

**OPENING STATEMENT
SENATOR JOSEPH R. BIDEN, JR.
CHAIRMAN OF THE JUDICIARY COMMITTEE
HEARING ON THE CONFIRMATION OF
CLARENCE THOMAS TO BE
AN ASSOCIATE JUSTICE TO THE U.S. SUPREME COURT**

SEPTEMBER 10, 1991

TODAY THIS COMMITTEE BEGINS ITS SIXTH SET OF SUPREME COURT CONFIRMATION HEARINGS HELD IN THE PAST FIVE YEARS, A RATE OF CHANGE AT THE SUPREME COURT UNEQUALLED IN RECENT TIMES.

IF YOU ARE CONFIRMED, JUDGE THOMAS YOU WILL COME TO A SUPREME COURT IN THE MIDST OF THIS VAST CHANGE. IN FOUR YEARS, JUSTICES POWELL, BRENNAN AND MARSHALL WILL HAVE BEEN REPLACED BY JUSTICES KENNEDY, SOUTER AND THOMAS.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 CONSTITUTION INTERPRETATION-- OF THE MEANING THAT THE SUPREME COURT GIVES TO OUR CONSTITUTION--

Opening Statement: Clarence Thomas Hearing 2

ARE BEING DEBATED IN THIS COUNTRY IN A MANNER UNLIKE ANYTHING WE HAVE SEEN SINCE THE NEW-DEAL ERA.

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 REGULATION OF OUR HEALTH CARE, ENVIRONMENT AND ECONOMY IS 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 DURING MY 19 YEARS IN THE SENATE,

Opening Statement: Clarence Thomas Hearing 3

FOR, AS HAS BEEN WIDELY DISCUSSED AND DEBATED, YOU ARE AN ADHERENT OF THE VIEW THAT "NATURAL-LAW" PHILOSOPHY SHOULD INFORM THE CONSTITUTION.

FINDING OUT WHAT YOU MEAN WHEN YOU SAY YOU WOULD APPLY A "NATURAL-LAW" PHILOSOPHY TO THE CONSTITUTION IS, IN MY VIEW, THE MOST IMPORTANT TASK OF THESE HEARINGS.

THIS IS PARTICULARLY TRUE BECAUSE OF THE PERIOD OF VAST CONSTITUTIONAL CHANGE IN WHICH YOUR NOMINATION COMES BEFORE US.

TO EXPLAIN WHY THIS IS SUCH AN IMPORTANT QUESTION, WE NEED ONLY LOOK AT THREE TYPES OF NATURAL-LAW THINKING WHICH HAVE IN FACT BEEN ADOPTED BY THE SUPREME COURT IN THE PAST –

AND WHICH ARE BEING DISCUSSED BY CONSTITUTIONAL SCHOLARS TODAY.

Opening Statement: Clarence Thomas Hearing 4

THE FIRST OF THESE VIEWS SEES NATURAL LAW AS A "MORAL CODE" -- A SET OF RULES SAYING WHAT IS RIGHT AND WHAT IS WRONG -- 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 ACTUALLY TOOK THIS APPROACH IN THE PAST, HOLDING IN 1873, FOR EXAMPLE, THAT WOMEN COULD NOT BECOME LAWYERS BECAUSE IT WAS NOT, AS THE COURT PUT IT, "IN THEIR NATURE."

NOW, NO ONE WANTS TO GO BACK THAT FAR TODAY, BUT THERE ARE NATURAL-LAW ADVOCATES WHO EXTOL A 20TH-CENTURY VERSION OF THIS PHILOSOPHY,

Opening Statement: Clarence Thomas Hearing 5

FOR THEY BELIEVE THAT IT IS THE JOB OF THE COURTS TO JUDGE THE MORALITY OF ALL OF OUR ACTIVITIES, WHEREVER THEY OCCUR -- PAYING NO RESPECT TO THE PRIVACY OF OUR HOMES AND BEDROOMS.

THEY BELIEVE THAT COURTS SHOULD FORBID ANY ACTIVITIES CONTRARY TO THEIR VIEW OF MORALITY OR NATURAL LAW.

THOSE WHO SUBSCRIBE TO THIS "MORAL-CODE" VIEW OF NATURAL LAW CALL INTO QUESTION A WIDE RANGE OF OUR PERSONAL AND FAMILY RIGHTS --

FROM REPRODUCTIVE FREEDOM, TO EACH INDIVIDUAL'S CHOICE OVER PROCREATION, TO THE VERY PRIVATE DECISION WE NOW MAKE ABOUT IS OR IS NOT A FAMILY.

THEY WANT TO SEE THE GOVERNMENT MAKE THESE CHOICES FOR US, BY APPLYING THEIR "VALUES AND NORMS" -- OR BY JUDGES APPLYING NATURAL LAW.

Opening Statement: Clarence Thomas Hearing 6

NEEDLESS TO SAY, JUDGE THOMAS, THIS SORT OF NATURAL-LAW PHILOSOPHY IS ONE THE NATION CAN NOT ACCEPT.

BUT IT IS NOT THE ONLY RADICAL NATURAL-LAW PHILOSOPHY THAT IS BEING DEBATED BY SCHOLARS,

FOR THERE IS ANOTHER GROUP THAT WANTS TO RE-INVIGORATE ANOTHER PERIOD IN THE SUPREME COURT'S PAST,

WHEN THAT COURT USED NATURAL LAW TO STRIKE DOWN A WHOLE SERIES OF GOVERNMENT ACTIONS AIMED AT MAKING THIS NATION A BETTER PLACE FOR ALL AMERICANS.

THOSE NATURAL-LAW RULINGS STRUCK DOWN CHILD LABOR LAWS, MINIMUM WAGE LAWS, AND LAWS THAT REQUIRED SAFE WORKING CONDITIONS.

Opening Statement: Clarence Thomas Hearing 7

THEY HELD THAT THE NATURAL-LAW "FREEDOM OF CONTRACT" AND "RIGHT TO PROPERTY" CREATED RIGHTS FOR BUSINESSES AND CORPORATIONS THAT ROSE ABOVE OUR EFFORTS TO PREVENT SUCH ILLS.

THAT PUT THESE SO-CALLED "ECONOMIC RIGHTS" INTO A ZONE OF PROTECTION SO HIGH THAT EVEN REASONABLE LAWS AIMED A CURBING CORPORATE EXCESSES WERE STRUCK DOWN.

NOW, AGAIN, NO ONE IS PROPOSING TO TAKE US ALL THE WAY BACK TO THAT ERA,

BUT THERE ARE THOSE WHO WISH TO EMPLOY THE SAME REASONING THAT WAS USED IN THAT ERA.

TODAY'S 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:

Opening Statement: Clarence Thomas Hearing 8

- * PROTECTION OF THE ENVIRONMENT, OUR AIR AND WATER;
- * REGULATION OF CHILD-CARE AND SENIOR-CITIZEN FACILITIES;
- * EVEN THE CONSTITUTIONALITY OF SOCIAL SECURITY.

NOW, JUDGE THOMAS, YOU HAVE MADE IT CLEAR THAT YOU DO NOT SUBSCRIBE TO THE MOST EXTREME OF THESE VIEWS,

BUT YOU HAVE SAID THAT YOU FIND SOME OF THESE VIEWS "ATTRACTIVE" AND THAT YOU SUPPORT THE IDEA OF AN "ACTIVIST SUPREME COURT THAT WOULD STRIKE DOWN LAWS REGULATING ECONOMIC RIGHTS."

AND AGAIN, THIS IS A VISION OF NATURAL LAW THAT WE HAVE MOVED BEYOND AND THAT MOST AMERICANS HAVE NO DESIRE TO RETURN TO.

Opening Statement: Clarence Thomas Hearing 9

THERE IS A THIRD TYPE OF NATURAL LAW – 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 SUBSCRIBE TO.

IN THIS VIEW OF NATURAL LAW, THE CONSTITUTION SHOULD PROTECT PERSONAL RIGHTS FALLING WITHIN THE ZONE OF PRIVACY, SPEECH AND RELIGION MOST ZEALOUSLY.

THESE PERSONAL FREEDOMS SHOULD NOT BE RESTRICTED BY A MORAL CODE IMPOSED ON US BY THE SUPREME COURT, OR BY UNJUST LAWS PASSED BY LEGISLATURES.

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;

Opening Statement: Clarence Thomas Hearing 19

- * TELL PARENTS THEY CAN NOT TEACH THEIR CHILDREN A SECOND LANGUAGE OR SEND THEM TO PRIVATE SCHOOLS.**

BUT WHILE RECOGNIZING THAT NATURAL LAW AND OUR CONSTITUTION PROTECT THESE RIGHTS, THE COURT HAS ALSO RECOGNIZED THAT GOVERNMENT MUST ACT TO PROTECT US FROM MANY DANGERS OF MODERN LIFE --

THE GOVERNMENT SHOULD STOP POLLUTERS FROM POLLUTING, STOP BUSINESSES FROM CREATING UNSAFE WORKING CONDITIONS, AND SO ON.

YES, THESE GOVERNMENT ACTIONS DO LIMIT FREEDOMS -- THE "FREEDOM TO POLLUTE;"

OR AS WE SAW IN NORTH CAROLINA RECENTLY, THE "FREEDOM" OF A FACTORY OWNER TO LOCK HIS EMPLOYEES INTO HIS BUILDING, WHERE 25 OF THEM PERISHED IN A FIRE.

BUT THIS IS THE KIND OF BALANCED LIBERTY WE EXPECT OUR GOVERNMENT TO PROVIDE.

Opening Statement: Clarence Thomas Hearing 11

THIS IS THE BALANCE THAT THE FRAMERS OF OUR CONSTITUTION ENSHRINED IN THAT GREAT DOCUMENT.

THEY WANTED, TO USE THEIR WORDS, AN "ENERGETIC GOVERNMENT" -- BUT THEY ALSO WANTED THAT GOVERNMENT TO PROTECT FUNDAMENTAL PERSONAL FREEDOMS.

TODAY, WE HAVE ACHIEVED THAT BALANCE BY HAVING THE SUPREME COURT EXTEND GREAT PROTECTION TO PERSONAL FREEDOMS, WHILE DECLINING TO BLOCK LAWS THAT REASONABLY REGULATE OUR ECONOMY OR SOCIETY.

ADOPTING A NATURAL-LAW PHILOSOPHY THAT UPSETS THAT BALANCE --

- * EITHER BY LESSENING THE PROTECTIONS GIVEN TO RIGHTS FALLING WITHIN THE ZONE OF PERSONAL AND FAMILY PRIVACY, SPEECH AND RELIGION --**

Opening Statement: Clarence Thomas Hearing 12

- * OR BY LESSENING OUR POWER TO PROTECT THE ENVIRONMENT, TO REGULATE CORPORATE EXCESSES, OR TO CREATE INSTITUTIONS LIKE SOCIAL SECURITY --**

WOULD BE A GRAVE AND SERIOUS MISTAKE.

JUDGE THOMAS, THERE ARE SIGNS IN YOUR WRITINGS AND SPEECHES THAT YOU ACCEPT THIS BALANCE.

BUT THERE ARE ALSO SIGNS THAT YOU WOULD APPLY NATURAL LAW TO EFFECT CHANGES IN THIS BALANCE --

- * TO REPLACE OUR FREEDOM TO MAKE PERSONAL AND FAMILY CHOICES WITH A GOVERNMENT-IMPOSED MORAL CODE,**
- * AND TO THRUST THE COURT INTO ECONOMIC AND REGULATORY DISPUTES THAT IT NOW STAYS OUT OF.**

Opening Statement: Clarence Thomas Hearing 13

**IF THIS COMMITTEE IS TO ENDORSE YOUR
CONFIRMATION,**

**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 IN
EACH OF THESE AREAS --**

**BOTH TO OUR PERSONAL FREEDOMS AND TO
ECONOMIC ISSUES.**

**IT WILL TAKE SOME TIME TO COVER IT ALL, BUT
IT IS IMPORTANT AND WE WILL COVER IT
CAREFULLY.**

**IN CLOSING, JUDGE THOMAS, I WANT TO
RETURN TO WHERE I STARTED -- THE
IMPORTANCE OF YOUR NOMINATION.**

Opening Statement: Clarence Thomas Hearing 14

SOME PEOPLE SAY THAT THE SUPREME COURT IS ALREADY "CONSERVATIVE," AND THEY ASK WHAT DIFFERENCE THE ADDITION OF ONE MORE CONSERVATIVE CAN MAKE TO THE COURT.

I REJECT THIS ARGUMENT.

FIRST, I DO NOT DENY THE RIGHT OF THE PRESIDENT TO NOMINATE A CONSERVATIVE -- I FULLY EXPECT HIM TO DO SO.

AND SO I FULLY EXPECT THE SUPREME COURT TO BE A MORE CONSERVATIVE BODY AFTER JUSTICE MARSHALL'S SUCCESSOR IS CONFIRMED THAN IT WAS BEFORE HE RESIGNED.

BUT SUCH AN ADDITIONAL MOVE TO THE RIGHT, WHICH I EXPECT, PALES IN COMPARISON TO THE RADICAL CHANGE IN DIRECTION THAT SOME ARE URGING ON THE COURT UNDER THE BANNER OF NATURAL LAW.

Opening Statement: Clarence Thomas Hearing 15

THUS, WE ARE NOT SEEKING HERE TO LEARN IF YOU ARE A CONSERVATIVE -- WE EXPECT NO LESS.

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.

BECAUSE OF YOUR YOUTH, JUDGE THOMAS, YOU WOULD BE THE FIRST SUPREME COURT JUSTICE APPROVED BY THIS COMMITTEE WHO WILL PROBABLY DECIDE MORE CASES IN THE 21ST CENTURY THAN YOU WILL IN THE 20TH CENTURY.

TO ACKNOWLEDGE THAT FACT ALONE IS TO RECOGNIZE THE UNIQUE SIGNIFICANCE OF YOUR NOMINATION AND THE CARE WITH WHICH THIS COMMITTEE MUST CONSIDER IT.

Opening Statement: Clarence Thomas Hearing 16

IN CLOSING, JUDGE THOMAS, LET ME SAY THAT THIS COMMITTEE'S OBLIGATION IS TO BE OPEN AND FAIR.

WE HAVE MANY SERIOUS QUESTIONS TO ASK YOU, AND IT WILL TAKE TIME TO GET THEM ALL ANSWERED --

SO ANY TIME YOU NEED A BREAK FOR ANY REASON, PLEASE LET ME KNOW -- OUR GOAL IN THESE HEARINGS IS TO LEARN WHAT YOU THINK, NOT TO TEST YOUR ENDURANCE.

IN WELCOMING YOU TO THESE HEARINGS, I WELCOME YOU ALSO TO A DIALOG I BELIEVE WILL HAVE HISTORIC IMPORTANCE TO THE SUPREME COURT, TO THE COUNTRY, AND TO ALL AMERICANS.

WE ARE PLEASED TO HAVE YOU JOIN US IN THAT GREAT ENDEAVOR.