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**CLARENCE THOMAS: THEN AND NOW**

In his first three days of testimony before the Senate Judiciary Committee this week, Judge Clarence Thomas repeatedly contradicted his previous record. Much of the discussion of those contradictions has focused on his testimony concerning Natural Law and its role in constitutional adjudication. Those contradictions are extremely significant, but the nominee has also contradicted himself on a variety of other issues.

The following quotations contrast Clarence Thomas's sworn testimony to the Senate Judiciary Committee with his previous record.

**Natural Law and Its Use in Constitutional Adjudication**

**Then** -- Clarence Thomas repeatedly advocated a "jurisprudence" grounded in "the Founders' notions of natural rights." (Notes on Original Intent) He argued that "without recourse to higher law, we abandon our best defense of judicial review" and that "higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges." ("The Higher Law Background of the Privileges and Immunities Clause," (hereinafter "Higher Law"), *Harvard Journal of Law and Public Policy*, vol.12, no. 1, Winter 1989 at 63-64).

**Now** -- Clarence Thomas claims that "I don't see a role for the use of natural law in constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory." (Hearings before the Senate Judiciary Committee on Clarence Thomas to become an Associate Justice of the Supreme Court (hereinafter "Hearings"), Sep. 10, 1991 at 137). Later, in the hearings Thomas offered a somewhat different view, stating that "there is no independent appeal to Natural Law," but "what one does is one appeals to the Drafters' view of what they were doing, and they believe in Natural Law." (Hearings, September 12 at 41.)

**Opinion Concerning Roe v. Wade**

**Then** -- In a critique of so-called judicial activism, Clarence Thomas wrote that the "current case provoking the most protest from conservatives is Roe v. Wade." (Higher Law at 63 n. 2.) Thomas wrote in a black newspaper that there was "tremendous overlap of the conservative Republican agenda and Black beliefs on abortion" and other issues. ("How Republicans Can Win Blacks, Chicago Defender, Feb. 21, 1987)

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Now -- Clarence Thomas told the Committee that "I cannot remember personally engaging" in any discussion about Roe v. Wade and "I do not" have a "personal opinion on the outcome in Roe v. Wade." (Hearings, Sep. 11, 1991 at 104-05)

#### White House Working Group on the Family

Then -- Clarence Thomas was the highest Administration official who served on the White House Working Group on the Family, which issued a report sharply criticizing as "fatally flawed" a series of decisions protecting the right to privacy, including Roe v. Wade. The Report notes that such decisions could be "corrected" either by constitutional amendment or by "the appointment of new judges and their confirmation by the Senate." (White House Working Group on the Family Report to the President, December 2, 1986 at 12)

Now -- Clarence Thomas claimed that "To this day, I have not read that report" and that he does not necessarily agree with several of its criticisms of privacy decisions (Hearings, Sep. 10, 1991 at 155,156-7).

#### Endorsement of Lewis Lehrman's Anti-abortion Article

Then -- Clarence Thomas called Lewis Lehrman's article, entitled "The Declaration of Independence and the Right to Life: One Leads Unmistakably to the Other," a "splendid example of applying natural law to the right to life." (Speech before the Heritage Foundation, June 18, 1987 at 22)

Now -- Clarence Thomas says that he "did not endorse the article," does not agree with it, and was attempting to use it simply to "convince my audience" concerning his views of civil rights. He testified that "I do not believe that Mr. Lehrman's application of natural law is appropriate." (Hearings, Sep. 10, 1991 at 195-7; Hearings, Sep. 11, 1991 at 97)

#### Views on the Ninth Amendment

Then -- Clarence Thomas criticized the "invention" and "activist judicial use of the Ninth Amendment," and wrote that the Ninth Amendment "will likely become an additional weapon for the enemies of freedom." ("Civil Rights as Principle versus Civil Rights as Interest," in D. Boaz, ed., Assessing the Reagan Years, Spring 1987 at 398-9; "Higher Law" at 63 n.2)

Now -- Clarence Thomas testified that "I think that the only concern I have expressed with the respect to the Ninth Amendment, Senator, has been a generic

one" that a judge "who is adjudicating under those open-ended provisions tether his or her rulings to something other than his or her personal point of view." (Hearings, Sep. 11, 1991 at 110)

#### Participation in Lincoln Review

**Then** -- Clarence Thomas served for ten years on the Editorial Advisory Board of the Far Right Lincoln Review and published three articles in the journal. It was the only scholarly publication with which Thomas was affiliated. (The three articles were "With Liberty...For All," Lincoln Review, Winter - Spring 1982 at 41; "Remembering an Island of Hope in an Era of Despair," Lincoln Review, Spring 1986 at 53; "Thomas Sowell and the Heritage of Lincoln," Lincoln Review, Winter 1987/88 at 7.)

**Now** -- Clarence Thomas said, "the role of a member of the advisory board was purely honorary. There were no meetings. There was no review of literature. There were no communications. There was no selection of material that was included in the journal. Indeed, I don't think that I have read a copy of the Lincoln Review in two or three years." (Hearings, Sep. 11, 1991 at 175)

#### Jay Parker and South Africa

**Then** -- At an EEOC staff meeting in 1986, Clarence Thomas discussed for 45 minutes the representation of South Africa by his friend Jay Parker, according to former Thomas aides. (Newsday, Sep. 12, 1991) In 1987, according to Foreign Agents Registration Act records, Thomas attended a dinner for the South African ambassador which Parker helped to arrange. (IPAC filings under the Foreign Agent Registration Act, Sep. 10, 1987; Newsday July 16, 1991).

**Now** -- Thomas testified that "I was not aware, again, of the representation of South Africa itself" by Jay Parker. (Hearings, Sep. 11, 1991 at 174)

#### Level of Protection for Economic Rights

**Then** -- Clarence Thomas argued, "What we need to emphasize is that the entire Constitution is a Bill of Rights; and economic rights are protected as much as any other rights." (Speech to the American Bar Association, Aug. 11, 1987 at 10)

**Now** -- Clarence Thomas claimed, "There is also a reference to property in our Constitution. That does **not necessarily mean** that in constitutional adjudication that the protection would be at the same level that we protect other rights. Nor

did I suggest that in constitutional adjudication that would happen. But it certainly does deserve some protection." (Hearings, Sep. 10, 1991 at 144)

#### Views on Discrimination against Women in the Work Place

Then -- Clarence Thomas argued that "the disparity in hiring figures between men and women" in cases like the Sears case could "be due to cultural differences between men and women, educational levels, commuting patterns, and other previous events." (Juan Williams, "A Question of Fairness," Atlantic Monthly, February 1987 at 81, quoting Williams.) Thomas praised an article by Thomas Sowell, that argued that historic pay and job inequities between men and women were due largely to women's personal choices, as a "useful, concise discussion" which "presents a much-needed antidote to cliches about women's earnings and professional status." ("Thomas Sowell and the Heritage of Lincoln," Lincoln Review, Winter 1987/88 at 15-16)

Now -- Clarence Thomas maintains that "I did not indicate that, first of all, I agreed with [Sowell's] conclusions" and that "my only point in discussing statistics is that I don't think any of us can say that we have all the answers as to why there are statistical disparities." (Hearings, Sep. 10, 1991 at 189,193)

#### Violations of Age Discrimination Law

Then -- Thomas stated that "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical and economic reasons, make sense. Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary." (ABA Banking Journal 9/85 at 120)

Now -- Clarence Thomas claimed that "I have never condoned violations of the Age Discrimination in Employment Act," although "it would make sense to an employer to think that, well, this approach is okay." (9/12 at 110,112).

#### Violation of Court Order while at Office of Civil Rights

Then -- While head of the Office for Civil Rights at the Department of Education, Thomas admitted in federal court that he was violating "grievously" a court order concerning OCR handling of civil rights cases. The court concluded that "the order has been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court." (Adams v. Bell, 3/12/82 Tr. at 61 &

3/15/82 Findings at 3)

Now -- Clarence Thomas testified that "we did everything we could to comply" with the court order and that the court recognized that "we were doing all we could" and "that it was impossible for us to comply with it." (9/12 at 161)

### **Run-amok Judges**

**Then** -- Clarence Thomas wrote that "higher law is the only alternative to the willfulness of both run-amok majorities and run-amok judges." ("The Higher Law Background of the Privileges and Immunities Clause," Harvard Journal of Law and Public Policy, vol. 12, no. 1, Winter 1989 at 63-64)

**Now** -- In response to Senator Kennedy's question of whether the nominee could identify any run-amok judges, Thomas said: "Senator, I thought about it when I looked at that language again, and I couldn't name any particular judge." (Sept. 13 P. 145)

### **Views on Oliver Wendell Holmes**

**Then** -- Clarence Thomas stated that "If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes." Quoting Walter Berns, a leading natural law advocate, and Robert Faulkner, Thomas said of Holmes: "No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach . . . what a people needs to govern itself well," and "what [John] Marshall had raised Holmes sought to destroy." Speech to Pacific Research Institute, August 4, 1988 p.13.

**Now** -- Clarence Thomas characterized Holmes as "a great judge." He stated that "we might disagree here and there" but that "he is a giant in our judicial system." September 13 P. 145.

### **The Nomination of Robert Bork**

**Then** -- Clarence Thomas stated that "Judge Bork is no extremist of any kind. If anything, he is an extreme moderate." (Speech to Pacific Research Institute Aug. 10, 1987 p. 16). According to Thomas, it "reflected disgracefully on the whole nomination process that Judge Bork is not now Justice Bork." (Speech to Cato Institute Oct. 2, 1987 p. 2) Thomas referred to the "spectacle of Senator Biden, following the defeat of the Bork nomination, crowing about his belief that his rights were inalienable and came from God." (Speech to Pacific Research

Institute Aug. 4, 1988 p.12)

Now -- Clarence Thomas testified that "I do not think that this committee and did not say that this committee engaged in" improper characterizations or conduct with respect to the Bork nomination, but "my view was that Judge Bork was qualified as to his temperament, as to his competence, and certainly qualified as to his overall abilities." (Sept. 13 P. 103,104)

#### Statements about Oliver North and Congress

Then -- Clarence Thomas stated that "I thought that Ollie North did a most effective job of exposing Congressional irresponsibility. He forced their hand, and revealed the extent to which their public persona is a fake." (Speech at Wake Forest, April 18, 1988 p.21). He commented "As Ollie North made perfectly clear last summer, it is Congress that is out of control." (Speech at Univ. of Virginia March 5, 1988 p.13) (emphasis in original) According to Thomas, North's testimony showed that the defense of limited government "is still possible," and the Iran-Contra committee "beat an ignominious retreat before Colonel North's attack on it, and by extension all of Congress." (Speech to Cato Institute, Oct. 2, 1987 p.13)

Now -- Clarence Thomas testified that "I do not think that I condoned" improper conduct by North. "I think myself, like many others, that in that highly charged political environment that Col. North took the advantage to himself and used that environment to his advantage, rather than succumbing to it." (Sept. 13 P.92)

#### Obligations of government and compassion

Then -- Clarence Thomas stated that "I, for one, don't see how the government can be compassionate. Only people can be compassionate and then only with their own money, their own property and their own efforts, not that of others." (Speech at California State Univ. April 25, 1988 p.22) He advocated changes "affecting our governance in all areas," including not only "racial preference schemes, and welfare and housing policy, but so-called middle class welfare programs as well", under which government "would return to limited government." (Speech at Wake Forest Univ. April 18, 1988 at 25-6)

Now -- Clarence Thomas testified that government "has an obligation" and "as a community, as people who live in an organized society, we have an obligation as a people to make sure that other people are not left out." (Sept. 13 P.86)