COUNTY COURT OF THE COUNTY OF WESTCHESTER
WESTCHESTER COUNTY COURTHOUSE
111 GROVE STREET
WHITE PLAINS, N.Y. 10601

CHAMBERS OF
J. RADLEY HEROLD
JUDGE

Personal & Unofficial

September 24, 1991

Hon. Joseph R. Biden, Jr., Chairman
United States Senate Judiciary Committee
Washington, D. C. 20510-6275

Dear Senator Biden:

Enclosed is my statement for insertion in the record of the proceedings dealing with the nomination of the Hon. Clarence Thomas as an Associate Justice of the United States Supreme Court. I have taken the liberty of enclosing 13 copies for distribution to the other members of the Committee.

I further note with interest that you plan to hold hearings on the procedures involved in future confirmation proceedings. I would appreciate the opportunity of appearing as a witness in that regard.

Very truly yours,

J. Radley Herold, J. C. C.

JRH:mh
Enclosures

I wish to acknowledge my appreciation to the Committee for its kindness in permitting me to make a written statement for insertion in the record of the proceedings dealing with the nomination of the Hon. Clarence Thomas as an Associate Justice of the United States Supreme Court. This statement will consist of observations not related solely to the hearings which have just been concluded but also to some study of hearings in the past decade and the history of the process before that. To the extent that any of my observations contain any criticism it is meant to be constructive only and for the future use and benefit of the Legislative and Executive branches as well as future nominees. Furthermore, the observations made and the opinions expressed are solely my own and are not to reflect any official opinion - nor could they - of the Court of which I am a member. And lastly, I have stated no opinion - as it may be inappropriate to do so - as to whether Judge Thomas should be confirmed or not. My purpose in the making of this statement is to set forth my observations and concerns with regard to the confirmation process with a view toward ensuring that the most qualified persons are nominated and confirmed as Justices of the United States Supreme Court.

A Judge, regardless of the manner by which chosen or the Court for which chosen, must possess the following

qualities: Integrity, judicial temperament, an open mind and the willingness to listen, a background of diversified experience, extensive contact with people and an appreciation of the human consequences of his or her decisions, the discipline necessary to decide issues on the facts presented and an interpretation of the law as they apply to those facts, scholarly qualities and a sense of humor.

The first quality, integrity, is the most important for without it all of the others are of little value. The last, a sense of humor, often spoken of but never made a criterion, should be made one. A Judge possesses enormous authority and power and must deal every day with the most serious of issues affecting other human beings. A sense of humor will guarantee that these issues are put into proper perspective. It will further show the necessary ingredient of humanity in all of the decisions. And lastly a sense of humor will cause the Judge to realize that no matter how serious the issues may be that he or she must never take himself or herself too seriously.

It is readily acknowledged that both the President and the Senate have serious and important roles in the process of selecting Supreme Court Justices which should not be ignored or diminished. It is further acknowledged that both the Executive and Legislative branches are political in

nature and respond accordingly to their respective constituencies. That is altogether proper under our Law and our system of Government. But the Judicial branch is and should remain non-political. It is, by its nature, a non-democratic body responsible only to interpret the constitutional mandates and duly enacted legislation. It is not a body answerable to the will of the People expressed by a majority vote. Its loyalty is and must remain to the Law.

In recent years the proceedings involving nomination and confirmation of Supreme Court Justices have taken on features which are of concern to me. And this is so regardless of the political environment that may have motivated the appointment or its connection, if any, to the "direction" the Executive branch may wish the Court to go.

Every citizen expects that their Judges will view a legal dispute with an open mind, listen to all of the evidence in an impartial manner and after hearing all of the arguments, make a decision based on the facts as determined and an interpretation of the applicable law. No one wants a Judge to prejudge the matter and decide the case before it is heard.

As Senators you have the solemn responsibility of deciding whether or not to consent to the nomination after hearing all of the testimony of the nominee and the various witnesses. Yet in recent years, on some occasions, some

members of the Judiciary Committee and of the Senate as a whole, following the nomination and at the beginning of the hearings have publicly stated their opinion of the nominee and how they intend to vote. This should not be taken as meaning that a Senator does not have a right to express an opinion and vote as they see fit. They clearly have those rights which must not be diminished. It is the timing with which they exercise those rights which is of concern to me.

They are taking part in a procedure by which a judicial nominee will or will not be confirmed. They are properly concerned that the judicial nominee, if confirmed, will be impartial and render legal decisions only after hearing the case. Yet some Committee members, by announcing their decisions before hearing the "case", both for and against the nominee, are exhibiting an appearance of partiality and consequently diminishing the integrity of the Committee and the Senate as a whole. It may well be that such announcements are engaged in as a result of some tradition with respect to such hearings or without any in-depth thought as to the consequences but nonetheless they leave an impression on the public at large of a prejudgment by such Senators.

There are both valid and inappropriate areas of inquiry by the Committee of a judicial nominee. The personal background of the nominee, education, employment,

any judicial or litigation experience, the published writings, and, if already a Judge, the opinions of the nominee, as they are now, should be examined.

The general legal philosophy of the nominee may also be explored to the extent that it reveals the knowledge the nominee has of the areas of law which may come before the Court. More importantly, it will reveal and the nominee should be asked about the method by which he or she will go about studying the issues and reaching a decision. This should be asked regardless of whether a nominee is already a Judge or not.

The questioning of the nominee by the Committee as to his or her prior writings and opinions in connection with their general legal philosophy is entirely proper for another reason. It will assist the Committee in determining the integrity of the nominee. The Committee must be aware, however, of the capacity in which the nominee wrote or spoke. It is one thing to express your own personal views. It is quite another to advocate a position on behalf of an employer or client. And it must not be forgotten that the personal views of a nominee, published or otherwise, although given on research by the nominee, are without the benefit of a pending lawsuit and the input of opposing counsel for the parties. Other than this reasonable distinction little else will justify a nominee in his or her

explanation of contradictory opinions or statements except a sincere and acknowledged change of mind or opinion. This may come about from the intellectual growth of the nominee. No nominee should be concerned about honestly changing their opinion about a subject. It is a sign of maturity and growth - not otherwise. What is not acceptable is an attempt to reconcile or to deny that various statements are contradictory when, in fact, no other reasonable conclusion could be drawn.

The most difficult area of inquiry for the Committee is where they inquire as to those issues which are likely to be before or are before the Court.

It is a clear violation of the Canons of Judicial Conduct for a nominee, whether already a Judge or not, to express an opinion on a matter in dispute or likely to be before the Court. And the members of the Committee - who are lawyers - should know that better than anyone else. For a nominee to answer such a question not only violates the Canons but also establishes a basis upon which he or she may rightfully be asked to recuse himself or herself from a matter which is or comes before the Court. In so doing the nominee deprives the Court and the Country of both a vote and a voice on a matter, no matter what the outcome.

While the nominee must be the judge of when to draw the line it does little good for the members of the

Committee to continually ask questions which they must realize cannot be answered by any nominee who wants to abide by the Canons.

Let us theorize a future situation: the composition of this Committee were Republican by majority, Roe v. Wade had been reversed some 10 years before, the White House was occupied by a Democrat perceived to be liberal and the nominee to the Supreme Court was perceived to be a liberal with a "pro-choice" paper trail. Would that entitle the "conservatives" on the Committee to demand to know how the nominee would vote on a pending case likely to reinstate Roe v. Wade? The answer is clearly: No. Neither the Canons nor basic common sense should change dependent on the political makeup of the Executive or Legislative branches or the political climate of the country. These questions must not be asked by the Committee but if asked must not be answered by the nominee. And this theoretical example with regard to Roe v. Wade can also be applied to other "landmark" decisions, Miranda v. Arizona, Mapp v. Ohio, New York Times v. Sullivan and Texas v. Johnson to name just a few.

The nominees should also be aware that their conduct before the Committee may also raise serious concerns. With the present day emphasis on the "paper trail" of a nominee, some nominees may possess a minimal

trail or none at all. If such a nominee were still to come before the Committee claiming no opinions, published or otherwise, on any of the landmark decisions of the Supreme Court, that position could reasonably cause Committee members to conclude a number of things about the nominee: (1) he or she has too little life experience to be a member of the Supreme Court; (2) the nominee is lacking in truthfulness and basic integrity; or (3) the nominee does not possess the intellectual capacity to be a member of the Court.

The nominees ought to be aware that they should not appear to choose among the areas likely to be before the Court as to which they will speak about and which they will not. They should decline to answer all in that category lest they violate the Canons on Judicial Conduct and give an appearance, if not an actuality, of seeking to curry favor with certain Committee members on a matter in which the latter have a known interest and view.

It also seems apparent that it is almost expected of a nominee that he or she must disavow all of their previously held personal views. Judges do not ask that of jurors at trials. Jurors are asked to put aside their personal views on the law and other subjects for the purpose of the matter before them but not otherwise. Judges should not be asked to do more than that. To ask Judges to do so

is to strip them of their intellectual abilities and their independence of thought.

Any forthright Judge will tell you that they approach cases with a considerable number of thoughts in mind because they have read the court file beforehand. But if asked what their decision is going to be at that point they have none. And though they will have tentative reactions during the case they will never know what their decision will be until after all of the evidence is in, the briefs re-read and the arguments heard. And this is so whether a Judge has strongly held personal beliefs or not. Qualified Judges possess a discipline by which they instinctively put their personal views aside and decide the case on its merit or lack of merit as determined by the applicable law.

The Executive branch, as part of its role in the process, has taken to extensive preparation of the nominees. There is nothing inherently wrong with that. There is much to be learned from such sessions as to the procedures of the Committee so long as the "handlers" do not "spoon feed" the nominee resulting in repetition of that information to the Committee. The nominee should be as tactfully courteous as possible with the "handlers", listen politely, do his or her own homework as well and then speak frankly to the Committee.

It has been reported that in some circles that every question asked must be answered by the nominee in some fashion. It is hoped that this does not mean that a nominee must attempt an answer in areas with which he or she is not familiar. Any such advice, if it is being given, should cease. Anyone with any common sense knows that there will be areas of the law about which a nominee will be unfamiliar. There is no shame or disqualification for a nominee to admit such unfamiliarity. The public expects no different and any other approach will only court disaster.

While the Executive branch has every right to nominate whomever they want they must be mindful of the reason why they nominate an individual. While it may be to pursue a certain philosophy or change the direction of the Court it may not "sell" as being "too obvious". And history nevertheless tells us that there is no predictability as to the decisions which will be made by the Judges no matter what the Executive branch may hope or expect. Associate Justice Hugo Black, who once had a minor association with the Klu Klux Klan, established himself as a renowned Justice with his opinions on the breadth of various Constitutional freedoms. Earl Warren, a California prosecutor, who urged the incarceration of Japanese-Americans after the attack on Pearl Harbor, wrote the unanimous opinion in Brown v. Board of Education and the majority opinion Miranda v. Arizona.

Felix Frankfurther, regarded as liberal by some, dissented in the Mapp v. Ohio decision which mandated the exlusionary rule on state courts in criminal cases. If nothing else this shows that if perchance confirmed nominees who may have had no apparent feel for independence when they arrived on the Court gained it by growing on the Court.

These are but a few of my observations. But I believe them to be significant and worthy of consideration by the Committee, the Executive branch and future nominees not only to the Supreme Court but to other Federal Courts as well. Once again I appreciate the opportunity given me by the Committee to submit this statement on a very important matter - ensuring that the most qualified persons are nominated and confirmed as Justices of the United States Supreme Court and other Federal Courts.

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