

Senator Kohl returns, which should be momentarily, and at that time I would ask the staff to inform him that I would like him to begin his questioning before I return or chair the hearing and start the matter up.

We will recess until Senator Kohl arrives.

[Recess.]

Senator KOHL [presiding]. The hearing will come to order.

We are awaiting the return of Chairman Biden, but in the interest of expediting the hearing, I will begin my conversation with Judge Thomas.

Let me say, Judge, as I said to you a minute ago, I am not sure if I will be back for round three, but I have enjoyed having a chance to talk with you this week. I think you have been just as forthcoming as you possibly could be with the committee, to the best of your ability, and to the best of my ability I have tried to be honest and fair with you, and it is an experience that I will not forget and I have enjoyed having a chance to be with you.

Judge THOMAS. The same here, Senator.

Senator KOHL. I would like to ask you for a minute about cameras in the courts, Judge Thomas. As you know, many, many States have cameras in the courts to some extent, and I think it has been highly successful in helping to educate the public.

Just in passing, I would like to say that I watch television perhaps 10 hours a week and I would say 9 or 9½ hours of C-SPAN, which I think does an outstanding job of educating the American public about public affairs and Government and things that are really important in our society, if we are to foster democracy and its growth and enlightenment—which certainly is very important nowadays.

But we do not have cameras in the Supreme Court. If you had to make a judgment—yes or no—would you support the experimentation, at the very least, with cameras in the Supreme Court? After all, as you know, virtually everybody in this country knows who Judge Wapner is, and no one knows who Chief Justice Rehnquist is. Can we do something about that?

Judge THOMAS. Maybe we should give Chief Justice Rehnquist his own sit-com. [Laughter.]

Senator I too watch C-SPAN and, as a citizen, have had the same reaction. It is a wonderful opportunity to see our governmental processes at the national level disseminated over the entire country.

With respect to the court systems, the only reservation that I would have is that it not be disruptive of the exchange between the Court and the individuals who appear before the Court. It is a different environment, particularly at the appellate level than perhaps at the trial court level, but I have no objection beyond a concern that the cameras in the court room be unobtrusive or as unobtrusive as possible. Of course, that is just my own reaction. I have not looked at that in detail.

Senator KOHL. So you have a positive feeling about it, you think if we can do it without disrupting the activities of the Court it would be a good thing for the American public?

Judge THOMAS. I think it would be good for the American public to see what is going on there. I do not know how long they would

be interested in what goes on in appellate argument. It tends to be not so—it does not rivet your attention, except maybe perhaps in the cases that have garnered a tremendous amount of publicity, but I see no reason why, beyond that concern, the American people should not have access to the courts.

Senator KOHL. All right. Judge Thomas, no doubt you have been reading the newspapers and listening to members of this committee. It is clear that many here on the committee seem troubled by your failure to answer some of our questions, and others on the committee seem troubled because they think that you have been badgered too much.

In terms of your own role and our role, what parts of the process would you keep the same, if you could make a recommendation at this time, and what do you think we ought to change to make these hearings as productive and useful as possible—which is, after all, what we are attempting to do in behalf of the American public that we serve?

Judge THOMAS. Well, you know, Senator, I probably would be freer to make that kind of an analysis after the fact. [Laughter.]

I would certainly love to come back. [Laughter.]

Senator, the process of advice and consent is an important process, it is critical, particularly for judges. In the executive branch, we have appointments and serve at the pleasure of the President. As judges, we serve for life. This process may have its flaws, but it is so important that, with flaws and all, it is worthwhile.

From my own standpoint, just going through the process, of course, I would like to have been able to have gone through it in a shorter period of time, but that is not an indication of anything other than the manner and the timing of my appointment, but I think that the process has been overall a very fair process to me.

Senator KOHL. All right. I would like to quote from today's New York Times, and ask your comment:

Justice Souter did not feel pressed to remake himself, rather, his fluent testimony gave the impression that his entire adult life had been a natural preparation for being a Justice. On the other hand, in Thomas' case, strenuous efforts have been made to fit what he has described as the proper judicial role. Judge Thomas has at times given the appearance of having wrenched himself from his most authentic personal moorings.

Do you agree, disagree, or have some feelings about that—some comments you would like to make, as we try to understand you and your background, where you are today and where you have come from?

Judge THOMAS. Senator, let me make two points, and one I alluded to this morning. I think that various individuals created their own images of me and what they see is that the real person does not fit those images. I think the more accurate assessments to follow would be the people who have worked with me every day over the past or for significant portions of my adult career, both in the executive branch and in the judiciary, as well as my other jobs, and not to individuals who have created this persona.

I am the same Clarence Thomas. I have been a sitting Federal judge, Senator, for about a year and a half, and the person that you see here is the same sitting Federal judge, someone who at-

tempts to be openminded, who works at it, being impartial, objective, listen and to work through very difficult problems.

And a final point: When I was in the executive branch, as I indicated to you yesterday, there were battles and there were give and takes. I participated in that, but I am not in the executive branch any more, I am not a part of the tension between the two political branches. I am a sitting Federal judge, and those are entirely different roles, and to the extent that individuals may see legitimate differences, they are the differences in the roles.

Senator KOHL. Would you agree that if, in Justice Souter's case, we were seeing a person more natural and comfortable in the judicial setting, it is simply a reflection of the fact that he had been in that setting for a much longer time than you have been in the judicial setting?

Judge THOMAS. I think there is an additional factor, as well as that, and that is that he did not have 138 published speeches in the executive branch and he was not in agencies in the executive branch involved in very, very controversial policies and difficult policy areas. I brought with me a background in some very difficult areas and areas in which people have strong, but honest opinions on different sides. I think that is an important difference.

If I had had the opportunity to remain, as he did, in an environment as a judge, without those controversial sorts of policy-making positions, I think much the same would have been said about me, because that is more suited to my personality.

Senator KOHL. All right. Judge Thomas, you have been extremely critical of the Senate's rejection of Judge Bork. In fact, in a 1987 speech to the ABA Business Law Section, you said that the Senate's failure to confirm Judge Bork was "a tragedy." I am interested in your views on how the Senate should discharge its advice-and-consent responsibility, so would you tell us what it was about the Senate's rejection of Judge Bork that was so improper?

Judge THOMAS. I guess, Senator, the point for me there and, again, my approach if I were making the decision, I think each member of this body would have to decide for himself, 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.

The others may have had disagreements and for other reasons felt that he should have been excluded and, of course, you have to discharge your duties in the best way you see fit, but that was my view at the time.

Senator KOHL. So, you are saying your overall assessment of the man is that he was qualified, and that fact simply makes his rejection, in your opinion, a tragedy, just that simple overall assessment that you—

Judge THOMAS. The other aspect of it—

Senator KOHL. Why was it—

Judge THOMAS. I thought, again, as a person and someone who knew Judge Bork, that the publicity surrounding him and the characterizations of him were ad hominem in nature and that the articles that I read and the things that had been said about him simply, even if there were substantial disagreements on attack of the person, I have, even as I indicated during my own confirmation

processes, I think *ad hominem* attacks on individuals, even when there are legitimate differences, are just simply wrong.

Now, I do not think that this committee and did not say that this committee engaged in that, but that was certainly a part of the overall process from the outside.

Senator KOHL. And had you been sitting on this committee, the chances are you would have voted for his confirmation?

Judge THOMAS. Again, my view from where I sat, was, as to his competence, as to his temperament, that he was qualified.

Senator KOHL. For the past few days, Judge Thomas, you have repeatedly suggested that this committee disregard a number of the articles you wrote and speeches that you made while you were in the executive branch. Using the same logic, should the Senate have ignored Judge Bork's writings, because when he did them he was in another area—he was an academic?

Judge THOMAS. I think, Senator, that the one point I made was that if I gave speeches as a Federal judge, I thought that particularly those should be closely examined, what I said as a Federal judge, my opinions while I was in the judicial branch of Government, in the judiciary.

I think that you have to weigh or discount to the best of your abilities or in your judgments speeches that are made outside of the judiciary, when one has a different role, for example, a person who is a law professor or a person who is in the executive branch, but I think it would be important to look closely at a speech that I made as a judge.

Senator KOHL. What I said is that he made many of those speeches when he was an academic, and you made many of the speeches that you have asked us to disregard when you were outside of the judiciary. So using the exact same logic, it would be consistent for you to say that you would support the contention that the things Judge Bork said when he was an academic should, at his request, be disregarded?

Judge THOMAS. I would not say disregarded, Senator, and I do not think I said disregard everything I have written. I think what I suggested is that is a different role.

Senator KOHL. Qualified or whatever the word is.

Judge THOMAS. Exactly. I think that they are different and that difference should be taken into account. One is freer to make comments outside of the judiciary and to discuss issues in different ways than one is within the judiciary, just as one is freer to make policies and make decisions in a different way. In the judiciary, it is more confined and I think appropriately more neutral.

Senator KOHL. Judge Thomas, throughout the hearings, when asked about specific speeches or articles, you have said that you have not read or reviewed the articles or speeches recently. The question I would like to ask is why you have not or why you did not, in preparation for this hearing. I would have expected that you anticipated being questioned about them. Why is it that you did not read some of these obvious things that you or your advisers would have forewarned you we were going to be talking about and deserved a look? Why wouldn't you have become familiar with them?

Judge THOMAS. I think, Senator, there are a lot of speeches and it is hard to review all of them, but what I have attempted to do is review some here and some there, the ones that I felt were going to be raised.

Senator KOHL. Well, let us talk about the Lew Lehrman article. Now, that was clearly a focus since the day that you were nominated, and it could have been understood by you—or anybody with whom you were having breakfast from time to time—that this was going to come up. There has got to be some reason you did not read it other than you didn't think it was important. I mean you knew we were going to talk about it, and yet you said at this hearing that you haven't read it and are not really fully familiar with it. I want to understand that from the point of view of one who wants to believe what you say, so explain it to me a little better.

Judge THOMAS. Well, I re-read my speech at the Heritage Foundation. What I suggested was I did not read his article. There is just so much material, Senator. I attempted to read as much of my own material, as well as to consider the fact that there was going to be just a vast body of legal material, as well as my biographical material, my background, my days at EEOC, my days at the Office for Civil Rights, my opinions on the court.

Senator KOHL. Yes, I understand, but this was an article that had been referred to dozens of times all summer and, as I recall, you came here—and correct me if I am wrong—but I think you said, look, I can't really talk about that article, because I haven't really read it or I will have to go back and re-read it, so don't hold me responsible for its content, word for word, because I am not really familiar with it. That was part of your distancing yourself, however sincerely, from natural law and its applicability.

Again, this may be my last opportunity to speak to you, and I want to walk away with the strongest positive feelings I can, I am puzzled as to why, in all the hours that you spent this summer thinking about this week, why that article would not have been an article that, in your mind or your friends' minds, wouldn't have been something that you have to read it and understand what is in it, because it is going to come up?

Judge THOMAS. I guess to this extent, Senator, that my response to questions concerning that article was that I cited it or praised it for a very limited purpose or made comments about it for a very limited purpose, and I stated what that purpose was. And that purpose didn't suggest from my standpoint the need to go back and learn everything about that particular article.

The point that I am trying to make with respect to the volume of other material, there were a lot—there were any number of areas beyond that that have come up also that I have had to attempt to address.

Senator KOHL. Well, that is true. But I still want to say it was clear that this article was going to be discussed in detail because of what you said about it with relationship to natural law and its applicability. It was clear.

There may have been other things, too, which you are alluding to, but it was clear that this one was going to be talked about. So I think it is logical for me to ask the question and expect some answer on that—that I can feel comfortable about—why you

wouldn't have come here fully familiar with the article and what it said, and the fact that you had regarded it with great admiration

Judge THOMAS. Well, I guess I would have to respond to that in a similar manner to the way I just simply did, and that is that I did not refer to it for the portions of the article that raised the questions.

Senator KOHL. OK. Last subject, and that is antitrust law. Judge Thomas, last year we celebrated the centennial of the Sherman Act. For over 100 years, this landmark measure has protected the principles that we consider most important—of competition, fairness, and equality. The antitrust laws are important to us because they ensure that competition among business of any size will be fair and that consumers will pay the lowest possible prices for all sorts of goods that they buy. These laws, as you know, are nonpartisan. They have been vigorously enforced by both Republican and Democratic administrations.

I know you have worked on antitrust issues as both an advocate and a judge. In fact, in a 1983 speech, you suggested that we create treble damages for violations of the civil rights laws so that they would have the same deterrent effect that the antitrust laws have.

My question is: Do you agree that the antitrust laws have been very important in shaping our economy?

Judge THOMAS. Senator, I think that all of our efforts, including the antitrust laws, to keep a free and open economy, one in which there is competitiveness, where the smaller businesses can have an opportunity to compete, and where consumers can benefit from that—those efforts, including the antitrust laws, have been beneficial to our country from my standpoint.

Senator KOHL. Judge, do you believe that an important purpose of the Sherman Act is to protect against consolidation of economic power to make sure that consumers are not charged high prices by large companies that have swallowed up their competition; that an important purpose of the Sherman Act is to protect against consolidation of economic power?

Judge THOMAS. Yes, Senator.

Senator KOHL. All right. So you believe the principal beneficiaries of vigorous enforcement of the antitrust laws are the consumers?

Judge THOMAS. I think the consumers and the country benefit from strong competition. We certainly as consumers benefit when there are new products, when there is development of products, when the quality of the products are improved as a result of competition, and, of course, when there is no temptation toward supra-competitive pricing; in fact, pricing is at the lower levels.

Senator KOHL. Well, then, how do you square this philosophy, with which I agree, with a decision like the *Illinois Brick* decision which bars the actual victim of any pricefixing from recovering damages, which would, for example, prevent mothers claiming that they were victimized by a conspiracy among infant formula companies from filing suit and collecting damages?

Judge THOMAS. I can't say exactly, Senator, how I would square it with that opinion. Certainly from my answers and certainly from my own position, I would be concerned if any consumers are having a more difficult time raising challenges in areas where they

have been harmed by practices of—unfair practices or unlawful practices of businesses.

Senator KOHL. So a decision like *Illinois Brick* is a decision that, if it came before you again in a similar fashion, you might review with great interest?

Judge THOMAS. I would certainly be concerned when consumers don't have access to our judicial system to have their injuries as a result of unfair practices or illegal practices or unlawful practices remedied.

Senator KOHL. All right. Judge Thomas, I am concerned that some judges would disregard the legislative intent of the antitrust laws and substitute their own ideological agenda, an agenda that may mean helping large corporations and ignoring consumers. I would like to read you a statement by Judge Posner of my own seventh court: "If the legislature enacts into statutory law a common law concept, as Congress did in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they interpret a common law principle, in which event the values of the Framers may not be controlling at all."

Do you believe that this is a legitimate approach to interpreting statutes in general, and should the courts interpret the Sherman and Clayton acts without exploring the legislative intent of their authors?

Judge THOMAS. Senator, as I have indicated—and I think it is very important for a judge to always be in search of, in adjudicating a case or interpreting a statute, the intent of the legislature and certainly not to ignore that intent and not to substitute his or her point of view or predilection for that intent.

Senator KOHL. All right. And the last question is on resale price maintenance, Judge Thomas. I want to talk about price-fixing for just a minute, because it is particularly of concern to me with my background. Since the *Dr. Miles* case in 1911, we have had in this country a rule that prohibits the manufacturer from dictating the retail price of his product. But some people have begun to argue that we should treat vertical price-fixing differently from horizontal price-fixing. And Robert Bork suggested in "The Antitrust Paradox," that it should be completely lawful for a manufacturer to fix retail prices.

Would you comment on that, please?

Judge THOMAS. Senator, I have no basis and have had no basis to take a position different from the one that finds that there are problems or concerns or perhaps illegality in vertical price-fixing or that vertical price-fixing be exempt from the antitrust laws—let me restate that.

I have had no reason or basis to argue that vertical price maintenance should be exempted from the antitrust laws.

Senator KOHL. Thank you very much, Judge Thomas.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. [presiding]. Judge, it is my responsibility to ask questions now, but one of our colleagues, again, based on our belief at the outset that we would end early on Friday, has a plane to catch. We are going to try to finish, but we may have to go late in order to finish. With the permission of my colleagues, I will go out of order and yield to him, and then return to myself. I would yield