to do with 32,000 pages of documents.

Now, Judge, I want to see if I can come away from this round of questions with a better understanding of the method—not the result, the method—that you would apply to interpreting the very difficult phrases in the Constitution, which have been phrases that have been matters of contention for 200 years or more and, when interpreted, have sent the country off in one direction or another.