

THE NOMINATION OF JUDGE CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT

*Senator Bill Bradley**

October 4, 1991¹

A friend of mine, Clifford Alexander, told me that one day in 1967 President Lyndon Johnson summoned him to the Oval Office of the White House. When he arrived, LBJ told this 33-year-old, African American, White House staff member that he had decided to appoint Thurgood Marshall to the Supreme Court.² LBJ asked him to sit down while he made some calls.

The President called Vice-President Hubert Humphrey. He called James Eastland of Mississippi, a plantation owner and the Chairman of the Senate Judiciary Committee. He called A. Philip Randolph of New York, visionary of the march on Washington. He called Roy Wilkins of the NAACP. He called Senators Everett Dirksen of Illinois, John McClellan of Arkansas, Sam Ervin of North Carolina.

The President told these men that Thurgood Marshall was an extremely talented man, that he was a well-known federal appeals court judge,³ that he had won fourteen of nineteen

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¹ See 141 CONG. REC. S14,377-79 (daily ed. Oct. 4, 1991) (statement of Sen. Bradley).

² Thurgood Marshall was sworn in as the ninety-sixth Supreme Court Justice on October 2, 1967. John MacKenzie, *Thurgood Marshall in THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, 3063 (Leon Friedman, & Fred Israel eds. 1969) [hereinafter JUSTICES]; see also William J. Brennan, Jr. et al., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23-76 (1991).

³ JUSTICES, *supra* note 2, at 3077. Marshall was nominated to the Second Circuit Court of Appeals by President Kennedy on September 23, 1961. Four prominent Southern Democrats on the Senate Judiciary Committee opposed Marshall's ap-

Supreme Court cases when he was Solicitor General of the United States, that he had won twenty-nine of thirty-two Supreme Court cases when he was General Counsel of the NAACP, that he had successfully argued *Brown v. Board of Education*⁴ before a distinguished Supreme Court consisting of two former Senators, a distinguished law school professor, a former U.S. Attorney General, a former State supreme court justice, and a former governor.⁵

He told them the times were changing, that America needed tolerance, that the days of discrimination should end, and that Marshall's appointment would signal hope to a generation of black Americans and progress to a generation of white Americans. He told them that Marshall rode the crest of a moral wave led by the courageous actions of an oppressed people, that Congress did change laws and courts did interpret those laws but that ultimately the biggest change had to be in people's hearts. He told them that by supporting Marshall people could demonstrate a change in their own hearts — a greater sense of generosity, understanding and a belief that racial barriers would continue to fall.

Johnson knew that Marshall's legal ability and character were equal to those Justices who sat on the *Brown v. Board of Education* court, but he also knew that confirmation could be difficult.⁶ He knew that the political stakes were high and that when it came to race, someone in American politics usually shouted the

pointment but the final vote on the Senate floor was fifty-four to sixteen in his favor. *Id.* at 3078.

⁴ 347 U.S. 483 (1954).

⁵ The Supreme Court Justices who decided *Brown* were Earl Warren, Chief Justice, former Attorney General of California, 1939-43, and former Governor of California, 1943-53; Hugo L. Black, Associate Justice; Stanley Forman Reed, Associate Justice; Felix Frankfurter, Associate Justice, former Professor of Law at Harvard University, 1914-39 (declined a nomination to the Massachusetts Supreme Judicial Court in 1932); William Orville Douglas, Associate Justice; Robert H. Jackson, Associate Justice, former Attorney General of the United States, 1940-41; Harold Hitz Burton, Associate Justice, former United States Senator from Ohio, 1941-45; Tom C. Clark, Associate Justice, former Attorney General of the United States, 1945-49; and Sherman Minton, Associate Justice, former United States Senator from Indiana, 1934-41.

⁶ JUSTICES, *supra* note 2, at 3086. Marshall's confirmation process was as controversial as his initial nomination to the Second Circuit Court of Appeals. The questioning by Southern Senators, particularly Strom Thurmond of South Carolina, was grueling. *Id.*

equivalent of "fire" in a crowded theater, even if there was no fire.

LBJ's motivation was above politics; his method was tenacious; his obligation was to a better American future.

In 1991, President George Bush nominated Clarence Thomas to the bench.⁷ He held a press conference and denied that race was even a factor in his decision. He mounted no campaign, made no major speech, and rallied no group of Americans. The President uttered only the "non sequitur" that "Thomas' life is a model for all Americans, and he's earned the right to sit on this nation's highest court." Virtually the only reason that George Bush gave in selecting Thomas was that he was "the best person for this position."⁸

Perhaps what the President meant to say was that Thomas is the best person for President Bush's political agenda. After all, he is the President who has been uniquely insensitive to black America,⁹ who has exploited racial division to attract votes more than once in his career, and who has asserted on countless occasions that in his America, sensitivity to equal opportunity for women and minorities will play no role in education or job placements. His tactical use of Clarence Thomas, as with Willie Horton, depends for its effectiveness on the limited ability of all races to see beyond color, and as such is a stunning example of political opportunism.

Many subtle and not so subtle messages are contained in Mr.

⁷ Clarence Thomas was nominated by President Bush on July 1, 1991. In brief, Justice Thomas' education and legal career are as follows:

B.A., with honors, College of the Holy Cross, 1971; J.D., Yale Law School, 1974. Office of the Attorney General of Missouri, 1974-77. Law Department, Monsanto Company, 1977-79. Legislative Assistant to U.S. Senator John C. Danforth (R-Mo.), 1979-81. Assistant Secretary of Civil Rights, U.S. Department of Education, 1981-82. Chairman, U.S. Equal Employment Opportunity Commission, May 1982 to March 1990. Judge, United States Court of Appeals, District of Columbia Circuit, appointed by President George Bush in 1990.

THE AMERICAN BENCH JUDGES OF THE NATION 76 (Marie T. Hough ed. 1992).

⁸ Maureen Dowd, *The Supreme Court: Conservative Black Judge, Clarence Thomas, Is Named To Marshall's Court Seat*, N.Y. TIMES, July 2, 1991, at A1.

⁹ See A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1015, 1019 (1992). Judge Higginbotham, a Judge on the Third Circuit Court of Appeals, recounts that both George Bush and Ronald Reagan have stated that the 1964 Civil Rights Act is unconstitutional.

Bush's nomination of Judge Clarence Thomas — messages that blur the meaning of a vote for or against Thomas. The messages say that Clarence Thomas did not need government intervention, so why should help be extended to others; that white America has no responsibility for the failure of blacks; that tokenism is the only acceptable form of affirmative action; that racism did not hold back Judge Thomas — why are other blacks always whining about its effect on their lives; and that an administration that nominates a black for the Supreme Court has answered the critics of its racial policies.¹⁰

Mr. President, I have struggled with the President's words that Clarence Thomas is "the best person for the position."¹¹ I thought about the 700,000 lawyers in America; I thought about the 10,000 judges; I thought about the 5000 law professors; I thought about the 875 black judges and the 200 black law professors. I thought about the ABA's rating of Clarence Thomas.¹² I concluded: to be truthful, I MUST disagree with the President.

But then, Clarence Thomas is as well qualified as some who now serve on the Supreme Court, and as a young man he still has room to grow — so why not give the President his man? After all, Judge Thomas has said in his confirmation hearings that he would be an impartial judge.¹³

But the skill of a judge is not some mechanical, computer-like, balancing act. Since the Supreme Court dispenses justice, what goes into one's conception of a just society will have an influence on decisions. So will one's reading of American history with its tensions between liberty and obligation; freedom and order; exclusion and participation; the dominant culture and the countless subcultures, and the individual and the community. Where a judge places himself in our historical narrative depends

¹⁰ *Supreme Court Nominees: Should Race and Gender Be Factors in Choosing Justices?*, Compare Lynn Hecht Schafran, Yes: "More Than a Symbol," 77 A.B.A. J. 38 (Sept. 1991) with Bruce Fein, No: *Don't Play Politics*, 77 A.B.A. J. 39 (Sept. 1991).

¹¹ See *supra* note 8.

¹² Joan Biskupic, *Search for Definitive Thomas Turns to the Hearings*, 49 CONG. Q. 2360 (weekly ed., Aug. 31, 1991). The American Bar Association (ABA) rated Clarence Thomas as "qualified" to serve on the Supreme Court although two members of the ABA Standing Committee on the Federal Judiciary had found Thomas "not qualified." In the past two decades, most nominees have received a "well qualified" rating, the highest possible endorsement from the ABA. *Id.*

¹³ See *infra* note 16.

on how thoroughly he learns our past, how he reads his times, how well he knows himself, how clearly he thinks about his values.

Clarence Thomas has opposed the use of government as a remedy for anything other than individual acts of discrimination against women and minorities, never mind that the poor cannot afford a lawyer.¹⁴ He has asserted that natural law can be applied to cases involving the right to privacy. He has said that natural law or a higher law "provides the only firm basis for a just and wise constitutional decision." In other words, one could invoke higher law to justify virtually any position. He has said, "Economic rights are protected as much as other rights," thus putting economic rights on equal footing with the right to speak your mind freely, or practice your religious faith, or live your life free of the unnecessary government intrusion into your private affairs.

Clarence Thomas took these positions in articles and speeches over a decade of right-wing political activism.¹⁵ For over 10 years he was one of the right wing's star mouthpieces. For over 10 years he was forceful and he was an advocate. Then in less than 10 days before the Judiciary Committee he backtracked or denied many of his past views.¹⁶

He said that these statements of political philosophy were made when he was an executive branch politician¹⁷ and that they

¹⁴ See Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 411 (1987), where Thomas concludes that:

[t]he legal debate over affirmative action, which has so long and so bitterly divided those who are concerned with civil rights, is behind us, and there is now an opportunity for cooperation and progress. As we begin, I would like to caution again that numerically based affirmative action is the easy, but rarely the best, solution.

Id. at 411.

¹⁵ See Elaine Jones, *Error of His Ways*, NATIONAL BAR ASSOCIATION MAGAZINE, Oct. 1991, at 9. Ms. Jones serves as Deputy Director-Counsel for the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund and discusses Thomas' advocacy of a "right-wing" political agenda. *Id.*

¹⁶ *Hearings on the Nomination of Clarence Thomas, Of Georgia, To Be An Associate Justice of the Supreme Court of the United States Before the Senate Judiciary Committee*, 102d Cong., 1st Sess. (1991) (forthcoming May 1992) [hereinafter *Hearings*].

¹⁷ Clarence Thomas served as Chairman of the U.S. Equal Employment Opportunity Commission (EEOC) from 1982 to 1990. "The Commission is a collegial body, generally composed of five members, which adopts regulations by majority

would not enter into his work as a Justice. In fact, by denying much of what he had long espoused, he implied that, rather than the very fiber of his existence, his political philosophy is like a set of clothes that you can change depending on the impression you want to create.

His chameleon-like behavior¹⁸ before the committee poses real dilemmas in considering his nomination.¹⁹ He presented himself to the committee, just as President Bush introduced him to the public, by highlighting the personal. He chose to emphasize not his reading of the law or his political philosophy, not his public record, but rather his politically attractive personal journey.²⁰ When questioned, he constantly referred back to the personal, as if he were a modern candidate repeating his sound bite.²¹

When one hears his story of growing up in Pinpoint, Georgia, a possible reaction is the one the President had after he listened with others to Thomas' opening statement: "I don't think there was a dry eye in the house," he said.

The great African American novelist Richard Wright, in writing about his great book, *Native Son*,²² gives another view of such tears, "I found I had written a book that even the banker's daughter could read and weep over and feel good about. I swore to myself that if I ever wrote another book no one would weep over it; that it would be so hard and deep that they would have to face it without the consolation of tears."

Today, fifty years after Wright penned those words, America cannot afford to sentimentalize black life. Significant parts of the African American community are being devastated and are self-destructing daily. Instead, we must take Wright's "hard and

vote." See *supra*, note 14, at 402; see also Clarence Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 STETSON U. L.J. 29 (1985).

¹⁸ Sharon McPhail, *Will the Real Clarence Thomas Please Stand Up?*, NATIONAL BAR ASSOCIATION MAGAZINE, Oct. 1991, at preamable page.

¹⁹ *The Thomas Hearings: How Should the Senate Confirmation Process be Reformed?*, Compare Bruce Fein, *Plugging Leaks*, 77 A.B.A. J. 42 (Dec. 1991) with Paul Reidinger, *Drain the Swamp*, 77 A.B.A. J. 43 (Dec. 1991).

²⁰ For a historical overview of the nomination process and the Senate function of advice and consent, see Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75 JUDICATURE 68-79 (1991).

²¹ *Hearings*, *supra* note 16.

²² RICHARD WRIGHT, *NATIVE SON* (1940).

deep" look. To hear Clarence Thomas' story as one of solely individual achievement is a dangerous mistake. I do not diminish his personal achievement or discipline. I admire it. But how he chose to share his story leaves out a lot.

On one level, it is a story of overcoming odds, of hard work, of tremendous dedication and self-reliance.²³ But it is also a more complex story of an authoritarian grandfather, women who sacrificed themselves for the man of the family, a dedicated group of nuns who gave guidance and inspiration, luck (as he says, "someone always came along"), historical change (civil rights movement) and attempts by Holy Cross and Yale at specific remedies to discrimination (affirmative action). Clarence Thomas' philosophy of the 1980's implied that only self-help was necessary, but his own life experience refutes that view. Self-help is necessary, but it is far from sufficient.

Clarence Thomas' self-help story does not ring true for those not lucky enough to get even the small breaks. But the conservatives love it. Who needs the state at any time in life if all of us can make it on our own? Who needs social security or college assistance or health care for the poor if everyone can make it on his own? Beneath the exclusive espousal of self-help is the bottom line of "I got mine, you get yours."²⁴

Personally, I believe through self-reliance, discipline, and determination a person can overcome virtually any obstacle — achieve any goal. But I also can imagine forces beyond your control — health, violent disaster, sudden economic trauma — that overwhelm your prospects.

Today, while conservatives preach the sufficiency of self-help, urban schools become warehouses rather than places to learn, black infant mortality rates and black unemployment rates skyrocket,²⁵ and a generation is being lost to violence in the

²³ See Ruth Marcus, *Self-Made Conservative; Nominee Insists He Be Judged on Merits*, WASHINGTON POST, July 2, 1991, at A1.

²⁴ See Haywood Burns, *Clarence Thomas, A Counterfeit Hero*, N.Y. TIMES, July 9, 1991, at A19. Mr. Burns serves as Dean of CUNY Law School at Queens and is Chairman Emeritus of the National Conference of Black Lawyers.

²⁵ On February 6, 1992, the U.S. Centers for Disease Control announced that the United States had achieved its lowest-ever infant mortality rate in 1989. In 1989, the rate was 9.8 deaths in the first year for every 1,000 live births. However, the disparity between white and black infant mortality widened. In 1989, the mortality rate for white infants was 8.1 while for blacks it was 18.6. See *Infant Mortality*

streets. Self-help is an important, individual conduct. And initiative deserves its rewards, but the need for equal opportunity in economic, educational, and political matters as well as real progress against poverty and crime require a role for the state.

Above all, those who win and climb up the ladder must never forget where they came from or mock the old culture or those who fell behind. Take Clarence Thomas' story of his sister. He said, "She gets mad when the mailman is late with her welfare check. That is how dependent she is."²⁶ Put candidly, Clarence Thomas seized on the welfare queen stereotype, even if it exaggerated the facts and even if it was his sister, in order to score conservative points. On one level, the event represents unfairness to a loved one, and on another, insensitivity to women generally. Is it any wonder that he says he has never discussed *Roe v. Wade*?²⁷

As I watched the confirmation process, I became profoundly saddened by the process itself and by what it did to Clarence Thomas.

People who have known Clarence Thomas since his college days agree on one thing. One thing stands out about him. No, not Pinpoint, Georgia - there are Pinpoint, Georgia stories in the lives of millions of Americans, both black and white, who have struggled against the odds, against discrimination, against the deck being stacked by majority culture or their economic superiors. No, the thing that separated Clarence Thomas from other people and marked his individuality was his point of view. He wore it like a badge — until he backtracked during the confirmation process. In doing what he perceived to be or was told to be necessary to attain one of the most important positions our country offers, he allowed himself to be manipulated into the ultimate indignity — being stripped of his point of view. The circle that

Hits New Low, Feb. 27, 1992, available in WESTLAW, News and Information Library, Facts on File, p. 142E3, Miscellaneous Section.

In January 1992, the U.S. unemployment rate stood at 7.1% for the second month in a row according to U.S. Labor Department data released February 7, 1992. The jobless rate for blacks rose in January 1992 to 13.7% from 12.7% in December 1991. See *Jobless Rate Unchanged in January*, Feb. 13, 1992, available in WESTLAW, News and Information Library, Facts on File, p. 91F1, United States Section.

²⁶ *Hearings*, *supra* note 16.

²⁷ 410 U.S. 113 (1973).

began in Pinpoint closed. In the beginning his individuality was denied due to *color*. Today his individuality is denied due to a calculated refusal to assert those views that gave his identity its boldest definition in the first place.

Clarence Thomas may be a good friend with a great sense of humor and someone of high moral character. One can be all that and still not be a person that you would want structuring the legal framework for our children's future.

For those like me who find his record troubling, his performance before the Judiciary Committee puzzling, and his life experience potentially an important influence on the present court, his nomination poses a fundamental question. Does one make the judgment on the basis of his individuality or his race? Does one vote against him because of his record or for him because, as Maya Angelou²⁸ has said, "he has been poor, has been nearly suffocated by the acrid odor of racial discrimination, is intelligent, well trained, black and young enough to be won over again."

Mr. President, I believe that individuality is more determinative than race. I believe Clarence Thomas' political philosophy, his public record, his overall professional experience, and his choice of what to show and what to hide in the committee hearing process present obstacles to his confirmation.

Given the heightened and proper sensitivity to blackness in the last 25 years in America, one asks, is there something latent in Thomas' being that would blossom if he had a lifetime tenure? Would his rigidity, reactionary views, and intolerance be replaced by a more flexible, balanced perspective?

Some people argue that Thomas is a wild card who might just bite the hand of those who have advanced and promoted him for his conservative views. Blackness, they say, will prevail over individuality. By blackness they presume a set of experiences that lead to views, not necessarily liberal, but different from Thomas' stated positions. But what is the essence of blackness? A common sharing of the experience of oppression? A common network of support to nurture the spirit, mind, and body under

²⁸ A noted author of numerous novels, articles, short stories, and poems, Angelou is the Reynolds Professor of American Studies at Wake Forest University. WHO'S WHO IN AMERICA 87 (46th ed. 1990-91).

assault? A common determination to add to the mosaic of America that which is uniquely African American? A common aspiration that all black Americans can live with dignity free from racist attacks, overt discrimination, sly innuendo, and without fundamental distrust of white Americans? Yes, all of these commonalities, and probably many others I have never even thought of, go into blackness, but can we assume that any or all of them will offset Clarence Thomas' political philosophy and his public record — both of which have run against the common currents of black life. To do so would be irrational. It would deny him the individuality — however we might disagree with its expression — which is God's gift to every human being. Qualities of mind and character attach to a person, not to a race.

Clarence Thomas' paradox is real. The individuality that allowed him survival in a world of hostile, dangerous racism is the individuality that seems to make him numb to the meaning of shared experience.

Those who call Clarence Thomas the "hope candidate" do not mean hope in the transcendent terms of "keep hope alive." Instead, they hope those qualities which have characterized his individuality up to this point can be transformed. I doubt that is possible. I doubt that he can "be won over again." Therefore, it is on the basis of his individuality, as I have been allowed to know it from his public record, his professional work, and his confirmation process, that I will cast my vote against Judge Thomas.²⁹

²⁹ 147 CONG. REC. S14,704-05 (daily ed. Oct. 15, 1991). The nomination of Clarence Thomas to the Supreme Court by President Bush was affirmed by a vote of 52 to 48. *See* Appendix. Senator Bradley declared his opposition to Thomas before the allegations concerning Thomas' sexual harassment of Anita Hill resulted in three days of televised hearings preceding the October 15, 1991 vote.

APPENDIX

SENATE VOTE ON THE NOMINATION OF CLARENCE THOMAS TO THE UNITED STATES SUPREME COURT

YEAS-52

Bond	Craig	Fowler
Boren	D'Amato	Garn
Breaux	Danforth	Gorton
Brown	DeConcini	Gramm
Burns	Dixon	Grassley
Chafee	Dole	Hatch
Coats	Domenici	Hatfield
Cochran	Durenberger	Helms
Cohen	Exon	Hollings
Johnston	Nickles	Smith
Kassebaum	Nunn	Specter
Kasten	Pressler	Stevens
Lott	Robb	Symms
Lugar	Roth	Thurmond
Mack	Rudman	Wallop
McCain	Seymour	Warner
McConnell	Shelby	
Murkowski	Simpson	

NAYS-48

Adams	Glenn	Mikulski
Akaka	Gore	Mitchell
Baucus	Graham	Moynihan
Bentsen	Harkin	Packwood
Biden	Heflin	Pell
Bingaman	Inouye	Pryor
Bradley	Jeffords	Reid
Bryan	Kennedy	Riegle
Bumpers	Kerrey	Rockefeller
Burdick	Kerry	Sanford
Byrd	Kohl	Sarbanes
Conrad	Lautenberg	Sasser
Cranston	Leahy	Simon
Daschle	Levin	Wellstone
Dodd	Lieberman	Wirth
Ford	Metzenbaum	Wofford