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NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

THE NOMINATION OF CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 10, 11, 12, 13, AND 16, 1991

Part 1 of 4 Parts

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NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, SEPTEMBER 10, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice at 10:05 a.m., in room 325, Senate Caucus Room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

OPENING STATEMENT OF CHAIRMAN JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

The CHAIRMAN. The hearing will come to order.

Good morning, Judge.

Judge THOMAS. Good morning, Senator.

The CHAIRMAN. Welcome. Welcome to the blinding lights. It is a pleasure to have you here.

Let me begin also by indicating that the morning is going to be painless, Judge—or maybe the most painful part of the whole process because you are going to hear from all of the committee who have an opening statement, and then a half a dozen Senators who are going to introduce you. So you will hear from about 20 Senators before you get to speak. It could be the most painful part of the process.

But let me begin today, Judge, on a slightly more serious note. This committee begins its sixth set of Supreme Court confirmation hearings held in the last 5 years, a rate of change that is unequaled in recent times. If you are confirmed, Judge Thomas, you will come to the Supreme Court in the midst of this vast change.

In 4 years, Justices Powell, Brennan, and Marshall will have been replaced by Justices Kennedy, Souter, and Thomas.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 constitutional interpretation of the meaning that the Supreme Court applies to the words of the Constitution are being debated in this country, in a way they haven't for a long time, in a manner unlike anything seen since the New Deal.

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 the regulation of health care, the environment, and the economy are 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 in the 19 years since I have been in the Senate. For as has been widely discussed and debated in the press, you are an adherent to the view that natural law philosophy should inform the Constitution. Finding out what you mean when you say that you would apply the natural law philosophy to the Constitution is, in my view, the single most important task of this committee and, in my view, your most significant obligation to this committee. This is particularly true because of the period of vast change in which your nomination comes before us.

Judge, to explain why this is such an important question, at least to me, we need only look at the three types of natural law thinking which have, in fact, been adopted by the Supreme Court of the United States in the past and which are being discussed and debated by constitutional scholars today.

The first of these views: Seize natural law as a moral code, a set of rules saying what is right and what is wrong, a set of rules and a moral code 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, as you know, Judge, actually took such an approach in the past, holding in 1873, for example, that women could not become lawyers because it was not, in the Court's phrase, "in their nature."

Now, no one wants to go back to 1873; no one wants to go back that far today. But there are natural law advocates who extol the 20th century version of this philosophy, for they believe that it is the job of the courts to judge the morality of all our activities, wherever they occur, paying no respect to the privacy of our homes and our bedrooms. They believe the Court should forbid any activity contrary to their view of morality and their view of natural law.

Those who subscribe to this moral-code view of natural law call into question a wide range of personal and family rights, from reproductive freedom to each individual's choice over procreation, to the very private decision we now make about what is and what is not a family. They want to see the Government make these choices for us by applying, to quote one report, "their values and norms"; or, if the legislature doesn't do it, by judges applying their values and norms.

Needless to say, Judge Thomas, this sort of natural law philosophy is one which I believe this Nation cannot accept. But it is not the only radical natural law philosophy that is being debated as we sit here today—it is being debated in the law schools and among the philosophers of this country—for there is another group that wants to reinvigorate another period of the Supreme Court's past.

When the Court used natural law to strike down a whole series of Government actions aimed at making the Nation a better place for Americans to live, those natural law rulings struck down such

laws as the child labor laws, minimum wage laws, and laws that required safe working conditions. They held that the natural law of freedom of contract and the natural law right to property created rights for businesses and corporations that rose above the efforts of Government to prevent the ills they created. They put these so-called economic rights into a zone of protection so high that even reasonable laws aimed at curbing corporate excesses were struck down.

Now, again, no one is proposing to take us all the way back to the so-called Lockner era. But there are those who wish to employ the same reasoning that was used in that era. Today, 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: Laws protecting the environment, our water and our air; laws regulating child care and senior citizen facilities; and even called into question the constitutionality of the Social Security system.

Now, Judge Thomas, you have made it abundantly clear that you do not subscribe to the most extreme of these views. But you have said that you find some of these views, to quote you, "attractive," and that you support the idea "of an activist Supreme Court that would strike down laws regulating economic rights."

Again, this is a vision of natural law that we have moved far beyond and that most Americans have no desire to return to.

And there is a third type of natural law, Judge. 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 believe most Americans subscribe to. It is this view of natural law that I believe—I personally, to be up front about it, think is appropriate. In this view of natural law, the Constitution should protect personal rights falling within the zone of privacy, speech, and religion most zealously. Those rights that fall within that zone should be most zealously protected. These personal freedoms should not be restricted by a moral code imposed on us by the Supreme Court or by unjust laws passed in legislative bodies.

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, or laws that tell parents that they could not teach their children a second language or could not send them to a private school. They struck down those legislative initiatives in the past.

While recognizing that natural law and our Constitution protect these rights, the same Court has also recognized that Government must act to protect us from many of the dangers of modern life, that Government should stop polluters from polluting, stop businesses from creating unsafe working conditions and so on.

Yes, these Government actions do limit freedom. They do limit freedom. They limit the freedom to contract. They limit the freedom to use one's property exactly as they would wish. They limit the freedom to pollute. They limit freedom. Or, as we saw in North Carolina recently, they limit the freedom of a factory manager to lock his employees into a building where 25 of them perished in a fire.

But this limitation on property, recognized as constitutional by the Court, is a balanced liberty that we have come to expect our Government to provide. This is the balance, in my view, that the Framers of our Constitution enshrined in that great document. They wanted, to use their words, "an energetic Government." But they also wanted a Government to protect fundamental personal freedom, and today we have achieved that balance by having the Supreme Court extend great protection to personal freedom while declining to block laws that reasonably regulate our economy, our society, our property.

Now, adopting a natural law philosophy that upsets that balance, either by lessening the protection given those rights falling within the zone of personal and family privacy and speech and religion or adopting a natural philosophy that lessens the power of Government to protect the environment, lessens the power of Government to regulate corporate excesses, or lessens the power of Government to create institutions like Social Security, would, in my view, be a serious mistake and a sharp departure from where we have been for the last 40 years.

Judge Thomas, there are signs in your writing and speeches that you accept the present balance, but there are also signs that you would apply natural law to effect changes in the balance I have just referred to; changes to replace our freedom to make personal and family choices without Government imposing their moral code, and to thrust the Court into economic and regulatory disputes that it now stays out of.

Judge, if this committee is to endorse your confirmation to the Senate, we must know—in my view, 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 to each of these areas, both to the areas of personal freedom and to the areas of economic issues. We will take some time to cover it, Judge, and some of it, as you know as well or better than I, is somewhat esoteric. But cover it we will, and we will cover it carefully.

In closing, Judge Thomas, I want to return to where I started: the importance of your nomination. Some people say that the Supreme Court is already conservative, and they ask what difference it makes to have an additional conservative on the bench. Well, I think that is the wrong question. I reject that argument.

First of all, I do not deny the President the right to appoint a conservative. As a matter of fact, I would be dumfounded if he didn't. And so I fully expect the Supreme Court to be a more conservative body after Justice Marshall's successor is confirmed than before Justice Marshall retired. But such an additional move to the right, which I expect, pales in comparison to the radical change in direction some are urging on the Court under the banner of natural law; pales in comparison to some of the changes that some of the people who are your strongest supporters have been urging on the philosophic thought and the notion of constitutional interpretation for the past decade.

Thus, we are not seeking here to learn—at least I am not seeking here to learn whether or not you are a conservative. I expect no

less, and I believe you when you say you are. 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.

Judge, because of your youth and, God bless you for it—I never thought I would be sitting here talking about the youth of a nominee to the Supreme Court, but I am. Heck, you are 6, 7 years younger than I. I am 48. How old are you, Judge? Forty-two? Forty-three?

Judge THOMAS. Well, I have aged over the last 10 weeks. [Laughter.]

But I am 43.

The CHAIRMAN. Forty-three years old. Because of your youth, Judge, you will be the first Supreme Court Justice the Senate will ever have confirmed, if it does, that will most likely write more of his opinions in the 21st century than he will write in the 20th century. To acknowledge that fact alone, Judge, is to recognize the unique significance of your nomination and the care with which this committee must look at it.

In closing, Judge Thomas, let me say that this committee's obligation is to be open and to be fair, and I hope you believe we have been that way thus far. We have many serious questions to ask you, Judge, and it will take time to get them all answered. So anytime you need a break, anytime you just get tired sitting there, let us know because we are testing the content of your mind, not your physical constitution to be able to sit there for a long time.

In welcoming you to these hearings, Judge, I welcome you also to a dialog, I believe, that will have historic impact on the Supreme Court, the country, and a historic impact for all Americans. We are pleased to have you join us here today, Judge, in what I consider to be a great endeavor and the most serious obligation this committee can undertake.

Again, welcome, and I will now yield to my senior colleague from the State of South Carolina and the ranking member, Senator Thurmond.

[The prepared statement of Senator Biden follows:]

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--

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,

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.

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,

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.

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.

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:

* 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.

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;

* 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.

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 --

* 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.

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.

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.

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.

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.

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OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman.

Today, the committee begins hearings to consider the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.

This makes the 7th nominee to the Supreme Court that this committee has considered in the past 10 years and, once confirmed, will be the 106th person to serve as a Justice, as well, I might say, as the 24th Supreme Court nomination that I have had the opportunity to review during almost my 37 years in the Senate.

As these hearings begin, we must remain keenly aware that we face a solemn responsibility. This committee undertakes no greater responsibility than the review of nominees to the Federal judiciary.

When a nominee is considered for the Supreme Court, our responsibility is an enhanced one. Those chosen for a seat on our Nation's highest court occupy a position of great authority, trust, and power, as this appointment is one of life tenure, without accountability by popular election.

Members of the Supreme Court make vitally important decisions and can only be removed in very limited circumstances. A Supreme Court Justice must be an individual who understands the responsibility to the people of this Nation, the concept of justice, and the magnificence of our Constitution.

Mr. Chairman, I have always believed that our Constitution is the most enduring document ever penned by the hand of man. It certainly remains the finest, most significant political document ever conceived. It creates the basic institutions of our National Government and spells out the powers of these institutions, the rights of our citizens, and the basic freedoms we all deeply cherish.

At an early age, I developed a deep and abiding respect for this document which stands as the centerpiece of mankind's struggle for self-determination. The fact that our Constitution has survived since its adoption in 1787 is a true testament to its remarkability.

When a vacancy occurs on the Supreme Court, it is one of the few times that all three branches of Government are so greatly impacted at the same time. The head of the executive branch, the President of the United States, elected by the people, chooses a nominee. This nominee will sit on the highest, most prestigious, and most powerful Court within our judicial branch. The Senate, as part of the legislative branch, is called upon to review the nominee to ensure that he or she is qualified to serve on the most important court in America.

I believe this process which embraces all three branches of Government signifies the majesty of our system and underscores the brilliance of our Founding Fathers. Clearly our magnificent Constitution confers tremendous responsibility on the Senate in a vast number of areas. In the confirmation process, the Senate alone holds exclusive authority to advise and consent on all judicial nominations. While the President of the United States has the constitutional authority to appoint judges of the Supreme Court, the advise and consent role of the Senate is one of the most important ones we undertake.

The Senate has assigned the task of holding hearings and the detailed review of judicial nominees to the Judiciary Committee. It is a task that this committee has undertaken with a clear awareness of the importance of our role in the confirmation process. The significance of this committee's role cannot be underestimated. In this century, no nominee to the Supreme Court has been confirmed by the full Senate after failing to attain a majority vote of the members of this committee.

Mr. Chairman, the role of the Supreme Court in our history has been vital because the Court has been called upon to solve many difficult and controversial problems, using its collective intellectual capacity, precedent, and constitutional interpretation to solve them. Throughout the course of our Nation's history, the Court has been called on to administer justice. As George Washington said, and I quote, "The administration of justice is the firmest pillar of good government." There is every reason to expect that the Court's role in the administration of justice will continue to be a major factor in the future.

For this reason, an individual chosen to serve on the Supreme Court must be one who possesses outstanding qualities. The impact of the decisions of the Court requires that a nominee is eminently qualified to serve.

During my consideration of the previous 23 nominees to the high Court in my almost 37 years, I have often reflected on the attributes I believe a Supreme Court Justice should possess. As we again consider a nominee to the Supreme Court, I believe these special qualities warrant reiterating:

First, unquestioned integrity. A nominee must be honest, absolutely incorruptible, and completely fair.

Second, courage. The courage to decide tough cases according to the law and the Constitution.

Third, compassion. While the nominee must be firm in his decisions, he should show mercy when appropriate.

Fourth, professional competence. The ability to master the complexity of the law.

Fifth, proper judicial temperament. The self-discipline to base decision on logic, not emotion, and to have respect for lawyers, litigants, and court personnel.

And, sixth, an understanding of the majesty of our system of government. The understanding that only Congress makes the law, that the Constitution is only changed by amendment, and that all powers not delegated to the Federal Government are reserved to the States.

I believe an individual who possesses these qualities will not fail the cause of justice. As we begin these hearings, there is every indication that Judge Thomas possesses the necessary attributes to be an outstanding member of the Supreme Court.

Mr. Chairman, upon reviewing the decisions Judge Thomas wrote and in which he participated on the Court of Appeals, I have concluded that Judge Thomas has exhibited an adherence to the rule of law and the true principles upon which our Nation was founded. Without question, the decisions he has written are within the mainstream of judicial thinking. He has articulated a clear and

concise understanding of the law and conformance to established principles of constitutional interpretation.

Some have stated that Judge Thomas has articulated a personal philosophy of law and constitutional interpretation which would curtail individual rights. I strongly disagree with those who have reached that conclusion. In fact, Judge Thomas has stated that he believes, and I quote, "that equality is the basis for aggressive enforcement of civil rights laws and equal opportunity laws designed to protect individual rights."

Those are words stated by a person who truly believes in the civil rights of the individual and a commitment to the principles of fairness and equality, not a nominee who is out of the mainstream of judicial interpretation and analysis.

An examination of the professional record of Judge Thomas provides no valid reason to believe he would seek to diminish the rights of any American citizen. Judge Thomas acknowledges that he has been a beneficiary of the diligent work of individuals such as Justice Thurgood Marshall and others involved in civil rights efforts.

Mr. Chairman, the issue of judicial philosophy or ideology has often been raised in relation to recent nominees to the Supreme Court. Some argue that philosophy should not be considered at all in the nomination process, while others state that philosophy should be the sole criteria. It is not appropriate that philosophy alone—I repeat, alone—should bar a nominee from the Supreme Court, unless that nominee holds a belief that is contrary to the fundamental, long-standing principles of our Nation.

Clearly if a philosophical litmus test can be applied to defeat a nominee, then the independence of the Federal judiciary would be undermined. Judges are not politicians put in place to decide cases based on the views of a political constituency, but are sworn to apply constitutional and legal principles to arrive at decisions that do justice to the parties before them.

The prerogative to choose a nominee to the Supreme Court belongs to the President, an individual elected by the people of this country. The full Senate has the opportunity to review that nominee who comes to this body with a presumption—and I repeat, with a presumption—in his favor. To reject a nominee based solely on ideology is inappropriate. Requiring a nominee to pass an ideological litmus test would seriously jeopardize the efficacy and independence of the Federal judiciary.

In closing, I believe Judge Thomas is well qualified to serve as a Justice of our Nation's highest Court. He possesses the integrity, intellect, professional competence, and judicial temperament to make an outstanding Justice. In addition, his personal struggle to overcome difficult circumstances early in his life is admirable. A review of his background shows he is a man of immense courage who has prevailed over many obstacles to attain remarkable success.

Mr. Chairman, the Supreme Court is the final arbiter of our Nation's most important legal disputes. Its authority is immense. This immense authority places a great responsibility on each of us as we begin the thorough review of Judge Thomas to be an Associate Jus-

tice of that Court. I look forward to a fair hearing, with swift consideration of this nominee by the committee and the full Senate.

Judge Thomas, we welcome you to the committee and look forward to your testimony.

Thank you, Mr. Chairman.

[The prepared statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE COMMITTEE ON THE JUDICIARY REFERENCE CONFIRMATION HEARINGS ON CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, SR-325, SENATE CAUCUS ROOM, 10:00 A.M., SEPTEMBER 10, 1991.

MR. CHAIRMAN:

Today, the Committee begins hearings to consider the nomination of Judge Clarence Thomas to be an Associate Justice of the Supreme Court of the United States. This makes the seventh nominee to the Supreme Court that this Committee has considered in the past ten years and, once confirmed, will be the 106th person to serve as a justice. As well, I might say, it is the 24th Supreme Court nomination that I have had the opportunity to review during my almost 37 years in the Senate.

As these hearings begin, we must remain keenly aware that we face a solemn responsibility. This Committee undertakes no greater responsibility than the review of nominees to the federal judiciary. When a nominee is considered for the Supreme Court, our responsibility is an enhanced one. Those chosen for a seat on our Nation's highest court occupy a position of great authority, trust, and power as this appointment is one of life tenure without accountability by popular election. Members of the Supreme Court make vitally important decisions and can only be removed in very limited circumstances. A Supreme Court justice must be an individual who understands the responsibility to the people of this Nation, the concept of Justice, and the magnificence of our Constitution.

Mr. Chairman, I have always believed that our Constitution is the most enduring document ever penned by the hand of man, and

certainly remains the finest, most significant political document ever conceived. It creates the basic institutions of our national government and spells out the powers of these institutions, the rights of our citizens, and the basic freedoms we all deeply cherish. At an early age, I developed a deep and abiding respect for this document which stands as the centerpiece of mankind's struggle for self-determination. The fact that our Constitution has survived since its adoption in 1787 is a true testament to its remarkability.

When a vacancy occurs on the Supreme Court, it is one of the few times that all three branches of government are so greatly impacted at the same time. The head of the executive branch, the President of the United States, elected by the people, chooses a nominee. This nominee will sit on the highest, most prestigious, and most powerful Court within our judicial branch. The Senate, as part of the legislative branch, is called upon to review the nominee to ensure that he or she is qualified to serve on the most important Court in America. I believe this process which embraces all three branches of government signifies the majesty of our system and underscores the brilliance of our Founding Fathers.

Clearly, our magnificent Constitution confers tremendous responsibility on the Senate in a vast number of areas. In the confirmation process, the Senate alone holds exclusive authority to "advice and consent" on all judicial nominations. While the President of the United States has the constitutional authority to "appoint...judges of the Supreme Court," the "advice and

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consent role" of the Senate is one of the most important ones we undertake. The Senate has assigned the task of holding hearings and the detailed review of judicial nominees to the Judiciary Committee. It is a task that this Committee has undertaken with the clear awareness of the importance of our role in the confirmation process. The significance of this Committee's role cannot be understated. In this century, no nominee to the Supreme Court has been confirmed by the full Senate after failing to attain a majority of the votes of members of this Committee.

Mr. Chairman, the role of the Supreme Court in our history has been vital because the Court has been called upon to solve many difficult and controversial problems - using its collective intellectual capacity, precedent, and Constitutional interpretation to solve them. Throughout the course of our Nation's history the Court has been called on to administer Justice. As George Washington said, "The administration of justice is the firmest pillar of good government." There is every reason to expect that the Court's role in the administration of justice will continue to be a major factor in the future.

For this reason, an individual chosen to serve on the Supreme Court must be one who possesses outstanding qualities. The impact of the decisions of the Court require that a nominee is eminently qualified to serve. During my consideration of the previous 23 nominees to the high Court in my almost 37 years, I have often reflected on the attributes I believe a Supreme Court justice should possess. As we again consider a nominee to the

Supreme Court, I believe these special qualities warrant reiterating:

First - Unquestioned integrity. A nominee must be honest, absolutely incorruptible, and completely fair.

Second - Courage. The courage to decide tough cases according to the law and the Constitution.

Third - Compassion. While a nominee must be firm in his decisions, he should show mercy when appropriate.

Fourth - Professional Competence. The ability to master the complexity of the law.

Fifth - Proper Judicial Temperament. The self-discipline to base decisions on logic, not emotion, and to have respect for lawyers, litigants, and court personnel.

Sixth - An understanding of the majesty of our system of government. The understanding that only Congress makes the laws, that the Constitution is only changed by amendment, and that all powers not delegated to the federal government are reserved to the States.

I believe an individual who possesses these qualities will not fail the cause of Justice.

As we begin these hearings, there is every indication that Judge Thomas possesses the necessary attributes to be an

outstanding member of the Supreme Court. He was born in Pinpoint, Georgia, on June 23, 1948, and raised in Savannah by his grandparents, Myers and Christine Anderson. In his youth, Judge Thomas overcame difficult economic conditions and excelled in his studies. He later attended the Immaculate Conception Seminary for two years before transferring to Holy Cross College. At Holy Cross, Judge Thomas distinguished himself as a member of the Honors Program, receiving his undergraduate degree in 1971. He then attended Yale Law School, one of our Nation's top law schools, graduating in 1974.

In addition to his impressive academic background, Judge Thomas has vast practical experience. Following law school, he worked for Senator Danforth, then the Attorney General for the State of Missouri. As an Assistant Attorney General for three years, Judge Thomas represented the State of Missouri before the trial courts, appellate courts, and the State Supreme Court on matters ranging from taxation to criminal law. From 1977-1979, he worked for the Monsanto Company handling corporate, antitrust, contract, and government regulation law.

In 1979, Judge Thomas again went to work for Senator Danforth in Washington, this time as a legislative assistant, responsible for energy, environment, federal lands, and public works issues. President Reagan nominated Judge Thomas to the position of Assistant Secretary for Civil Rights for the Department of Education in 1981. He was confirmed by the Senate for this position. Then, in 1982, President Reagan nominated him to serve as Chairman of the U.S. Equal Employment Opportunity

Commission where he ably served almost two terms, being confirmed by the Senate for each term. He was then nominated by President Bush for a position on the U.S. Court of Appeals for the D.C. Circuit, called by many the Nation's second highest court. Since his confirmation, Judge Thomas has participated in over 140 decisions, writing opinions in areas such as criminal law, antitrust law and trade regulation, as well as constitutional and administrative law. Without question, Judge Thomas has distinguished himself on the D.C. Circuit, and has served in an exemplary capacity as a member of this Court.

Mr. Chairman, upon reviewing the decisions Judge Thomas wrote and in which he participated on the Court of Appeals, I have concluded that Judge Thomas has exhibited an adherence to the rule of law, and the true principles upon which our Nation was founded. Without question, the decisions he has written are within the mainstream of judicial thinking. He has articulated a clear and concise understanding of the law and conformance to established principles of Constitution interpretations. Some have stated that Judge Thomas has articulated a personal philosophy of law and constitutional interpretation which would curtail individual rights. I strongly disagree with those who have reached that conclusion. In fact, Judge Thomas has stated that he believes, and I quote, that "equality is the basis for aggressive enforcement of civil rights laws and equal opportunity laws designed to protect individual rights." Those are words stated by a person who truly believes in the civil rights of the individual and a commitment to the principles of fairness and

equality, not a nominee who is out of the mainstream of judicial interpretation and analysis. An examination of the professional record of Judge Thomas provides no valid reason to believe he would seek to diminish the rights of any American citizen. Judge Thomas acknowledges that he has been a beneficiary of the diligent work of individuals such as Justice Thurgood Marshall and others involved in civil rights efforts.

Mr. Chairman, the issue of judicial philosophy, or ideology, has often been raised in relation to recent nominees to the Supreme Court. Some argue that philosophy should not be considered at all in the nomination process, while others state that philosophy should be the sole criteria. It is not appropriate that philosophy alone should bar a nominee from the Supreme Court unless that nominee holds a belief that is contrary to the fundamental, longstanding principles of our Nation.

Clearly, if a philosophical "litmus test" can be applied to defeat a nominee, then the independence of the Federal judiciary would be undermined. Judges are not politicians put in place to decide cases based on the views of a political constituency, but are sworn to apply Constitutional and legal principles to arrive at decisions that do justice to the parties before them. The prerogative to choose a nominee to the Supreme Court belongs to the President -- an individual elected by the people of this Country. The full Senate has the opportunity to review that nominee who comes to this Body with a presumption in his favor. To reject a nominee based solely on ideology, is inappropriate. Requiring a nominee to pass an ideological "litmus test" would

seriously jeopardize the efficacy and independence of the Federal judiciary.

Mr. Chairman, I want to comment briefly on the tenure of Judge Thomas as Chairman of the Equal Employment Opportunity Commission. When he was before the Judiciary Committee for a position on the Court of Appeals, an exhaustive evaluation of his role as Chairman of the EEOC was undertaken. Some of the issues related to the EEOC have again been raised since his nomination to the Supreme Court was announced. These issues were fully reviewed and discussed in detail when Judge Thomas was under consideration for a position on the D.C. Circuit. At that time, this Committee was informed that Judge Thomas was responsible for implementing policies designed to reform the EEOC, invigorating its mission to assure the fair treatment of all persons in the workplace, and insuring the vigorous enforcement of our equal employment laws. I strongly believe that Judge Thomas performed admirably as Chairman of the EEOC. His successor, Mr. Evan Kemp, stated that the EEOC "made a miraculous turnaround...under [Judge] Thomas." While Judge Thomas was Chairman, the Washington Post ran an editorial piece entitled "The EEOC is Thriving" and praised him for his "quiet but persistent leadership." I commend Judge Thomas for his diligent, successful efforts while Chairman of the EEOC.

In closing, I believe Judge Thomas is well qualified to serve as a justice on our Nation's highest court. He possesses the integrity, intellect, professional competence, and judicial temperament to make an outstanding justice. In addition, his

personal struggle to overcome difficult circumstances early in his life is admirable. A review of his background shows he is a man of immense courage who has prevailed over many obstacles to attain remarkable success.

Mr. Chairman, the Supreme Court is the final arbiter of our Nation's most important legal disputes; its authority is immense. This immense authority places a great responsibility on each of us as we begin the thorough review of Judge Thomas to be an Associate Justice of that Court.

I look forward to a fair hearing with swift consideration of this nominee by the Committee and the full Senate.

Judge Thomas, we welcome you to the Committee and look forward to your testimony.

Thank you, Mr. Chairman.

END

The CHAIRMAN. Thank you very much, Senator.
Senator Kennedy.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. Good morning, Judge.

I would just mention at the outset we come to the nomination on the basis that the President makes the nomination but it is a shared responsibility, an important responsibility for us to make a judgment on this. I might have some difference with my good friend and colleague from South Carolina on whether there is the presumption. I think any fair reading of the Constitutional Convention would show that this was to be a shared responsibility. I think at least I and other members of the committee would look so.

Two hundred years ago this year, the Bill of Rights became part of the Constitution. The Constitution itself confers upon the Federal Government the powers necessary to govern the country. But the Bill of Rights protects the fundamental rights that enable us to be truly free and to enjoy the full benefits of our democracy. Most important, the Constitution and the Bill of Rights preserve our individual liberty, and they are the Nation's promise to the people that no American will ever be forced to stand before a column of tanks in any battle to keep our democracy. It is our guarantee that majority rule is limited and that each individual has certain basic rights that the government cannot invade.

As we celebrate the bicentennial of the Bill of Rights, as we watch brave citizens in the Soviet Union and other lands struggle to attain similar rights and liberties, we feel justifiably proud of our system of government and the enduring achievements of the past two centuries. But we cannot permit our pride to diminish our commitment to preserving and strengthening our own democracy or dealing with the serious challenges that continue to confront us.

The nomination which we begin considering today is an essential part of the process by which we safeguard the Constitution, the Bill of Rights, and our democracy itself. If confirmed, Judge Clarence Thomas will become one of nine Supreme Court Justices with the ultimate power to define the Constitution, interpret the Bill of Rights, and ensure that the limited powers of government stay limited.

Many of us are concerned about the direction the Supreme Court has taken in recent years. It has increasingly abandoned its role as the guardian of the powerless in our society. It has repeatedly sought to turn back the clock on civil rights. It has relaxed the rules prohibiting the use of coerced confessions obtained by law enforcement officers. It has begun to retreat on the right to privacy. It has ruled that government officials can prohibit doctors in publicly funded clinics from practicing their profession to the best of their ability in giving their patients full medical advice.

The Court has not hesitated to overrule earlier decisions with which the new majority disagrees. Justice Thurgood Marshall warned us in his final Supreme Court opinion that power, not reason, is the new currency of the Court's decision-making. Justice

Marshall has been one of the greatest Justices in the history of the Supreme Court. His courageous career is an inspiration to the Nation, and his vision of the rule of law is an example to the world of the best in American justice.

The person who replaces Thurgood Marshall on the Court will be deeply involved in fundamental decisions that will affect the rights of all Americans in the years ahead and may well determine the very nature of our democracy and the future of the Bill of Rights. For this reason, the Senate has a special responsibility: to assess Judge Thomas' view of the Constitution and his dedication to individual rights and the separation of powers. We must decide whether he possesses a clear commitment to the fundamental values at the core of our democracy.

In his life and in his career, Judge Thomas has overcome large barriers of poverty and injustice, and he deserves great credit for the eminence he has attained. In many ways, he exemplifies the promise of the Constitution and the American ideal of equal opportunity for all.

But much more is at stake than Judge Thomas' background. Statements he has made and actions he has taken raise significant issues that must be addressed if he is to be confirmed by the Senate.

For example, on the right to privacy, Judge Thomas has strongly commended an article entitled "The Declaration of Independence and the Right to Life." One leads unmistakably from the other. That article refers to the constitutional right to abortion in *Roe* v. *Wade* as a conjured right with not a single trace of lawful authority. According to the article, which Judge Thomas has called "splendid," abortion is the constitutional equivalent of murder.

If this view is accepted by the Supreme Court, not only *Roe* v. *Wade* will be overruled, neither the Congress nor any State legislature will have the power to protect a woman's right to choose an abortion even in cases of rape or incest. And Federal and State governments will have an engraved invitation to invade other basic aspects of individuals' private lives.

Judge Thomas' record also raises serious questions about his view of ongoing efforts to end discrimination in our society against women and minorities. The civil rights revolution of the past generation has been called the "Second American Revolution." But it is a revolution that is far from complete. Millions of our fellow citizens are still left out and behind because of unacceptable conditions of discrimination based on race, sex, age, disability, and other forms of bigotry that continue to plague our society.

As Congress and the administration struggle to deal with these urgent challenges, we will need a Supreme Court that is sensitive, not hostile, to our efforts. At the same time, Judge Thomas has stated that the Constitution protects economic rights as much as any other rights. Until the 1930's, a similar doctrine was used by the Supreme Court to strike down attempts by Congress and the States to protect the rights and very health and safety of workers against unfair abuses of power by unscrupulous employers and corporations. Few Americans today would want the Supreme Court to revive that discredited doctrine of constitutional protection for the rights of business at the expense of working men and women.

Finally, Judge Thomas' role as Chairman of the Equal Opportunity Commission has given him extensive experience in dealing with Congress. As a result of that experience, however, he has made some harsh statements about congressional oversight of executive agencies. Obviously, such oversight is an essential part of the constitutional system of checks and balances. It has served the Nation well, and it must continue to do so.

The Senate's constitutional role in confirmation of Justices to the Supreme Court is one of our most important functions. I look forward to these hearings and to working with my colleagues on the committee and in the Senate to address these complex issues as thoroughly and as fairly as possible. The country deserves no less.

[The prepared statement of Senator Kennedy follows:]

from the office of

Senator Edward M. Kennedy

of Massachusetts

OPENING STATEMENT OF
SENATOR EDWARD M. KENNEDY
ON THE NOMINATION OF JUDGE CLARENCE THOMAS
TO THE UNITED STATES SUPREME COURT
SEPTEMBER 10, 1991

Two hundred years ago this year, the Bill of Rights became part of the United States Constitution. The Constitution itself confers upon the federal government the powers necessary to govern the country. But the Bill of Rights protects the fundamental rights that enable us to be truly free and to enjoy the full benefits of our democracy.

Most important, the Constitution and the Bill of Rights preserve our individual liberty. They are the nation's promise to the people that no American will ever be forced to stand before a column of tanks in any battle to keep our democracy. It is our guarantee that majority rule is limited and that each individual has certain basic rights that the government cannot invade.

As we celebrate the bicentennial of the Bill of Rights, as we watch brave citizens in the Soviet Union and other lands struggle to attain similar rights, we feel justifiably proud of our own system of government and the enduring achievements of tha past two centuries. But we cannot permit our pride to diminish our commitment to preserving and strengthening our own democracy, or dealing with the serious challenges that continue to confront us.

The nomination which we begin considering today is an essential part of the process by which we safeguard the Constitution, the Bill of Rights, and our democracy itself. If confirmed, Judge Clarence Thomas will become one of nine Supreme Court Justices with the ultimate power to define the Constitution, interpret the Bill of Rights, and ensure that the limited powers of government stay limited.

Many of us are concerned about the direction the Supreme Court has taken in recent years. It has increasingly abandoned its role as the guardian of the powerless in our society. It has repeatedly sought to turn back the clock on civil rights. It has relaxed the rules prohibiting the use of coerced confessions obtained by law enforcement officers. It has begun to retreat on the right to privacy. It has ruled that government officials can prohibit doctors in publicly-funded clinics from practicing their profession to the best of their ability, and giving their patients full medical advice. The Court has not hesitated to overrule earlier decisions with which the new majority disagrees. Justice Thurgood Marshall warned us in his final Supreme Court opinion that "[p]ower, not *reason*, is the *new* currency of th[e] Court's decisionmaking."

Justice Marshall has been one of the greatest justices in the history of the Supreme Court. His courageous career is an inspiration to the nation, and his vision of the rule of law is an example to the world of the best in American justice.

(OVER)

The person who replaces Thurgood Marshall on the Court will be deeply involved in fundamental decisions that will affect the rights of all Americans in the years ahead, and may well determine the very nature of our democracy and the future of the Bill of Rights.

For this reason, the Senate has a special responsibility to assess Judge Thomas' views of the Constitution and his dedication to individual rights and separation of powers. We must decide whether he possesses a clear commitment to the fundamental values at the core of our democracy.

In his life and his career, Judge Thomas has overcome barriers of poverty and injustice, and he deserves great credit for the success he has attained. In many ways, he exemplifies the promise of the Constitution and the American ideal of equal opportunity for all.

But much more is at stake than Judge Thomas' background. Statements he has made and actions he has taken raise significant issues that must be addressed by the Senate.

For example, on the right to privacy, Judge Thomas has strongly commended an article entitled "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other." That article refers to the constitutional right to abortion in Roe v. Wade as a "conjured right" -- "with not a single trace of lawful authority." According to the article, which Judge Thomas has called "splendid," abortion is the constitutional equivalent of murder. If this view is accepted by the Supreme Court, Roe v. Wade will be overruled; and neither Congress nor any state legislature will have the power to protect a woman's right to choose an abortion, even in cases of rape or incest. And federal and state governments will be free to invade other basic aspects of individuals' private lives.

Judge Thomas' record also raises serious questions about his views on the ongoing efforts to end discrimination in our society against women and minorities. The civil rights revolution of the past generation has been called the Second American Revolution. But it is a revolution that is far from complete; millions of our fellow citizens are still left out and left behind because of unacceptable conditions of discrimination based on race, sex, age, disability and other forms of bigotry that continue to plaque our society. As Congress and the Administration struggle to deal with these urgent challenges, we need a Supreme Court that is sensitive, not hostile, to our efforts.

At the same time, Judge Thomas has stated that the Constitution protects economic rights "as much as any other rights." Until the 1930s a similar doctrine was used by the Supreme Court to strike down attempts by Congress and the states to protect the rights -- the very health and safety -- of workers against unfair abuses of power by unscrupulous employers and corporations. Few Americans today would want the Supreme Court to revive that discredited doctrine of constitutional protection for the rights of business at the expense of working men and women.

Finally, Judge Thomas' role as Chairman of the Equal Employment Opportunity Commission has given him extensive experience in dealing with Congress. As a result of that experience, however, he has made some harsh statements about congressional oversight of executive agencies. Obviously, such overaight is an essential part of the constitutional system of checks and balances. It has served the nation well, and it must continue to do so.

The Senate's constitutional role in the confirmation of Justices to the Supreme Court is one of our most important functiona. I look forward to these hearings, and to working with my colleagues on the committee and in the Senate to address these complex isauea as thoroughly and as fairly as possible. The country deserves no less.

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The CHAIRMAN. Thank you, Senator.
Senator Hatch.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. Before I begin my statement, let me say that I hope that Justice Marshall is well, and I wish him well. His career and service to our country throughout his life marks him, in my view, as the single most influential lawyer in the 20th century, and maybe one of the most influential lawyers of all time.

Judge Thomas, welcome to the committee. This is your fifth confirmation before the U.S. Senate. I don't know many people who have had that experience or who have been able to endure that kind of an experience.

I just want to say that I have known you for over 10 years, and I don't think President Bush could have made a better decision or better judgment than to nominate you for the Supreme Court of the United States of America. You are eminently qualified to be a Supreme Court Justice.

Judge Thomas has an excellent educational and legal background. He has served in all three branches of the Federal Government, and in so serving, as I have mentioned, he has already won Senate confirmation 4 times in less than 9 years, perhaps more than any other person during a similar period of time.

Judge Thomas has also served as an assistant attorney general of the State of Missouri under our distinguished colleague, Jack Danforth. He has also worked in the private sector as a lawyer in Monsanto Co.'s legal department.

I share President Bush's view that a Justice of the Supreme Court of the United States should interpret the law according to the original meaning and not legislate his or her own policy preferences from the bench. Based on a careful review of Judge Thomas' writings and judicial opinions and my personal knowledge of the man, I am confident that Judge Thomas will interpret the law according to its original meaning, rather than substitute his own policy preferences for the law.

I am also confident that Judge Thomas will zealously safeguard the principle of equal justice under law for all Americans; not just white Americans, not just black Americans or Hispanic Americans or Asian Americans, but for all Americans, without unfair preference.

Judge Thomas' opinions also indicate that he is a sound law-and-order jurist, tough but fair to criminal defendants.

Those who have known Judge Thomas over the years know that he is a man of fierce independence. When he is confirmed, he will be nobody's man but his own, as I know he has been throughout his life. That I know.

And the judge's independence in not bounded by ideology. For example, when asked his views about establishing enterprise zones in inner cities, a principal element of conservative urban policy, Judge Thomas politely poured cold water on the idea. In so doing, here is part of what he said in 1985:

The first priority is to control crime. The sections where the poorest people live aren't really livable. If people can't go to school or rear their families or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are criminals? There were lots of black businesses before enterprise zones, but blacks cannot stay in business if they are mugged or if customers are mugged going in and out of the establishment or if people are hanging out selling drugs in front of it. If you want to encourage business in these areas, then stopping crime has got to be at the top of the list.

Judge Thomas' independence, however, does not sit well with some special interest groups and some liberal academics and pundits. These critics would like to impose their liberal policy agenda on the American people through the judiciary. They fear Judge Thomas will be faithful to the Constitution and Federal laws as enacted instead of to their political agenda.

We have heard criticism from some groups that Judge Thomas isn't strong on civil rights. Nonsense. Judge Thomas has an excellent record on civil rights and a deep personal commitment to equal opportunity. As he wrote in 1986,

I am a black Southerner. I grew up under the heel of segregation, and I have always found it offensive for the Government to treat people differently from others because of the color of their skin.

At his confirmation hearing just last year for the judgeship he now holds, Judge Thomas testified, "The reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society, gained access."

He took over the chairmansbip of an Equal Employment Opportunity Commission in 1982 that was left in a shambles by his Carter administration predecessors. The Washington Post, no shill for the Reagan administration civil rights record, praised "the quiet but persistent leadership of Chairman Clarence Thomas" in an editorial on May 17, 1987, entitled "The EEOC is Thriving." The July 15, 1991, U.S. News and World Report wrote, "Overall, it seems clear that he [Thomas] left the [EEOC] in better condition than he found it." He has favored strong remedies for discrimination, including many affirmative steps, such as increased recruitment and outreach to minorities and women. This is the kind of nondiscriminatory affirmative action which we all favor.

No, it isn't his civil rights record that these liberal critics are really concerned about; that is just a smokescreen. These critics really object to Judge Thomas having spoken out against what is popularly called reverse discrimination. He has, on a number of occasions, voiced his objections to preferences, to numerical devices whether labeled quotas, goals, or set-asides. This is the kind of affirmative action which is discriminatory itself. Here is one way he has put his views:

I am proud to defend the principle that people should be judged on the basis of what they can do, not on the basis of irrelevant personal characteristics. [Some believe] that the laws should be read to prohibit only some discrimination and to permit, or even require, other discrimination—the prohibited and permitted types of discrimination to be determined, apparently, by the governing elites. Since the memory of when the governing elites favored discrimination against black people is still so clear in my mind, I prefer not to leave to the elites the discretion to categorize race discrimination into permitted and prohibited classes. All discrimination must be prohibited.

Now, just as our society had finally enacted long overdue laws to prohibit racial, ethnic, and gender discrimination, new forms of discrimination were invented, ostensibly in the name of civil rights. Innocent persons were made new victims of discrimination as a purported means of remedying discrimination against others and as redress for a history these new victims had not created.

Now, we all know that discrimination and bigotry still persist in this country. It is a shame. Indeed, a tiny portion of my mail regarding Judge Thomas is another unfortunate reminder that some people in this country want to keep black people down. One satisfactory result of Judge Thomas' confirmation to the Supreme Court, for this Senator, will be the powerful rebuke it delivers to these un-American bigots. But the answer to discrimination is to end it, make whole its victims, take steps to ensure that it does not recur, and require the guilty party to recruit more minorities and women into its applicant pool and consider them fairly along with the rest of the applicants. The answer is not engage in discrimination against other innocent persons. Two wrongs do not make a civil right.

The overwhelming majority of the American people favor equal opportunity—not equal results; not preferences for or against anyone because of their race, ethnicity, or gender; not reverse discrimination. They are well familiar with the variety and scope of the devices, however euphemistically labeled, used to embed preferences and reverse discrimination in employment and elsewhere.

The advocates of preference and reverse discrimination know that these policies are extremely unpopular with the American people. Accordingly, supporters of these unfair policies couch their attacks on Judge Thomas in other language. Thus, they criticize him for his "civil rights record" or alleged lack of sensitivity, or for being against all affirmative action rather than only the preferential, unfair aspects of affirmative action, as reflects his true position while in the executive branch. In my view, it is really the judge's expressed belief in the equal rights of all Americans that some of these critics are really upset about.

Now, I do not know how Judge Thomas will vote on specific aspects of affirmative action. As a Supreme Court Justice, he will be in a new and a unique role. But because he has spoken out while in policy-making positions against preferences and what has become popularly known as reverse discrimination, the supporters of these unfair policies want to punish him. I trust, however, that the Senate will not sacrifice Judge Thomas on the twin altars of preferences and reverse discrimination.

I will not dwell on my frequently expressed concern that the Senate has been infringing on the independence of the judiciary when it seeks direct or indirect commitments on specific legal issues from judicial nominees. Issues in the courts must be resolved in the courts. This judicial resolution should occur after parties have presented the facts of a specific case, deployed their legal arguments for the judges to consider, and the judges have done their own research and internal consultation. Such issues are not to be decided based on what a nominee tells a Senate committee in advance. Confirmation of a nominee should not turn on a commitment to prejudge an issue.

I do wish to express two special concerns about this nomination process. Some interest group advocates of particular policies want this committee to insist that Judge Thomas answer questions and meet certain litmus tests, such as on abortion, that Justice Souter did not answer or meet just 1 year ago, 1 year ago this week. Last year, we were told that Justice Souter held the key to *Roe* v. *Wade*, yet virtually no one in the Senate made his discussion of that issue a condition of their vote.

Now, Judge Thomas is before us, and some would have us believe he now holds the key to *Roe* v. *Wade*. I note that Judge Thomas casts only one vote, not five. It is inappropriate enough that he is expected to answer some of the questions Justice Souter did not answer. But if Judge Thomas is held to a higher standard and even more rigorous litmus tests than Justice Souter, I think many Americans will be deeply troubled and will want to know why this particular nominee is being singled out at this time.

Moreover, we are here to determine Judge Thomas' fitness to be a Justice of the Supreme Court, not to conduct oversight on the EEOC or the Office for Civil Rights. We are not here to test his memory on events and documents constructed years ago. I would also note that after every matter in which Judge Thomas was involved in the executive branch, this Senate later confirmed him to a very responsible position at least once, and, in some cases, three times.

Finally, I just wish to mention my own delight at Judge Thomas' success. That success says a great deal about our country and about Judge Thomas, the man. Having grown up in the era of Jim Crow and gone barefoot in the unpaved streets of his community, he will soon be able to put his feet under the bench in the highest court in this land, as he contemplates the finer points of the law.

I understand this. I was born into a family where we didn't have indoor facilities either during the early years of my life. And I understand what it is like in this great country. And I have to tell you, Judge Thomas, I am so doggone proud of you I can hardly stand it. I think it is a terrific thing that you are nominated to this position, and I personally will support you with every fiber of my being.

As you yourself said when nominated, only in America could such a thing happen. It is wonderful to be a citizen in this country, and it is wonderful to see you sitting there before us this day. And it just reconfirms what all of us already know. This is the greatest country in the world.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch follows:]

Statement of Senator Orrin G. Hatch
Nomination of Judge Clarence Thomas
to the Supreme Court

September 10, 1991

It is a particular pleasure for me to welcome Judge Thomas to this Committee. I have known Judge Thomas for over 10 years. President Bush could not have made a finer nomination to the Supreme Court. This nominee is eminently qualified to be a Supreme Court Justice.

Judge Thomas has an excellent educational and legal background. Judge Thomas has served in all three branches of the federal government. In so serving, he has already won Senate confirmation four times in less than nine years, perhaps more than any other person during the same period.

Judge Thomas has also served as an Assistant Attorney General of the State of Missouri, under our distinguished colleague, John Danforth. He has also worked in the private sector as a lawyer in Monsanto Company's legal department.

I share President Bush's view that a Justice of the Supreme Court should interpret the law according to its original meaning and not legislate his or her own policy preferences from the bench. Based on a careful review of his writings and judicial opinions, and my knowledge of the man, I am confident Judge Thomas will interpret the law according to its meaning, rather than substitute his own policy preferences for the law.

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or Hispanic Americans or Asian Americans, but for all Americans, without unfair preference.

Judge Thomas' opinions also indicate that he is a sound law-and-order jurist -- tough but fair on criminal defendants.

Those who have known Judge Thomas over the years know that Judge Thomas is a man of fierce independence. When he is confirmed, he will be nobody's man but his own, as he has been throughout his life.

The Judge's independence is not bounded by ideology. For example, when asked his views about establishing enterprise zones in inner cities, a principal element of conservative urban policy, Judge Thomas politely poured cold water on the idea. In so doing, here is part of what he said in 1985: "The first priority is to control crime. The sections where the poorest people live aren't really livable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are criminals? There were lots of black businesses before enterprise zones...But blacks cannot stay in business if they are mugged, or if customers are mugged going in and out of the establishment, or if people are hanging out selling drugs in front of it. If you want to encourage business in these areas, then stopping crime has got to be at the top of the list."

Judge Thomas' independence, however, does not sit well with

some special interest groups and some liberal academics and pundits. These critics would like to impose their liberal policy agenda on the American people through the judiciary. They fear Judge Thomas will be faithful to the Constitution and federal laws as enacted, instead of to their political agenda.

We have heard criticism from some groups that Judge Thomas isn't strong on civil rights. Nonsense. Judge Thomas has an excellent record on civil rights and a deep personal commitment to equal opportunity. As he wrote in 1986, "I am a black Southerner, I grew up under the heel of segregation and I have always found it offensive for the government to treat people differently from others because of the color of our skin." At his confirmation hearing just last year for the judgeship he now holds, Judge Thomas testified: "...the reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society, gained access..."

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discrimination, including many affirmative steps, such as increased recruitment and outreach to minorities and women. This is the kind of nondiscriminatory affirmative action which we all favor.

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rights. Innocent persons were made new victims of discrimination as a purported means of remedying discrimination against others and as redress for a history these new victims had not created.

Now, we all know that discrimination and bigotry still persist. Indeed, a tiny portion of my mail regarding Judge Thomas is another unfortunate reminder that some people in this country want to keep black people down. One satisfactory result of Judge Thomas's confirmation to the Supreme Court, for this Senator, will be the powerful rebuke it delivers to these un-American bigots. But the answer to discrimination is to end it, make whole its victims, take steps to ensure that it does not recur, and require the guilty party to recruit more minorities and women into its applicant pool and consider them fairly along with the rest of the applicants. The answer is not to engage in discrimination against other, innocent persons. Two civil wrongs do not make a civil right.

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Now, Judge Thomas is before us and some would have us believe he now holds the key to Roe v. Wade. I note that Judge Thomas casts one vote, not five. It is inappropriate enough that he is expected to answer some of the questions Judge Souter answered. But, if Judge Thomas is held to a higher standard and even more rigorous litmus tests than Judge Souter, I think many Americans will be deeply troubled and will want to know why this particular nominee is being singled out.

Moreover, we are here to determine Judge Thomas' fitness to be a Justice of the Supreme Court, not to conduct oversight on the EEOC or the Office for Civil Rights. We are not here to test his memory on events and documents constructed years ago. I would also note that after every matter in which Judge Thomas was involved in the Executive Branch, this Senate later confirmed him to a very responsible position at least once, and in some cases, three times.

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success. That success says a great deal about our country and about Judge Thomas, the man. Having grown up in the era of Jim Crow, and gone barefoot in the unpaved street of his community, he will soon be able to put his feet under the bench in the highest court in the land, as he contemplates the finer points of the law. As Judge Thomas said when nominated, only in America could such a thing happen.

The Nominee's Judicial Experience

Let me lay to rest, here, any criticism that Judge Thomas' less than two years on the bench somehow renders him less than the best for the job. Of the 105 people who have served on the Supreme Court, 41 had no prior judicial experience whatsoever. Another 10 Justices had less than two years of State or federal judicial experience. Thus, Judge Thomas has as much or more judicial experience as nearly half of those who served on the Supreme Court, including many of the most distinguished and well-regarded Justices ever to serve. The use of double-standards to hold down blacks in well known. I am confident that the Senate will not impose an unconscious double-standard on this nominee with respect to judicial experience.

The CHAIRMAN. Thank you.

Senator Metzenbaum has been kind enough, I am told, to yield to Senator Leahy because he has an appointment with the President to discuss the next five nominees to the Supreme Court. [Laughter.]

I will yield to Senator Leahy.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I thank you, but I especially want to thank Senator Metzenbaum. Because of the President's schedule, the time of the meeting is such that I probably would not be able to make an opening statement if he did not yield, and I appreciate the courtesy of both of you.

Judge Thomas, I am pleased to welcome you and your family to these hearings, and I was delighted to have a chance to meet, albeit briefly, Mrs. Thomas this morning.

The Constitution's advise-and-consent process established a method of assuring the fitness of Supreme Court nominees. That really has to be the most important function this committee can serve. It was at such committee hearings as we are having today that Justice Thurgood Marshall was approved for a seat on the Court some 24 years ago.

If you look at the distinguished career of Justice Marshall, you see him serving as the able guardian of rights, rights that affect the welfare of every man, woman, and child in this country, rights like personal privacy, rights like a woman's right to choose, freedom of speech, the separation of church and State, and school desegregation. He fought for those issues during those 24 years and those issues are no less important today.

The nominee who replaces Justice Marshall on the Court is going to be with us long after many at this table today have moved on. When children born this year become eligible to vote in the year 2009, Judge Thomas, if you are confirmed, you will still be a relatively youthful 61 years old. So your nomination comes at a pivotal time in Supreme Court history.

In little over a year, two of the Court's great defenders of individual liberties—William Brennan and Thurgood Marshall—have both retired. Now, their departure gives cause for public concern about the direction of the Court, and that concern is reflected in the hundreds of letters and phone calls I have received from Vermonters this summer. Many fear that we are witnessing the creation of a monolithic, right-wing Court that is going to favor the State and the power of the State and its bureaucracies over individual and minority rights.

Now, you speak passionately about individual freedom, and your concerns are well placed, for it is the courts, and preeminently the Supreme Court, that must defend those freedoms.

Judges are often targets of public disdain because they rule according to the law; they don't rule according to popular opinion or public opinion polls. That takes courage, especially when decisions run counter to shifting political winds. Our Founding Fathers anticipated this by insulating judges from the majority will, granting them lifetime tenure. Laws may be made by majorities, but minori-

ties are safe only if those laws are tempered by justice and a passion for the liberties of the individual.

The next Supreme Court nominee that the Senate confirms must be dedicated to the proposition that personal freedom is the birthright of every single American. In exercising our advise-and-consent responsibility, we have to consider a nominee's threshold qualities of judgment, temperament, experience, intellectual distinction, and moral fiber.

But having done that, we look beyond to probe a nominee's judicial philosophy. Does he or she have an expansive or a narrow view of the Constitution? Does the nominee regard the Constitution as a safeguard for civil rights and liberties, as it was for Thurgood Marshall and so many great conservative and liberal Justices of the Court? Or does the nominee espouse a narrow and guarded approach that ultimately limits the freedoms of all Americans?

Finally, we have to assess a nominee's willingness to answer questions. No nominee should be asked to discuss cases pending before the Court. I accept that. That is a given. Neither should a nominee feel free to avoid questions about established constitutional doctrine on the ground that a case on that subject may eventually come before the Court. Far too much is at stake.

The Senate and the public have a right to know what a nominee thinks about critical issues before that nominee is confirmed to a lifetime seat on the Court. Let me make this very clear, Judge Thomas. In recent years, we have danced around the question of where nominees stand on a woman's fundamental right to choose an abortion. This is one of the burning social issues of our time. It is the single issue about which this committee and the American people most urgently wish to know the nominees' views. And yet the Senate and the Nation have been frustrated by polite—albeit respectful—stonewalling. To the extent that Judge Souter declined to answer pertinent questions last year, I was disturbed, and I told him so.

In light of your warm praise for Louis Lehrman's essay arguing that all abortions should be unconstitutional, I believe the burden is on you to explain that view. I will expect forthright answers from you. If not, then I will have no choice but to assume that you agree with what Mr. Lehrman said.

Judge Thomas, let me also say that I look forward to getting to know you better in these hearings. I am impressed, and I believe the country is impressed, by the less-traveled road that you have taken from Pin Point, GA, to the threshold of the Supreme Court. Your self-discipline, your diligence, and your hard work are exemplary.

At the same time, you must understand that your record and some of your writings trouble me. I have no clear idea of what your approach is to the Constitution. You describe yourself as conservative. Well, most Vermonters are conservative, too. But Vermont conservatives believe first and foremost in limited government, a government that stays out of people's personal affairs, leaves us alone. They understand what Justice Louis Brandeis described as "the right to be let alone."

But many conservative activists contend that Justices should defer invariably to majority rule, somehow to put blind faith in the

infallibility of whatever the legislature does. You were part of a White House working group on the family which went so far as to argue that the jurisdiction of the Federal courts might have to be curtailed. Why? To ensure that the majority automatically rules.

I think the model becomes "my government, right or wrong," and I find that a chilling abandonment of individual and minority rights. Let us never forget that history has been written time and again by those who dare to challenge conventional wisdom.

You often allude to what the Declaration of Independence calls the laws of nature and of nature's God. Well, natural law, we all know, is an elastic concept. It can be used to defend but also to deny basic rights. In a case alluded to already at this hearing today, the famous case from the 1870's, one Supreme Court Justice would have upheld a law in Illinois that barred a Vermont woman from becoming a lawyer. And why would this Vermont woman be barred from becoming a lawyer? Because under the laws of nature, according to this Justice, women were granted the noble and benign offices of wife and mother, and that was it. He wanted to make certain we knew that natural law would never accept a woman as a lawyer.

Now, that might seem like a very quaint and dated reference, but the natural law problem is anything but dated. It can be used to argue for or against rights like abortion and privacy. I want to know what natural law means to you, Judge. How would you use it to interpret the Constitution and the Bill of Rights? And I will ask questions along that line.

In the hearing this committee held last year to consider your nomination to the D.C. circuit, you said that you were not "someone who has had the opportunity or the time to formulate an individual, well-thought-out constitutional philosophy." Well, that is fair enough. I don't have any problem with that answer. Every nominee to the Court of Appeals need not come armed with a fully coherent constitutional jurisprudence. They have to follow what is already in the law, what is already decided by the Supreme Court. But nominees to the Supreme Court should be prepared to tell this committee and, through us, the American people how they are going to approach the Constitution and the Bill of Rights.

I am troubled by your open admiration for those willing to deceive and defy Congress and by the hostility you have demonstrated toward Congress, both in action and in words in your speeches. You have attacked Chief Justice Rehnquist's opinion that upheld the special prosecutor law for Watergate-style investigations. You have questioned Congress' power to enact civil rights legislation. You have suggested repeatedly that Congress has no business carrying out its oversight function, one of the most important functions of this body.

I have always considered the separation of powers to be the surest guarantor of the limited government you claim to prefer. So when you state a clear preference for executive branch power over congressional authority, it gives me some pause.

Finally, I am concerned about some of your ideological views. You have wholeheartedly endorsed the statement that America is careening with frightening speed toward a statist dictatorial system. Well, I cannot accept that, and these words seem more

than a little strange as we watch the unfolding drama of Eastern Europe and the Soviet Union, where countries that truly suffered under statist dictatorial systems throw off their shackles. And when they throw off their shackles, where do they look? They look toward a free and compassionate America as an example of how a democracy is run.

But, more disturbingly, your words strike me as the views of a combative, hard-line ideologue. The last thing I seek in a Supreme Court Justice is ideology. I value intelligence and wisdom, compassion, a willingness to listen to all sides of an argument. I want someone on the bench who is going to give every litigant a fair shake, without bias or predisposition of any kind. Ideological fervor plays no part in a judicial temperament.

So I look forward to discussing these and other issues with you. I welcome you to these hearings. I hope that you will be forthcoming in your responses to the committee because ultimately we have to make the fully informed recommendation to the Senate and to the rest of this country. I welcome you here, and, Mr. Chairman, again, I thank both you and Senator Metzenbaum for the courtesy.

[The prepared statement of Senator Leahy follows:]

U.S. SENATOR PATRICK LEAHY

VERMONT

STATEMENT OF SENATOR PATRICK LEAHY
ON THE NOMINATION OF CLARENCE THOMAS
TO THE UNITED STATES SUPREME COURT
SEPTEMBER 10, 1991

Judge Thomas, I am pleased to welcome you and your family to these hearings.

The Advice and Consent process established by the framers of the Constitution to assure the fitness of Supreme Court nominees is one of this Committee's most solemn responsibilities. It was at such committee hearings that Justice Thurgood Marshall was approved for a seat on the Court 24 years ago.

During his distinguished career, Justice Marshall served as an able guardian of rights that affect the welfare of every man, woman and child in this country -- rights like personal privacy; a woman's right to choose; freedom of speech; the separation of church and state; and school desegregation. These issues are no less important today. The nominee who replaces Justice Marshall on the Court will be with us long after many around this table today have moved on. When children born this year become eligible to vote in 2009, Judge Thomas, you will, if confirmed, still be a relatively youthful Justice of 61.

Your nomination comes at a pivotal time in Supreme Court history. In little over a year, two of the Court's great defenders of individual liberties -- William Brennan and Thurgood Marshall -- have retired. Their departure gives cause for public concern about the direction of the court, and that concern is reflected in the hundreds of letters and phone calls I have received from Vermonters this summer. Many fear that we are witnessing the creation of a monolithic right-wing Court that will favor the power of the state and its bureaucracies over individual and minority rights.

You speak passionately about individual freedom, and your concerns are well placed for it is the courts, and preeminently the Supreme Court, which must defend such freedom.

Judges are often targets of public disdain because they rule according to law, not popular opinion. That takes courage, especially when decisions run counter to shifting political winds. Our Founding Fathers anticipated this by insulating judges from the majority will and granting them lifetime tenure.

Laws may be made by majorities, but minorities are safe only if those laws are tempered by justice and a passion for the liberties of the individual.

The next Supreme Court nominee that the Senate confirms must be dedicated to the proposition that personal freedom is the birthright of all Americans.

In exercising our advice and consent responsibility, we must first consider a nominee's threshold qualities of judgment, temperament, experience, intellectual distinction and moral fiber.

But we must look beyond that, probing a nominee's judicial philosophy. Does he or she have an expansive or narrow view of the Constitution? Does he regard the Constitution as the safeguard for civil rights and liberties, as it was for Thurgood Marshall and so many great conservative and liberal Justices of the Court, or does he espouse a narrow and guarded approach that will limit our freedoms?

Finally, we have to assess a nominee's willingness to answer questions. No nominee should be asked to discuss cases pending before the Court. Neither should a nominee feel free to avoid questions about established constitutional doctrine on the ground that a case on that subject eventually will come before the Court. Too much is at stake. The Senate and the public have a right to know what a nominee thinks about critical issues before that nominee is confirmed to a lifetime seat on the Court.

Let me make this clear, Judge Thomas. In recent years, we have danced around the question of where nominees stand on a woman's fundamental right to abortion. This is one of the burning social issues of our time. It is the single issue about which this Committee and the American people most urgently wish to know the nominee's views. And yet the Senate and the nation have been frustrated by polite and respectful stonewalling. To the extent that Judge Souter declined to answer pertinent questions last year, I was disturbed and I told him so.

In light of your warm praise for Lewis Lehrman's essay arguing that all abortion should be unconstitutional, the burden is on you to explain your views. I will expect forthright answers from you. Otherwise, I will have no choice but to assume that you agree with Mr. Lehrman.

Judge Thomas, let me say that I look forward to getting to know you better in these hearings. I am impressed -- and the country is -- by the less-travelled road you have taken from Pin Point, Georgia to the threshold of the Supreme Court. Your self-discipline, diligence and hard work are exemplary.

At the same time, your record and your writings trouble me.

First, I have no clear idea of your approach to the Constitution. You describe yourself as conservative. Most Vermonters are conservative, too. Vermont conservatives believe first and foremost in limited government -- a government that stays out of people's personal affairs and understands what Justice Louis Brandeis described as the "right to be let alone."

But many "conservative" activists contend that judges should invariably defer to majority rule, putting blind faith in the infallibility of the legislature. You were part of a White House Working Group on the Family which went so far as to argue that the jurisdiction of the federal courts might have to be curtailed to ensure that the majority rules. The motto becomes "my government, right or wrong," a chilling abandonment of individual and minority rights. Let us never forget that history has been written time and again by those who dare to challenge conventional wisdom.

You often allude to what the Declaration of Independence calls the "Laws of Nature and of Nature's God." Natural law is an elastic concept which can be used to defend or to deny basic rights. In a famous case in the 1870s, one Supreme Court Justice would have upheld a law in Illinois that barred a Vermont woman from becoming a lawyer because, under the laws of nature, women were granted "the noble and benign offices of wife and mother." He wanted to make certain we knew that natural law would never accept a woman as a lawyer.

That might seem like a quaint and dated reference, but the natural law problem is anything but dated. It can be used to argue for or against rights like abortion and privacy. I want to know what

natural law means to you, Judge Thomas, and how you would use it to interpret the Constitution and the Bill of Rights.

In the hearing this Committee held last year to consider your nomination to the D.C. Circuit, you said that you were "not...someone who has had the opportunity or the time to formulate an individual, well thought-out constitutional philosophy."

Fair enough. Every nominee to the Court of Appeals need not come armed with a fully coherent constitutional jurisprudence.

But nominees to the Supreme Court should be prepared to tell this Committee and the American people how they would approach the Constitution and the Bill of Rights.

I am also troubled by your open admiration for those willing to deceive and defy Congress and by the hostility you have demonstrated toward Congress both in action and in word. You have attacked Chief Justice Rehnquist's opinion that upheld the special prosecutor law for Watergate-style investigations. You have questioned Congress's power to enact civil rights legislation. You have repeatedly suggested that Congress has no business carrying on its oversight function.

I have always considered the separation of powers to be the surest guarantor of the limited government you claim to prefer. Thus, your clear preference for executive branch power over the congressional authority gives me pause.

Finally, I am concerned about some of your ideological views. You have wholeheartedly endorsed the statement that "[America is] careening with frightening speed towards...a statist-dictatorial system...." These words seem more than a little strange as we watch the unfolding drama of Eastern Europe and the Soviet Union, where countries that truly suffered under statist-dictatorial systems throw off their shackles and turn a hopeful eye toward a free and compassionate America. More disturbing, your words strike me as the views of a combative, hard-line ideologue. The last thing I seek in a Supreme Court Justice is ideology. I value intelligence, wisdom, compassion, and a willingness to listen to all sides of an argument. I want someone on the bench who is going to give every litigant a fair shake, without bias or predisposition of any kind. Ideological fervor plays no part in a judicial temperament.

Judge Thomas, I look forward to discussing these and other issues with you. I welcome you to these hearings and hope that you will be forthcoming in your responses to this Committee so we can make a fully informed recommendation to the Senate and to the American people.

The CHAIRMAN. Thank you.
Senator Simpson.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator SIMPSON. Thank you, Mr. Chairman.

I see you were trying to throw me off of my usual pattern there. The tenor of my remarks were somewhat dependent upon the commentaries that might emanate from my friend and senior colleague from Ohio.

The CHAIRMAN. It will make it harder for you to attack, before attacked, but give it a shot anyway, Senator.

Senator SIMPSON. Thank you. I was citing there a natural law of the Judiciary Committee. [Laughter.]

Judge Thomas, we welcome you to this important step in this process. Some of my colleagues have already spoken very clearly of your impressive and truly inspiring life story. I will not reiterate those remarkable accomplishments, and yet they certainly do stir one.

I would only point out a clear irony, congratulations, and because of your tremendously successful career to date, you now have the opportunity to be subjected to a very rigorous process that can be unpleasant and sometimes rancorous, but, hopefully, never unfair. I do not believe our Chairman would ever allow that.

Let me emphasize that these hearings can also be, quite clearly, courteous and thoughtful, and I believe that was indeed the case when we heard testimony and comments from Judge Souter and Judge Kennedy, before this committee voted to elevate them to the Supreme Court.

On the other hand, I think Judge Bork might choose to undergo a medieval torture chamber, rather than to be presented again before this committee, and that was a very unfortunate situation in my mind, whether you liked him or whether you didn't.

So, Judge Thomas, unlike some nominees we have faced, and I think, again, in particular, of Justices Kennedy and Souter, you are really not a great mystery to any of us. You have been here before the U.S. Senate four times. No one I can ever imagine would have that type of exposure before this committee.

So, no mystery to us. You have twice been confirmed by the U.S. Senate here on the EEOC, by this very committee, after extensive hearings before the Senate, we confirmed your nomination to the U.S. Court of Appeals for the District of Columbia Circuit. Four times, members of the Senate have voted for or against you, very few in the negative.

What is different now, I suppose will be told to us is being a "higher standard." I think it will be really a higher degree of plain old politics. There is nothing wrong with that, but I think we ought to stay with reality as to what it will be.

There will be some witnesses who will appear after you who will be very critical of you, extremely critical. They certainly have that right to express any type of opinion they may wish. However, for those Americans who are not as familiar with your record as we are in the Senate after four separate hearings, let me emphasize

that some criticisms of you have already been well considered and rejected by the Senate, and I think that is important to keep in mind.

Some groups will be here to criticize your tenure, as Chairman of the EEOC or as Director of the Education Department's Office of Civil Rights. This committee and the full Senate has had all of those criticisms squarely before us on more than several occasions, including one which was not of great record, before the Senate Select Committee on Aging, which was a real rake-around job in ancient days, and not much came of that, either.

So, we rejected all of those previous when we confirmed your nomination to the D.C. Circuit Court by a voice vote. I think there was a quite audible "nay," perhaps from one on the panel who is not a faint-hearted man and who speaks very clearly on the issues.

So, I would hope that this hearing does not simply dwell on all these previously thoroughly debated and already decided issues. That laundry has been well-washed.

Some critics will be here to say and will say here that the ABA found you to be only qualified for the Supreme Court, and that is the American Bar Association. I assume some on that committee apparently would have preferred that you had more experience on the appeals court. But let us clearly remember that most of those in the ABA are of the same critics who opposed the nomination of Robert Bork, even though a majority of the ABA committee had found Judge Bork to be "well-qualified." So much for that.

Let us also recognize the ABA rating for exactly what it is, helpful at times, irrelevant at others, and always subject to political manipulation and pressure of special interest groups within the bar—yes, that does occur.

Some special interest groups will be here to say some pretty harsh and even some very arrogant and patronizing and even nasty things about you, from the testimony I can envision coming from them in some of the material I have seen. You might not even be able to recognize yourself when they are finished portraying you. I know that was the case with Robert Bork.

I do not come back on that to express any unfairness by the Chairman. There are many who feel the other way. That is not even the issue. But what I saw happen, this Senator from Wyoming, was we watched a man who had been on the Federal bench for 5½ years, who had done and written 104 decisions, none of them ever overturned on appeal, and 6 of his dissents became majority opinions of the U.S. Supreme Court, and whether one liked him or not, he was portrayed to this committee and to the U.S. people as a gargoyle, a sexist, a racist, an invader of the bedroom, a sterilizer of women. I sat right here and watched it all happen—a very, very troubling procedure.

So, from what I have come to discern, you will also be portrayed by some as being hostile to privacy rights, as being an apologist for segregated schools, and a promoter of wild, dramatic, and unchecked theories of natural law that will cause the U.S. Constitution to come undone, it seems. One writer, I think who aspires to this Court under some other administration, has said that the Senate cannot avoid sharing the responsibility for the fate of self-government in the United States—pretty dramatic.

I thought, as I heard the discussion, I think you might come to see that natural law will become but a pseudonym for natural opposition or natural partisanship or natural frustration, at having to place an independent, thoughtful, bright conservative on the U.S. Supreme Court. That will become quite evident to the American public.

Now, there is a natural solution for that, elect a natural Democrat as President of the United States. The American public has not chosen recently to do that, but, naturally, they could. [Laughter.]

So, some groups have actually portrayed you as being hostile to civil rights issues, and that is patently absurd and demeaning and arrogant. It is clearly known that you are a powerful supporter of antidiscrimination laws. We also well know that other groups are most afraid of other groups who do not like the fact that you oppose remedies which themselves cause reverse discrimination, when actually most types of reverse discrimination do indeed violate the Constitution and most Americans really do strongly oppose reverse discrimination.

So, I believe these criticisms of you to be inaccurate and off-base, and some writers I think have been in some cases somewhat hysterical. And one can be a fine and strong supporter of civil rights, while being very strongly opposed to unfair preferences, and many here feel that way. I know I fit that category, too.

So, Judge Thomas, there will be a number of us here who listen to seek the truth. If we are here just to hear some of the special interest groups parrot some of the old sale lines of criticism I have just recited, well, we have our opportunity to rebut that.

But for now, I earnestly recommend that you sit back and relax as much as is possible. The Chairman will handle it with equanimity and care and fairness, and allow the American public to come to know you in the same way that many of us on this committee know you. And through tough, hard, serious and, yes, even partisan questions by this committee, I believe all Americans will come to know you for what you are, an uncommonly bright, articulate, and qualified judge, with significant and impressive legal and life experiences, who is ready, fully ready, willing, and able to serve our country on the Nation's highest court.

Let me conclude by saying that not only do I believe you will be good for the Supreme Court, but, Judge Thomas, I think you will also be very good for America on the broader level. You yourself have noted that is some risk, obviously, that there are too many people today giving groups excuses for various things that happened in their lives. I am not even going to comment on that. You can. You have.

But I think the last thing anyone needs right now in this country, white, brown, yellow, or black, is more excuses for everything. Excuse time is over. It is important to run out of scape goats. It is time for all Americans—and that is what we are in this pluralistic society—to focus again on what has made this country great, and we must all reacquaint ourselves, all of us, every race, color and creed, with those distinctly American and, yes, even corny notions of hard work and decency and kindness and fairness to our fellow

humans, and we must strive to provide every single individual with an equal opportunity to realize his or her full potential.

You exemplify what all of us might be able to accomplish, good things if we were to stop making excuses, and I was awfully good at that. I was known as "Alibi Al" in high school, and it worked. I could fake anybody out except myself. Finally, creeping maturity overcame me, and there was some progress.

So, you are an inspiration to us all. Mr. Chairman, I thank you and I sincerely welcome Judge Thomas to our committee, and I thank you for your past and present courtesies.

The CHAIRMAN. Thank you, Senator, for once again not disappointing. I think you will soon find out that Judge Thomas' views are so different from Judge Bork's that you will be surprised to find that this is not about conservatives; rather, this is about how people think.

Senator SIMPSON. I have an opportunity for rebuttal, thank you. [Laughter.]

The CHAIRMAN. Senator Metzenbaum.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Thank you, Mr. Chairman.

Judge Thomas, this is the fifth Supreme Court vacancy in the Reagan-Bush era. Once Justice Marshall's seat is filled, Presidents Reagan and Bush will have filled a majority of seats on the Supreme Court.

A judicial nominee cannot become a member of the High Court, simply because the President and his advisers are comfortable with that nominee's views and judicial philosophy. The Supreme Court is not an extension of the Presidency. The Constitution makes it clear that the Supreme Court is a separate and independent branch of government. That same Constitution assigned the Senate a role in the confirmation process, to help preserve the independence of the judiciary.

The importance of the Senate's role has grown in recent years, because, quite frankly, Presidents Reagan and Bush have made no bones about using the Court to advance their political and social agenda.

A core element of the Reagan-Bush political program has been reversal of Supreme Court decisions in the areas of abortion, civil rights, individual liberties, and the first amendment. The Reagan and Bush administrations have used the courts to achieve policy outcomes on social issues which they could not obtain through the legislative process.

Make no mistake about it, the Reagan and Bush administrations have succeeded. You only have to look at the Court's astonishing decision last term in the abortion gag rule case, to realize that the Rehnquist court is intent on implementing the Reagan-Bush social agenda.

An omen of things to come from the Rehnquist court was contained in a paragraph in *Payne* v. *Tennessee*, a 1991 case in which the Court reversed itself on a question of constitutional liberties. The majority in that case stated that adherence to precedent is

most important in cases involving property and contract rights. But with respect to constitutional rights and liberties, a majority of the Rehnquist court stated that adherence to precedents "is not an inexorable command, particularly in constitutional cases."

In other words, the Reagan-Bush Supreme Court thinks that Justices should be more respectful of precedent, when a business person's contractual rights are at stake than when a woman's constitutional right to choose or an African-American's right to equal treatment is at stake.

As Justice Marshall wrote in his dissent in *Payne*, this statement by the Reagan-Bush court sends "a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting open defiance of our precedents," said Justice Thurgood Marshall.

It is in that context that the current nominee comes before the Judiciary Committee.

The nomination of Judge Clarence Thomas has provoked debate and differences of opinion throughout the country. But there is one thing upon which everyone, including this Senator, agrees: Judge Thomas' life story is an uplifting tale of a youth determined to surmount the barriers of poverty, segregation, and discrimination. It was an extraordinary journey from hardscrabble Pin Point, GA, to the promise and privileges of Yale Law School.

It would be easy, and probably smart politically, for Senators to vote in favor of this nomination, because of Judge Thomas' personal triumph over adversity. Frankly, I suspect the President and his advisers believe that some Senators will do just that. But the Senate must evaluate the nomination based upon the career and record of the nominee, Judge Thomas. The question for this committee is not where does Judge Thomas come from, rather, the question for the committee is this: Where would a Justice Thomas take the Supreme Court?

I am deeply concerned about the answer to that question. The record suggests that Judge Thomas may be an eager and active participant in the Rehnquist court's assault on established judicial precedents which protect civil rights and individual liberties. Judge Thomas has harshly criticized important court decisions which have protected voting rights for blacks and promoted equal treatment for minorities and women. Indeed, he has suggested that many of these decisions be overturned.

Virtually every public statement which Judge Thomas has made regarding the issue of abortion indicates that he does not believe the Constitution protects a woman's right to choose. Judge Thomas even signed onto a White House report which urged the appointment of new Supreme Court Justices who would overturn decisions such as *Roe* v. *Wade*.

There are those who suggest that because of his extraordinary background, Judge Thomas will bring a different perspective to the Court. That may be true. It also may not be true. I am concerned that the nominee's statements and record indicate that, rather than bring a different perspective to the Court, he will fit in all too well with the Court that has spurned its special duty to protect the rights of women and minorities, the elderly, and the poor.

During his tenure as Chairman of EEOC, Judge Thomas failed to fulfill his duty to protect the legal rights of older workers. Now, some argue that this failure as EEOC Chairman is irrelevant in determining his qualifications for the Court.

I believe that his disregard for the rights of older workers is very relevant. It directly relates to his sensitivity and to his duty to provide judicial and constitutional protection for the aged. Unfortunately, while Judge Thomas was head of the EEOC, thousands of older workers who believed that they were victims of age discrimination lost their right to bring age bias suits in Federal court, because his agency failed to process their claims in a timely manner. Despite assurances from Clarence Thomas that he would correct the problem, Congress found it necessary, in 1988 and again in 1990, to pass legislation to restore the rights of these older workers.

In his career with the Federal Government, Clarence Thomas was appointed to jobs designed to protect and enforce the rights of the disadvantaged. Yet, in speech after speech, Clarence Thomas rails against governmental efforts to aid minorities and the disadvantaged. In one article, Judge Thomas even asserted that it was "insane" for African-Americans to expect the Federal Government to help relieve the harmful effects of decades of discrimination.

Judge Thomas benefited both from affirmative action and from the work of civil rights leaders and government officials who have tried to break down the barriers of poverty and discrimination. Yet, Judge Thomas condemns government efforts to give other people the same chance he had to climb over those barriers to success.

One other area of concern is Judge Thomas' constitutional philosophy. Judge Thomas' speeches and writings suggest that he might read the Constitution as forbidding the minimum wage law, banning affirmative action, and severely restricting constitutional power.

In addition, Judge Thomas has asserted that the Constitution must be interpreted in light of natural law. As has already been pointed out, natural law is a broad, vague concept which means different things to different people. Over 50 years ago, conservative judges used natural law arguments to uphold antiunion practices by employers and strike down health and safety legislation.

Similarly, a 19th century Supreme Court decision relied upon natural law arguments about "the paramount destiny and mission of women" to justify an Illinois law which banned women from practicing law. Today, antiabortion advocates have cited natural law as the basis for their argument that a fetus has a constitutionally protected right to life which overrides a woman's right to choose. In 1987, Judge Thomas called one article which made that argument "a splendid example of applying natural law."

So, Judge Thomas, I begin this hearing with a great deal of respect for your accomplishments, but also with a great deal of concern about your record and about the direction in which the Court has been moving.

You have been nominated for a seat on the Supreme Court which can no longer be counted on as a force to promote racial harmony, equal treatment, and social justice. A majority of the Supreme Court has taken a sharp right turn and declared open

season on a number of constitutional liberties and civil rights which Americans hold dear.

While the President may celebrate the Court's movement in this direction, I lament it. Ultimately, Judge Thomas, I must examine your record and determine whether you will be a Justice who will accelerate this movement, or a Justice who will help to restore balance to the Court, and once again make it a force for equal justice, fair treatment, and individual liberty.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Grassley.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I want to thank you for scheduling this hearing so soon after the recess is over so that we have an opportunity to get through this and to get Judge Thomas sworn in and serving on the Court when it opens its fall term. So, thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator GRASSLEY. Congratulations, Judge Thomas, and I welcome you, and, primarily, I want to also welcome your family. This is for you and for us on this committee a really historic moment, because there has been only 105 Supreme Court Justices since the Supreme Court was set up in accordance with the Constitution. So that will put you, Judge Thomas, in a very small prestigious group. But somehow I feel it is a group you have prepared yourself for diligently.

I hope that my fellow Americans know that Judge Thomas has served with distinction in both Federal and State governments. At the Federal level he has substantial experience in all three branches of government, and I would venture to guess that few nominees have ever had such a breadth of experience before being nominated to the highest court in the land.

I would hope that this background has given Judge Thomas an appreciation for the appropriate role of courts that they have within our democratic government. Our American governmental system is, of course, a delicate one, with a structure of checks and balances and defined roles for each branch of our government.

Sometimes Justices haven't always understood that they are not policymakers. For example, some have criticized Judge Thurgood Marshall for continuing to be an advocate even after he donned the robes of an umpire.

One of the architects of article 3, Alexander Hamilton, wrote that the courts must declare only the sense of the law, and if they should be disposed to exercise will rather than that judgment the consequence would be the substitution of their pleasure to that of a legislative body.

To be faithful to our Constitution's framers, Judge Thomas will actually be required to step away, step back from his past involvement in the shaping of public policy. Being a judge, as he has said since assuming his position on the Court of Appeals, requires discipline. Rather than making policy, he will be called upon to inter-

pret the policies of the elected branches of government, of course all the while guided by the Constitution.

This confirmation hearing will give the Senate, and at the same time the American people, the chance to become acquainted with Judge Thomas and to assess whether he possesses the qualities that a Justice should have—fairness, open-mindedness, and objectivity.

I suspect that we will all see an individual unlike any other who has come before us as a nominee for the High Court. Judge Thomas spent the first 17 years of his life in strict segregation of the South, directed as to what water fountain he could drink from and what public restroom he could use. Judge Thomas has described this "as close to totalitarianism as he would ever hope to get."

He grew up without material comforts and even conveniences. We have heard from him and people who have known him well that it wasn't until he was 7 years old that he lived in a home with indoor plumbing. His home was run quite strictly by his grandparents who, in his words, had "Ph.D.'s in life earned at the university of experience with hard times as their advisor."

They instilled in him discipline and respect. It seems to me that discipline is a shortcoming in too much of American society today. So, having that in Judge Thomas puts him a cut above average American society.

He was inspired by his grandfather and his teachers. They were Catholic nuns. They gave him his personal foundation—"God, values, morality, and education"—and these are the words that he told the nuns when he paid tribute to them in 1986.

In the Senate we have some who have started from humble beginnings and many who were born in great wealth and privilege. None of us, however, has had to surmount the obstacles Judge Thomas confronted. Racism and prejudice from his cruel teenage classmates in the seminary to supposedly enlightened employers he encountered as a young law school graduate.

As he has noted, he has been "deterred and preferred" by racially conscious policies. Many others with his experiences would become cynical and selfish, I am sure. But rather we have before us in Judge Thomas a man who has devoted his professional life to work on behalf of equal rights and opportunities for all individuals. He sees the respect for individual rights as a great and overriding tradition of our Nation. What is most important, and he knows while saying that that there is still a lot of work that needs to be done in this great country of ours.

Now some find Judge Thomas to be threatening because he challenges the liberal orthodoxy of special preferences and group entitlements. That has become, as columnist William Raspberry has said, "black political orthodoxy." But Judge Thomas' message of self-reliance is a reminder to all Americans that while government's responsibility is to ensure equal opportunity, reliance, let me say too much reliance upon government-mandated preferences won't solve each and every problem.

Now we will have the opportunity in the next few days to explore many topics with Judge Thomas. However, he is no stranger to the Senate, and I think I am the fourth person this morning who

has said that he has been before this confirmation process of the Senate on four separate occasions, and I guess this is the fifth one.

Moreover, I think that Judge Thomas in many different ways, both in public and before this body, has already been very forthcoming. In response to the Committee's request for certain documents, Judge Thomas has provided, I have been told, some 36,000 pages of documents, and I understand that it has been cataloged in some 10 boxes of documents. I don't know, I suppose there could be others because we confirm a lot of people. But I really don't know of any other nominee who has been so scrutinized and so analyzed as you have been Judge Thomas in preparation for this hearing.

This document request is just an example of how far the Senate has strayed in the nomination process. I suppose I say that in a historical context. Some have stated that the Senate's "advise and consent" role in the elevation of Supreme Court Justices, of any Supreme Court Justice, for that matter, is the most important power that we in the Senate here exercise. Now, I don't happen to share that view, as important as I take my responsibilities today and through this process, because I happen to feel that confronting the issue of war—as we did only last January, and attempting to bring government spending under control are among the more significant responsibilities that we have.

And, of course, I think the Constitution doesn't elevate the confirmation process quite this high. The Constitution shows this because the "advise and consent" role is spelled out in chapter 2 with executive powers, and not with the legislative powers in Article 1. So I think the Constitution itself indicates it is not a preeminent legislative power.

It is really only in recent years that the Senate has redefined its role. When Justice White was nominated, just 29 years ago, he came to this Judiciary Committee and was asked only eight questions. What has changed to require all these long hearings over the last quarter century? Well, something has lengthened the process, and to some extent I feel it has been lengthened needlessly. I don't know exactly why, but this is how the process works today, and I am a Member of the Senate and I am going to make sure the process works. But I think once in a while maybe we ought to take some—reanalyze how we do things.

And, of course, saying this doesn't mean that the Senate should be a rubber stamp. I don't believe that.

Judge Thomas, I look forward to talking with you over the next few days about the role of the courts in our democracy, how you approach cases, and the differences that you see between judicial restraint on the one hand and judicial activism on the other hand. And I will have some questions for you like my colleagues are going to have questions about how you see this whole issue of natural law. We should also have an understanding as to whether you bring a very personal philosophy to the job and the responsibilities of judging.

Finally, Judge Thomas, I wish you well in the process which lies ahead, and I caution very much against a quest for commitments on very specific issues, particularly issues that will come before the Court. For if you were to lay out any particular positions on the legal issues of the day, the independence and the integrity of the

judiciary would be compromised. We expect you to be a policeman for that integrity and independence, and I believe that you have been already.

Thank you.

The CHAIRMAN. Thank you very much, Senator.

Senator Heflin.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Thank you, Mr. Chairman.

I would like to welcome you, Judge Thomas, to this historic confirmation hearing. Your nomination by the President is a continuation of a constitutional process begun over 200 years ago, and there are few duties that I take more seriously than the "advise and consent" function entrusted to the Members of the U.S. Senate.

As I have with every nomination hearing, I will use this occasion to listen and learn. Through the media, we have all seen and heard and read a great deal about your nomination and its uniqueness. But it is during these hearings where spontaneity and unpredictability are common so that those of us charged with the duty of advice and consent are able to make an informed decision.

I have often stated that the Supreme Court is really a people's court. But, while the Court deals with such abstract legal principles as justiciability, collateral estoppel, comity, due process, and so forth, the Court must ultimately deal with real people, their rights, duties, property, and most importantly, their liberty. The Justices of the Supreme Court are the final guarantors of the sacred text of the Constitution and its Bill of Rights and the liberties and freedoms which are enshrined therein and developed therefrom.

If confirmed, you will have vast power over the lives of Americans as to their rights of speech, religion, press, association, as well as their property rights. You will participate in decisions which will affect the rights of those accused of a crime, as well as the rights of a lawful society to be protected from the criminal element, and you will have an important say as to what degree of privacy the American people are entitled.

The list could go on, of course, but my point is that before we are called on to exercise our confirmation function, we in the Senate must explore what is in your heart and what is your basic judicial philosophy, because if you are confirmed you will serve a lifetime—for perhaps the next 30 years, thus well into the 21st century. We, on behalf of the American people, must investigate if you will zealously guard the freedoms and the liberties that provide a legacy and framework for generations to come.

In reviewing the qualifications of a nominee, I am of the opinion that an individual should possess at least the following three criteria: First, an understanding on the proper role of the judiciary under our Constitution; second, an abiding belief in an independent judiciary; and third, a deep commitment to equal justice under the law.

To some, you are the very embodiment of the American Dream—you have overcome the bonds of poverty and racial segregation and

deprivation and have risen to the top. To others, you have succeeded, but forgotten your past and turned your back on others now less fortunate than you.

I and my colleagues will attempt to look into your heart and mind. I will be looking to see if you intend to bring a rigidly ideological agenda to the Court. I will want to know if you respect the principles of stare decisis and judicial restraint, and, most importantly, if you intend to turn the clock back on almost 30 years of racial progress and harmony which have occurred, albeit imperfectly, in the diverse society known as America.

Under the "advise and consent" function it is our solemn duty to explore any doubts about you and your thinking.

The theme of this hearing could be entitled "Doubting Thomas." The term "Doubting Thomas" has been applied to individuals from biblical times, but it is applied today in a different context. You are not the doubter. It is we in the Senate who are the doubters. This hearing can remove, clarify, increase, or decrease the doubts and the doubters.

There are many who have expressed doubts that you are sensitive to equal rights and equal justice under the law for all Americans; doubts about your commitment to achieving the legitimate aspirations of all Americans from whatever walk of life and regardless of their political persuasions; doubts about your concept of natural law, its standards, restrictions, breadth and application; doubts as to whether your judicial thinking is within the mainstream of judicial thought; and many other doubts as well.

Judge Thomas, if the Senate is persuaded that you will pursue an ideological agenda, have a closed mind, and will be a judicial activist ignoring the will of elected bodies, then the doubts will become impediments to your confirmation. On the other hand, if your testimony persuades us that you will dispense justice fairly and impartially and that you will listen and be open-minded, then, in my judgment, doubts will be alleviated.

President George Washington told his first Attorney General, Edmund Randolph, "The administration of justice is the firmest pillar of government and if justice is the ultimate goal and indispensable for the survival of a free republic, we best ensure it by the people we select as its custodians." We will now have the opportunity to learn if you are worthy of that admonition, and I look forward to hearing from you.

Thank you.

The CHAIRMAN. Thank you very much.

Senator Specter.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much.

Judge Thomas, I join my colleagues in welcoming you here this morning. I have read extensively on your opinions and your speeches and your background, and I congratulate you on a very remarkable career.

As I have read about your roots and about the instructions and guidance which you got from your grandfather, I could not help

but think that your grandfather and my father would have been good friends. You have really pulled yourself up, perhaps without bootstraps, perhaps by your kneecaps. You come to the Senate, for what we have an obligation to do, is to make a very careful analysis of your background and record, as we will attempt to make an evaluation as to what kind of a Supreme Court Justice you would be, if confirmed.

The importance of your nomination is overwhelming. At the age of 43, if you serve as long as Justice Thurgood Marshall did, that would be until 83 or 40 years, which is the equivalent of 10 Presidential terms. And when you consider that in the last Supreme Court session, out of 121 decisions, that 19 were decided by a 5-to-4 vote, where the Court is on the cutting edge of the most important issues which confront our country, a Justice who can provide that fifth vote for 40 years, 10 presidential terms, may really be more important than a President.

The opening statements, Judge Thomas, I think are useful, to give some idea as to what the individual Senators think are important, as we proceed with the questioning. A major concern that I have involves the functioning of the Court as a super legislature.

You have already heard many say that we want the laws interpreted and not made, and I am concerned by a major case on federalism handed down by the Supreme Court in 1984, where two Justices in the minority, on a 5-to-4 decision, said they only awaited a fifth Justice to change the complexion of the Court. That case could be reversed, placing ideology at the forefront. And I could cite many cases, but only one more within the confines of limited time here, the interpretation of the 1964 Civil Rights Act.

In 1971, a unanimous Supreme Court, with an opinion written by Chief Justice Burger, a noted conservative Justice, interpreted the Civil Rights Act in a very meaningful way. In 1989, that decision was changed, as a matter of judicial interpretation, even though the Congress of the United States had allowed that decision to stand for some 18 years.

Four of the Justices who voted to change the law, not to interpret the law, but to change the law, have appeared before this committee during the past decade and have placed their hands on the Bible and have said that they would not make new law, but only interpret the law, but they changed a view of congressional intent in the context that Congress allowed that law to stand for some 18 years.

I think it is fair to take a look at your writings and your decisions as a basis for questioning. I do not believe that you ought to be called upon—I say this, speaking for myself, because there are no conclusive parameters to what a Senator may ask, but I do not believe you ought to be asked for the ultimate decision as to how you will decide any case, because in our judicial process, that really calls upon a specific statement of facts, briefs, arguments, deliberations among the Justices, and then a decision.

But as I read through your readings, Judge Thomas, and take a look at what deference you will give to constitutional process and the congressional will, as I evaluate your judicial temperament in carrying out congressional will, I have noted a number of your writings—and this is not an isolation, but illustrative of one of

your speeches, that you say Congress is no longer primarily a deliberative or even a law-making body, that there is little deliberation, and even less wisdom in the manner in which the legislative branch conducts its business.

Now, I have noted your critical view of the Congress that would pass an ethnic set-aside law, I have noticed your critical view of a major case interpreting affirmative action in a context where the Congress could have changed those decisions, but did not, and I have noted your recognition of the Congress leaving those cases in place. I think it is appropriate to analyze your approach to our constitutional continuum in that context.

At one point in your writings, although you don't endorse it as a conclusion, you refer to a quick-fix of additional Supreme Court nominees. In another place, you talk about the preference of having additional nominees change the minority opinion into a majority opinion, and I believe that these are important issues, as we see the role of a nominee, a prospective Supreme Court Justice in a critical role, as to whether we may expect you to interpret the law, which I believe is the role of the Court, as opposed to making new law.

In terms of the questions which are appropriate to ask you, that has been an evolving matter. There is a fascinating article written by Chief Justice Rehnquist, when he was a lawyer in 1958, which admonished the Senate in the confirmation proceedings for Justice Whittaker for asking mundane questions about his experience as a skunk trapper and the fact that he brought honor to two States, being born in Kansas and I think appointed from Missouri, and Chief Justice Rehnquist admonished the Senate for not really going into the very substantive questions on equal protection of the law and due process of law.

When we come to the question of separation of powers, that is rockbed in our society, and the Senate has a duty to make an independent evaluation. I for one continue to believe that deference is due to the President's nomination, but even that could be subject to question, Judge Thomas, if the trend of the Court continues as a super legislature establishing policy.

There has already been some discussion here today, and I think it is worth nothing that an early draft of the Constitution gave the Senate the authority to appoint Supreme Court Justices. And going back to Chief Justice Rehnquist's observations in 1958, he is very pointed in approving an editorial which said that the Senate would have the authority, if it chose to exercise it, to insist on balance on the Court.

As I say, I for one believe that, at this point in our constitutional evolution, we have not come to a point of equal partnership between the President and the Senate, so deference is still owed to the President, but this could be a more complex question, if the Court continues to function as a super legislature.

The issue of affirmative action, I think, will be very important in these hearings, for two reasons. One is to test your own development as a lawyer and your own philosophy of life, your philosophy of law, your philosophy of justice, because at one point you had sanctioned affirmative action in terms of standards and goals, and there has been a change in your thinking, and you are certainly

entitled to that, but I think that is an issue which will bear some scrutiny.

I have noted in your writings, Judge Thomas, your conclusion that the *Dred Scott* decision, which upheld slavery, and the opinion of Chief Justice Taney put a backdrop of racism and discrimination, which are deeply rooted in the history of the United States and remain even to the present time, which is a very strong statement. Unfortunately, I agree with you. I think it is an accurate statement about racism and discrimination.

I noted your comment in a fairly recent writing about you in the Atlantic Monthly, by Mr. Juan Williams, "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do, you'll never have the same contacts and opportunities, you will never be seen as being equal to whites." That again is a very strong statement and raises the question in my mind as to whether we should be promoting affirmative action, and I think our discussion here will move far beyond the surface labels of what are quotas, which we hear to much about today, and what affirmative action really means.

I know that there are some who are critical of any person who takes the benefit of affirmative action and then rejects it for others. I have read the newspaper accounts, and I don't know firsthand whether you were the beneficiary of affirmative action. But even if you were, you may be the best witness on the subject to really delve into this issue which is on the cutting edge of one of the most important issues facing our society today, and that is equality of employment opportunity.

Beyond these issues, Judge Thomas, there are many, many other questions which we are going to have to go into. As Senator Grassley commented, the war powers issue is a big one. We just went through a heated debate just a few months ago which involves the question of Congress' authority to declare war versus the Commander-in-Chief's authority, the President's authority, as Commander-in-Chief, very big issues on freedom of speech, freedom of religion, the exercise clause, the establishment clause, so I think we will have subjects of real great importance, and I approach this hearing totally with an open mind.

Speaking for myself and others who disagree and have already announced positions, I believe that separation of powers calls for independence of the Senate, repeating what I have already said, with deference to the President's views. But I think we ought to listen to you carefully, in a very friendly way, in a very constructive way, and clear out the other witnesses before coming to a judgment of the case.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Senator Simon.

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Thank you, Mr. Chairman.

Judge Thomas, I join in welcoming you and your family here.

No responsibility this committee faces is heavier than the decision on a nominee for the Supreme Court. That is always true, but its truth is underscored when the retiring Justice is 83 and the nominee is 43. There are nominees for high positions, such as a Cabinet member, to which all of us in the Senate resolve limited doubts in favor of the President. Doubts in the case of a Supreme Court nominee must be resolved in favor of protecting the public.

While there are some who are looking for an outstanding legal scholar for the nomination, such nominations have been rare in the history of the Court, though when that has happened the Nation benefited.

The American Bar Association rating of the nominee is not high, but among those who have developed into superior Justices are people whose legal background cannot be characterized as stellar. My conclusion is that the nominee has the basic ability to make a good Justice. And the fact that he is an African-American brings diversity to the Court. That is a plus.

But I have unanswered questions that these hearings should clarify. What is Judge Thomas' understanding of the role of the Court? In criticizing a 6-to-3 Supreme Court decision, *Johnson* v. *Transportation Agency*, on the employment rights of women, the nominee applauded Justice Scalia's dissent, which he has every right to do, but then said he hoped the dissent—I am quoting—"would provide guidance for lower courts." What did he mean by that? Does he believe the lower courts need not follow the lead of a majority on the Supreme Court?

A fundamental question the committee must weigh is: Are we destabilizing the law by creating a Supreme Court that swings back and forth, depending on the whims of an administration?

While the history of the Supreme Court appointments often reflects the political philosophy of the President making the nomination, Presidents have also considered the stability of the law in making appointments. And so Herbert Hoover named Justice Benjamin Cardozo, Dwight Eisenhower selected Justices Earl Warren and William Brennan, Richard Nixon nominated Justice Harry Blackmun, and Gerald Ford nominated Justice John Paul Stevens. And Democratic Presidents appointed conservative Court members. John F. Kennedy named Justice Byron White, and Harry Truman named a Republican Senator, Justice Harold Burton.

In each case, the President, at least once, nominated people who were of a differing political philosophy. At least eight times in this century, Presidents have nominated Justices who were of a different political party than the President. The law has been well-served through this balance, but in recent years, this sense of balance has diminished. Will the current nominee add to a balance or an imbalance? The law should not be a pendulum, swinging back and forth, depending on the philosophy of a President.

I am concerned that the Court is shifting from its role of being the champion of the less fortunate. It is easy for any government to become too cozy with the wealthy and powerful. Once on the Court, Justices do not rub shoulders with society's unsuccessful at Washington cocktail parties and dinners. But the test of whether we are a civilized society is not whether we treat the elite well, but how

responsive we are to those who do not have the political or financial reins of power, the least fortunate among us.

The nominee has, to his great credit, overcome major obstacles to be where he is today. But what about those who have been less fortunate or less able in overcoming obstacles? What does he mean, when he writes—and I quote—"I do not see how the government can be compassionate; only people can be compassionate and then only with their own money, their own property or their own effort, not that of others."

I join Judge Thomas in lauding self-help, but not to the exclusion of Government's proper role. Does Judge Thomas mean that we should not have student aid programs, a Head Start Program? Does that suggest there is something unconstitutional or morally wrong with Government seeing to it that no one falls through the cracks in our health care delivery system?

Was Government not compassionate when we passed Federal legislation outlawing segregation? Yes, it affected the property rights of hotel and restaurant owners and many others, but does anyone really believe that this Government action was morally wrong? Was this comment of the nominee a throw-away line, or does it suggest a philosophical mindset?

Aside from the natural laws that have been referred to here, do the nominee's views differ in any marked respect from those of Judge Robert Bork, whom this committee rejected by a 9-to-5 vote?

I am also concerned with the erosion of basic liberties that is taking place on the present Court. The *Rust* v. *Sullivan* decision is potentially the most significant assault on our basic liberties since the Supreme Court, during World War II, approved the Federal Government taking from their homes Japanese-Americans who had committed no crime.

If the logic of the *Rust* decision is upheld, that the Federal Government can restrict speech if it provides financial support, then libraries that receive Federal support can be told what books they may have, and universities can be told what they may teach. This decision will be revisited both by the Congress and the Court. I do not expect the nominee to tell me how he would rule on *Rust* v. *Sullivan*, but I want to sense the philosophical moorings that will shape how he votes.

A Thomas address that comments on the ninth amendment, was it a casual speech, like Senators too often make, or does it accurately reflect his thinking?

The Court will soon make decisions on sensitive church-State issues. Where does the nominee stand on these traditions? Freedom is much easier to give away than to preserve. I want a nominee who understands not only the letter of our Constitution, but also the spirit of it.

What does Judge Thomas sense is his mission on the Court? That is the fundamental question we need answered to make our decision.

Judge Thomas, in my opening statement for the Souter nomination, I used these words to that nominee that are just as appropriate today: I want someone to whom every American can look and say, "There is a champion of my liberty." That should be true of men and women, the old and the young, the able and the disabled,

for people of every religion and color and national background and station in life. This is an extremely high standard, but it is an extremely high court to which you aspire.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Brown.

OPENING STATEMENT OF HON. HANK BROWN, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, it is a pleasure for me to join with others on this committee to welcome you here, along with your beautiful family. I don't know how this committee will resolve the question before it as to your judicial competence, but in terms of your ability to be an excellent listener, I think you have already passed the test. I suspect a further trial is ahead of you, though, in that regard.

You have perhaps enjoyed so much your other four Senate confirmation process that you have been anxious to go ahead with a fifth. You have come here before us a husband, as a father, as a son, and a brother. I only hope at the end of this deliberation that your family feels that you have had a full and a fair opportunity to present your viewpoint. I think that is important for us to make the right kind of decision.

Mr. Chairman, as we consider Judge Thomas for the position of the 106th Justice of our Supreme Court, we fulfill an important constitutional duty. Over the course of the next several weeks, the American people will have an opportunity to witness the three branches of our Government coming together to fulfill those duties and to chart the course for our judicial history in the future of this Nation.

I think it is important that we gather and do this job in a thorough manner that has been laid out. We judge not only the nominee, but I think in some measure we judge ourselves as well.

The American people are unique in the history of mankind. We are unique in our commitment to individual and personal rights. It is perhaps a phenomenon that the Constitution and its amendments deal as much with preserving individual freedom from the powers of Government as they deal with establishing the very framework of that Government itself. That approach, that uniqueness, says a great deal about us as Americans, and I think says a great deal about what has made us so extraordinarily successful.

I am one of those that believes it is appropriate for this committee to inquire into the judicial philosophy of the nominee. Mr. Chairman, your own op-ed piece that appeared in the Washington Post I thought was not only a very thoughtful work but one that set forth many of the important questions that we ought to be dealing with. But I also believe for us to request specific answers to potential cases before the Court would be a great disservice to the American people. It would be a disservice because I think all of us would feel how wrong it would be to have a judge sit in judgment of us when he has already made up his mind or pronounced a decision. A willingness to have an objective review of the facts in any

case is at the very foundation of the American commitment to justice.

I believe we ought to seek a Court committed to constitutional principle. Our judges must be guardians of individual rights whether they agree with the cause or the issue or not. Their job is to stand up and protect our rights, sometimes even for us to make mistakes.

I hope also, Judge Thomas, that you and the other judges who sit on the Supreme Court will understand clearly and firmly that amending the Constitution and legislating are not the province of the Court, are not now and never should be the province of the Court, but that these are reserved under our Constitution to others and ultimately to the people that they serve.

This committee has approved a number of judicial nominees who I think could fairly be called judicial conservatives. Those approvals have come in recent years as a variety of nominees have come before this committee.

I am very concerned that, unlike Justice Souter and some other nominations, special interest groups in our country have announced their decision on your nomination, have come out in opposition to your nomination, even before this committee has had a chance to delve into the facts and the issues before it. This process of sentencing someone before they have a trial I think is a bad practice. It is a bad practice for members of this committee. It is a bad practice for interest groups in our society. Frankly, it is a practice that I hope you, Judge Thomas, will never engage in.

We must ask ourselves, I think, if Judge Thomas is to be held to a different standard than that of Justice Souter or Justice Kennedy or Justice Scalia or Justice O'Connor. I hope he will not be held to a different standard. I hope the standards that ruled the deliberations with regard to those Justices will be the same ones that we use with regard to your nomination.

In short, this committee should not prejudge Judge Thomas, as unfortunately some have done already.

Some discussion has already been laid before the committee with regard to the qualifications and the judgment of the American Bar Association. I believe it's important to have their determination of the qualified status of Judge Thomas in the record because I think the standard they use in determining if a judge is qualified I think is so important. Here is that standard as presented by the American Bar Association: To merit the committee's evaluation of qualified or well qualified for the Supreme Court, the nominee must be in the top of the legal profession, have outstanding legal ability and wide experience, and meet the highest standards of integrity, professional competence, and judicial temperament.

The question has already been raised in the opening statements about your commitment to equal justice. In that regard, the American Bar Association has considered that. To quote from the Bar Association themselves, in investigating temperament the committee considers, among other factors, the prospective nominee's compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias, and commitment to equal justice. I don't know if anyone has ever accused the American Bar Association of being the spokesman for President Bush. Far from it. But I believe the

question of commitment to equal justice has been considered by the American Bar Association and Judge Thomas found qualified.

Mr. Chairman, it was 28 years ago that Martin Luther King stood on the steps of the Lincoln Memorial and gave a speech that I believe helped shape the conscience of this Nation. He said, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character."

We are here to learn more about the judicial philosophy of Judge Thomas. But I must say I am flatly and frankly impressed with the personal background and the character of Judge Thomas. He knows what it is like to work for a living. He understands what it is like to truly help others. Throughout his life, he has rolled up his own sleeves to help those in need. Whether serving breakfast to disadvantaged children or tutoring school children, Clarence Thomas has been there.

He understands our legal system from a wide variety of experiences, and I think that variety of experiences is important in making a Justice of the Court. He has worked in a legal aid clinic and practiced corporate law, from drafting legislation for the U.S. Senate to hearing cases on the District of Columbia Circuit Court of Appeals.

Clarence Thomas brings to the Court an understanding of segregation as one who has felt its oppression. He brings to the Court an understanding of poverty as one who has experienced it firsthand. And I believe he brings to the Court an understanding of the American dream as one who has lived it.

Thank you, Mr. Chairman.

[The prepared statement of Senator Brown follows:]

OPENING STATEMENT OF SENATOR BROWN

Thank you, Mr. Chairman. Judge Thomas, I am pleased to join with my colleagues in welcoming you and your family here today.

Four times before you have successfully appeared before the Senate for confirmation for increasingly important positions of trust within our government. I hope this week will end with you feeling that you have had a full and fair opportunity to address the questions asked of you.

Mr. Chairman, today we consider Judge Thomas' qualifications to become the 106th Justice of the United States Supreme Court. In so doing, we fulfill our constitutional duties. Over the course of the next several weeks, the American people will witness the three branches of government meeting within the corners of the constitution to chart the future of our country.

We gather here not only in judgment of the nominee, but in judgment of ourselves as guardians of the constitutional process.

As a people we are unique in history in protecting the rights of the individual. The very foundation of our social compact - the Constitution and its Amendments - focus as much on preserving individual freedom from government as it does in establishing the framework for that government.

It is appropriate for us to inquire into the judicial philosophy of a nominee, but to demand rulings on cases yet to be heard would be a disservice to the American people. How would any of us feel about going before a judge who had prejudged the issues in their case?

We should seek a court committed to constitutional principle. Our Justices must be guardians of the rights of individuals whether they agree with their cause or not. Finally, Supreme Court Judges must understand that amending the Constitution and legislating are not the province of the Court. Over the course of this hearing I hope to learn more about Judge Thomas' judicial philosophy and his approach toward interpreting the Constitution.

This committee has approved several other judicial conservatives in the past decade who have advocated judicial restraint. In those cases, the nominees were given a fair and just opportunity to express their opinions and ideals.

I am concerned that, unlike Justice David Souter's nomination, several special interest groups announced their opposition to Judge Thomas before the Senate and the country could assemble a record upon which to fairly assess his qualifications. This despite pledges from these groups to conduct their reviews in the same manner as others had been evaluated.

Is Judge Thomas being held to a different standard than that of Justice Souter, Justice Kennedy, Justice Scalia and Justice O'Connor? I hope not!

This Committee should not prejudge Clarence Thomas, as some have done.

Dr. Martin Luther King stated on the steps of the Lincoln Memorial, on a hot summer Washington day in August 1963, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character."

Mr. Chairman, I am impressed with the background and character of Judge Thomas. He knows what it's like to work for a living. He understands what it's like to truly help others. Throughout his life he has rolled up his own sleeves to help those in need. Whether serving breakfast to disadvantaged children youth or tutoring school children, Clarence Thomas has been there.

He understands our legal system from a wide variety of experiences: from working in a legal aid clinic to practicing corporate law -- from drafting legislation for the U.S. Senate to hearing cases on the District of Columbia Circuit Court of Appeals.

Clarence Thomas brings to the court an understanding of segregation as one who has experienced its oppression. He brings to the Court an understanding of poverty as one who has experienced it first hand. And he brings to the Court an understanding of the American dream as one who has lived it.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.
Senator Kohl.

OPENING STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you very much, Mr. Chairman.

Judge Thomas, the next few days are going to be important for you, but they will be even more important for the American people. On their behalf, we will be talking with you about basic constitutional principles, which means we will be talking about the values at the core of our country. If you are confirmed, this will be the only such conversation the American people will ever have with you. So we must make an extra effort, Judge Thomas, to get to know you, and you must make an extra effort to help us do that.

By design, we give the Supreme Court great independence. Its members are unaccountable to the people and, absent severe dereliction of duty, unrecallable by the Congress. Members of the Court sit for life, and they shape the life of this country. We give them this freedom and independence because we expect them to remain above the puil of politics and the flow of fashion.

Justice Black put that point clearly when he observed, and I quote, "Under our constitutional system, courts stand against any ill winds that blow as havens of refuge for those who might otherwise suffer because they are weak or helpless or outnumbered, or because they are nonconforming victims of prejudice and public excitement."

Judge Thomas, you are 43 years old. If confirmed, you may serve for 30 or 40 years, decades in which you will shape the nature of our country. Before we decide whether to entrust you with this power, we ask you to stand before the public and explain your views, express our hopes, and expound on your approach to the bedrock principles that guide us as a Nation. We have an obligation to find out where you will take us before we decide whether we want you to lead us there.

So as we begin this process, let me identify three of the qualifications which I believe we should look for in a Justice. First, we should seek a nominee with exceptional character, and that you clearly have. You grew up in poverty and experienced segregation. Despite that, or perhaps because of it, you went on to Yale Law School. You worked for and earned the support of one of the most distinguished and demanding Members of the Senate, John Danforth. You served as head of the Equal Employment Opportunity Commission, and you now sit on a Federal court of appeals.

So yours, indeed, is a story we want to tell about America in the 20th century. It testifies to our achievements in creating opportunity for all from a social contract written for just a few.

More than that, it is evidence of your own intelligence, dedication, and commitment. No one can read the story of your life and your success and not be impressed. Nevertheless, as I am sure you would agree, that alone does not justify your confirmation.

Second, we should look for someone who can read the law and relate it to the competing interests of American culture. We want a nominee whose values reflect the diversity of American life, where

the Constitution protects all of us, those who live in high-rise condos and those who live in the depths of the tenements, those who work for wages and those who retire on investment, those who call for orthodoxy and those who champion revolution. All of these strains of American life must be protected if we are to keep spinning the fabric of renewal and regeneration which has clothed American history for more than 200 years.

Third, we want a nominee with an open mind but a firm sense of direction. When you came before this committee last year, in response to a question I asked you said, and I quote, that you did not have "a fully developed constitutional philosophy." That did not disqualify you for a seat on the court of appeals where you are required to follow precedent. But the Supreme Court sets precedent. It interprets the Constitution in which we as a people place our faith and on which our freedoms as a Nation rest. In my judgment, if you cannot articulate a constitutional philosophy, one that includes full safeguards for individuals and minorities and that also squares with your past statements, then in my judgment you are not qualified to sit on the Supreme Court.

I realize that is a strong requirement, Judge Thomas, but it is, I believe, a fair one. So during these hearings, we will want to determine what your philosophy is. We will want to learn what you really believe, and we will want to know how and when and why you came to believe it.

Let me give just a few examples of the themes running through your speeches and writings which trouble me. You have openly criticized decisions like *Griswold* and *Roe* which go to the heart of a woman's right of choice. You have been an outspoken admirer of natural law, a doctrine largely dismissed for the past half-century. In fact, you have suggested that, and I quote, "it provides the only firm basis for a just, wise, and constitutional decision."

You have opposed nearly all forms of affirmative action, and yet when we met in my office, you told me that you supported affirmative action. And you have frequently expressed disdain for Congress, its Members, and the legislative process, yet your oath as a Federal judge requires that you faithfully execute our laws.

Your own record raises serious questions. Since you have such low esteem for Congress, how can you expect us to believe that you will defer to congressional intent? And since you have criticized past Court decisions about the right to privacy, what credence should we give to your pledge to follow precedent in this area of the law? And since you said that natural law is the only basis for constitutional decisions, why wouldn't you overturn rulings which you believe conflict with natural law principles?

I am hopeful that you can resolve these and other questions to our satisfaction, and, Judge Thomas, in order for you to do that, you will need to be perfectly candid before this committee. When you came to my office in July, you told me not to believe what I had read about you; that we would see "the real Judge Thomas" at the confirmation hearings. This statement suggests that you recognize, as many of us do, that these proceedings are the only way the country and the Congress will be able to assess your qualifications and to determine your fitness to sit on our Nation's highest Court.

You can only help your cause by being forthcoming, so please don't hedge, please don't give us answers prepared for you by others, and don't hide behind the argument that you cannot prejudge issues.

Judge Thomas, we do not have to agree with you on everything, but we do have to be sure that you have firm beliefs and reasoned conclusions about the role of the courts, the Congress, and the Constitution. And we do have to be sure that what you say to this committee today comports with what you have said to others in the past. And we do have to be sure, Judge Thomas, that we know what is in your heart and what is in your mind before we decide upon your nomination.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Kohl.

Judge, that concludes the opening statements of the Senators. It is now 12:30. As you and I discussed and as I have informed my colleagues on the committee, let me briefly explain what will be the way in which we will proceed after we break.

We will shortly break for 1½ hours. We will reconvene at 2 o'clock, at which time the Senators who have requested the honor of introducing you to the committee will come to the table at your side, one at a time, and make their statements of introduction to the committee. When those six Senators conclude their remarks, I will then ask you to stand and be sworn.

After that time, I will then ask you if you would be kind enough to introduce your patient family who is sitting behind you for the committee to be formally introduced to your family. Then we will ask for an opening statement from you.

At the conclusion of your opening statement, I will begin questioning. Each Senator will have a 30-minute dialog with you.

There is a very important meeting in the Senate today that will take place, as we have discussed with you and your staff. We will break every day around 5 o'clock but there is a very important meeting today in the Senate. One of our Members, a very beloved member, Senator Pryor, who was almost fatally stricken with a heart attack, has returned and is in good health. There is a reception for him, which you are welcome to attend if you would like. You know so many of us so well.

The Senator asked the time and place. The time is 5 or 5:30. I am not certain. It will depend on how far along we are whether or not one of the members begins his questioning. If it takes us much beyond 5 o'clock, we will not begin, and we will conclude before 5:00.

So, again, the committee will recess until 2 p.m.

[Whereupon, at 12:30 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will please come to order.

Welcome back, Judge, and I say welcome to all our colleagues who are here to introduce you.

Judge, it has been a very difficult task for the Chair to decide which of the 74 Senators you have introducing you should go first,

so we decided we would start based on the State you were born in, and we would work our way from there. And so we will begin by welcoming the Senators from Georgia: our senior Senator, Senator Nunn, and Senator Fowler. We will yield the floor now to the distinguished Senator from Georgia, Senator Nunn.

STATEMENT OF HON. SAM NUNN, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator NUNN. Thank you very much, Mr. Chairman.

Mr. Chairman, I am pleased to appear before your committee today to introduce to you my fellow Georgian, Judge Clarence Thomas. If confirmed, Judge Thomas will become the fifth native Georgian to serve on the Supreme Court and, according to my reading of history, the first Georgian in over 75 years.

As most Americans now know from hearing the inspiring story of his life, Clarence Thomas was born in the small community of Pin Point, GA, and was raised by his mother and his grandparents. He attended school in the nearby city of Savannah, where he experienced both the exhilaration of academic accomplishment and the pain of racial discrimination and economic hardship. While he pursued higher education outside the South at Holy Cross and Yale and pursued his profession of law in Missouri and here in Washington, Judge Thomas' roots remain in Georgia.

Mr. Chairman, I know this committee will be placed under great pressure from those opposing and those supporting this nomination. Many advocacy groups tend to focus narrowly on the nominee's likely vote on upcoming cases affecting their primary cause or causes. Some organizations complain that Judge Thomas has not generated a sufficient "paper trail" of judicial decisions and law review articles to enable them to determine with certainty how he will vote on a particular issue that captures their full attention. Others piece together details of his education and his personal life and speculate as to his likely vote on complex and complicated constitutional issues.

Mr. Chairman, I confess, in introducing Judge Thomas, that I do not know how he will vote on a reconsideration of *Roe* v. *Wade* or on other constitutional decisions that may soon come before the Court, nor do his opponents or supporters. I expect that Judge Thomas will not himself make such decisions until the case or cases are before the Court, the arguments have been heard, and he has had an opportunity to study the issues in considerable detail.

A narrow perspective is understandable for those who focus on only one or two issues, but I believe that those of us who have the constitutional responsibility of advice and consent must take a much broader view. Our duty is not to create or deny another vote on abortion or sex discrimination or affirmative action, or any other particular issue. Our duty, as I see it, is to confirm a Supreme Court Justice who, subject to good behavior, under the Constitution may serve for many years on the Court—indeed, may serve for life.

I doubt seriously, Mr. Chairman, that many of today's, maybe most of today's burning issues will still be raising the blood pressure of our Nation 7 years from now when Judge Thomas is 50,

much less when he reaches the still relatively young judicial age of 60. While our Constitution is a source of great stability for our Nation, our constitutional law is not immune from the incredible pace of change that is affecting so many aspects of our public as well as our private lives.

With the literal explosion of computers and information technology, biotechnology and genetic engineering, medical science and medical technology, the cases Judge Thomas will face in applying such constitutional concepts as privacy, human rights, equal protection, and due process may not be those envisioned today, or even those that we can imagine today.

On these and many other issues which we can barely glimpse on the horizon, even full-time professors of constitutional law do not have a completely settled view.

When all is said and done, Mr. Chairman and members of the committee, I believe that the Senate should vote on Clarence Thomas' nomination not based on his position on any one or two or three issues, but first on his ability to reason clearly, to reason fairly, and to reason wisely, as reflected in his answers to your questions which will be propounded before this committee; and second on his character, as indicated by his background, his values, his life experience, and the judgment of those who know him best.

Mr. Chairman, I hope that this committee and the Senate will take the long view of this nomination and the long view of the role that this 43-year-old nominee will play on the Supreme Court for years to come if he is confirmed.

Those who know Clarence Thomas best—and I have talked to many of them—make a powerful case as to his values, his legal and judicial abilities, his integrity, and his determination.

I am certain that some will judge Clarence Thomas by trying to pin him down on some fixed point of the ideological spectrum. I hope, however, that the majority of this committee and the majority of the U.S. Senate will vote on our perception of his character, his judicial abilities, his independence, and, most importantly, his willingness to learn and develop from experience and from reflection.

Mr. Chairman, I introduce Clarence Thomas with pride, in part because he was born in Georgia, spent his childhood in Georgia, graduated from high school in Georgia, practiced law in Georgia, and has family and many friends in Georgia.

Mr. Chairman and members of the committee, Clarence Thomas has climbed many jagged mountains on the road from Pin Point, GA, to this Senate Judiciary Committee. I believe that if he is confirmed, Judge Thomas will remember his own climb and will always insist on fairness and equal justice under law for those who are still climbing.

Mr. Chairman, I am proud to introduce to this committee Judge Clarence Thomas, a native of the State of Georgia.

The CHAIRMAN. Thank you very much, Senator Nunn.

Senator Fowler.

STATEMENT OF HON. WYCHE FOWLER, JR., A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator FOWLER. Mr. Chairman, I certainly join in the pride of my senior colleague that a Georgian has been nominated for the highest judicial office in the land. In fact, I cannot think of a time of similar pride both for myself and for Georgians, except for the nomination of Georgian Martin Luther King, Jr., for the Nobel Peace Prize.

As Senator Nunn has said, we have had visits and trips, and there is remarkable enthusiasm, not the least because Judge Thomas has already succeeded not only in putting Pin Point, GA, on the map, but so swelled their breasts with pride that they are seeking to annex Savannah and Hinesville and half of the Georgia coast.

The second reason, though, and far more important in joining in this introduction is that it means that political speculation about this nominee should be over. It is now through your offices, the members of the Senate Judiciary Committee, that we can begin the thorough examination of the nominee and his beliefs that the Constitution requires of us.

Judge Thomas has already shown himself to be a man who has broken many molds and defied many labels. It seems to me that we have no less an obligation, a constitutional obligation, to not submit ourselves to easy categorization as we fulfill our constitutional obligations which I believe Judge Thomas would agree with were he in your position.

I know that you and members of the committee all join me in putting some of the unsavory political campaigning that has gone on behind us. That has been at the least a rude distraction both to the constitutional process and to Judge Thomas' nomination. Now we can get on to the real responsibilities of the Senate confirmation process.

Judge Thomas is perfectly able to express himself, present his case. I know he will do it, and the American people deserve the thorough examination of those views before a decision is made.

The CHAIRMAN. Thank you very much.

Gentlemen, I know you have other obligations. We appreciate your taking the time to come and introduce Georgia's native son.

Now we will hear from the Senators who are going to introduce Virginia's adopted son. We will begin, as we have a wont to do here in the Senate, in order of seniority and begin with the distinguished senior Senator from the Commonwealth of Virginia, Senator Warner.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman and members of the committee. Like our Georgia colleagues, Senator Robb and I likewise consider it a privilege to appear here today on behalf of Judge Thomas and, in a way, on behalf of the constituents we represent in the Commonwealth of Virginia.

Mr. Chairman, I would like to have my statement inserted in the record in full. I want to be brief.

The CHAIRMAN. Without objection, your entire statement will be placed in the record as if read.

Senator WARNER. I will be brief such that we can move along with these proceedings.

I wish to acknowledge that my personal preparation for this hearing has been a very valuable learning experience for me. I have traveled——

The CHAIRMAN. I know what you mean, Senator.

Senator WARNER. It is not over for you yet, Mr. Chairman.

I have traveled throughout my State, finishing yesterday the last of some 14 meetings, most of these meetings dominated by minority individuals, minority background. And I listened and learned very carefully, I say to my colleagues. It was a profitable experience.

This procedure we are undertaking now, mandated by the Constitution under the advise-and-consent clause, will, I hope, end up in two ways: First, I say to you, my friend, Judge Thomas, most respectfully, I hope that it is a learning experience for you and that you emerge from this a stronger, a wiser, and a more compassionate person; and, secondly, that these hearings and the floor debate and the final vote will be perceived by citizens across our land as being fair and objective, and that that will constitute a record and indicate support for this fine American to go forward and take on his responsibilities with great unity across our country.

The hearing has the opportunity to dispel a number of concerns that were voiced to me by conscientious individuals, but we have that opportunity as Senators in this free and deliberative process to dispel those concerns.

This is a very interesting nomination in the sense that the U.S. Senate has already acted in confirming Judge Thomas as a Federal Circuit Court judge. We rendered our judgment. Therefore, we are being examined. And to the extent that some of us may wish to reexamine that, I say to you most respectfully, you have a very heavy, if not the highest, of burdens of proof. The burden of proof has shifted to the Senate since we have already spoken on behalf of the credentials of this man.

It is for those reasons that, again, I conclude by saying that I hope these Senate proceedings will be perceived and accepted as fair and objective, and that the final conclusion, which I hope will be confirmation, will be in the best interest of our United States.

I thank you.

[The prepared statement of Senator Warner follows:]

JOHN WARNER
VIRGINIA

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SELECT COMMITTEE ON INTELLIGENCE
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STATEMENT BY SENATOR JOHN WARNER

BEFORE THE SENATE JUDICIARY COMMITTEE

ON THE NOMINATION OF

CLARENCE THOMAS AS

ASSOCIATE JUSTICE TO THE UNITED STATES SUPREME COURT

SEPTEMBER 10, 1991

Mr. Chairman and members of the Committee, I am pleased to join my colleagues from Georgia, Missouri and Senator Robb in introducing Judge Clarence Thomas, who has been nominated to be an Associate Justice of the U.S. Supreme Court.

Judge Thomas and his family now reside in Northern Virginia. Judge Thomas serves on the United States Circuit Court of Appeals for the District of Columbia.

Clarence Thomas' career, now known to Americans, has been varied and extensive. He has held jobs ranging from legislative assistant for Senator Danforth to Chairman of the Equal Employment Opportunity Commission (EEOC). At this time I will not dwell on the details of his impressive professional background, which have been fully covered by members of this committee in their opening statements today.

I do, however, wish to make a few comments regarding Judge Thomas' early life, as the values I hope he will bring to the Supreme Court, if confirmed, are a direct reflection of his background -- a background of which he speaks to me with pride.

Clarence Thomas was raised in a poor, segregated environment in a small town in Georgia. His grandfather, a strong, self educated man who was determined that his grandson would have more opportunities than he himself had experienced, firmly instilled in Clarence the virtues of hard work, diligence, tenacity, and religious values. Most importantly, he impressed upon him that he should not use the circumstances of his upbringing as an excuse for not striving to achieve excellence in his own goals.

Judge Thomas further expresses with humility and gratitude the support given by religious teachers throughout his lifetime. Judge Thomas has truly experienced poverty, prejudice and racism in his lifetime, but, true to those who have inspired him, he has set his own goals.

Mr. Chairman, I believe Clarence Thomas has the education, character, experience and temperament to serve as a member of the Supreme Court, and I am pleased to have had the opportunity to present him to the Committee.

Mr. Chairman, my preparation for this hearing has been a rewarding experience. I have travelled throughout my state listening to a diverse cross section of Virginians. They have freely, forcefully expressed their views for and against this nomination. It has been a learning experience for me.

It is my hope that this "advise and consent" procedure, mandated by the Constitution will conclude in such a manner that, first, Judge Thomas will become a stronger and wiser person; and second, that many of the concerns that exist today about him

will, by the time the floor debate is concluded and the final vote taken, be resolved.

Despite the conscientious efforts over the years of the Executive and Legislative branches of our government, the judicial branch is viewed by minority groups as the strongest bastion against racism and discrimination.

It is for that reason that I hope these Senate proceedings will be perceived as fair, objective, and having reached a conclusion in the best interest of our Nation.

We, the Senate, are also being judged in this confirmation process. For we, as a body, have already exercised our Constitutional responsibility by confirming Judge Thomas as qualified to become a member of the federal judiciary. To now reverse that finding would impose on this body a burden of proof of the highest magnitude.

The CHAIRMAN. Thank you very much, Senator.
Senator Robb, welcome.

STATEMENT OF HON. CHARLES S. ROBB, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ROBB. Thank you, Mr. Chairman, Senator Thurmond, other members of the Judiciary Committee.

As a Virginian, Senator Warner and I are frequently extended the courtesy of introducing for Senate confirmation residents of our State that the President has nominated to high level positions in the Federal Government, notwithstanding the fact that in most cases they have burnished their credentials while bearing true faith and allegiance to a political party other than the one that at least I happen to represent. In that capacity, I was pleased to introduce Judge Thomas when he was nominated to his current judgeship with the U.S. Court of Appeals for the District of Columbia Circuit.

Recognizing the importance of a lifetime appointment to the highest Court in our land, however, and the prospect that, if confirmed Associate Justice of the Supreme Court at his age, he could well serve for 30 years or more, I don't suggest that any prior examination of his credentials ought to substitute for the thorough examination you are about to begin or that our prior vote to confirm Judge Thomas ought to obligate us necessarily to confirm Justice Thomas.

Therefore, like most of our Senate colleagues, I am going to withhold final judgment until these confirmation hearings have been completed and your committee has acted. I would be less than candid, though, if I didn't observe at the outset that I have had two very good meetings in my office with Judge Thomas, one for each of his nominations, and I am very much impressed with the way he has dealt with the challenges that he has faced. I am impressed with his life story and the way he has persevered against the odds. I am impressed by the way he has thought about the way society works—and doesn't work—and I am impressed by his sense of conviction about the ideas and principles in which he believes.

I care deeply about the issues most often cited by those individuals and organizations that have announced their opposition to Judge Thomas. And because I am more often aligned with them than against them, I simply ask that they join me in withholding final judgment until they have actually heard Judge Thomas respond to direct questions about those issues which concern all of us.

I believe based on my own conversations with him that he will respond to many of those questions and concerns in ways that will be far more reassuring than inferences that have been drawn solely from fragmented comments and speeches where the questions have not been squarely joined.

In short, I find Judge Thomas more difficult to stereotype than his public image might suggest, and I believe almost everyone will discover a few surprises during the confirmation process.

Mr. Chairman, you have an important responsibility to fulfill, and I wish you well.

The CHAIRMAN. Thank you very much, gentlemen.

Now, we will move west of the Mississippi, to a State in which our distinguished nominee has worked and has friends, and one of his friends is the junior Senator from the State of Missouri, Senator Bond.

Senator Bond, welcome. We are very anxious to hear what you have to say.

STATEMENT OF HON. CHRISTOPHER S. BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Thank you very much, Mr. Chairman and members of the committee.

It is a great honor and a pleasure for me to come before this committee today to join in the multifaceted presentation of Judge Clarence Thomas, the President's nominee for Associate Justice to the United States Supreme Court.

Coming from Missouri, I have to make a major effort to claim him for the State of Missouri, but we do so with a great deal of pride.

I had the real pleasure first of meeting Judge Thomas when we both worked in Jefferson City, MO, in the early 1970's. Both of us began our career in State government as assistants attorney general under Jack Danforth. It was an exciting and intellectually challenging place for a young lawyer to work. The outstanding caliber of the other people that Jack Danforth brought to that office is best illustrated by the jobs that some of them now hold—Federal judges, Chairman of the FCC, and we hope soon a Supreme Court Justice.

Even among a cast of stars like that, Clarence Thomas shone as a lawyer. He was not content simply to move cases through the office, but, instead, worked to use his position to accomplish change and to improve the lives of people in our State.

His legal work and his intellect were noticed, not just by Jack Danforth, but by many others, as well. When Jack was elected to the Senate, Clarence Thomas came to Washington and applied his skills to a series of jobs, ranging from corporate lawyer to the Chairman of the Equal Employment Opportunity Commission, giving him the opportunity to learn firsthand about a wider range of legal areas than most recent nominees to the Court.

I say, Mr. Chairman, that if you look at the group of people who know Clarence Thomas best, you will find his most ardent supporters. I only hope that those who do not know him as well as we do may have the opportunity during the course of these hearings to gain the knowledge and the respect that we have.

Though his skills as a lawyer and a judge are obvious, they are not, in my view, the only reason that this committee should vote to approve Judge Thomas' nomination. Just as important is his compassion and understanding of the impact that the Supreme Court has on the lives of average Americans.

We are all familiar with Judge Thomas' background as outlined by our distinguished colleague from Georgia. It is an inspiring story. There is no doubt that he can be proud of his achievements.

But it is also important to focus on his continuing efforts throughout his life to live up to the values and principles that his

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grandfather instilled in him, which I know were strengthened by the many years he spent living in Missouri. The strength of character is every bit as important as his professional qualifications, and I urge you to consider it as you proceed with these hearings.

Mr. Chairman, there have been many accusations and straw men raised over the course of the past few months. Unfortunately, that has become a part of the nomination process. Though we cannot stop people from voicing their opinion or attacking a nominee or even members of the committee, unfair or groundless as the attacks may be, we can disregard those charges and focus on the important details, the nominee's fitness for the job.

I urge the members of the committee to do just that. I know that when they do, they will find Judge Thomas to be well qualified to serve as the newest member of the United States Supreme Court.

Thank you, Mr. Chairman.

[The prepared statement of Senator Bond follows:]

SENATOR BOND
INTRODUCTION OF JUDGE CLARENCE THOMSAS
9/10/91

Mr. Chairman, members of the committee, it is a great pleasure to come before you today to join in the presentation of Judge Clarence Thomas, the President's nominee for Associate Justice of the United States Supreme Court.

I first met Judge Thomas when we both worked in Jefferson City in the early 70s. Both of us began our careers in state government as assistant attorneys general under Jack Danforth. It was an exciting and intellectually challenging place for a young lawyer to work; and the outstanding caliber of people that Jack Danforth brought to that office is best illustrated by the jobs that some of them now hold -- federal judge, chairman of the FCC, and soon, Supreme Court justice.

Even among such a cast of stars, Clarence Thomas shone as a lawyer. He was not content to simply move cases through the office, but instead worked to use his position to accomplish change and to improve the lives of people in our state. His legal skills and his intellect were noticed not just by Jack Danforth, but by many others as well. When Jack was elected to the Senate in 1976, Judge Thomas applied his skills to a series of jobs ranging from corporate lawyer to chairman of the Equal Employment Opportunity Commission -- giving him the opportunity to learn firsthand about a wider range of legal areas than most recent nominees to the court.

Though his skills as a lawyer and a judge are obvious, they are not the only reason that this committee should vote to approve Judge Thomas' nomination. Just as important is his compassion and understanding of the impact that the Supreme Court has on the lives of average Americans. We are all familiar with Judge Thomas' background -- it is an inspiring story, and there is no doubt that he can be proud of his achievements. But it is also important to focus on his continuing efforts throughout his life to live up to the values and principles that his grandfather instilled in him -- and which I know were strengthened by the many years he spent living in Missouri. This strength of character is every bit as important as his professional qualifications, and I urge you to consider it as you proceed with these hearings.

Mr. Chairman, there have been many accusations and straw men raised over the course of the past few months. Unfortunately, that has become part of the nomination process. Though we cannot stop people from voicing their opinion or attacking a nominee -- unfair or groundless as those attacks may be -- we can disregard such charges and focus on the important details -- the nominee's fitness for the job. I urge the members of the committee to do that and I know that when they do, they will find Judge Thomas to be well-qualified to serve as the newest member of the United States Supreme Court.

The CHAIRMAN. Thank you very much, Senator.

I might add, Judge Thomas, I had the occasion to spend about 7 or 8 days with the junior Senator from Missouri in the month of August, and when he was not lobbying me on matters relating to the North Slope and others, he was lobbying me with regard to you. You are probably the only Supreme Court Justice nominee who has ever been discussed on the North Slope of Alaska in the middle of nowhere. [Laughter.]

Everyone was talking about the precedents being set, Judge Thomas. I do not know whether or not we should call this the Rudman precedent or not, but you have one of the strongest and most ardent supporters, I suspect you have anywhere, including your mother and your wife and your son and your sister, in the person of the senior Senator from Missouri.

We are all supposed to be limited to 10 minutes. I want you to know at the outset that I have no illusion that this is going to be a 10-minute introduction. [Laughter.]

For my respect for our colleague from the State of Missouri, I will do what the former chairman of this committee, Senator Eastland used to do. He would say we have to end this meeting at 2:00 o'clock or we are not able to meet beyond that time. Some would say, "I notice it is 2:00 o'clock, Mr. Chairman," and he would turn around and open up the face of the clock and turn the clock back and say, "It doesn't look like 2:00 to me." [Laughter.]

So, we will invoke the rule of the former chairman of this committee. Jack, try to keep it under an hour, if you can. [Laughter.]

Senator DANFORTH. Mr. Chairman, thank you very much. I am sorry that the North Slope gambit did not occur to me during the hearing.

The CHAIRMAN. Well, I assume you put your junior colleague up to it.

STATEMENT OF HON. JOHN C. DANFORTH, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator DANFORTH. Mr. Chairman and members of the committee, other than the nominee himself, I know Clarence Thomas better than anyone who will appear before this committee. I hired him 17 years ago, when he was a law student. He worked for me twice, as an assistant State attorney general and as a legislative assistant, and we have kept in touch since he left my office.

His life story is public knowledge, and I will not review it for you. Instead, this will be a personal testimony about the Clarence Thomas I know, and a reflection on the case that is being made by various groups that oppose his confirmation.

Let me begin with the most fundamental points. Clarence Thomas is intelligent, hard-working, honest, and fair. Because these are the minimum qualifications we expect of a nominee for any position, I will not dwell on them. It is enough to assure the committee on the basis of personal knowledge that Clarence Thomas possesses each of these requisites to serve on the Supreme Court.

As the ABA will testify, he is certainly qualified for the job. But he has more than these fundamentals. The Clarence Thomas I

know has special qualities which convince me that he is more than the average nominee. He would be an extraordinary Justice on the Supreme Court.

What are these special qualities? First, Clarence Thomas is his own person. President Bush had it absolutely right when he called him "fiercely independent." This quality struck me when I first interviewed him in the faculty lounge at Yale Law School. Clarence made it clear that he was his own person, to be judged on his own merits. He was not to be the special case, given special treatment, and he was not to be given special work within my office. He was uniquely Clarence Thomas, and his goal was to be the best Clarence Thomas he could possibly be. He has reached that goal, and that to me is his most striking attribute.

Repeatedly, he has said that, as a judge, he has no personal agenda and that he will call them as he sees them. That pledge is a function of his independence and it is completely consistent with the Clarence Thomas I know. It is consistent with the young assistant attorney general who, to my political dismay, insisted that my constituents had no legal right to keep their low-numbered license plates. It is consistent with the Chairman of the EEOC, who excoriated his own administration for favoring tax-exempt status for a racially exclusive college, and for opposing extension of the Voting Rights Act.

I have no doubt whatever in giving the committee this assurance: Just as Clarence will resist any effort to impinge on his independence by seeking commitments on how he will decide cases before the Court, so he will never become a sure vote for any group of Justices on the Court.

For 2 months, I have noted with wonder the certainty of various interest groups, as they have predicted how the nominee would vote on an array of issues. They do not know Clarence Thomas. I do. I cannot predict how he would vote on any issue. He is his own person. That is my first point.

Second, he laughs. To some, this may seem a trivial matter. To me, it is important, because laughter is the antidote to that dread disease "federalitis." The obvious strategy of interest groups trying to defeat a Supreme Court nominee is to suggest that there is something weird about the individual. I concede that there is something weird about Clarence Thomas, it is his laugh. It is the loudest laugh I have ever heard. It comes from deep inside and it shakes his body, and here is something at least as weird in this most uptight of cities, the object of his laughter is most often himself.

Third, he is serious, deeply serious in his commitment to make a contribution with his life. I will never forget visiting with Clarence after he had been nominated for a second term at the EEOC. I pressed him on why he would accept a second term. It is a thankless job, one that, when done well, makes everyone mad. It is a career blind alley. He answered simply, "I haven't yet finished the job."

I pondered that statement many times over the past 5 years. Undoubtedly, he meant that he had not yet finished the job of transforming the EEOC from the administration basket case he inherited to the first-rate agency it is today. But I think he meant more than that. I think he meant the discrimination he has known in

his own life is still too much with us. There is so much more to do, if we are to end it.

This is the seriousness of Clarence Thomas. It is not anger, as some have suggested. It is not a bitterness that eats away at him, but it is profound and it forms the person that he is and the Justice he will become.

I hope that sometime in the days Judge Thomas will be before this committee, someone will ask him not about unenumerated rights or the establishment clause, but about himself, what was it like to grow up under segregation, what was it like to be there when your grandfather was humiliated before your eyes, what was it like to be laughed at by seminarians because you are black.

Everyone in the Senate knows something about the legal issues before the Supreme Court. Not a single member of the Senate knows what Clarence Thomas knows about being poor and black in America.

For more than 2 months, interest groups have been poring over the volume of speeches made by the nominee, looking for the word here or phrase there that could be used against him. I hope all of us will read some of his speeches in their entirety. They are eloquent statements of his deep commitment to justice in America. It is better to read the whole speech, but if we are piercing together sayings, here is my compendium of the words of Clarence Thomas.

He said—and these are his words—"What is more amoral than the enslavement of an entire race? What is more amoral than the vicious cancer of racial discrimination? What is more amoral than the fabrication of a legal and political system which excludes, demeans and degrades an entire race?"

He said, "Discrimination holds out a different life for those who do not happen to be the right race or the right sex. It is a world in which the have's continue to reap more dividends than the have-not's, and the powerful wield more influence than the powerless."

He said, "It exists in the factories and the plants and the corporate board rooms, it makes a lie of our pledge of freedom. It is the great fault that sends tremors through the bedrock of our nationhood."

He said, "I never understood the logic behind the division of labor that decreed that women be restricted to certain jobs, such waste of talent, such infringement of individual rights."

He said, "Today, the civil rights law often appear to be without teeth to insure nondiscrimination." He said, "There is something less than equitable about a system that subjects an individual to stronger sanctions for breaking into a mailbox than for violating the basic civil rights of another human being."

Those are the words of Clarence Thomas. Name one other member of the Supreme Court that talks like that. Name one other person who could conceivably be nominated by President Bush who talks like that.

The obvious question is: Why do some civil rights leaders, good people, oppose the nominee with such a strong commitment to equality? The answer lies in a major debate now taking place in America which divides good people, who share a common commitment to equal justice.

With respect to the black community, William Raspberry has described the debate as follows: "At issue is whether it is wiser to pursue government policies that target blacks generally—contract set-asides, affirmative action, hiring and promotion, race-based special admissions, and so on—or to fashion approaches based on specific social, educational and economic conditions."

"Over-simplified," Raspberry continues, "the two opposing propositions can be stated this way: One, race-specific approaches; two, approaches that target the conditions, joblessness, drug abuse, family dissolution, and under-education."

Before becoming a judge, while he was in the executive branch, Clarence Thomas was a leading advocate for one side of this debate. At that time, he argued that race-based preferences are not helpful to the most disadvantaged citizens, that they stigmatize and sometimes even victimize the beneficiary, and that they create destructive animosity among unfavorite citizens. In their place, he advocated affirmative action based on disadvantage, rather than race, with special emphasis on education and job training, coupled with strict enforcement and tough penalties in cases of specific discrimination.

I do not understand why the nomination of a Supreme Court Justice should be the occasion for arguing the best political strategy for advancing the cause of civil rights. Whether one strongly supports or strongly opposes race-based preferences should not trigger an attack on the person's motives or fitness to serve on the Court.

Nearly a third of black families are now living in poverty. Nearly a third of young black men do not have jobs. The average income of blacks is not much more than half that of whites. Against this background, we should welcome, not penalize a diversity of opinion on solving the problem of inequality. We should welcome a diversity of opinion among blacks as well as whites.

If support for race-based preferences becomes a litmus test for the Supreme Court, that test would rule out a majority of the American people and a majority of the Members of the Senate, as well.

Mr. Chairman, throughout this process, you and all members of this committee have been characteristically considerate and fair to the nominee. I join him in thanking you for your kindness. I am convinced that, like the President, you will not judge Clarence Thomas on the basis of litmus tests, you will judge him on the basis of his ability and character and the special qualities he would bring to the Court.

It is a proud day in my life to present for the Supreme Court a person I know so well and believe in so strongly.

[The prepared statement of Senator Danforth follows:]

STATEMENT OF SENATOR JOHN C. DANFORTH BEFORE THE SENATE JUDICIARY COMMITTEE IN SUPPORT OF THE NOMINATION OF JUDGE CLARENCE THOMAS SEPTEMBER 10, 1991

Other then the nominee, himself, I know Clarence Thomas better than anyone who will appear before the committee. I hired him 17 years ago when he was a law student. He worked for me twice, as an assistant state Attorney General and as a legislative assistant, and we have kept in touch since he left my office.

His life history is public knowledge, and I will not review it for you. Instead, this will be a personal testimony about the Clarence Thomas I know, and a reflection on the case that is being made by various groups that oppose his confirmation.

Let me begin with the most fundamental points. Clarence Thomas is intelligent, hard-working, honest and fair. Because these are the minimum qualifications we expect of a nominee for any position, I will not dwell on them. It is enough to assure the committee, on the basis of personal knowledge, that Clarence Thomas possesses each of these requisites to serve on the

Supreme Court. As the ABA will testify, he is certainly qualified for the job. But he has more than these fundamentals. The Clarence Thomas I know has special qualities which convince me that he is more than the average nominee. He would be an extraordinary justice on the Supreme Court. What are these special qualities?

First, Clarence Thomas is his own person. President Bush had it absolutely right when he called him, "fiercely independent." This quality struck me when I first interviewed him in the faculty lounge at Yale Law School. Clarence made it clear that he was his own person to be judged on his own merits. He was not to be the special case, given special treatment, and he was not to be given special work within my office. He was uniquely Clarence Thomas, and his goal was to be the best Clarence Thomas he could possibly be. He has reached that goal, and that, to me, is his most striking attribute.

Repeatedly, he has said that as a judge, he has no personal agenda, that he will call them as he sees them. That pledge is a function of his independence, and it is completely consistent with the Clarence Thomas I know. It is consistent with the young assistant Attorney General who, to my political dismay, insisted that my constituents had no legal right to keep their low numbered license plates. It is consistent with the Chairman of the EEOC who excoriated his own administration for favoring tax exempt status for a racially exclusive college and for opposing extension of the Voting Rights Act.

I have no doubt whatever in giving the committee this assurance: Just as Clarence Thomas will resist any effort to impinge on his independence by seeking commitments on how he will decide cases before the Court, so he will never become a sure vote for any group of justices on the Court.

For two months, I have noted with wonder the certainty of various interest groups as they have predicted how the nominee would vote on an array of issues. They don't know Clarence Thomas. I do. I cannot predict how he would vote on any issue. He is his own person. That is my first point.

Second, he laughs. To some, this may seem a trivial matter. To me, it is important, because laughter is the antidote to that dread disease, federalitis.

The obvious strategy of interest groups trying to defeat a Supreme Court nominee is to suggest that there is something weird about the individual. I concede that there is something weird about Clarence Thomas. It is his laugh. It is the loudest laugh I have ever heard. It comes from deep inside, and it shakes his body. And here is something at least as weird in this most uptight of cities. The object of his laughter is most often himself.

Third, he is serious--deeply serious in his commitment to make a contribution with his life.

I will never forget visiting with Clarence after he had been nominated for a second term at the EEOC. I pressed him on why he would accept a second term. It is a thankless job, one

that, when done well, makes everyone mad. It is a career-blind alley. He answered simply, "I haven't yet finished the job."

I have pondered that statement many times over the past five years. Undoubtedly, he meant that he had not yet finished the job of transforming the EEOC from the administrative basket case he inherited to the first-rate agency it is today. But, I think he meant more than that. I think he meant that the discrimination he has known in his own life is still too much with us. There is so much more to do if we are to end it.

This is the seriousness of Clarence Thomas. It is not anger as some have suggested. It is not a bitterness that eats away at him. But it is profound, and it forms the person he is and the justice he will become. I hope that sometime in the days Judge Thomas will be before this committee, someone will ask him not about unenumerated rights or the establishment clause, but about himself. What was it like to grow up under segregation? What was it like to be there when your grandfather was humiliated before your eyes? What was it like to be laughed at by seminarians because you are black? Everyone in the Senate knows something about the legal issues before the Supreme Court. Not a single member of the Senate knows what Clarence Thomas knows about being poor and black in America.

For more than two months, interest groups have been poring over the volume of speeches made by the nominee, looking for the word here or phrase there that could be used against him. I hope all of us will read some of his speeches in their entirety. They are eloquent statements of his deep

commitment to justice in America. It is better to read the whole speech, but if we are piecing together sayings, here is my compendium of the words of Clarence Thomas.

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"At issue is whether it is wiser to pursue government policies that target blacks generally--contract set-asides, affirmative-action hiring and promotion, race-based special admissions, and so on--or to fashion approaches based on specific social, educational and economic conditions.

"Oversimplified," Raspberry continues, "the two opposing propositions can be stated this way:

"(1)Race-specific approaches.

"(2) Approaches that target the conditions--joblessness, drug abuse, family dissolution and under-education."

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affirmative action based on disadvantage rather than race, with special emphasis on education and job training, coupled with strict enforcement and tough penalties in cases of specific discrimination.

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It is a proud day in my life to present for the Supreme Court a person I know so well and believe in so strongly.

The CHAIRMAN. Thank you very much, Senator Danforth. I know the nominee knows how fortunate he is to have a friend like you.

While you are on your feet, Judge, we will swear you.

Senator DANFORTH. Can you still see the nominee, Mr. Chairman? [Laughter.]

The CHAIRMAN. Judge, while we are just passing some time here, I just want you to know up until a few nominees ago this is what you would have faced the entire time of your questioning. They are all gentle souls, but they are anxious to see you, and we agreed that we would do this so they could have you sworn in.

Judge Thomas, do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge THOMAS. I do.

The CHAIRMAN. Please be seated.

[Pause.]

The CHAIRMAN. Well, Judge, Jack Danforth said—talked about what is at issue. I want to make it clear at the outset of my questioning that there is a great deal more at issue than whether or not your view on how to deal with the civil rights of Americans deviates from the view of any single group of people.

I beg your pardon?

So I would now like to invite you to—having been sworn, to, if you would, please introduce your family to us, who have been waiting patiently all morning and the committee is anxious to meet them, as I am sure everyone else is. So, would you please introduce your family to us, Judge?

Judge THOMAS. Thank you, Mr. Chairman.

I would like first to introduce my wife Virginia.

The CHAIRMAN. Welcome, Mrs. Thomas. It is a pleasure to have you here.

Judge THOMAS. My mother, Leola Williams; my sister, Emma May Martin; and my son Jamal.

The CHAIRMAN. Jamal, welcome. You look so much like your father that probably at a break you would be able to come back in and sit in there and answer questions. So, if he is not doing it the way you want it done, you just slide in that chair.

Judge THOMAS. He may not take it as a compliment if you say he looks like me.

The CHAIRMAN. He is young. He has a chance to grow out of it, as my father says about my sons.

Judge THOMAS. I would like to also introduce my mother-in-law and father-in-law, Donald and Marjorie Lamp, who are in the audience here.

The CHAIRMAN. Would you please stand, Mr. and Mrs. Lamp. Welcome to the hearing. Thank you very much for coming.

Do you have an opening statement, Judge?

Judge THOMAS. Yes, Mr. Chairman.

The CHAIRMAN. Please.

TESTIMONY OF HON. CLARENCE THOMAS, OF GEORGIA, TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Judge THOMAS. Mr. Chairman, Senator Thurman, members of the committee, I am humbled and honored to have been nominated

by President Bush to be an Associate Justice of the Supreme Court of the United States. I would like to thank the committee, especially you, Chairman Biden, for your extraordinary fairness throughout this process, and I would like to thank each of you and so many of your colleagues here in the Senate for taking the time to visit with me.

There are not enough words to express my deep gratitude and appreciation to Senator Danforth, who gave me my first job out of Yale Law School. I have never forgotten the terms of his offer to me: more work for less pay than anyone in the country could offer. Believe me, he delivered on his promise, especially the less pay.

I appreciate his wise counsel and his example over the years, and his tireless efforts on my behalf during the confirmation process.

And I would like to thank Senators Bond, Nunn, Fowler, Warner, and Robb, for taking the time to introduce me today.

Much has been written about my family and me over the past 10 weeks. Through all that has happened throughout our lives and through all adversity, we have grown closer and our love for each other has grown stronger and deeper. I hope these hearings will help to show more clearly who this person Clarence Thomas is and what really makes me tick.

My earliest memories, as alluded to earlier, are those of Pin Point, GA, a life far removed in space and time from this room, this day and this moment. As kids, we caught minnows in the creeks, fiddler crabs in the marshes, we played with pluffers, and skipped shells across the water. It was a world so vastly different from all this.

In 1955, my brother and I went to live with my mother in Savannah. We lived in one room in a tenement. We shared a kitchen with other tenants and we had a common bathroom in the backyard which was unworkable and unusable. It was hard, but it was all we had and all there was.

Our mother only earned $20 every 2 weeks as a maid, not enough to take care of us. So she arranged for us to live with our grandparents later, in 1955. Imagine, if you will, two little boys with all their belongings in two grocery bags.

Our grandparents were two great and wonderful people who loved us dearly. I wish they were sitting here today. Sitting here so they could see that all their efforts, their hard work were not in vain, and so that they could see that hard work and strong values can make for a better life.

I am grateful that my mother and my sister could be here. Unfortunately, my brother could not be.

I attended segregated parochial schools and later attended a seminary near Savannah. The nuns gave us hope and belief in ourselves when society didn't. They reinforced the importance of religious beliefs in our personal lives. Sister Mary Virgilius, my eighth grade teacher, and the other nuns were unyielding in their expectations that we use all of our talents no matter what the rest of the world said or did.

After high school, I left Savannah and attended Immaculate Conception Seminary, then Holy Cross College. I attended Yale Law School. Yale had opened its doors, its heart, its conscience to recruit and admit minority students. I benefited from this effort.

My career has been delineated today. I was an assistant attorney general in the State of Missouri. I was an attorney in the corporate law department of Monsanto Co. I joined Senator Danforth's staff here in the Senate, was an Assistant Secretary in the Department of Education, Chairman of EEOC, and since 1990 a judge on the U.S. Court of Appeals for the District of Columbia Circuit.

But for the efforts of so many others who have gone before me, I would not be here today. It would be unimaginable. Only by standing on their shoulders could I be here. At each turn in my life, each obstacle confronted, each fork in the road someone came along to help.

I remember, for example, in 1974 after I completed law school I had no money, no place to live. Mrs. Margaret Bush Wilson, who would later become chairperson of the NAACP, allowed me to live at her house. She provided me not only with room and board, but advice, counsel and guidance.

As I left her house that summer, I asked her, "How much do I owe you?" Her response was, "Just along the way help someone who is in your position." I have tried to live by my promise to her to do just that, to help others.

So many others gave their lives, their blood, their talents. But for them I would not be here. Justice Marshall, whose seat I have been nominated to fill, is one of those who had the courage and the intellect. He is one of the great architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so insurmountable to those of us in the Pin Point, GA's of the world.

The civil rights movement, Rev. Martin Luther King and the SCLC, Roy Wilkins and the NAACP, Whitney Young and the Urban League, Fannie Lou Haemer, Rosa Parks and Dorothy Hite, they changed society and made it reach out and affirmatively help. I have benefited greatly from their efforts. But for them there would have been no road to travel.

My grandparents always said there would be more opportunities for us. I can still hear my grandfather, "Y'all goin' have mo' of a chance then me," and he was right. He felt that if others sacrificed and created opportunities for us we had an obligation to work hard, to be decent citizens, to be fair and good people, and he was right.

You see, Mr. Chairman, my grandparents grew up and lived their lives in an era of blatant segregation and overt discrimination. Their sense of fairness was molded in a crucible of unfairness. I watched as my grandfather was called "boy." I watched as my grandmother suffered the indignity of being denied the use of a bathroom. But through it all they remained fair, decent, good people. Fair in spite of the terrible contradictions in our country.

They were hardworking, productive people who always gave back to others. They gave produce from the farm, fuel oil from the fuel oil truck. They bought groceries for those who were without, and they never lost sight of the promise of a better tomorrow. I follow in their footsteps and I have always tried to give back.

Over the years I have grown and matured. I have learned to listen carefully, carefully to other points of views and to others, to think through problems recognizing that there are no easy answers

to difficult problems, to think deeply about those who will be affected by the decisions that I make and the decisions made by others. But I have always carried in my heart the world, the life, the people, the values of my youth, the values of my grandparents and my neighbors, the values of people who believed so very deeply in this country in spite of all the contradictions.

It is my hope that when these hearings are completed that this committee will conclude that I am an honest, decent, fair person. I believe that the obligations and responsibilities of a judge, in essence, involve just such basic values. A judge must be fair and impartial. A judge must not bring to his job, to the court, the baggage of preconceived notions, of ideology, and certainly not an agenda, and the judge must get the decision right. Because when all is said and done, the little guy, the average person, the people of Pin Point, the real people of America will be affected not only by what we as judges do, but by the way we do our jobs.

If confirmed by the Senate, I pledge that I will preserve and protect our Constitution and carry with me the values of my heritage: fairness, integrity, openmindedness, honesty, and hard work.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very, very much for a moving statement, Judge.

Let me begin at the very outset by pointing out to you I, for one, do not in any way doubt your honesty, your decency, or your fairness. But, if I could make an analogy, I am interested in what you think, how you think. I don't doubt for a moment the honesty, decency, or fairness of Senator Hatch. I don't doubt for a moment the honesty, decency, or fairness of Senator Metzenbaum. But I sure have a choice of which one I would put on the bench.

Because they are both honest—I mean this sincerely now. It is an important point. At least you understand what I have in mind. The fact you are honest and the fact you are decent and the fact you are fair, the fact you have honed sensibilities mean a lot to me. But what I want to do the next half hour and the next several days is to go beyond that.

I will concede easily those points because it is true. No question. As we lawyers say, let's stipulate to the fact you are honest, decent, and fair, and let's get about the business of finding out why anyone who ever had the nuns can remember their eighth grade nun. Mine was Mother Agnes Constance. I don't know why I remember it so vividly. I suspect we both know why we remember so vividly.

Judge THOMAS. Dare not forget.

The CHAIRMAN. And we both know they never forget.

I made a speech not too many years ago, a commencement speech, at St. Joseph's University. After the speech was over I felt that finger that I am sure you felt in the middle of your back, and I heard, "Joey Biden, why did you say 'I' instead of 'me' " in such and such a sentence. It is a true story. I turned around and it was my seventh grade nun. So we both have at least that in common, and let's see what we can find out about whether or not we have in common, if anything, about the broader philosophic constructs upon which the Constitution can and must be informed.

Judge, as Senator Danforth said, he hopes we have read your speeches. I assure you I have read all of your speeches, and I have

read them in their entirety. And, as I indicated in my opening statement, what I want to talk about a little bit is one of the things you mention repeatedly in your speeches so that I can be better informed by what you mean by it.

Whether you are speaking in the speech you delivered on the occasion of Martin Luther King's birthday, a national holiday and whether it should be one, to a conservative audience, making the point that he should be looked to with more reverence or whether or not it was your speech to the Pacific Institute or whether or not it is the Harvard Journal, whatever it is you repeatedly invoke the phrase "natural rights" or "natural law."

And, as I said at the outset, here is good natural law, if you will, and bad natural law in terms of informing the Constitution, and there is a whole new school of thought in America that would like very much to use natural law to lower the protections for individuals in the zone of personal privacy, and I will speak to those later, and who want to heighten the protection for businesses and corporations.

Now, one of those people is a Professor Macedo, a fine first-class scholar at Harvard University. Another is Mr. Epstein, a professor at the University of Chicago. And, in the speech you gave in 1987 to the Pacific Research Institute you said, and I quote: "I find attractive the arguments of scholars such as Stephen Macedo who defend an activist Supreme Court that would"—not could, would—"strike down laws restricting property rights."

My question is a very simple one, Judge. What exactly do you find attractive about the arguments of Professor Macedo and other scholars like him?

Judge THOMAS. Senator, again, it has been quite some time since I have read Professor Macedo and others. That was, I believe, 1987 or 1988. My interest in the whole area was as a political philosophy. My interest was in reassessing and demonstrating a sense that we understood what our Founding Fathers were thinking when they used phrases such as "All men are created equal," and what that meant for our form of government.

I found Macedo interesting and his arguments interesting, as I remembered. Again, it has been quite some time. But I don't believe that in my writings I have indicated that we should have an activist Supreme Court or that we should have any form of activism on the Supreme Court. Again, I found his arguments interesting, and I was not talking particularly of natural law, Mr. Chairman, in the context of adjudication.

The CHAIRMAN. I am not quite sure I understand your answer, Judge. You indicated that you find the arguments—not interesting—attractive, and you explicitly say one of the things you find attractive—I am quoting from you: "I find attractive the arguments of scholars such as Steven Macedo who defend an activist Supreme Court that would strike down laws resisting property rights."

Now, it would seem to me what you were talking about is you find attractive the fact that they are activists and they would like to strike down existing laws that impact on restricting the use of property rights because, you know, that is what they write about.

Judge THOMAS. Well, let me clarify something. I think it is important, Mr. Chairman.

The CHAIRMAN. Please.

Judge THOMAS. As I indicated, I believe, or attempted to allude to in my confirmation to the Court of Appeals, 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. I was interested in that. There were debates that I had with individuals, and I pursued that on a part-time basis. I was an agency chairman.

The CHAIRMAN. Well, judge, in preparing for these hearings, some suggested that might be your answer. So I went back through some of your writings and speeches to see if I misread them. And, quite frankly, I find it hard to square your speeches, which I will discuss with you in a minute, with what you are telling me today.

Just let me read some of your quotes. In a speech before the Federalist Society at the University of Virginia, in a variation of that speech that you published in the Harvard Journal of Law and Policy, you praised the first Justice Harlan's opinion in *Plessy* v. *Ferguson*, and you said, "Implicit reliance on political first principles was implicit rather than explicit, as is generally appropriate for the Court's opinions. He gives us a foundation for interpreting not only cases involving race, but the entire Constitution in the scheme of protecting rights." You went on to say, "Harlan's opinion provides one of our best examples of natural law and higher law jurisprudence."

Then you say, "The higher law background of the American Government, whether explicitly appealed to or not, provides the only firm basis for a just and wise constitutional decision."

Judge, what I would like to know is, I find it hard to understand how you can say what you are now saying, that natural law was only a—you were only talking about the philosophy in a general philosophic sense, and not how it informed or impacted upon constitutional interpretation.

Judge THOMAS. Well, let me attempt to clarify. That, in fact, though, was my approach. I was interested in the political theory standpoint. I was not interested in constitutional adjudication. I was not at the time adjudicating cases. But with respect to the background, I think that we can both agree that the founders of our country, or at least some of the drafters of our Constitution and our Declaration, believed in natural rights. And my point was simply that in understanding overall our constitutional government, that it was important that we understood how they believed—or what they believed in natural law or natural rights.

The CHAIRMAN. For what purpose, Judge?

Judge THOMAS. My purpose was this, in looking at this entire area: The question for me was from a political theory standpoint. You and I are sitting here in Washington, DC, with Abraham Lincoln or with Frederick Douglass, and from a theory, how do we get out of slavery? There is no constitutional amendment. There is no provision in the Constitution. But by what theory? Repeatedly Lincoln referred to the notion that all men are created equal. And that was my attraction to, or beginning of my attraction to this approach. But I did not—I would maintain that I did not feel that

natural rights or natural law has a basis or has a use in constitutional adjudication.

The CHAIRMAN. Well, Judge, let's go back to Macedo, then. What was the political theory you found so attractive that Mr. Macedo is espousing?

Judge THOMAS. The only thing that I could think of with respect to—and I will tell you how I got to the issue of property rights and the issue of the approach or what I was concerned about. What I was concerned about was this: If you ended slavery—and it is something that I don't know whether I alluded to it in that speech, but it is something that troubled me even in my youth. If you ended slavery and you had black codes, for example, or you had laws that did not allow my grandfather to enjoy the fruits of his labor, prevented him from working—and you did have that. You had people who had to work for $3 a day. I told you what my mother's income was. By what theory do you protect that?

I don't think that I have explicitly endorsed Macedo. I found his arguments interesting, and, again, that is the——

The CHAIRMAN. But he doesn't argue about any of those things, Judge.

Judge THOMAS. I understand that. I read more explicit areas. I read about natural law even though my grandfather didn't talk about natural——

The CHAIRMAN. But, I mean, isn't it kind of—I guess I will come back to Macedo. You also said in that speech out at the Pacific Research Institute, you said, "I am far from being a scholar on Thomas Jefferson, but two of his statements suffice as a basis for restoring our original founding belief and reliance on natural law, and natural law, when applied to America, means not medieval stultification but the liberation of commerce." You speak many times—I won't bore you with them, but I have pages and pages of quotes where you talk about natural law not in the context of your grandfather, not in the context of race, not in the context of equality, but you talk about it in the context of commerce, just like it is talked in the context, that context, by Macedo and by Epstein and others in their various books, a new fervent area of scholarship that basically says, "Hey, look, we, the modern-day court, has not taken enough time to protect people's property, the property rights of corporations, the property rights of individuals, the property rights of businesses." And so what we have to do is we have to elevate the way we have treated protecting property. We have to elevate that to make it harder for governments to interfere with the ability of—in the case of Epstein the ability to have zoning laws, the ability to have pollution laws, the ability to have laws that protect the public welfare.

Then you say in another place in one of your speeches, you say, "Well, look, I think that property rights should be given"—let me find the exact quote—"should be given the exact same protection as"—you say, "Economic rights are as protected as much as any other rights," in a speech to the American Bar Association.

Now, Judge, understand my confusion. Economic rights now are not protected as much as any other rights. They are not protected that way now. They are given—if they pass a rational basis test, in effect, it is all right to restrict property. When you start to restrict

things that have to do with privacy and thought process, then you have to have a much stricter test. And so you quote Macedo. You talk about the liberation of commerce and natural law, whatever you want to call it, natural law or not. And then you say economic rights—and, by the way, you made that speech to the ABA the day after you made the speech where you praised Macedo.

Can you tell me, can you enlighten me on how this was just some sort of philosophic musing?

Judge THOMAS. Well, that is exactly what it was. I was interested in exactly what I have said I was interested in. And I think I have indicated in my confirmation to the court of appeals that I did not see a role for the application of natural rights to constitutional adjudication, and I stand by that.

The CHAIRMAN. Judge, you argue Harlan did just that and that it was a good thing for him to have done. He applied this theory of natural rights, as you say, in his dissent in *Plessy* v. *Ferguson.*

Judge THOMAS. I thought that——

The CHAIRMAN. He should have, you say.

Judge THOMAS. Well, the argument was I felt that slavery was wrong, that segregation was wrong.

The CHAIRMAN. Right.

Judge THOMAS. And, again, I argue—and I have stood by that—that these positions that I have taken, I have taken from the standpoint of philosophical or from the standpoint of political theory.

The CHAIRMAN. Well, Judge, let me find——

Judge THOMAS. Let me, if I could have an opportunity.

The CHAIRMAN. Sure, oh, please.

Judge THOMAS. My interest in this area started with the notion, with a simple question: How do you end slavery? By what theory do you end slavery? After you end slavery, by what theory do you protect the right of someone who was a former slave or someone like my grandfather, for example, to enjoy the fruits of his or her labor?

At no point did I or do I believe that the approach of natural law or that natural rights has a role in constitutional adjudication. I attempted to make that plain or to allude to that in my confirmation to the court of appeals. And I think that that is the position that I take here.

The CHAIRMAN. OK, Judge. Well, look, let's not call it natural law, natural rights, whatever. What do you mean when you say economic rights are protected as much as any other rights in the Constitution? What do you mean by that?

Judge THOMAS. Well, the simple point was that notions like—for me, at this point—and, again, I have not gone back and I don't know the text of all those speeches. But there are takings clauses—there is a taking clause in the Constitution, and 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 that would happen. But it certainly does deserve some protection. Certainly the right of my grandfather to work deserves protection.

The CHAIRMAN. The right of my Grandfather Finnegan, too, deserved protection and your grandfather to work. But the issue here

is whether or—look, let me explain to you why I am concerned about this. You know why. Let's make sure other people know why.

There is a whole new school of thought made up of individuals that up until about 5 years ago only spoke to one another. That school of thought is now receiving wider credence and credibility, to the point that former Solicitor General Charles Fried, in his book "Order and Law,"—not a liberal Democrat, Reagan's Solicitor General—said in his book about this group of scholars to whom Macedo and others like you refer—maybe you didn't mean the same thing, but this group of scholars, meaning Macedo and Epstein and others who I will mention in a moment. He says, "Fledgling federalist societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein had a specific, aggressive and, it seemed to me, quite radical project in mind,"—meaning for the administration—"to use the takings clause"—I don't have much time so I won't go into it, but you and I both know the takings clause is that portion of the fifth amendment that has nothing to do with self-incrimination. It says if the government is going to take your property, they have to pay for it, except historically we have said if it is regulating your property, it is not taking it. If it is regulating under the police power to prevent pollution or whatever else, then it is not taking it and doesn't have to pay for it.

And what these guys want to do is they want to use that takings clause like the 14th amendment was used during the Lockner era. This is Fried speaking. It says "had a specific, aggressive, and, it seemed to me, quite radical project in mind to use the takings clause of the fifth amendment to serve as a brake upon Federal and State regulation of business and property. The grand plan was to make government pay compensation for taking property every time its regulation impinged."

Now, that is what this is all about, Judge. And, again, I am not saying that that is your view, but it seems to me when you say, which nobody else who writes in this area—I don't know anybody—and I have read a lot about this area. I don't know anybody else who uses the phrases "natural law," "property," "the takings clause," who doesn't stand for the proposition that Macedo and Epstein for, which is that we got this a little out of whack. We have got to elevate the standard of review we use when we look at property, just to the same standard, to use your phrase, the same rights as personal rights, that most Americans think to be personal, whether they can assemble, whether or not they can go out and speak, whether or not they can worship, whether or not they can have privacy in their own bedroom.

And so these guys want to change that balance, but that is why I am asking you this. I will come back to it in a minute in my second round. But let me shift, if I may——

Judge THOMAS. May I just respond?

The CHAIRMAN. Yes, please.

Judge THOMAS. First of all, I would like to just simply say, and I think it is appropriate, that I did not consider myself a member of that school of thought. And, secondly, I think that the post-Lockner era cases were correctly decided.

My interest in natural rights were purely from a political theory standpoint and as a part-time political theorist. I was not a law professor, nor was I adjudicating cases. And as I indicated and have indicated, I do not think that the natural rights or natural law has an appropriate use in constitutional adjudication.

The CHAIRMAN. Well, Judge, I would ask for the record, and I will make these available to you, that all the references you make that I have found—and there are pages of them—where you explicitly connect natural law with either specific cases or talk about informing specific aspects of constitutional interpretation be entered in the record. In my second round, I will be able to talk with you about them. You will have had a chance to read them.

[The documents follow:]

1

[THOMAS QUOTATIONS ON NATURAL LAW]

KEYNOTE ADDRESS, PACIFIC RESEARCH INSTITUTE'S CIVIL RIGHTS TASK FORCE, AUGUST 4, 1988

"THE AMERICAN CONCEPTION OF THE RULE OF LAW PRESUPPOSES APPRECIATION FOR THE POLITICAL PHILOSOPHY OF NATURAL RIGHTS IN ALL THE DEPARTMENTS OF GOVERNMENT. THE CONSERVATIVE FAILURE TO APPRECIATE THE IMPORTANCE OF NATURAL RIGHTS AND HIGHER LAW ARGUMENTS CULMINATED IN 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, NOT FROM A PIECE OF PAPER. WE CANNOT EXPECT OUR VIEWS OF CIVIL RIGHTS TO TRIUMPH, BY CONCEDING THE MORAL HIGH GROUND TO THOSE WHO CONFUSE RIGHTS WITH WILFULNESS."

* SPEECH AT FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, MARCH 5, 1988

"HIGHER LAW PRINCIPLES HAD TO WORK THEIR WAY THROUGH THE CONSTITUTION'S TEXT. A NATURAL RIGHTS UNDERSTANDING OF THE CONSTITUTION DOES NOT GIVE JUSTICES A RIGHT TO ROAM. RATHER, IT POINTS THE ENTIRE GOVERNMENT TOWARD FREEDOM."

* KEYNOTE ADDRESS CELEBRATING THE FORMATION OF THE PACIFIC RESEARCH INSTITUTE'S CIVIL RIGHTS TASK FORCE, AUGUST 4, 1988

[WHAT MAKES THE FOLLOWING QUOTATION SIGNIFICANT IS THAT THOMAS IS CRITICIZING A SPECIFIC SUPREME COURT CASE ON THE BASIS OF NATURAL LAW -- INDICATING THAT NATURAL LAW IS NOT JUST A "PHILOSOPHY," BUT HELPS DECIDE -- AND EVEN CONTROLS JUDICIAL DECISIONS.]

"CONSERVATIVE HEROES SUCH AS THE CHIEF JUSTICE FAILED NOT ONLY CONSERVATIVES BUT ALL AMERICANS IN THE MOST IMPORTANT COURT CASE SINCE BROWN V. BD. OF EDUCATION. I REFER OF COURSE TO THE INDEPENDENT COUNSEL CASE, MORRISON V. OLSON. ... JUSTICE ANTONIN SCALIA'S REMARKABLE DISSENT IN [MORRISON] POINTS THE WAY TOWARD [THE CORRECT] PRINCIPLES AND IDEAS. HE INDICATES HOW AGAIN WE MIGHT RELATE NATURAL RIGHTS TO DEMOCRATIC SELF-GOVERNMENT AND THUS PROTECT A REGIME OF INDIVIDUAL RIGHTS.

"JUSTICE SCALIA'S DISSENT CITED THE MASSACHUSETTS BILL OF

RIGHTS, WHICH ARTICULATES THE FUNDAMENTAL BASES OF DECENT GOVERNMENT. HE QUOTED THE LAST OF THE 30 ARTICLES OF THAT DOCUMENT. ... BY RECALLING ARTICLE 30, THE SCALIA OPINION MAY PUT US ON THE WAY TO RECOGNIZING THE IMPORTANCE OF ARTICLE ONE OF THE MASSACHUSETTS BILL OF RIGHTS: QUOTE 'ALL MEN ARE BORN FREE AND EQUAL, AND HAVE CERTAIN NATURAL, ESSENTIAL, AND UNALIENABLE RIGHTS; AMONG WHICH MAY BE RECKONED THE RIGHT OF ENJOYING AND DEFENDING THEIR LIVES AND LIBERTIES; THAT OF ACQUIRING, POSSESSING, AND PROTECTING PROPERTY, IN FINE, THAT OF SEEKING AND OBTAINING THEIR SAFETY AND HAPPINESS.' END QUOTE ...

"THIS SHORT PASSAGE SUMMARIZES WELL THE TIE BETWEEN NATURAL RIGHTS AND LIMITED GOVERNMENT. BEYOND HISTORICAL CIRCUMSTANCE, SOCIOLOGICAL CONDITIONS, AND CLASS BIAS, NATURAL RIGHTS CONSTITUTE AN OBJECTIVE BASIS FOR GOOD GOVERNMENT. SO THE AMERICAN FOUNDERS SAW IT, AND SO SHOULD WE."

* NOTES ON ORIGINAL INTENT, UNDATED (THOMAS IS QUOTING A LETTER WRITTEN BY ANDREW HAMILTON)

"THE YOUNG [ANDREW] HAMILTON DEFENDED AMERICAN RIGHTS AGAINST A TORY BY ARGUING 'THE FUNDAMENTAL SOURCE OF ALL YOUR ERRORS, SOPHISMS, AND FALSE REASONINGS IS A TOTAL IGNORANCE OF THE NATURAL RIGHTS OF MANKIND.' THIS COULD APPLY TO VIRTUALLY ANY JUDGE OR DARE I SAY ANY TEACHER OF

LAW TODAY. ... THE NATURAL RIGHTS, HIGHER LAW UNDERSTANDING OF OUR CONSTITUTION IS THE NON-PARTISAN BASIS FOR LIMITED, DECENT, AND FREE GOVERNMENT."

* FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, U. VA. SCHOOL OF LAW, MARCH 5, 1988

"FAR FROM BEING A LICENSE FOR UNLIMITED GOVERNMENT AND A ROVING JUDICIARY, NATURAL RIGHTS AND HIGHER LAW ARGUMENTS ARE THE BEST DEFENSE OF LIBERTY, AND OF LIMITED GOVERNMENT. MOREOVER, WITHOUT RECOURSE TO HIGHER LAW, WE ABANDON OUR BEST DEFENSE OF A COURT THAT IS ACTIVE IN DEFENDING THE CONSTITUTION BUT JUDICIOUS IN ITS RESTRAINT AND MODERATION. HIGHER LAW IS THE ONLY ALTERNATIVE TO THE WILFULNESS OF BOTH RUNAMOK MAJORITIES AND RUNAMOK JUDGES."

* SPEECH BEFORE THE KIWANIS CLUB, WASHINGTON, JAN 14, 1987

"AS DR. KING MAINTAINED, AMERICAN POLITICS AND THE AMERICAN CONSTITUTION ARE UNINTELLIGIBLE WITHOUT THE DECLARATION OF INDEPENDENCE, AND THE DECLARATION IS UNINTELLIGIBLE WITHOUT THE NOTION OF A HIGHER LAW BY WHICH WE FALLIBLE MEN AND WOMEN CAN TAKE OUR BEARINGS. THAT IS WHAT I GREW UP ACCEPTING."

* "AFFIRMATIVE ACTION: CURE OR CONTRADICTION?" CENTER MAGAZINE, NOV/DEC. 1987.

"THE RULE OF LAW IN AMERICA MEANS NOTHING OUTSIDE

CONSTITUTIONAL GOVERNMENT AND CONSTITUTIONALISM, AND THESE ARE SIMPLY UNINTELLIGIBLE WITHOUT A HIGHER LAW. MEN CANNOT RULE OTHERS BY THEIR CONSENT UNLESS THEIR COMMON HUMANITY IS UNDERSTOOD IN LIGHT OF TRANSCENDENT STANDARDS PROVIDED BY THE DECLARATION'S "LAWS OF NATURE AND OF NATURE'S GOD." NATURAL LAW PROVIDES A BASIS IN HUMAN DIGNITY BY WHICH WE CAN JUDGE WHETHER HUMAN BEINGS ARE JUST OR UNJUST, NOBLE OR IGNOBLE."

* SPEECH AT FEDERALIST SOCIETY FOR LAW AND POLICY STUDIES, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, MARCH 5, 1988 (THE EMPHASIS IS THOMAS'S)

"HARLAN'S RELIANCE ON POLITICAL FIRST PRINCIPLES [AS EXPRESSED IN THE DECLARATION OF INDEPENDENCE -- SEE PRECEDING PARAGRAPH] WAS IMPLICIT RATHER THAN EXPLICIT, AS IS GENERALLY APPROPRIATE FOR SUPREME COURT OPINIONS. HE GIVES US A FOUNDATION FOR INTERPRETING NOT ONLY CASES INVOLVING RACE BUT THE ENTIRE CONSTITUTION AND ITS SCHEME OF PROTECTING RIGHTS. ... THE HIGHER LAW BACKGROUND OF THE CONSTITUTION, <u>WHETHER EXPLICITLY APPEALED TO OR NOT</u>, PROVIDES THE ONLY FIRM BASIS FOR A JUST, WISE, AND CONSTITUTIONAL DECISION."

[THOMAS ON ECONOMIC RIGHTS]

[IF THOMAS WAFFLES ON WHETHER HE THINKS ECONOMIC RIGHTS NEED MORE PROTECTION, THE FOLLOWING QUOTES INDICATED HIS DISSATISFACTION WITH THE EXISTING STATE OF AFFAIRS]

[THESE QUOTES SUGGEST THOMAS THINKS ECONOMIC RIGHTS ARE VITALLY IMPORTANT, AND UNDERAPPRECIATED]

* "REWARDS BELONG TO THOSE WHO LABOR," BY CLARENCE THOMAS, WASHINGTON TIMES, JAN. 18, 1988.

"TODAY WE ARE FAR FROM THE LEGAL INEQUITIES MY GRANDFATHER SUFFERED. INDEED, OUR CURRENT EXPLOSION OF RIGHTS -- WELFARE RIGHTS, ANIMAL RIGHTS, CHILDREN'S RIGHTS AND SO ON -- GOES TO THE POINT OF TRIVIALIZING THEM. FURTHERMORE, ECONOMIC RIGHTS ARE CONSIDERED ANTAGONISTIC TO CIVIL OR HUMAN RIGHTS -- THE FORMER BEING MATERIALISTIC AND DIRTY WHILE THE LATTER ARE LOFTY AND NOBLE. THE SPLIT HAS EVOLVED IN SUCH A WAY THAT SOME WHO CONSIDER THEMSELVES GREAT CHAMPIONS OF HUMAN RIGHTS CONTRAST THEMSELVES WITH ADVOCATES OF PROPERTY RIGHTS OR ECONOMIC RIGHTS."

* LETTER TO THE EDITOR, WASHINGTON TIMES, SEPTEMBER 2, 1987

"ABOVE AND BEYOND THE NEED FOR CONSTITUTIONAL AMENDMENTS (WHOSE MEANING CAN ALWAYS BE DISTORTED) IS A RENEWED UNDERSTANDING THAT THE FOUNDERS' CONSTITUTION INTENDED TO PROTECT INDIVIDUAL RIGHTS -- THE FULL INDIVISIBLE RANGE,

ECONOMIC AND CIVIL. THE FATHER OF THE CONSTITUTION, JAMES MADISON, PUT IT SUCCINCTLY: 'AS A MAN IS SAID TO HAVE A RIGHT TO HIS PROPERTY; HE MAY EQUALLY BE SAID TO HAVE A PROPERTY IN HIS RIGHTS.'"

* ABA BUSINESS LAW SECTION SPEECH, AUGUST 11, 1987.

[ECONOMIC RIGHTS] "ARE SO BASIC THAT THE FOUNDERS DID NOT EVEN THINK IT NECESSARY TO INCLUDE THEM IN THE CONSTITUTION'S TEXT, WITH THE IMPORTANT EXCEPTIONS OF THE CONTRACT CLAUSE AND THE LAST CLAUSES OF THE FIFTH AMENDMENT."

* PACIFIC RESEARCH INSTITUTE SPEECH, AUGUST 10, 1987.

"OF COURSE, THERE ARE SEVERAL DIFFERENT VERSIONS OF NATURAL LAW AND NATURAL RIGHTS, INCLUDING SOME IN SHARP CONFLICT WITH ONE ANOTHER. YET, I THINK ALL OF THEM WOULD HAVE TO AGREE ON CERTAIN ELEMENTS CONCERNING ECONOMICS. THESE ARE: FIRST, THE COMMON SENSE OF THE FREE MARKET; SECOND, AS LINCOLN PUT IT, 'THE NATURAL RIGHT TO EAT THE BREAD [ONE] EARNS WITH [ONE'S] OWN HANDS;' THIRD, THE DIGNITY OF LABOR."

* PACIFIC RESEARCH INSTITUTE SPEECH, AUGUST 10, 1987

"I WOULD ONLY ADD TO BLOOM'S WISE OBSERVATIONS HERE, THAT A

RENEWED EMPHASIS ON ECONOMIC RIGHTS MUST PLAY A KEY ROLE IN THE REVIVAL OF THE NATURAL RIGHTS POLITICAL PHILOSOPHY THAT HAS BROUGHT THIS NATION TO ITS SECOND BICENTENNIAL YEAR."

* NOTES ON ORIGINAL INTENT, UNDATED

"I WOULD ADVOCATE INSTEAD A TRUE JURISPRUDENCE OF ORIGINAL INTENT, ONE WHICH UNDERSTOOD THE CONSTITUTION IN LIGHT OF THE MORAL AND POLITICAL TEACHINGS OF HUMAN EQUALITY IN THE DECLARATION. HERE WE FIND BOTH MORAL BACKBONE AND THE STRONGEST DEFENSE OF INDIVIDUAL RIGHTS AGAINST COLLECTIVIST SCHEMES, WHETHER BY RACE OR OVER THE ECONOMY. MORALITY AND POLITICAL JUDGMENT ARE UNDERSTOOD IN OBJECTIVE TERMS, THE FOUNDERS' NOTIONS OF NATURAL RIGHTS."

[THESE QUOTES SUGGEST THOMAS WILL NOT SUPPORT RADICAL CHANGE IN THE COURT'S TREATMENT OF ECONOMIC RIGHTS]

* PACIFIC RESEARCH INSTITUTE SPEECH, AUGUST 10,1987.

"LET ME SAY THIS IN PASSING ABOUT RECENT ISSUES INVOLVING THE SUPREME COURT. I FIND ATTRACTIVE THE ARGUMENTS OF SCHOLARS SUCH AS STEPHEN MACEDO WHO DEFEND AN ACTIVIST SUPREME COURT, WHICH WOULD STRIKE DOWN LAWS RESTRICTING PROPERTY RIGHTS. BUT THE LIBERTARIAN ARGUMENTS OVERLOOKS THE PLACE OF THE SUPREME COURT IN A SCHEME OF SEPARATION OF

POWERS. ONE DOES NOT STRENGTHEN SELF-GOVERNMENT AND THE RULE OF LAW BY HAVING THE NON-DEMOCRATIC BRANCH OF GOVERNMENT MAKE POLICY."

* KEYNOTE ADDRESS, PACIFIC RESEARCH INSTITUTE'S CIVIL RIGHTS TASK FORCE, AUGUST 4, 1988

"UNFORTUNATELY, THE ATTACK ON JUSTICE COMES NOT ONLY FROM CONSERVATIVES BUT FROM LIBERTARIANS AS WELL. LIBERTY CANNOT BE PRESERVED SIMPLY BY DECLARING MORE RIGHTS OR GIVING MORE POWER TO A SUPREME COURT WHICH WOULD BE ENCOURAGED TO ZEALOUSLY PROTECT THESE PARTICULAR RIGHTS. THERE IS NO MORE A RIGHT TO USE DRUGS THAN THERE IS A RIGHT TO SELL ONESELF INTO SLAVERY. NOW, ECONOMIC LIBERTY OR PROPERTY RIGHTS IS CERTAINLY AN ESSENTIAL PART OF THE INDIVIDUAL RIGHTS WE AS AMERICANS CHERISH. ... YET TOO GREAT AN EMPHASIS ON ECONOMIC RIGHTS DISTORTS THE PRINCIPLES OF GOOD GOVERNMENT. IN FACT, TOO GREAT AN EMPHASIS ON RIGHTS CAN BE HARMFUL TO DEMOCRACY."

* ABA BUSINESS LAW SECTION SPEECH, AUGUST 11, 1987

"IF IT TAKES A JUDGE TO SOLVE OUR COUNTRY'S PROBLEMS, THEN DEMOCRACY AND THE RULE OF LAW ARE DEAD. AND I FOR ONE, ALONG WITH BOB BORK, AM NOT YET READY TO GIVE UP ON SELF-GOVERNMENT. IRONICALLY, BY OBJECTING AS VOCIFEROUSLY AS THEY HAVE TO JUDGE BORK'S NOMINATION, THESE SPECIAL INTEREST GROUPS UNDERMINE THEIR OWN CLAIM TO BE PROTECTED BY THE

COURT. THE COURT HAS ITS DIGNITY, AND ITS POWER, BY VIRTUE OF BEING ABOVE AND BEYOND SUCH CLAMORING. FOR SIMILAR REASONS I CANNOT ACCEPT THE LIBERTARIAN JURISPRUDENCE WHICH ARGUES THAT THE COURT SHOULD ONCE AGAIN EXPLOIT THE DUE PROCESS CLAUSES AND BECOME ACTIVE IN STRIKING DOWN LAWS WHICH REGULATE THE ECONOMY. THIS IS YET ANOTHER ASSAULT ON THE NOTION THAT THE WHOLE CONSTITUTION IS A BILL OF RIGHTS, AND THAT THE SEPARATION OF POWERS IS ESSENTIAL TO DEMOCRATIC REPUBLICANISM."

* SPEECH TO CATO INSTITUTE, APRIL 23, 1987

"IF YOU THINK SUCH AN APPROACH WILL LEAD TO INCONSISTENCIES, YOU'RE CERTAINLY RIGHT. BUT CONSIDER THE CURRENT EAGERNESS OF SOME LIBERTARIANS TO DEVELOP A JURISPRUDENCE WHICH JUSTIFIES JUDICIAL ACTIVISM BY THE COURTS TO STRIKE DOWN LAWS AND REGULATIONS CONCERNING ECONOMIC AND BUSINESS ACTIVITY. DO SUCH PEOPLE REALLY THINK SUCH A POWERFUL COURT WOULD STOP AT STRIKING DOWN ONLY THOSE LAWS? THAT DEFIES REALITY."

EMPHASIS IS THOMAS'S)

The CHAIRMAN. But let me move, if I may, for a second. As I said earlier, I mentioned that concomitant with those who want to sort of raise up the economic protections and business incorporation to make it harder for government to regulate them without paying them, which is a multibillion-dollar change in the law—not your view—where Mr. Epstein's views take place, the multibillion-dollar expense for the taxpayers if they wanted to continue to regulate the way we now regulate and consider reasonable. As I mentioned earlier, there is a second zone of individual rights, a zone which includes such rights as free speech, religion, and privacy in the family. These rights are also protected as informed by natural law principles.

Now, you say that is not what you mean, informed by natural law principles. But some of the specific protections are very specific. For example, the fourth amendment guarantees personal privacy in a particular context, illegal search and seizures, and other protections are more general, like the 14th amendment that says "nor shall any State deprive any person of life, liberty, or property without due process of law."

Now, Judge, in your view, does the liberty clause of the 14th amendment protect the right of women to decide for themselves in certain instances whether or not to terminate pregnancy?

Judge THOMAS. Senator, first of all, let me look at that in the context other than with natural law principles.

The CHAIRMAN. Let's forget about natural law for a minute.

Judge THOMAS. My view is that there is a right to privacy in the 14th amendment.

The CHAIRMAN. Well, Judge, does that right to privacy in the liberty clause of the 14th amendment protect the right of a woman to decide for herself in certain instances whether or not to terminate a pregnancy?

Judge THOMAS. Senator, I think that the Supreme Court has made clear that the issue of marital privacy is protected, that the State cannot infringe on that without a compelling interest, and the Supreme Court, of course, in the case of *Roe* v. *Wade* has found an interest in the woman's right to—as a fundamental interest a woman's right to terminate a pregnancy. I do not think that at this time that I could maintain my impartiality as a member of the judiciary and comment on that specific case.

The CHAIRMAN. Well, let's try it another way, Judge. I don't want to ask you to comment specifically on *Roe* there. What I am trying to get at, there are two schools of thought out there. There is a gentleman like Professor Michael Moore of the University of Pennsylvania and Mr. Lewis Lehrman of the Heritage Foundation who both think natural law philosophy informs their view, and they conclude one who strongly supports a woman's right and the other one who strongly opposes a woman's right to terminate a pregnancy.

Then there are those who say that, no, this should be left strictly to the legislative bodies, not for the courts to interpret, and they fall into the school of thought represented by John Hart Healy and former Judge Robert Bork, for example, who say the Court has nothing to do with that.

Now, let me ask you this: Where does the decision lie? Does it lie with the Court? For example, you quote, with admiration, Mr. Lehrman's article. Mr. Lehrman's article was on natural law and—I forget the exact title here. Let me find it. "Natural Law and the Right to Life." And you say when you are speaking at a gathering that you think that that is a superb application of natural law. You say, "It is a splendid example of applying natural law."

Now, what did you mean by that?

Judge THOMAS. Well, let me go back to, I guess, my first comment to you when we were discussing natural law—I think that is important—and then come back to the question of the due process analysis.

The speech that I was giving there was before the Heritage Foundation. Again, as I indicated earlier, my interest was civil rights and slavery. What I was attempting to do in the beginning of that speech was to make clear to a conservative audience that blacks who were Republicans and the issues that affected blacks were being addressed and being dealt with by conservatives in what I considered a less-than-acceptable manner.

The second point that——

The CHAIRMAN. In what sense? In that they were not——

Judge THOMAS. That they were not.

The CHAIRMAN [continuing]. Invoking natural law.

Judge THOMAS. No, that—no. The second point that I wanted to make to them was that they had, based on what I thought was an appropriate approach, they had an obligation just as conservatives to be more open and more aggressive on civil rights enforcement. What I thought would be the best way to approach that would be using the underlying concept of our Constitution that we were all created equal.

I felt that conservatives would be skeptical about the notion of natural law. I was using that as the underlying approach. I felt that they would be conservative and that they would not—or be skeptical about that concept. I was speaking in the Lew Lehrman Auditorium of the Heritage Foundation. I thought that if I demonstrated that one of their own accepted at least the concept of natural rights, that they would be more apt to accept that concept as an underlying principle for being more aggressive on civil rights. My whole interest was civil rights enforcement.

The CHAIRMAN. Judge, you said in that speech, "The need to reexamine natural law is as current as last month's issue of Time on ethics, yet it is more venerable than St. Thomas Aquinas. It both transcends and underlies time and place, race and custom, and until recently it has been an integral part of the American political tradition. Dr. King was the last prominent American political figure to appeal to it. But Heritage trustee Lewis Lehrman's recent essay in the American Sector on the Declaration of Independence and the meaning of the right to life is a splendid example of applying it. Briefly put, this thesis of natural law is that human nature provides the key to how men ought to live their lives."

And then Mr. Lehrman's article goes on, not you, Mr. Lehrman's article goes on and says, "Because it is a natural right of a fetus, there is no ability of the legislative body to impact in any way on whether or not there can or cannot be an abortion at any time for

any reason. And the Court must uphold applying natural law, the principle that abortion is wrong under all circumstances, whether it is the life of the mother, no matter what, all circumstances."

Judge THOMAS. It was not my intention, Mr. Chairman, as I have tried to indicate to you, to adopt—I think I have been explicit when I wanted to adopt someone or say something, adopt a position or say something. I think I have done that.

My interest in the speech I think is fairly clear, or is very clear. My interest was in the aggressive enforcement of civil rights. Remember the context. I am in the Reagan administration. I have been engaged in significant battles throughout my tenure. It is toward the end of the Reagan administration. And I feel that conservatives have taken an approach on civil rights where they have become comfortable with notions that it is okay to simply be against quotas or to be against busing or to be against voting rights and consider that a civil rights agenda.

What I was looking for were unifying themes in a political standpoint, not a constitutional adjudication standpoint, and I used themes that I thought that one of their champions had in a way adopted, not adopting his analysis or adopting his approach, but adopting a theme that he used to serve the purposes that I thought were very important.

The CHAIRMAN. Well, Judge, let me conclude this round by saying that—picking up that context, that you were a part of the Reagan administration. In 1986, as a member of the administration, you were part of what has been referred to here, the administration's Working Group on the Family. This group put out what I think can only be characterized as a controversial report. And you sign that report which recommends more State regulation of the family than is now allowed under the law. That report concludes that the Supreme Court's privacy decisions for the last 20 years are fatally flawed and should be corrected.

Judge, did you read this report before it was released?

Judge THOMAS. Well, let me explain to you how working groups work in the domestic policy context or the way that they worked in the administration. Normally what would happen is that there would be a number of informal meetings. At those meetings, you would express your—there would be some discussion around the table. My interest was in low-income families. I transmitted, after several meetings transmitted to the head of that working group, my views on the low-income family and the need to address the problems of low-income families in the report.

The report, as it normally works in these working groups in domestic policy, the report is not finalized, nor is it a team effort in drafting. You are submitted your document. That document is then, as far as I know, it may be sent around or may not be sent around. But there is no signature required on those.

The CHAIRMAN. Did you ever read the report, Judge?

Judge THOMAS. The section that I read was on the family. I was only interested in whether they included my comments on the low-income family.

The CHAIRMAN. But at any time, even after it was published?

Judge THOMAS. No, I did not.

The CHAIRMAN. You haven't to this moment read that report?

Judge THOMAS. To this day, I have not read that report. I read the sections on low-income families.

The CHAIRMAN. There was an awful lot of discussion in the press and controversy about it.

Judge THOMAS. There was controversy about it. I was interested in low-income families. If you work with the domestic policy group or the working groups at the White House, what one quickly learns is that you send your input, that that input is reduced to what they want it reduced to, and then the report is circulated in final.

The CHAIRMAN. Well, let me conclude. This is the last thing I will ask you. This report, which is only 67 pages long, of which your report is part of—and I acknowledge your suggesting, telling us that you did not read the report before or after, and your part was only a small part of this. But in this report, take my word for it, it says that one of these fatally flawed decisions—and they explicitly pick out one—is *Moore* v. *City of East Cleveland,* where the city of East Cleveland said a grandmother raising two grandchildren who are cousins and not brothers is violating the zoning law and therefore has to do one of two things: move out of the neighborhood or tell one of her grandchildren to leave.

As you know, that case, I believe, was appealed to the Supreme Court, that grandmother, and the Court said, "Hey, no, she has an absolute right of privacy to be able to have two of those grandchildren, even though they are cousins, to live with her and no zoning law can tell her otherwise."

Now, this report says, explicitly it says, that the city of East Cleveland and other cities should be able to pass such laws if they want and they should be upheld. And if we can't get them upheld, then we should change the Court. That is what this report says. And they say that the cities and States should be able to establish norms of a traditional family.

If you will give me the benefit of the doubt that I am telling you the truth and accurately characterizing the report on that point, do you agree with what I suggested to you is the conclusion of that report in the section you have not read?

Judge THOMAS. I have heard recently that that was the conclusion, but I would like to make a point there. I think—and I think the Supreme Court's rulings in the privacy area support—that the notion of family is one of the most personal and most private relationships that we have in our country. If I had, of course, known that that section was in the report before it became final, of course I would have expressed my concerns.

The CHAIRMAN. It is kind of outrageous, isn't it? Isn't it an outrageous suggestion?

Judge THOMAS. That would have had direct implications on my own family, that I could easily have been zoned out of my neighborhood should approaches like that take place. But my point to you—and I think it is very, very important, Senator—is this: That when you are involved or were involved in a working group in the White House, we were more in the nature of resource people. This was not a committee report. This was not a conference report which was circulated normally for comment. It was something generally that you provided your input, and I provided a significant memo, I believe, on low-income families and families that I felt

were at risk in the society and how we should approach resolving those families. I do not remember there being any discussion of the final draft.

The CHAIRMAN. Well, I have much more to ask you, Judge. We are going to go back, when I get a chance again, to the Macedo quote, the ABA speech, and the Lehrman speech, and this report. But, quite frankly, at this point you leave me with more questions than answers, but let me yield to my distinguished colleague, Senator Thurmond.

Senator METZENBAUM. Mr. Chairman, before proceeding forward—and I don't wish to interrupt my colleague, Senator Thurmond—would you be good enough to ask the Judge to read that report in order that we might inquire further of him tomorrow in our questioning period?

The CHAIRMAN. Well, if you plan on inquiring of him, I will make sure he has a copy available, and he can decide whether he wishes to read it or not.

Senator METZENBAUM. I do intend to inquire of him.

The CHAIRMAN. I will see to it that he has a copy, and he can make the judgment whether he wishes to read it.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Now, Judge, I think we can move right along. I have about 30 minutes here, and I have approximately 14 questions. I think we can finish them if you will just make your answers fairly brief.

Judge Thomas, the Constitution of the United States is now over 200 years old. Many Americans have expressed their views about the endurance of this great document. With the events in the Soviet Union, this document takes on an even greater significance as the foundation of our domestic form of government. Would you please share with the committee your opinion as to the success of our Constitution and its distinction as the oldest existing Constitution in the world today?

Judge THOMAS. Senator, I think it should be clear to all——

Senator THURMOND. Speak in the microphone. Speak out so we can all hear you.

Judge THOMAS. Senator, I think it should be clear to all of us that our Constitution, as it has endured, is one of the greatest documents, not only in our lifetimes, but certainly in the history of the world. It protects our freedoms as well as provides us with a structure of government that is certainly the freest government in the world, and it has certainly been a model for other countries.

Senator THURMOND. Second question: Judge Thomas, *Marbury* v. *Madison* is a famous Supreme Court decision. It provides the basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches. Would you briefly discuss your views on this authority?

Judge THOMAS. Senator, I think it is important to recognize—and we all do recognize—that *Marbury* v. *Madison* is the underpinning of our current judicial system, that the courts do decide and do the cases in the constitutional area, and it is certainly an approach that we have grown accustomed to and around which our institutions, our legal institutions have grown up.

Senator THURMOND. Judge Thomas, the 10th amendment to the Constitution provides that all powers are reserved to the States or the people if not specifically delegated to the Federal Government. What is your general view about the proper relationship between the Federal and State governments, and do you believe that there has been an substantial increase in Federal authority over the last few decades?

Judge THOMAS. Senator, I think that it is clear that our country has grown and expanded in very important ways. Through the commerce clause, for example, there has been growth in the national scope of our Government. Through the 14th amendment, there has been application of our Bill of Rights, or portions, to the State governments. Through the growth in communications and travel, of course, we are more nationalized than we were in the past.

I think what the Court has attempted to do is to preserve in a way as best it possibly could the autonomy of the State governments, but at the same time recognize the growth and expansion and the natural growth and expansion of our National Government.

Senator THURMOND. Judge Thomas, some have discussed your tenure as Chairman of the Equal Employment Opportunity Commission since your nomination to the Supreme Court. Although this committee thoroughly reviewed the issues raised about the EEOC when you were nominated for the D.C. Circuit Court, would you tell the committee what are the problems you encountered at the EEOC and the steps you took to resolve them? And if you care to discuss any major accomplishments now, I would be glad to have you do so.

Judge THOMAS. Senator, EEOC, of course, was a significant portion of my career in government. It was a most important part. When I arrived at EEOC in 1982, of course, we had some very, very difficult problems. We had problems with respect to the infrastructure of the agency. I felt that we should investigate more cases and that we should litigate more cases. We were immediately faced with problems of just managing our own money in the agency.

Over time, we were able to solve those problems. Over time, we were able to correct the infrastructure and to develop it and ultimately to improve our enforcement. We litigated more cases than ever in the history of the agency. We have been able to investigate cases, and we were able to do more with less in the agency with fewer resources. So I am very proud of my tenure at EEOC. I think we made great accomplishments. I think we made great strides. I think there was a lot to do after I left, and I felt that the agency was headed in a very positive direction.

Senator THURMOND. Judge Thomas, the Supreme Court has ruled that the death penalty is constitutional. There are hundreds of inmates under death sentences across the country. Many have been on death row for several years as a result of the endless appeals process. Recently the Senate passed legislation which would reduce the number of unnecessary appeals by giving greater deference to State decisions. Additionally, the Supreme Court has ruled in certain cases that there should be limits to the endless filing of habeas petitions, especially in death penalty cases.

Would you give the committee your views on the validity of placing some reasonable limitations on the number of post-trial appeals in death penalty cases?

Judge THOMAS. Senator, generally I think that there would be a concern among all of us. The death penalty is the harshest penalty that can be imposed, and it is certainly one that is unchangeable. And we should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face that kind of a consequence.

I would be concerned, of course, that we would move too fast, that if we eliminate some of the protections that perhaps we may deprive that individual of his life without due process. So I would be in favor of reasonable restrictions on procedures, but not to the point that individuals—or I believe that there should be reasonable restrictions at some point, but not to the point that an individual is deprived of his constitutional protections.

Senator THURMOND. Judge Thomas, I believe that tough sentences should be imposed in criminal cases, especially when the crime committed is one of violence. Over the years, I have favored tough criminal sanctions. Too often, unfortunately, victims of crime have not played a prominent enough role in the criminal justice system. However, recently the number of victims who participate in the prosecution of criminal cases has increased. In fact, the Court recently rules in the case of *Payne* v. *Tennessee* that the use of victim-impact statements in death penalty cases does not violate the Constitution.

In your opinion, should victims play a greater role in the criminal justice system? And if so, to what extent should a victim be allowed to participate, especially after a finding of guilt against an accused?

Judge THOMAS. Of course, Senator, that is a matter that the Court has, as you have noted, recently considered. My concern would be in a case like that that we don't in a way jeopardize the rights of the victim. Of course, we would like to make sure that the victims are involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process; that an individual who is a criminal defendant is in some way harmed by that other than just simply getting it right and making sure that the total impact of the conduct is known.

I think that there are concerns on both sides. From the standpoint of the victims, that is important. But there are also the constitutional rights of the criminal defendant.

Senator THURMOND. Judge, if I propound any question you consider inappropriate, just speak out and tell me.

Judge, Congress established the U.S. Sentencing Commission in 1984. Its function is to promulgate sentencing guidelines for Federal judges to ensure uniform and predictable prison sentences. The Supreme Court ruled in the case of *United States* v. *Mistretta* that the sentencing guidelines are constitutional.

Judge Thomas, from your experience, do you believe that uniform sentencing is more fair to those individuals who commit similar crimes and in the long run that sentencing guidelines will create better competence in the criminal justice system?

Judge THOMAS. Senator, I think that the problem, the concern that many individuals had in the sentencing of criminal defendants was the apparent unfairness and the disparity of sentences. The approach and the effort, the purpose of the uniform guidelines, one of the purposes was to simply provide some sense or to eliminate that disparity and that sense of unfairness. To the extent that it has done that in eliminating that disparity, I think it has brought a sense of fairness to the process.

The concern, of course, of anyone who is involved in the criminal justice system is that we do not sacrifice justice or fairness for uniformity or for rigidity. But I think that most judges would agree that the guidelines have eliminated the disparity in sentencing.

Senator THURMOND. Judge Thomas, you are currently serving as a member of the U.S. Court of Appeals for the District of Columbia Circuit. You have participated in some 140 decisions. How beneficial, in your opinion, will your prior judicial experience be to you if confirmed to serve on the Supreme Court?

Judge THOMAS. Senator, I think that in my own career I have had the opportunity to work in a variety of positions. I have had an opportunity to work in the Federal Government, to be engaged in appellate work there, to represent agencies, as well as in the legislative and executive branches of the National Government. What has been important to me in those processes is that I have had the opportunity to grow, to learn, to expand, to mature, to make hard decisions, and to, I think, become a better person and to become certainly advanced as someone who is capable of deciding tough cases or making tough decisions.

When one moves to the—when I moved to the judiciary, I felt that I had matured rapidly. But when one goes to the judiciary, one puts on those robes and realizes the immense responsibility of being a judge; that at the end of a decision, something is going to happen. Perhaps a person may stay in prison longer or a person may leave prison. There may be some economic effects. There may be a change in a company. Somebody wins or someone loses. So one becomes more serious and one again matures greatly.

I think it is also important because one has to—a judge has to become accustomed to not having views, formed views on issues that may come before him or her. You become impartial or neutral. You begin to look at problems in a different way, and you recognize your fallibility.

I think that my tenure on the court of appeals has been of tremendous benefit to me, and it certainly provided me with an occasion to mature more rapidly and to a larger extent than even my process of maturation in my previous jobs.

Senator THURMOND. Judge Thomas, the doctrine of stare decisis is a concept well recognized in our legal system and the concept that virtually all judges have in mind when making decisions, especially in difficult cases. I am sure that the issue of prior authority has been a factor which you have considered while on the bench. Would you please briefly state your general view of stare decisis and under what circumstances you would consider it appropriate to overrule a prior procedure?

Judge THOMAS. I think overruling a case or reconsidering a case, Senator, is a very serious matter. Certainly, the case would have to

be—you would have to be of the view that a case is incorrectly decided, but I think even that is not adequate.

There are some cases that you may not agree with that should not be overruled. Stare decisis provides continuity to our system, it provides predictability, and in our process of case-by-case decision-making, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case indirect, but that it would be appropriate, in view of stare decisis, to make that additional step of overruling that case.

Senator THURMOND. Judge Thomas, under our Constitution, we have three very distinct branches of government. The role of the judiciary is to interpret the law. However, there have been times when judges have gone beyond their responsibility of interpreting the law and, instead, have exercised their individual will as judicial activists. Would you please briefly describe your views on the topic of judicial activism?

Judge THOMAS. I think, Senator, that the role of a judge is a limited one. It is to interpret the intent of Congress, the legislation of Congress, to apply that in specific cases, and to interpret the Constitution, where called upon, but at no point to impose his or her will or his or her opinion in that process, but, rather, to go to the traditional tools of constitutional interpretation or adjudication, as well as to statutory construction, but not, again, to impose his or her own point of view or his or her predilections or preconceptions.

Senator THURMOND. Judge Thomas, the exclusionary rule is well known in criminal law. At times, it is applied when there was no misconduct on the part of law enforcement. For this reason, the Supreme Court recognized a good-faith exception to the exclusionary rule in the case of *United States.* v. *Leon,* applying it to only searches made pursuant to a warrant. Judge Thomas, would you discuss the effect of the exclusionary rule in preventing police misconduct, and whether or not there is a varied basis for good-faith exception, especially when there is a search warrant.

Judge THOMAS. I think in the case of *United States* v. *Leon,* of course, the Court did find the good-faith exception, but the approach that the Court took and the concern was this, that the warrant and the requirement is to make sure that the law enforcement officials are deterred from pursuing in an unlawful way or obtaining evidence in an unlawful way, it will not be used in the process.

In *United States* v. *Leon,* as I remember it, the magistrate had issued a warrant and the police officers or the law enforcement officials had relied on that warrant in good faith. The Court is simply saying that it would serve no purpose of deterrence, by precluding the use of a warrant that was issued by a magistrate, perhaps by mistake, but relied on, then, in good faith by the law enforcement officials.

Of course, there are exceptions to that, but I think that the Court and the law enforcement community have come to accept the use of the exclusionary rule up to a point, and the Court is looking for ways to make sure that the purposes of the exclusion-

ary rule are advanced, as opposed to simply being used in a way that is rote.

Senator THURMOND. Judge, concerns have been raised about the high costs and sometimes lengthy delays to resolve cases in the Federal courts. Last year, Congress passed legislation that I introduced, along with Senator Biden, that requires each Federal district to prepare a proposal to reduce delay and costs in the Federal civil litigation process. In your view, is there a need to expedite civil cases and reduce costs, to insure that individuals have confidence in the courts to resolve disputes? And what would you recommend to improve handling of civil cases in the Federal courts?

Judge THOMAS. Senator, I think that the concern that any of us would have when the court has a crowded docket is that there would be individuals who most need the access to our judicial system who would be squeezed out of that system, and we would also be concerned that if the costs of civil litigation were to increase, once again, the individuals who most need access to our judicial system would be eliminated from that system.

I think that there have been some proposals by the Vice President, there have been approaches that involve dispute resolution in order to speed up the process. There have even been private individuals who have established ways to adjudicate cases.

My concern with the later approach, of course, would be that we would have separate judicial systems for those who can afford it, the private system, and for those who cannot, they would have to wait in line for a crowded governmental system.

But I think that there are some proposals. Of course, there is some discussion and I think that all times the judicial system should be open to all of our citizens. It is one common aspect that we all have the same judiciary.

Senator THURMOND. Judge Thomas, in an opinion written last year by Justice Scalia concerning the first amendment's freedom of religion, the Supreme Court ruled in *Employment Division* v. *Smith* that a law which is otherwise valid does not violate the first amendment if it incidentally affects religious practices. Would you please briefly discuss the impact this decision has on the compelling State interest test established in *Sherbert* v. *Verner* in 1963?

Judge THOMAS. Of course, Justice Scalia's decision was, in essence, that since the general criminal statutes outlaw the use of peyote, I think, in that case, that one could not claim that it was a violation of their first amendment right to exercise their religious beliefs, that this preclusion by statute had occurred or that you could not use it in a religious exercise of any sort or religious celebration.

What Justice Scalia did was actually use a different test than had been used in the past. He avoided using the *Sherbert* test. Justice O'Connor used the compelling interest test. She used the *Sherbert* test and reached the same result, if I remember the case right.

I think it is an important departure from prior approaches and it is one that anyone who approaches these cases should be concerned about or at least be watchful for.

Senator THURMOND. Judge Thomas, the issue of capital punishment is a controversial topic, with strongly held views on both sides. Now that the Supreme Court has ruled that the death penal-

ty is a constitutional form of punishment and provided steps to insure that it is not imposed as unfettered discretion, certainly there are judges who are personally opposed to the death penalty. Since the Supreme Court has ruled that the death penalty is constitutional, what role, if any, should the personal opinion of a judge play in decisions he or she may render in case such as the death penalty?

Judge THOMAS. Senator, I think as I have indicated, I do not think that a judge's personal opinions should play a role in deciding cases, and certainly if a judge has strongly held views to a point that he or she cannot be impartial or objective, then I think that judge should consider recusal.

I think, of course, that some judges believe that the death penalty per se may be violative of constitutional rights, and that is one form of analysis or approach. But I think that if your personal views are so strong in any area, you should consider recusal.

Senator THURMOND. Judge Thomas, there have been complaints by Federal and State judges regarding the inferior quality of advocacy before the courts. During your service on the bench, have you found that legal representation in the courts was adequate? And what in your opinion should be done to insure that individuals get quality representation in the courts?

Judge THOMAS. Senator, during my own law school years, I thought it was important that I be involved, as a law student, in providing some representation for individuals who could not afford lawyers. I think we would all agree, in our judicial process and in this complex world, that it is difficult to represent one's self. While I was in the Attorney General's office, as well as at the Monsanto Co., I attempted to provide services to individuals who needed assistance.

I think that the level of representation or the level of advocacy by the lawyers who have appeared before the court on which I currently sit has been very, very high. The lawyers' involvement in the process help us to sharpen the arguments, to understand the arguments, and certainly to sharpen our inquiry and our analysis of very, very difficult legal issues.

I think it is important not only from the standpoint, and I think it is critical that individuals be represented, but I think it is not only important from that standpoint, but also from the standpoint of judges being able to get the cases right.

Senator THURMOND. Judge Thomas, prison overcrowding is a major problem facing Federal and State institutions today. Several State systems are currently under Federal prisoner cap orders which limits committing additional inmates to certain prisons. At a time when violent crime and drug offenses are such a problem, what other alternatives are available to insure that prison space is available for those sentenced to serve time?

Judge THOMAS. That is a difficult question, Senator. I do not think that those of us in the judiciary have the ability to know exactly how to solve all of the prison overcrowding issues. That, of course, is a problem that is facing virtually all areas. There have been efforts to move individuals to areas other than where they are convicted, to areas where they have additional space, and there

have been efforts to use other facilities, perhaps military bases, et cetera.

But I think it is a problem that is worthy of reconsideration and it is one that, with the current prison population, has to currently be reexamined, not only by this body or similar bodies, but also law enforcement officials, as well as members of the judiciary.

Senator THURMOND. Judge Thomas, as you are aware, public liability cases often involve very complex issues, with large sums of money at stake. Many argue that Congress should pass reform legislation to modify the burden of proof in certain types of cases and to limit the amount of damages that jurists would be allowed to award.

Based on your experience as a judge, what is your opinion of the ability of a judge in such complicated trials to comprehend these intricate issues and award damages reasonably related to the injuries suffered by the plaintiff? And if juries grant unwarranted awards, can appellate courts correct them?

Judge THOMAS. Senator, those cases are very difficult cases. I think that when juries and when judges attempt to adjudicate those cases, they have to sort out a complex set of issues, as well as determine in difficult circumstances what the appropriate relief would be.

At the appellate level, our job is not simply to go back and impose our views on the trier of fact in those cases, but, rather, to assure that the appropriate standards of law were employed.

Senator THURMOND. Judge Thomas, many people have supported the enactment of alternative dispute resolution measures such as arbitration in products liability lawsuits. Do you believe that these alternative dispute resolution measures will work in a fair manner and be helpful in resolving complicated issues that are usually considered by a jury, as well as helping to expedite the handling of such cases?

Judge THOMAS. We used, Senator, the alternative dispute resolution process. We began during my tenure at EEOC to begin to take a look at those sorts of approaches to resolving very difficult problems, and I believe that they should be explored. In our own court, we have explored the use of that process in resolving some of the appellate cases.

Again, I think is necessary to make sure that the cases that are allowed to go through that process are those that are susceptible to resolution in that manner. I would be concerned that any individual is deprived of his or her day in court, by using mechanisms that are not directly in the judicial process.

Senator THURMOND. Judge Thomas, the Sentencing Commission is considering whether current Federal criminal sentences are adequate. In fact, the Commission has promulgated new guidelines for white collar and corporate offenses. Congress has also seen fit to increase the term of imprisonment for various white collar crimes, including those involves financial institutions.

From your experience, have penalties for white collar crime and corporate defendants been sufficient, and do you anticipate tougher penalties for white collar criminals in the future, as a result of the recent savings and loan offenses and securities related crimes?

Judge THOMAS. Senator, certainly I have not sat as a trial judge imposing those sentences. I think that the sentences under our guidelines in the areas in which I have been involved certainly seem to be adequate. I would be concerned that there would be significant differences between serious crimes in one area and serious crimes in another area, and I think that this body, as well as individuals who have studied this area, have attempted to reduce the disparity in those sentences and I think that is an important project and endeavor.

Senator THURMOND. Judge Thomas, the caseload of the Supreme Court has grown rapidly over the past several decades. Part of this increase is a result of more cases being filed in the lower courts. Cases today are more complex, as our laws have become far more numerous and intricately fashioned. Would you please give the committee your thoughts on the current caseload of the Supreme Court and comment briefly on any innovative methods which could be utilized at the Federal level for handling this increased caseload?

Judge THOMAS. I certainly could not, Senator, as much as I probably would like to advise the Supreme Court on its workload. I think that the judges on my court, and I would assume that Justices on the Supreme Court, are working at a level that is very, very significant. I know that our own investment of time on our court usually involves 6 or 7 days a week. Of course, we do not have the option of screening the cases, as the Supreme Court does.

I think the Supreme Court has the awesome task of making some of the most difficult decisions in our Nation, and certainly the most difficult decisions in our judicial system, and it is important that they control their workload, I think, in a way that they can make these decisions in an appropriate manner.

Senator THURMOND. Judge, the light is red and my time is up. Thank you very much.

The CHAIRMAN. Judge, you have been sitting there a long time. I am going to try to get finished by 5:30, so why don't we come back at 20 after. We will recess until 20 after.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

First of all, Judge Thomas, I want to commend you for an extremely moving description about your early years, your relationship with your family, your grandfather, and really describing a situation which has existed for far too many people in our society. And I found it extremely moving and a very fair characterization in terms of your own integrity and fairness.

And I commend my colleague and friend, John Danforth. I had the good opportunity to serve in the Senate for many years and I have heard many of the Senate introduce nominees for various positions and I have never heard one that has been more eloquent or heartfelt than Senator Danforth's statement. For those of us who have respect for him and for his values, I want to say how much I certainly appreciate it.

As you understand, we have questions of you or about your views of the Constitution and the role of Government, and I would like

to, if I could, start out with the issue of the role of government in our society.

In several of your speeches and articles you have taken a broad view of business rights, of an employer's interest in being free——

The CHAIRMAN. Would the Senator hold for a second?

Would you close that door, please? Tell people in the hall to come in or stay out for a while. OK? The Senator cannot be heard.

Thank you very much. Excuse me.

Senator KENNEDY. I thank the Chair. Right.

Well, in a number of speeches and articles you have taken a broad view of business rights, of an employer's interest in being free of government regulation. If confirmed, you will be called upon to interpret the Federal, State and local laws protecting employees and regulating workplaces. And, if you were hostile to these efforts and construed them narrowly as a result, you could seriously undermine our efforts to correct unsafe and unhealthy conditions that endanger millions of working men and women across the country, and I would like to ask you about some of your statements on this important issue.

In a 1987 interview with a publication called Reason you question the need for many important Federal agencies. You said, and I quote: "Why do you need a Department of Labor? Why do you need a Department of Agriculture? Why do you need a Department of Commerce? You can go down the whole list, you don't need any of them really."

You were quoted correctly, were you not?

Judge THOMAS. Senator, I again don't know the context of that quote. I don't know what I said before or after. Of course, I think all of us would certainly be in favor of, and I certainly count myself among those Americans who are for safe working environments and who are strongly for protections from abuses and exploitation from individuals who have more clout and more power.

I am for a safe working environment and I am for the standards that protect workers. And I am certainly, as I have made clear during my tenure at EEOC, strongly in favor of laws hat prevent employers from discriminating against individuals.

Senator KENNEDY. Well, I will put the full interview in the record. You were asked about various departments and agencies and the necessity for your own agency, I believe, as a matter of fact, and the response to the—do you remember at all the interview? I have it and I will put it in the record.

The inquiry is "Should I suspect that we might think that the EEOC ought not to exist. Why do you think that this agency should exist in a free society?"

"While in a free"—this is your answer—"free society I don't think there would be a need for it to exist. Had we lived up to our Constitution, had we lived up to the principles that we espouse there would certainly be no need. There would have been no need. Unfortunately, the reality was that for politics reasons or whatever there was a need to enforce antidiscrimination laws, or at least there was a perceived need to do that. Why do you need a Department of Labor? Why do you need a Department of Agriculture? Why do you need a Department of Commerce? You can go down the whole list, you don't need any of them."

Judge THOMAS. From that quote, Senator, I think the point that I was trying to make, there are certain individuals who think you don't need any government involvement, who felt that EEOC should not exist, for example. Well, in a perfect world you don't need EEOC. But this is not a perfect world. In a perfect world you probably wouldn't need a Department of Labor or Department of Agriculture. This is not a perfect world.

Senator KENNEDY. Well, why—if you take Department of Labor with enforcement of, say, OSHA regulations, or Department of Agriculture trying to deal with food inspection, Department of Commerce trying to ensure that American workers are going to be competing or the fair playing field, I just wondered even why you might suggest that those agencies as well as others.

Judge THOMAS. Well, let me explain I think the point that I was trying to make. I believe, and I would have to go back and look at the entire question, but the point is this. There are some individuals who say: "Well, we don't need any government." "You don't need EEOC." "Why should there be an EEOC?"

Well, if there were no discrimination in the world, I don't think you and I would think that there was a need for EEOC. The reality is, though, that there is discrimination in the world.

You could ask rhetorically what is the need for other departments if this were a perfect world. The answer is this is not a perfect world. If this were a perfect world, you wouldn't have to enforce health and safety laws. But the answer is that there are some people who violate health and safety laws, and you and I, and I think many others, think that people should be protected from those sorts of individuals.

Senator KENNEDY. Well, don't statements like these suggest hostility on your part to attempts by Government to help people that can't help themselves?

Judge THOMAS. No, Senator. I think I was actually defending the effort in instances where there is a need for the Government to participate and for the Government to have a role. There were many individuals—I remember sitting down with an individual early in my tenure at EEOC, and his first words were to me, in a very pleasant way but firm, "You know, I don't think this agency should exist." But I spend a considerable amount of time defending the need for this agency and defending the need a specific role of the Government in certain areas.

And I think that was the point I was trying to make there.

Senator KENNEDY. Just to read these final words of yours, after you said you don't need any of them, "I think though if I had to look at the role of Government and what it does in people's lives I see the EEOC as having much more legitimacy than the others if properly run. Now you run the risk that the authority can be abused when EEOC or any organization start dictating to people. I think they go far beyond anything that should be tolerated in this society."

Well, now in a speech at the Pacific Research Institute, in 1987, you criticized entitlement programs. This is what you said: "The attack on freedom and rights had to be accompanied by their redefinition. In the socialist view the new freedom was thus only another name for the old demand for an equal distribution of wealth.

The new freedom meant freedom from necessity and it was a short road to what we call today entitlements. Before a right meant the freedom to do something. Now a right has come to mean, at least in some unfortunately growing circles, the legal claim to receive and demand something."

Which entitlements were you referring to as socialism—Social Security or Medicare or unemployment insurance?

Judge THOMAS. I don't think I referred to any of them specifically, Senator. I think I was trying to make the distinction between what we traditionally consider rights and freedoms versus programs that are specifically implemented or initiated by the government.

I don't think that my comment there was one where I was looking at a specific governmental program and saying that this is an entitlement program that I think is bad or good. I think there is a comparison, there is a debate, and I thought it was a vibrant debate, about what our rights and what our freedoms were.

Senator KENNEDY. Well, what is your view about entitlements?

Judge THOMAS. I think that I have said in speeches and I think that it is appropriate that many of us——

Senator KENNEDY. Excuse me. I didn't understand.

Judge THOMAS. I think that I have said in speeches and I think that programs, there are certain programs in our society that have helped. I remember visiting my mother in Fellwood Homes, which is a Federal housing project in Savannah, GA. Fellwood Homes was seen as what? It was seen—we lived in a tenement. She moved to a lane, a dirt street and a move up in the world. A steppingstone was Fellwood Homes before she could then move to something better. I thought that those programs were good.

I think we all though in a pluralistic society are concerned that sometimes when we do something that we hope is good that it may on some occasions have a negative impact, and I think that it is not illegitimate to say that some of these programs, or at least some of the ramifications, may not be what we expected and some of the consequences may be unintended consequences.

But I certainly believe that the efforts on behalf of providing public housing to my mother or the efforts of providing relief to individuals who could not receive jobs, et cetera, in my neighborhood were very, very good efforts.

Senator KENNEDY. Well, of course, as you know, there are certain programs which are entitlements and other programs which are not, and I think all of us understand some, various programs work well, others do not. And I am sure we as an institution don't do as well as we should in sorting out the ones that do not.

But entitlements have a special position. They certainly do from a budgetary position, and they have been selected by the Congress basically in a bipartisan way because they have a certain relevancy, because they have had an evaluation, and when you mention something like Social Security, student loan programs, various—crop insurance programs, some of the other half a dozen or so, because there is only that many, some of the particular programs for children, those are considered entitlements. And I didn't know—your bunching those together within the same paragraph that is talking about the socialist view, the need freedom, was that thus

only another name for the old demand for equal distribution, effectively entitlements?

Judge THOMAS. Well, certainly I again don't remember the full context of that, but let me just say this, Senator. I was not speaking in a budgetary sense or a more technical sense. I think I was comparing two views of what rights are today and I thought it was, as I said, an important discussion and an important debate.

Senator KENNEDY. In a 1988 article you stated that, and I quote, "Our current explosion of rights, welfare rights, animal rights, children's rights, and so on, goes on to the point of trivializing them."

You know, which children's rights do you object to?

Judge THOMAS. I guess I don't object to rights. I was just—the only point I was making, Senator, and it wasn't in any way undermining the need to be concerned about these problems in our society. I certainly have been involved with organizations to make sure that kids are not abused, and I certainly spend my time trying to make sure that kids are given guidance and help. I think that is very, very important in our society.

But my point was that when we talk about rights, rights that we consider basic or fundamental or freedoms, that when you begin to attach the word "right" to a particular effort or cause or a program that you believe in that then the notion of rights becomes one that is commonly used, as opposed to reserve for these very, very important rights that we believe in.

Again, that is not putting, not in any way saying that there is no problem, but simply saying that it becomes a common experience to simply, say, declare a particular right.

Senator KENNEDY. Well, the reason I am pursuing this line of questioning is to get some kind of sense about your view about various statutes that will be approved by the Congress to address what the Congress believes are areas of need, and whether from these statements that it is fair to draw any implications of some hostility to statutes which would be drafted by the Congress to try and focus in the areas of particular needs or protections, for example, the OSHA for protecting the workplace, or whether it is the food inspections, or whether it is in terms of trade, or whether it is in terms of even parental leave, which you have expressed some degree of hostility to in your statements.

The real question is whether we can—we draw any conclusion as to the degree of hostility that you might have by yourself in interpreting statutes given these kinds of statements when perhaps there is an approach to trying to deal with these kinds of conditions that you may or may not agree with.

Judge THOMAS. Well, Senator, I think that when one is in a policymaking function, just as if I were in this body, I could debate with you on, and I think quite legitimately, about my concerns in particular areas. I think you have a sort of role, or at least a part of your function would be an advocate for a particular point of view.

But when you make a decision, when you write a statute, when this body deliberates and concludes, whether I agreed or not in the policymaking function, when I operate as a judge or when I decide a case and look at it as a judge, I am no longer an advocate for

that policy point of view. My job is to interpret your intent, not to second-guess your intent. It is not to second-guess what you think is the appropriate policy. It is not to second-guess whether or not you are right, not to second-guess whether I think it would be better to have 10 more rules as opposed to the 5 that you have, but simply to determine what you felt was right, what you felt was correct, and what your intent was and to apply that. And that is the way I see my role now as a judge.

Senator KENNEDY. Well, it is helpful because many of the decisions that are going to be made by the Court over the period of these next years are going to reflect the basic tension that exists between an executive and the Congress in the development of legislation and what the Court is going to say on many of these matters that are increasingly de facto at the present time. So your view about how you approach this is I think very important, and particularly in light of these earlier comments.

Let me move to another subject area, and this is referring to an article about you in the Atlantic Monthly in 1987. You said that hiring disparities could be due to cultural differences between men and women. This is the article "A Question of Fairness," by Juan Williams.

That article states that you said that it could be that women are generally unprepared to do certain kinds of work by their own choice, it could be that women choose to have babies instead of going to medical school. Do you still think that that explains the underrepresentation of women in so many jobs in our economy today?

Judge THOMAS. I think, and I think it is important to state this unequivocally, and I have said this unequivocally in speech after speech. There is discrimination. There is sex discrimination in our society. 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.

For example, if I sit here and I were to look at the statistics in this city, say with the example of number of blacks, I couldn't—and compare the number of blacks that are on that side of the table, for example. I cannot automatically conclude that that is a result of discrimination. There could be other reasons that should be explored that aren't necessarily discriminatory reasons.

I am not justifying discrimination, nor would I shy away from it. But when we use statistics I think that we need to be careful with those disparities.

Senator KENNEDY. Very little I could differ with you on the comment. But I was really driving at a different point, and that is whether you consider women are generally unprepared to do certain kinds of work by their own choice; it could be that women choose babies instead of going to medical school.

Let me just move on to your comments about Thomas Sowell, an author whose work you respect and many—whose ideas you have stated that you agree with. Mr. Sowell wrote a book called the Civil Rights Rhetoric: A Reality. You reviewed that book for the Lincoln Review in 1988 as part of a review of the works of Thomas Sowell, and in particular you praised Mr. Sowell's discussion, chapter 5 of his book entitled "A Special Case of Women," and you called it a

much needed anecdote to cliches about women's earnings and professional status.

Mr. Sowell explains that women are paid 59 percent of what men receive for the same work by saying that women are typically not educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields, such as construction work, lumberjacking, and coal mining, and the like.

As a matter of fact, there were no women employed in the coal mine industry in 1973. In 1980, after the Federal Government had begun an effort to enforce antidiscrimination laws, that 3,300 women are working in coal mines.

Does that surprise you at all?

Judge THOMAS. If there is discrimination, it doesn't surprise me. There were lots of places I think in our society. You know, I used to when I—I can remember in my own classrooms looking around and realizing that 7 or 8 of the top 10 students in my classroom in grammar school were the smartest students and wondering at that age, If 8 of the 10 of them are the brightest, then why aren't there women doctors and why aren't there women lawyers.

But the point that I was making with respect to Professor Sowell again is a statistical one. There is a difference between the problem that, say, a 16-year-old or 18-year-old minority kid, female, in this city or in Savannah or across the country, who is about to—who has dropped out of high school, there is a difference between the problems of that child or that student than there is for someone who has a Ph.D. or someone who has a college degree.

And I thought that it would be more appropriate, again referring back to the programs that you talked about, that we talked about earlier, in looking at how to solve these problems that you disaggregate the problems and you be more specific instead of lumping it all into one set of statistics.

Senator KENNEDY. Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers or needs more time off for personal emergencies, then they may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

He says the physical consequences of pregnancy, childbirth alone are enough to limit a woman's economic option, and then he reaches some troubling conclusions about women in the workplace based on stereotyped gender roles. Yet you call those descriptions of women workers a much needed antidote to cliches.

Aren't those views the very cliches that women have been trying to escape for so long?

Judge THOMAS. Senator, I think that someone like a Tom Sowell is certainly one who is good at engaging a debate, and I think it is important that there be individuals who look at statistics in his way.

I did not indicate that, first of all, that I agreed with his conclusions. But I think this is an important point. I had during my tenure, I think, the majority of the members of my own personal staff and the—were women, and the conclusion, for example, about

married women I found certainly not supported by my experience with married women on my staff. That was not the point.

The point is that I think sometimes that we can be involved in debate and make generalizations, and it is always good to have someone who has a different point of view and have some facts to debate that.

Senator KENNEDY. Well, the reason I raise this is because with regards to this particular description of women you described that chapter as a much needed antidote to cliches, and I think many women would read his description, particularly in that chapter, as being really a description of the stereotype which—attitude which has really kept them back in too many instances.

I am sure you are commendable for what you have done and that is a powerful factor in relationship, obviously, with other statements or speeches. But nonetheless, that chapter really stands out and that is why I wanted to bring this up.

Judge THOMAS. Well, I think that—again, Senator, I think it is important that in our society and as a policymaker that you have debate. I don't think that Professor Sowell or others are in any way sexist or in any way people who would discriminate. I made it a point, it was very important to me during my tenure at EEOC and it has been very important to me during my life, to make sure that these arbitrary stereotypes or these arbitrary discriminatory barriers were knocked down, and I think you can simply look at my record in promoting women to the Senior Executive Service. I think it is second to none in the Federal Government. Similarly, with respect to my personal staff.

I think it is important. I do think that discrimination exists and I think it needs to be eradicated. But at the same time, when we do have approaches in our society, I think that reasonable people can disagree, and reasonable people of good will can disagree, without being characterized in a negative way.

Senator KENNEDY. In my final area of questioning, I would like to come back to just an area that was raised by Chairman Biden in the concluding part of his questions, and that was with regard to the Lehrman essay.

In the speech in 1987, called Why Black Americans Should Look to Conservative Policies, you spoke about natural law, you said, Heritage Foundation Trust, Lew Lehrman's recent essay, "An American Spectator," on the Declaration of Independence and the meaning of the right to life, is a splendid example of applying natural law.

The title of the Lehrman article you endorsed is "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other." The article makes only one argument and it is about only one subject, that natural law protects the right to life and that, as a result, the Constitution must be interpreted to protect the right to life.

So, Lehrman's basic position is that abortion violates the constitutional right to life, and he argues that when the Supreme Court decided *Roe* v. *Wade*, it simply conjured up a right of abortion, and he calls it a spurious right borne exclusively of judicial supremacy, with not a single trace of lawful authority. He also draws a parallel between those who support abortion and those who supported slav-

ery. He says the decision to protect a woman's right to abortion has resulted in a holocaust.

These extreme statements about a woman's right to choose were all expressed in that article, and you called that article splendid, is that correct?

Judge THOMAS. Senator, again, I did not endorse the article, but I would like to make this point, and it is very important and perhaps it is one that was missed earlier. My interest toward the end of the Reagan administration was an important interest to me, and that was that I had spent almost a decade of my life battling with individuals who were conservative, and I felt that they should not be antagonistic to civil rights, and I felt that, in fact, they should be very aggressive on civil rights.

In exploring, on a part-time basis during my busy work day, a unifying theme on civil rights and on the issue of race, I was looking for a way to unify and find a way to talk about slavery and civil rights, the way that the abolitionists used, the very same approach that was used and offered in the *Brown* v. *Board of Education* brief, authored, among others, by my predecessor, by Justice Marshall, whose seat I am nominated to fill.

My point was that I figured or I concluded that conservatives would be skeptical about the notion of natural law, but one of their own had endorsed it, and I simply wanted to give some authenticity to my approach, so that I could then move on and get them to consider being more aggressive on the issue of civil rights. That was very, very important to me.

Senator KENNEDY. Well, have you ever publicly stated that you disagree with the article?

Judge THOMAS. I have never been called on, it has never been raised as an issue. It was considered, I think by many, as a throwaway line. I saw it as that, as something to convince my audience and it has never really come up.

As I indicated, I don't think that you can use natural law as a basis for constitutional adjudication, except to the extent that it is the background in our Declaration, it is a part of the history and tradition of our country, and it is certainly something that informed some of the early litigation, I guess, with respect to the 14th amendment, but it is certainly something that has formed our Constitution, but I don't think that it has an appropriate role directly in constitutional adjudication.

Senator KENNEDY. Well, do you disagree with the article now?

Judge THOMAS. I do disagree with the article and I did not endorse it before. My point was simply—and I think it was an important point—that I endorse natural law, but I use natural law to make the point that conservatives should aggressively enforce civil rights.

Senator KENNEDY. Well, do I understand now that you do disagree with the article?

Judge THOMAS. I disagree in the manner that he used it, yes. I disagree with the article, yes.

Senator KENNEDY. Can you elaborate on what——

Judge THOMAS. Well, to the extent that he uses natural law to make a constitutional adjudication, in that sense, or to provide a moral code of some sort, I disagree with it.

Senator KENNEDY. But with regards to the other features of the article?

Judge THOMAS. I don't know all the other features of the article. My interest was a very single-minded interest, Senator, and that was in trying to convince a conservative audience in the Lew Lehrman Auditorium of the Heritage Foundation, with a concept that Lew Lehrman adopted, to make my point, and it was an important point to me.

I did not endorse, nor do I now endorse other portions of his article.

Senator KENNEDY. Did you mention in that speech, did you say anything else about Lew Lehrman, I mean he is a trustee of the Heritage Foundation, or the work that he has done? Did you say anything else, other than endorsing this—like most of us in these kinds of circumstances, you know, perhaps looking about gilding the lily or so, but there are different ways of doing it, and I am just asking whether you talked about his work as a trustee of the Heritage Foundation or other work that he has done, or was the only reference to Mr. Lehrman about this article?

Judge THOMAS. His use of natural law was the only reference. Again, Senator, this has not been something that has come up in a way that required explication. The important point for me was a very simple point, and that was that I was attempting to convince conservatives, individuals whom I thought would be skeptical about the notion of natural law and skeptical about aggressive enforcement of civil rights the way that I believe that civil rights should be endorsed, that here was a basis on which they could be aggressive, and I think it was an important speech, and I saw it, the manner in which it was quoted prior to my nomination to this Court was one in which I was criticizing the administration and criticizing conservatives.

Senator KENNEDY. Well, I did not find any reference to civil rights in the Lehrman article.

Judge THOMAS. But throughout my speech there is reference.

Senator KENNEDY. I have read that. Finally, did you agree with any parts of the article, the Lehrman article?

Judge THOMAS. My only interest, again, was in the notion that he used natural law. I do not think that natural law can be used to adjudicate the issue that he adjudicated.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Hatch, and then we will end today's hearing.

Senator HATCH. Thank you, Mr. Chairman.

In all due respect, let me just start with the Chairman's excerpt that he cited to you earlier. That excerpt from the Pacific Research Institute speech is, in my view, completely out of context, and let me just read it to you, starting on page 16 of the speech:

"I find attractive the arguments of scholars such as Stephen Macedo, who defend an activist Supreme Court which would strike down laws restricting property rights." You immediately take on that statement. "But the libertarian argument overlooks the place of the Supreme Court in the scheme of separation of powers. One does not strengthen self-government and the rule of law by having the nondemocratic branch of the government make policy."

Now, in all honesty, I would ask that the entire speech be placed in the record, and I would——

The CHAIRMAN. Without objection, it will be placed in the record.

[The article referred to follows:]

SPEECH BY

CLARENCE THOMAS

BEFORE THE

PACIFIC RESEARCH INSTITUTE

SAN FRANCISCO, CALIFORNIA
AUGUST 10, 1987

THANK YOU, CHIP. I AM HONORED TO HAVE BEEN INVITED TO ADDRESS YOU. GROUPS LIKE THE PACIFIC RESEARCH INSTITUTE ARE A VITAL PART OF AMERICAN DEMOCRATIC LIFE. YOU ENRICH THE DEBATE WITH YOUR THOUGHTFUL, INDEPENDENT VIEWS ON IMPORTANT PUBLIC POLICY ISSUES.

I AM PARTICULARLY GRATEFUL TO ADDRESS SUCH A REFLECTIVE AUDIENCE, SOME OF WHOM APPRECIATE AN AUTHOR I AM FOND OF, AYN RAND. AS YOU CAN IMAGINE, SHE IS NOT HIGHLY HONORED IN WASHINGTON, D.C. NONETHELESS, HER BOOKS CONTINUE TO SELL, AND THAT'S SUCCESS, AT LEAST BY HER STANDARDS.

IN THE LAST FEW MONTHS WE HAVE SEEN A PERHAPS MORE AMAZING BEST-SELLER, ALLAN BLOOM'S THE CLOSING OF THE AMERICAN MIND. IT HAS BEEN NUMBER ONE ON BEST-SELLER LISTS FOR SEVERAL WEEKS. NOW THIS IS CERTAINLY A DIFFICULT BOOK--AT LEAST FOR SOMEONE LIKE ME WHO IS NOT SPECIALIST IN POLITICAL PHILOSOPHY. IT IS, HOWEVER, A REWARDING, REASSURING ATTACK ON THE MORAL RELATIVISM THAT TYPIFIES AND CORRUPTS OUR AGE. BUT WHY SHOULD HIS ARISTOCRATIC VIEW OF AMERICAN LIFE--IN MANY WAYS MORE ARISTOCRATIC THAN AYN RAND'S-- BE SO POPULAR? WHAT DO PEOPLE FIND APPEALING ABOUT HIS ATTACK ON THE UNIVERSITIES?

SURELY MUCH OF THE BOOK'S SUCCESS IS DUE TO ITS PUBLICATION DURING A LONG-SIMMERING DEBATE OVER THE GOALS OF EDUCATION.

BLOOM'S UNCOMPROMISING TOUGHNESS, HIS OBVIOUS LEARNING, CONTRASTS WITH THE MUSH THAT SO MANY WRITERS ON EDUCATION TYPICALLY DOLE OUT.

I SHOULD ADD THAT I HEARTILY APPROVE OF HIS CRITIQUE OF BLACK STUDIES AND THE DEBILITATING EFFECTS OF PREFERENTIAL TREATMENT ON BLACK STUDENTS, ESPECIALLY THOSE AT ELITE UNIVERSITIES. BLOOM'S REFLECTIONS ON THE TAKE-OVER ALMOST TWENTY YEARS AGO AT CORNELL UNIVERSITY COINCIDE WITH THOSE OF ANOTHER FACULTY MEMBER AT THE TIME, MY FRIEND TOM SOWELL. AS CHAIRMAN OF THE EEOC I HAVE TRIED TO BASE THE FIGHT AGAINST DISCRIMINATION ON RECOVERING RIGHTS OF THE INDIVIDUAL. IT DOES NOT HELP THE INDIVIDUAL WHO HAS BEEN DISCRIMINATED AGAINST FOR THAT COMPANY IN THE FUTURE TO HIRE X NUMBER OF PEOPLE OF HIS OR HER RACE. JUSTICE BY THE NUMBERS IS GUARANTEED TO PRODUCE INJUSTICE. FOR EXAMPLE, I THINK WE MAY WELL HAVE SEEN THIS IN DISCRIMINATION AGAINST ASIAN-AMERICANS AT TOP UNIVERSITIES. BUT I DIGRESS.

THERE IS A SIDE TO BLOOM'S BOOK WHICH I AM SURE IS NOT FULLY APPRECIATED. AND IT IS CRUCIAL. LET ME READ A BRIEF PASSAGE FROM EARLY IN THE BOOK:

> "THE UNITED STATES IS ONE OF THE HIGHEST AND MOST EXTREME ACHIEVEMENTS OF THE RATIONAL QUEST FOR THE GOOD LIFE ACCORDING TO NATURE. WHAT MAKES ITS POLITICAL STRUCTURE POSSIBLE IS THE USE OF THE RATIONAL PRINCIPLES OF NATURAL RIGHT TO FOUND A PEOPLE, THUS UNITING THE GOOD WITH ONE'S OWN."

NOW NATURAL RIGHT IS THE CENTRAL THEME OF AMERICAN POLITICS, FROM THOMAS JEFFERSON TO MARTIN LUTHER KING. UNFORTUNATELY, KING WAS THE LAST GREAT PUBLIC SPOKESMAN TO ARTICULATE THIS THEME OF A HIGHER LAW UNDERLYING OUR POLITICAL INSTITUTIONS. BLOOM'S SUB-THEME OF NATURAL RIGHT IS NOT ONLY APPROPRIATE BUT ESSENTIAL FOR THE CELEBRATION OF OUR CONSTITUTION'S BICENTENNIAL. BUT WHERE DO WE RECEIVE EDUCATION IN THE HIGHER LAW? COULD WE DO BETTER THAN TO RE-READ THE DECLARATION OF INDEPENDENCE, AND TAKE SERIOUSLY THE IDEA OF FOUNDING A NATION BASED ON "THE LAWS OF NATURE AND OF NATURE'S GOD," ESTABLISHED ON SELF-EVIDENT TRUTHS OF HUMAN EQUALITY AND NATURAL RIGHTS?

THIS MUST BE OUR ULTIMATE RESOURCE, IF WE ARE TO PRESERVE POLITICAL FREEDOM. BUT HOW DO WE LEARN ABOUT NATURAL RIGHTS AND NATURAL LAW? HOW DO WE RESPECT SUCH AN OUTMODED NOTION?

HERE I THINK BLOOM SELLS THE COUNTRY SHORT. AS IMPORTANT AS THE UNIVERSITIES ARE, THERE ARE INDEED OTHER SOURCES FOR TEACHING PEOPLE ABOUT THE MOST IMPORTANT THINGS FOR LIVING. CAREFUL STUDY OF THE GREAT BOOKS CAN COMPLETE WHAT A DECENT UPBRINGING HAS BEGUN, BUT IT CANNOT TAKE THE PLACE OF REARING.

BEAR WITH ME A MINUTE AS I REFLECT BACK ON MY EARLY LIFE. PICTURE A POORLY EDUCATED, RECENTLY MARRIED YOUNG BLACK MAN DURING THE DEPRESSION IN SAVANNAH, GEORGIA. ENVISION HIM

STARTING A WOOD-DELIVERY BUSINESS THEN ADDING COAL, THEN ADDING ICE, THEN MOVING TO FUEL OIL. PICTURE HIM RISING AT 2:00 OR 3:00 IN THE MORNING TO CUT WOOD AND DELIVER ICE. PICTURE HIM GETTING ONLY TWO OR THREE HOURS SLEEP PER NIGHT. GO FORWARD IN TIME WITH HIM AS HE BUILDS HIS OWN HOUSE WITH HIS OWN HANDS AND AS HE ACQUIRES A MODEST AMOUNT OF PROPERTY. THAT IS THE BRIEF ENCAPSULATED STORY OF MY OWN GRANDFATHER WHO DURING THE MOST REPRESSIVE PERIOD OF JIM CROW LAW AND RACIAL BIGOTRY WAS ABLE TO GAIN SOME DEGREE OF FINANCIAL AND ECONOMIC SECURITY BECAUSE THERE WAS AT LEAST SOME ECONOMIC LIBERTY, SOME ECONOMIC FREEDOM, EVEN THOUGH POLITICAL AND SOCIAL FREEDOM WERE DENIED.

DO YOU THINK THIS MAN WOULD RAISE HIS GRANDSONS TO IGNORE ECONOMIC FREEDOM AS A MAJOR PART OF THEIR LIVES? THIS MAN WHO BELIEVED THAT YOU SHOULD LIVE BY THE SWEAT OF YOUR BROW, THAT YOU MUST EARN A LIVING, THAT YOU MUST LEARN HOW TO WORK! I REMEMBER ONE CHRISTMAS WHEN ALL THE OTHER KIDS WERE RUNNING UP AND DOWN THE ROAD AND ENJOYING THEIR TOYS, SHOOTING FIRECRACKERS, AND GENERALLY HAVING A GREAT TIME, MY GRANDFATHER CAME TO ME AND MY BROTHER (WE WERE 8 AND 9 YEARS OLD) AND SAID THAT HE HAD WORK FOR US TO DO. SO, AS USUAL, WE PILED INTO THE 1951 PONTIAC AND RODE. HE TOOK US TO A FIELD THAT HAD LAID FALLOW FOR YEARS AND HAD GROWN UP. HE DROVE DOWN THE REMNANTS OF AN OLD ROAD. WE MADE OUR WAY ACROSS THE FIELD TO AN OLD OAK TREE. HE LOOKED AT IT, SURVEYED IT, PACED PENSIVELY AND ANNOUNCED THAT WE WOULD BUILD A HOUSE THERE. AND, HE MARKED THE SPOT. ON MAY 17, FIVE MONTHS LATER, WE WERE FINISHING THE STEPS TO THE HOUSE THAT WE BUILT.

THEN WE FARMED, BUILT FENCES AND BARNS. WE PLANTED MORE AND MORE EACH YEAR. WE ACQUIRED PIGS, COWS, CHICKENS AND DUCKS. THE ACHIEVEMENTS GO ON AND ON.

IN MY GRANDFATHER'S VIEW, A MAN HAD A RIGHT AND AN OBLIGATION TO PRODUCE. AND THE RIGHT TO KEEP WHAT HE PRODUCED. THAT IS NOT TO SAY THAT THIS MORAL, GOD-FEARING MAN WAS NOT GENEROUS. INDEED, HE WAS EXTREMELY GENEROUS WITH ALL THAT HE HAD. BUT, THERE WAS NO SHAME ABOUT WORK, ABOUT THE FREEDOM TO WORK AND PRODUCE.

ON THE CONTRARY, IT WAS NECESSARY TO BE FREE TO PRODUCE AND FREE TO KEEP WHAT HE PRODUCED, TO BE SELF-SUFFICIENT AND, HENCE, PROTECTED FROM SOME OF THE EFFECTS OF BIGOTRY. TO MY GRANDFATHER, SELF-SUFFICIENCY IN AN OTHERWISE HOSTILE WORLD, WAS FREEDOM. WITH FREEDOM TO PRODUCE AND TO OWN, HE COULD AT LEAST SURVIVE.

AS THE EVENTS OF THE SIXTIES SWIRLED ABOUT US, PROVISION FOR SURVIVAL WAS MADE POSSIBLE BY A FAMILY FARM, A FAMILY BUSINESS, AND A FAMILY EFFORT. THOUGH FULL PARTICIPATION IN THE FREE ENTERPRISE SYSTEM WAS LIMITED IN MUCH THE SAME WAY, AND FULL PARTICIPATION IN A FREE SOCIETY WAS LIMITED, MY GRANDPARENTS FELT THAT THE OPPORTUNITIES WE HAD HERE WERE GREATER THAN ANYWHERE IN THE WORLD. AND, IN SPITE OF THE CONTRADICTIONS, WE FAITHFULLY RECITED THE PLEDGE OF ALLEGIANCE AND SANG THE STAR SPANGLED BANNER AT OUR SEGREGATED SCHOOLS. AS WE WERE REMINDED

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EVERY DAY AT THE DINNER TABLE, HARD WORK PRODUCED THE HOUSE WE LIVED IN, THE CLOTHES WE WORE AND THE FOOD WE ATE. EVEN THOUGH WE KNEW WE COULD SURVIVE AND DO WELL, IT WAS COMMON KNOWLEDGE WHY IT WAS SO DIFFICULT -- WHY THE REWARDS OF OUR EFFORTS WERE NOT COMMENSURATE WITH THOSE OF WHITES.

REMINDING OURSELVES THAT BLACKS HAD TO WORK TWICE AS HARD TO GET HALF AS FAR, MY GRANDPARENTS ALWAYS KNEW THEY WOULD MAKE IT. THEY KNEW WE WERE INHERENTLY EQUAL UNDER GOD'S LAW -- THE HIGHER LAW-- AND THAT THE WAY WE WERE TREATED WAS A CRIME AGAINST GOD EVEN IF NO LAWS OF MAN WERE VIOLATED. THIS BELIEF IN A HIGHER LAW THAT GUARANTEED OUR NATURAL RIGHTS ENABLED US TO REAFFIRM THE EXISTENCE AND PRIMACY OF THESE RIGHTS EVEN AS WE WERE BEING PREVENTED FROM EXERCISING THEM.

TODAY, THERE APPEARS TO BE A PROLIFERATION OF RIGHTS-- ANIMAL RIGHTS, CHILDREN'S RIGHTS, WELFARE RIGHTS, AND SO ON. WHAT IS MEANT BY RIGHTS? TODAY, WE ARE COMFORTABLE REFERRING TO CIVIL RIGHTS. BUT ECONOMIC RIGHTS ARE CONSIDERED ANTAGONISTIC TO CIVIL RIGHTS -- THE FORMER BEING VENAL AND DIRTY, WHILE THE LATTER IS LOFTY AND NOBLE. THIS, AS I HAVE NOTED, IS NOT THE WAY I WAS TAUGHT. AFTER ALL, AREN'T FREE SPEECH AND WORK BOTH MEANS TO AN EVEN HIGHER END?

NOW NO ONE WOULD DARE ATTACK MY GRANDFATHER AND HIS ACHIEVEMENTS. INDEED, PEOPLE MARVEL AT HIM, AND JUSTLY SO. BUT CONSIDER THE ATTACK ON THE WEALTHY, OR "THE RICH." WE SEE IT IN INTELLECTUALS LIKE JOHN KENNETH GALBRAITH OR IN POPULAR

DEPICTIONS OF AMERICAN BUSINESS. FRANKLIN ROOSEVELT DENOUNCED THE "MALEFACTORS OF GREAT WEALTH." HIS LATTER-DAY POLITICAL HEIRS SIMPLY DENOUNCE THE CORRUPTION OF THE WEALTHY. BUT IN FACT WHAT THE CRITICS REALLY WANT TO DO IS ATTACK THE SOURCES OF WEALTH, EVEN INCLUDING THE RIGHT TO ACQUIRE WEALTH. AND THE ATTACK ON ECONOMIC RIGHTS IS AN ATTACK ON ALL RIGHTS. OR AS JAMES MADISON PUT IT IN HIS FAMOUS FEDERALIST PAPER NUMBER 10: THE FIRST OBJECT OF GOVERNMENT IS THE "PROTECTION OF DIFFERENT AND UNEQUAL FACULTIES OF ACQUIRING PROPERTY." NOTICE HE DOES NOT SAY THAT GOVERNMENT SHOULD PROTECT AN ALREADY EXISTING, UNEQUAL DISTRIBUTION OF PROPERTY. MADISON LOOKS FORWARD TO A DYNAMIC ECONOMY WHICH WOULD UNLEASH HUMAN CAPABILITIES, DESTROYING OLD ARISTOCRACIES, AND ERECTING NEW ONES, WHICH IN TURN WOULD BE SUPPLANTED. HENCE IT IS, THAT SOCIALISTS AND THEIR APOLOGISTS HAVE TO ATTACK THE NOTION OF INDIVIDUAL RIGHTS AND REPLACE IT WITH NOTIONS OF "GROUP RIGHTS" AND "SOCIAL MAN" AND ALL SORTS OF PRINCIPLES JUSTIFYING ECONOMIC REDISTRIBUTION. AS NOBEL LAUREATE FRIEDRICH HAYEK SUCCINCTLY PUT IT, "THE STRIVING FOR SECURITY TENDS TO BECOME STRONGER THAN THE LOVE OF FREEDOM.... WITH EVERY GRANT OF COMPLETE SECURITY TO ONE GROUP THE INSECURITY OF THE REST NECESSARILY INCREASES." ODDLY ENOUGH SOME CONSERVATIVES AID AND ABET THE CRITIQUE OF RIGHTS BY AN IRRATIONAL EMBRACE OF TRADITION AND A MEDIEVAL UNDERSTANDING OF SOCIETY, ANTITHETICAL TO THE PROTECTION OF RIGHTS.

IN THIS CONNECTION IT IS INTERESTING TO OBSERVE THAT FOR ALL SOCIALISTS TALK ABOUT EQUALITY, KARL MARX HAD ONLY CONTEMPT FOR THE NOTION OF EQUAL RIGHTS. THAT'S BECAUSE HE KNEW THAT A FOCUS

ON RIGHTS WOULD LEAD INEVITABLY TO INEQUALITIES IN SOCIETY. TRUE EQUALITY OF OPPORTUNITY WOULD LEAD TO INEQUALITIES; BUT TO BE JUSTIFIED ALL INEQUALITIES WOULD HAVE TO BE BASED ON AN ORIGINAL EQUALITY OF OPPORTUNITY.

AS HAYEK HAS NOTED, THE ATTACK ON FREEDOM AND RIGHTS HAD TO BE ACCOMPANIED BY THEIR REDEFINITION. IN THE SOCIALIST VIEW, "THE NEW FREEDOM WAS THUS ONLY ANOTHER NAME FOR THE OLD DEMAND FOR AN EQUAL DISTRIBUTION OF WEALTH." THE NEW FREEDOM MEANT FREEDOM FROM NECESSITY. AND IT WAS A SHORT ROAD FROM RIGHTS TO WHAT WE CALL TODAY "ENTITLEMENTS." BEFORE, A RIGHT MEANT THE FREEDOM TO DO SOMETHING; NOW A RIGHT HAS COME TO MEAN, AT LEAST IN SOME, UNFORTUNATELY GROWING CIRCLES, THE LEGAL CLAIM TO RECEIVE AND DEMAND SOMETHING.

THE ATTACK ON WEALTH IS REALLY AN ATTACK ON THE MEANS TO ACQUIRE WEALTH: HARD WORK, INTELLIGENCE, AND PURPOSEFULNESS. AND THAT IN TURN IS AN ATTACK ON PEOPLE LIKE MY GRANDFATHER. THIS WAS A MAN WHO POSSESSED IN ESSENCE ALL THE MEANS OF ACQUIRING WEALTH A PERSON COULD NEED. HE COULD NOT BE ATTACKED; BUT THE "RICH" AND THEIR CARICATURES ARE EASY TARGETS. THESE CRITICS OF "THE RICH" REALLY DO MEAN TO DESTROY PEOPLE LIKE MY GRANDFATHER, AND DECLARE HIS MANLINESS TO BE FOOLISHNESS AND WASTED EFFORT.

BLACKS KNOW WHEN THEY ARE BEING SET UP. UNFORTUNATELY, THIS HAS TAKEN PLACE IN THIS ADMINISTRATION IN SOME OF THE RHETORIC AND STRATEGY ABOUT CIVIL RIGHTS. I HAVE OBJECTED TO THIS THEN, AS I OBJECT NOW TO THE LEFTIST EXPLOITATION OF POOR BLACK PEOPLE. THE ATTACK ON WEALTH IN THEIR NAME IS SIMPLY A MEANS TO ADVANCE

THE PRINCIPLE THAT THE RIGHTS AND FREEDOMS OF ALL SHOULD BE CAST ASIDE, TO ADVANCE UTOPIAN SCHEMES, WHICH IN FACT END IN DESPOTISM.

IN MORE RECENT TIMES MY GRANDFATHER WOULD BE PROPOSED BY SOME WELL-MEANING DEMAGOGUE AS A RECIPIENT OF "ECONOMIC JUSTICE" OR "SOCIAL JUSTICE." THAT WOULD ONLY MEAN THAT HE'D HAVE TO WORK HARD NOT ONLY FOR HIMSELF BUT FOR A BUNCH OF OTHERS AS WELL. AND ISN'T THIS THE VERY DEFINITION OF SLAVERY? SUCH RIGHTS AS WERE PERMITTED HIM UNDER SEGREGATION HE MADE FULL USE OF. AND HOW COULD ANYONE TODAY, WHO DOES NOT LABOR UNDER MY GRANDFATHER'S BURDENS, DO ANY LESS? WHY DON'T WE SEE MORE PEOPLE ACTIVELY PURSUING THE ECONOMIC RIGHTS WHICH HE EXERCISED? (SOME PEOPLE CALL THIS SELF-HELP, BUT IT DOES NOT REQUIRE A SPECIAL LABEL.) ISN'T IT IRONIC THAT CIVIL RIGHTS ESTABLISHMENT ORGANIZATIONS HAVE TO PROCLAIM THE NEED FOR SELF-HELP?

WHAT I WANT TO EMPHASIZE HERE IS THAT WORK IS AN ENORMOUS MORAL EDUCATOR. SO ARE SPORTS. BOTH HAVE GOALS-- MONEY IN THE CASE OF WORK, AND HONOR IN THE CASE OF SPORTS. BUT IN PURSUIT OF THESE GOALS WE GAIN QUALITIES OF THE SPIRIT HARD TO BRING ABOUT THROUGH OTHER MEANS. I MEAN QUALITIES SUCH AS SELF-DISCIPLINE, SELF-RESPECT, TRUE GENEROSITY, NOT TO MENTION HEALTH AND COMRADESHIP.

SOMETIMES WE GET MEANS CONFUSED WITH ENDS. PEOPLE LIVE FOR THE SAKE OF WORKING, INSTEAD OF MAKING WORK A PART OF THEIR LIVES. AND THE CONFUSION OCCURS OFTEN ENOUGH IN THE CASE OF

SPORTS. YET, THE QUALITIES ONE LEARNS INCIDENTAL TO THE ENDS (MONEY OR HONOR) OFTEN BECOME MORE IMPORTANT THAN THOSE ENDS. TOO OFTEN WE SEE BUSINESS AND COMMERCIAL LIFE DERIDED AS "MATERIALISTIC" AND "CRASS." THESE CRITICS IMPLY WE SHOULD HONOR IDEALISTIC PROFESSIONS: JOURNALISTS, LAWYERS, AND PROFESSORS.

BUT I SERIOUSLY DOUBT THAT A FREE NATION COULD EXIST, IF IT WERE TO BE COMPRISED SOLELY OUT OF PEOPLE WHO MAKE THEIR LIVING BY PRODUCING WORDS. AMERICAN FREEDOM REQUIRES JOURNALISTS, LAWYERS, AND PROFESSORS, BUT EVEN MORE IMPORTANT ARE THOSE WHO EXERCISE THEIR ECONOMIC RIGHTS IN COMMERCE. COMMERCE, ALONG WITH SPORTS, TEACHES US THE CONDITIONS OF FREEDOM. THE UNFAIRLY RIDICULED CALVIN COOLIDGE KNEW THIS QUITE WELL, WHEN HE CALLED COMMERCE "THE GREAT ARTISAN OF HUMAN CHARACTER." HE WAS A FAR CRY FROM A BABBITT BOOSTER OF PETTY AVARICE. "WE MUST FOREVER REALIZE," HE ONCE DECLARED, "THAT MATERIAL REWARDS ARE LIMITED AND IN A SENSE THEY ARE ONLY INCIDENTAL, BUT THE DEVELOPMENT OF CHARACTER IS UNLIMITED AND IS THE ONLY ESSENTIAL."

FREEDOM WAS ALWAYS REGARDED AS AN EDUCATOR. THIS IS WHY TOCQUEVILLE, IN HIS 1835 CLASSIC, DEMOCRACY IN AMERICA, ALWAYS EMPHASIZED THE IMPORTANCE OF FREEDOM AS A TEACHER OF A WAY OF LIFE. FREEDOM WASN'T SIMPLY A LACK OF CONSTRAINTS ON MEN'S BEHAVIOR. FREEDOM MEANT THAT MEN MUST ACCEPT RESPONSIBILITY, OR LESS THEY WOULD GRADUALLY LOSE THEIR FREEDOM TO A CENTRALIZED POWER OBLIVIOUS TO THEIR DESIRES.

CERTAINLY THIS VIEW OF COMMERCE AND BUSINESS WAS NOT LOST ON THE FOUNDING FATHERS. JAMES MADISON, THE MAN WHO MOST APPROPRIATELY MIGHT BE CALLED THE FATHER OF OUR CONSTITUTION, PUT IT SUCCINCTLY: "AS A MAN IS SAID TO HAVE A RIGHT TO HIS PROPERTY, HE MAY EQUALLY BE SAID TO HAVE A PROPERTY IN HIS RIGHTS." IT IS THIS BROAD NOTION OF PROPERTY-- MEANING ALL THE HUMAN FACULTIES SUCH AS REASON, PASSION, AND IMAGINATION-- THAT INFORMED THE WORLD OF THE FOUNDERS.

EARLIER THIS YEAR, I ADDRESSED AN AUDIENCE AT THE UNIVERSITY OF VIRGINIA LAW SCHOOL. IT WAS INSPIRING TO VISIT, ONCE AGAIN, A UNIVERSITY FOUNDED TO EDUCATE STATESMEN IN NATURAL RIGHTS. NOW, I AM FAR FROM BEING A SCHOLAR ON THOMAS JEFFERSON. BUT TWO OF HIS STATEMENTS SUFFICE AS A BASIS FOR RESTORING OUR ORIGINAL FOUNDING BELIEF AND RELIANCE ON NATURAL LAW. AND NATURAL LAW, WHEN APPLIED TO AMERICA, MEANS NOT MEDIEVAL STULTIFICATION BUT THE LIBERATION OF COMMERCE.

CONSIDER FIRST, THE DECLARATION OF INDEPENDENCE'S RELIANCE ON THE "LAWS OF NATURE AND OF NATURE'S GOD." THESE UNDERLIE THE SELF-EVIDENT TRUTHS: "ALL MEN ARE CREATED EQUAL; THAT THEY ARE ENDOWED BY THEIR CREATOR WITH CERTAIN INALIENABLE RIGHTS; THAT AMONG THESE ARE LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS...." GO FROM THIS TO JEFFERSON'S LAST LETTER. THE DYING JEFFERSON, ALMOST FIFTY YEARS TO THE DAY AFTER THE DECLARATION WAS PUBLISHED, REFLECTED FOR THE LAST TIME ON THE MEANING OF THE FOURTH OF JULY:

"THAT FORM [OF GOVERNMENT] WHICH WE HAVE SUBSTITUTED, RESTORES THE FREE RIGHT TO THE UNBOUNDED EXERCISE OF REASON AND FREEDOM OF OPINION. ALL EYES ARE OPENED, OR OPENING, TO THE RIGHTS OF MAN. THE GENERAL SPREAD OF THE LIGHT OF SCIENCE HAS ALREADY LAID OPEN TO EVERY VIEW THE PALPABLE TRUTH, THAT THE MASS OF MANKIND HAS NOT BEEN BORN WITH SADDLES ON THEIR BACKS, NOR A FAVORED FEW BOOTED AND SPURRED, READY TO RIDE THEM LEGITIMATELY, BY THE GRACE OF GOD."

WHAT CONFIDENCE IN AMERICA! JEFFERSON DOES NOT SPEAK OF THOSE AMORPHOUS, SUBJECTIVE FEELINGS CALLED "VALUES." THE TRUTH OF THE RIGHTS OF MAN RESTS ON AN OBJECTIVE TEACHING, A SCIENCE. A BELIEF IN A HIGHER LAW ENABLES SUCH CONFIDENCE AND PROVIDES DIRECTION. IF IT DIDN'T FREE THE SLAVES IMMEDIATELY, IT WAS THE MOST POWERFUL ARGUMENT LINCOLN HAD. IF NATURAL LAW WAS INSUFFICIENT BY ITSELF TO END THAT LEGACY OF SLAVERY, SEGREGATION, MARTIN LUTHER KING'S APPEAL TO IT ONCE AGAIN MOVED AMERICANS. BUT WHERE IS NATURAL LAW TODAY? IS IT GONE, ALONG WITH THE SEGREGATED SCHOOLS, BUSES, AND DRINKING FOUNTAINS OF MY YOUTH?

WITH MY PERSONAL EXPERIENCE IN MIND, I WOULD LIKE TO USE THIS OCCASION TO PRESENT A SKETCH OF A THEORY OF NATURAL LAW, WHICH WOULD UNITE BOTH LIBERTARIAN AND CONSERVATIVE PRINCIPLES. I DOUBT THAT WHAT I WILL SAY WILL BE ANYTHING NEW, BUT I THINK IT IS IMPORTANT TO PRESENT A COHERENT, PRINCIPLED BASIS FOR

APPROACHING CURRENT POLITICAL AND ETHICAL QUESTIONS.

IN AMERICA, THE NATURAL LAW STRENGTHENS THE POSITIVE, OR MAN-MADE LAW. JUSTICE HOLMES ONCE RIDICULED IT AS A "BROODING OMNIPRESENCE IN THE SKY." I WOULD LIKEN IT MORE TO A CONSCIENCE OR, AS LINCOLN PUT IT, A "STANDARD MAXIM" WHICH KEEPS US HONEST. IT IS, AS BLOOM SUGGESTS, THE ANTIDOTE TO THE RELATIVISM WHICH CURRENTLY AFFLICTS US. OF COURSE, THERE ARE SEVERAL DIFFERENT VERSIONS OF NATURAL LAW AND NATURAL RIGHTS, INCLUDING SOME IN SHARP CONFLICT WITH ONE ANOTHER. YET, I THINK ALL OF THEM WOULD HAVE TO AGREE ON CERTAIN ELEMENTS CONCERNING ECONOMICS. THESE ARE: FIRST, THE COMMON SENSE OF THE FREE MARKET; SECOND, AS LINCOLN PUT IT, "THE NATURAL RIGHT TO EAT THE BREAD [ONE] EARNS WITH [ONE'S] OWN HANDS;" AND THIRD, THE DIGNITY OF LABOR.

THE FREE MARKET LOGIC OF BUYING LOW AND SELLING HIGH AFFIRMS COMMON SENSE AND PUNISHES THOSE WHO LACK IT. ITS PRINCIPLES ARE VIRTUALLY SCIENTIFIC, THOUGH IN PRACTICE PEOPLE MAKE DECISIONS BASED ON SUPERSTITION AND BRIBERY, FOR EXAMPLE. THE FREE MARKET LOGIC EXISTS WHETHER THE ECONOMIC SYSTEM IS CAPITALISM, SOCIALISM, OR ANY KIND OF TRADITIONAL ECONOMY. IN FACT, TO HALT COMPLETELY THE FREE MARKET'S OPERATION REQUIRES TYRANNY. TO QUOTE THE OLD ROMAN POET, YOU CAN EXPEL NATURE WITH A PITCHFORK, BUT IT IS SURE TO RETURN. THOUGH THE FREE MARKET DOES NOT BY ITSELF GUARANTEE DEMOCRACY, IT DOES REQUIRE SIGNIFICANT PERSONAL FREEDOM. MOREOVER, THE QUALITIES OF INDEPENDENT JUDGMENT AND COMPETITIVENESS WHICH IT FOSTERS CERTAINLY POINT TOWARD REGIMES HONORING FREE ELECTIONS.

THE SECOND NATURAL LAW PRINCIPLE SUPPORTING THE FREE MARKET IS THE NATURAL RIGHT TO EARN FROM ONE'S LABOR. JOHN LOCKE, WHOSE POLITICAL PHILOSOPHY INFORMS OUR DECLARATION OF INDEPENDENCE, MADE THIS A CRUCIAL PRINCIPLE. SLAVERY WAS THUS AN EVIL THAT THREATENED THE FREEDOM OF ALL IN A SOCIETY THAT TOLERATED IT. IN OTHER WORDS, THIS PRINCIPLE ELABORATES ON OUR FIRST PRINCIPLE OF RESPECTING THE IMPULSES OF THE FREE MARKET. THE FREE MARKET ITSELF RESTS ON CERTAIN ETHICAL ASSUMPTIONS OR AT LEAST ONE MAJOR ASSUMPTION: ONE CANNOT TRADE IN SLAVES.

I AM REMINDED HERE OF THE GREAT COURT SCENE IN SHAKESPEARE'S MERCHANT OF VENICE, IN WHICH SHYLOCK JUSTIFIES HIS TAKING A POUND OF FLESH FROM ANTONIO.

"WHAT JUDGMENT SHALL I DREAD, DOING NO WRONG?
YOU HAVE AMONG YOU MANY A PURCHAS'D SLAVE,
WHICH, LIKE YOUR ASSES AND YOUR DOGS AND MULES,
YOU USE IN ABJECT AND IN SLAVISH PARTS,
BECAUSE YOU BOUGHT THEM. SHALL I SAY TO YOU,
"LET THEM BE FREE ....." YOU WILL ANSWER,
"THE SLAVES ARE OURS." SO DO I ANSWER YOU.
THE POUND OF FLESH WHICH I DEMAND OF HIM
IS DEARLY BOUGHT, 'TIS MINE, AND I WILL HAVE IT.
IF YOU DENY ME, FIE UPON YOUR LAW!
THERE IS NO FORCE IN THE DECREES OF VENICE."

BY PERMITTING THE SLAVE-TRADE, VENICE RELINQUISHED ITS RIGHT TO CONDEMN OTHER FORMS OF BARBARISM, SUCH AS THE TAKING OF THE POUND OF FLESH. THE VENETIANS FALL SILENT, AND IT TAKES THE CLEVER

PORTIA TO SAVE THE DAY. SHAKESPEARE HAD SPOTTED A FATAL CONTRADICTION IN A SEEMINGLY VERY FREE SOCIETY. AND VENICE WOULD EXACT ITS EQUALLY IRRATIONAL REVENGE ON SHYLOCK.

THUS, I WOULD JUSTIFY GOVERNMENT INTERVENTION IN CASES TO INSURE THAT THE FREE MARKET IS TRULY FREE. IN MY YEARS AT THE EEOC I HAVE TRIED TO MOVE TOWARD THIS IDEAL.

FINALLY, TO THE FREE MARKET PRINCIPLE AND THE PRINCIPLE FORBIDDING ARTIFICIAL BARRIERS, I ADD THE PRINCIPLE OF THE DIGNITY OF LABOR. FROM ALLAN BLOOM'S BOOK ONE CAN GET THE IMPRESSION THAT LIFE IS LED SOLELY IN THE MIND. BUT WITHOUT LABOR, THE WORK OF ONE'S BODY, ONE CAN FEEL SELF-CONTEMPT. THIS ATTITUDE CAN IN TURN HAVE OTHER CONSEQUENCES DELETERIOUS TO FREEDOM AND DECENCY.

I HAVE RECENTLY BEEN PERUSING ONE OF THOSE GREAT BOOKS BLOOM CITES FREQUENTLY, TOCQUEVILLE'S DEMOCRACY IN AMERICA. ONE OF THE MOST STRIKING OBSERVATIONS HE MAKES CONCERNS THE RADICALLY DIFFERING EFFECTS OF SLAVERY AND FREE LABOR. HE CONTRASTS THE ETHOS IN THE FREE STATE OF OHIO WITH THAT IN THE NEIGHBORING SLAVE STATE OF KENTUCKY. LET ME READ A BRIEF PASSAGE, JUST TO GIVE YOU A FLAVOR OF THAT DISCUSSION. IN THE SLAVE STATE

> "WORK IS CONNECTED WITH THE IDEA OF SLAVERY, BUT [IN THE FREE STATE] WITH WELL-BEING AND PROGRESS; ON THE ONE SIDE IT IS DEGRADING, BUT ON THE OTHER HONORABLE; ON THE LEFT BANK NO WHITE LABORERS ARE TO BE FOUND, FOR THEY WOULD BE AFRAID OF BEING LIKE THE SLAVES; FOR WORK PEOPLE MUST RELY ON THE NEGROES.... THE AMERICAN [IN THE SLAVE STATE] SCORNS NOT ONLY WORK ITSELF BUT ALSO ENTERPRISES IN WHICH WORK IS

NECESSARY TO SUCCESS; LIVING IN IDLE EASE, HE HAS THE TASTES OF IDLE MEN; MONEY HAS LOST SOME OF ITS VALUE IN HIS EYES; HE IS LESS INTERESTED IN WEALTH THAN IN EXCITEMENT AND PLEASURE AND EXPENDS IN THAT DIRECTION THE ENERGY WHICH HIS [FREE STATE] NEIGHBOR PUTS TO OTHER USE...."

WORK HAS A DIGNITY WHICH IN TURN GIVES MEANING TO OTHER SPHERES OF LIFE. THIS IS A PART OF THE HUMAN CONDITION, AN ELEMENT OF HUMAN NATURE, WHICH ANY DECENT GOVERNMENT OR SOCIETY MUST RESPECT.

NOW I REALIZE THIS IS JUST A BEGINNING OF A PROJECT, BUT I HOPE IT IS OF SOME USE.

LET ME SAY THIS IN PASSING ABOUT RECENT ISSUES INVOLVING THE SUPREME COURT. I FIND ATTRACTIVE THE ARGUMENTS OF SCHOLARS SUCH AS STEPHEN MACEDO WHO DEFEND AN ACTIVIST SUPREME COURT, WHICH WOULD STRIKE DOWN LAWS RESTRICTING PROPERTY RIGHTS. BUT THE LIBERTARIAN ARGUMENT OVERLOOKS THE PLACE OF THE SUPREME COURT IN A SCHEME OF SEPARATION OF POWERS. ONE DOES NOT STRENGTHEN SELF-GOVERNMENT AND THE RULE OF LAW BY HAVING THE NON-DEMOCRATIC BRANCH OF THE GOVERNMENT MAKE POLICY. HENCE, I STRONGLY SUPPORT THE NOMINATION OF BOB BORK TO THE SUPREME COURT. JUDGE BORK IS NO EXTREMIST OF ANY KIND. IF ANYTHING, HE IS AN EXTREME MODERATE, ONE WHO BELIEVES IN THE MODESTY OF THE COURT'S POWERS, WITH RESPECT TO THE DEMOCRATICALLY ELECTED BRANCHES OF GOVERNMENT. I AM APPALLED BY THE MUD-SLINGING CUM DEBATE OVER THE BORK NOMINATION. THE VERY IDEA OF THE SUPREME COURT IS TO DISPENSE IMPARTIAL JUSTICE, ONE ABOVE THE STRUGGLE OF SPECIAL

INTEREST GROUPS. OF COURSE WHAT HAS HAPPENED OVER THE LAST 50 OR SO YEARS IS A GROWTH OF POWER IN THE NON-ELECTED BRANCHES. AND MUCH OF WHAT IS DONE ADMINISTRATIVELY WINDS UP IN THE COURTS. SO THE COURTS AND THE BUREAUCRACY ARE LOBBIED. AND NOW A SUPREME COURT NOMINATION-- OF A DISTINGUISHED SCHOLAR-- IS TREATED AS THOUGH IT WERE AN ELECTION FOR THE LOCAL ZONING COMMISSION. IT IS A TRAGEDY FOR THE RULE OF LAW AND THE NOTION OF IMPARTIAL JUSTICE. AFTER ALL, IF IT TAKES A JUDGE TO SOLVE OUR COUNTRY'S PROBLEMS, THEN DEMOCRACY AND THE RULE OF LAW ARE DEAD. AND I FOR ONE, ALONG WITH BOB BORK, AM NOT YET READY TO GIVE UP ON SELF-GOVERNMENT. IRONICALLY, BY OBJECTING AS VOCIFEROUSLY AS THEY HAVE TO JUDGE BORK'S NOMINATION, THESE SPECIAL INTEREST GROUPS UNDERMINE THEIR OWN CLAIM TO BE PROTECTED BY THE COURT. AGAIN, THE COURT HAS ITS DIGNITY, AND ITS POWER, BY VIRTUE OF BEING ABOVE AND BEYOND SUCH CLAMORING.

LET ME CONCLUDE BY QUOTING AGAIN FROM ALLAN BLOOM'S BOOK. HERE HE LAMENTS THE PASSING OF A VIEW FORMERLY HELD BY AMERICANS ON NATURAL RIGHTS:

> "BY RECOGNIZING AND ACCEPTING MAN'S NATURAL RIGHTS, MEN FOUND A FUNDAMENTAL BASIS OF UNITY AND SAMENESS. CLASS, RACE, RELIGION, NATIONAL ORIGIN OR CULTURE ALL DISAPPEAR OR BECOME DIM WHEN BATHED IN THE LIGHT OF NATURAL RIGHTS, WHICH GIVE MEN COMMON INTERESTS AND MAKE THEM TRULY BROTHERS."

I WOULD ONLY ADD TO BLOOM'S WISE OBSERVATIONS HERE, THAT A RENEWED EMPHASIS ON ECONOMIC RIGHTS MUST PLAY A KEY ROLE IN THE REVIVAL OF THE NATURAL RIGHTS POLITICAL PHILOSOPHY THAT HAS BROUGHT THIS NATION TO ITS SECOND BICENTENNIAL YEAR.

THANK YOU!

Senator HATCH. I would also suggest that we not pluck a sentence out of context, none of us should do that, from 138 speeches that you gave. Gee, I would hate to remember all the speeches I gave in any given period of time, and I think we ought to have it all in context and you ought to be given a copy of it, so that you can refer to the actual language. I think that is the only fair way to do it. The committee has——

The CHAIRMAN. If the Senator would yield for a moment. Before the hearing even began, on Friday I told the witness that the first thing I would ask him about was Macedo. I specifically told him, so he understood that, even back then.

Senator HATCH. I am not suggesting the Chairman is unfair. I am saying that the process is unfair, if we do not do at least this. When we want to quote a line out of context, I am suggesting from here on in, let us give the Judge a copy of the speech and refer to the line that you are quoting on, because this one was clearly out of context, and clearly he was not endorsing the Macedo definition of an activist Supreme Court. I mean it is very clear to anybody who reads it.

This committee has obtained over 30,000 pages of documents or material from this nominee, and I think if he is asked about one of his writings, he at least ought to be able to see it in front of him, and I would suggest we follow that procedure.

Judge let me ask you this: Will any of the writings or speeches cited today affect you in your role as a judge or as a Justice in this particular case, or will you rely on the actual text of the law, the legislative history, prior case law, et cetera?

Judge THOMAS. Senator, as I noted, my interest particularly in the area of natural rights was as a part-time political theorist at EEOC who was looking for a way to unify and to strengthen the whole effort to enforce our civil rights laws, as well as questions, to answer questions about slavery and to answer questions about people like my grandfather being denied opportunities. Those were important questions for me.

When one becomes a judge—and I think I alluded to this in my confirmation hearing for the court of appeals—there are approaches to adjudicating cases and to understanding statutes, to analyzing statutes and determining meanings in statutes or your intent in statutes, as well as constitutional adjudication.

I do not see how my writings in a policy context, I do not see that they will affect anything that I do on the Supreme Court. As I noted that the whole notion of natural law, as our Founders believed it, is a background of our regime, and to the extent that it is used at all, it is an understanding of the way that they looked at our regime and at the way that they, in the Declaration of Independence, felt that our country should operate, and, of course, that then is translated into provisions that they drafted for the Constitution itself. It informs us as to the value that they put on individual freedom, for example. I think that is important, but that does not play a direct role in adjudicating cases on a constitutional basis.

Senator HATCH. I agree with that. In the November 1987 Reason article cited by Senator Kennedy, it was an interview, an off-the-cuff interview, I take it. Reason says, "I suspect that he might

think that the EEOC ought not to exist," talking about Thomas. The question put to you was this: "Why do you think that this agency should exist in a free society?" Your answer was, "Well, in a free society"—later today, you said, "Well, in a perfect society," I think that is what you meant by that—"Well, in a free or perfect society, I don't think there would be a need for it to exist. Had we lived up to our Constitution, had we lived up to the principles that we espoused, there would certainly be no need."

"There would have been no need for manumission either. Unfortunately, the reality was that, for political reasons or whatever, there was a need to enforce antidiscrimination laws, or at least there was as perceived need to do that. Why do you need a Department of Labor? Why do you need a Department of Agriculture? Why do you need a Department of Commerce?"

Those appear to me to be rhetorical questions, in light of the point you are making, in a perfect world you do not need them, but here was discrimination and we needed to enforce antidiscrimination laws.

You can go down the whole list of Federal agencies, you say, and you do not need any of them, really. But what you meant was, and it is apparent, as you read this carefully, in a perfect world. You go on to say, "I think, though, if I had to look at the role of Government and what it does in people's lives, I see the EEOC as having much more legitimacy than the others, if properly run." That's a hands-on person-to-person agency that is dealing with the most common problems in employment law and in discrimination and in opportunity.

Is that not correct?

Judge THOMAS. That is right.

Senator HATCH. Well, here is what you say: "Now, if you run the risk that the authority can be abused, when EEOC or any organization starts dictating to people, I think they go far beyond anything that should be tolerated in this society." That is a far cry from what was implied in the questions to you.

You go on to say other things that I think you make pretty clear. Still, it was an off-the-cuff interview with a publishing group. Frankly, I think it was pretty clear that you were not arguing we should do away with all of these agencies, unless we had a perfect world. Is that a fair summary of that?

Judge THOMAS. That is the point in that interview that I was trying to make. The question—and that is Reason magazine, if I remember correctly, is a libertarian magazine, and some libertarians believe that there should be no organizations and no governmental agencies such as the EEOC, so the question then becomes how do you justify, if you are for the individual, how do you justify a governmental agency that, in affairs and relationships, the employment relationship between individuals, and the response is, well, if this were a perfect world, you might be right, but this is not a perfect world, and if there is a justification for any kind of an agency in our Government, and there are many, then EEOC is at the top of that list.

Senator HATCH. I suspect that you are going to be criticized for your tenure at the EEOC. I cited the Washington Post praise of you. I cited U.S. News & World Report's praise of you. As former

Chairman of the Labor Committee and currently ranking member, we had a lot to do with the EEOC, and I have to tell you, you did a good job running that agency. Was it perfect? No, but you did a good job. Frankly, you took it seriously and you brought more cases than any other EEOC Chairman in history, and you recovered over a billion dollars in those cases, and we could go on and on.

Tell me, generally, your reaction to these comments, Judge: "Natural law is not a theory of legal interpretation," according to Professor Robert George, of Princeton University, who is a lawyer and holds a doctorate in philosophy from Oxford University. "Rather," he goes on to say, "it is a theory of law that holds that there are true standards or principles of morality, that human beings are bound in reason to respect, and that among these are norms of justice and human rights that may not be sacrificed for the sake of social utility. Both liberals and conservatives share a belief in fundamental principles of justice and right, however much they disagree about the exact content and implications of some of these principles. The relevance of natural law to judging, it is that out of respect for the rule of law, judges are obliged to recognize the limits of their own authority. The scope of a judge's authority is settled not by natural law, but the constitutional allocation of political authority among the judicial and other branches of government."

Now, as Professor George has written, belief in natural law is perfectly consistent with fidelity to the Constitution, as the supreme law of the land and the commitment to judicial restraint. Now, whatever may be your views of the rights and wrongs of various social issues as a matter of natural law, it seems to me your commitment to natural law and natural rights neither permits you nor requires you to treat the Constitution as a vehicle for imposing those ideas on the rest of the country. Do you agree basically with that statement?

Judge THOMAS. Senator, I think that is, in part, the point that I was attempting to make. My interest, for example, was in the fact that, in our country, you had a stated ideal in the declaration, all men are created equal.

Senator HATCH. Natural law means there should not be slaves, right?

Judge THOMAS. That is the next step, that if that is true, then how can one person own another person, and yet you had slavery existing at the same time the declaration existed. In order to change that constitutionally, not as a matter of principle in our regime, but constitutionally you needed an amendment to the Constitution, and I indicated that. There is a difference between the ideal and the Constitution itself.

With respect to constitutional adjudication, I do not think that there is a direct role for natural law in constitutional adjudication. It is a part of our history and tradition. It is a part of our background and our country. It is a belief that a number of our drafters held. It is in our Declaration, and as I mentioned before, it is prominent in the brief filed by the NAACP in *Brown* v. *Board of Education,* to show the ideals of this country, but even there as an appendix, I think it is listed as a political philosophy section.

I do not know, I cannot remember whether it was advocated as a way to adjudicate, but my point is that it does not, it is not a method of constitutional adjudication. When I was speaking as Chairman of EEOC, again, I was a policymaker. I was not a litigator and I was not a constitutional law professor.

Senator HATCH. That is a good distinction, by the way.

Judge THOMAS. Well, it was an important one for me and it is an important one for me now. When one is a judge, from my standpoint, one does not go into one's own personal philosophies and apply those personal philosophies in one's effort to adjudicate cases. I think that there are principles, there are traditional approaches that have been used, and I have confined myself and would confine myself to that.

Senator HATCH. When you are talking about natural law, you are talking about equality?

Judge THOMAS. That all men are created equal, that is basic law.

Senator HATCH. That is right, and you are taking that from the Declaration of Independence.

Judge THOMAS. That is right.

Senator HATCH. And you are saying that is why we needed the 13th, 14th and 15th amendments.

Judge THOMAS. That was the most apparent and grossest contradiction in our society, that you had declaration declaring all of us to be equal, and yet the coexistence with that of slavery.

Senator HATCH. Well, I find it to be interesting, because Judge Bork was criticized because he did not particularly endorse the principle of natural law in constitutional adjudication, and now you are being criticized because you purportedly do. Frankly, it is a double standard, and, I might add, by the same committee.

What I interpret you to be saying—and maybe I am wrong, and you correct me if I am wrong—is that when it comes to natural law and the Constitution, the Constitution takes preeminence.

Judge THOMAS. The Constitution is our law, it is the law of our land. The natural law philosophy is a political theory, my interest was political theory, it was not constitutional law.

Senator HATCH. So, when you become a Justice on the U.S. Supreme Court, and I believe you will, you intend to uphold the Constitution of the United States, is that correct?

Judge THOMAS. With every fiber in my body.

Senator HATCH. Above anything else?

Judge THOMAS. My job is to uphold the Constitution of the United States, not personal philosophy or political theories.

Senator HATCH. I think that is a pretty good way of putting it. Some have criticized natural law as being outside the mainstream. I have seen articles by some of our eminent law professors in this country, at least one in particular that I can see. If natural law is outside the mainstream, then so is the Declaration of Independence, and that is the point you are making, it seems to me. As Professor Robert George, of Princeton University, observed, if you believe that slavery was inherently unjust and should have been abolished, you believe in natural law of some sort. Throughout our American history, many of our greatest leaders, Thomas Jefferson, Abraham Lincoln, Martin Luther King, Jr., they have all invoked natural law in their struggles against injustices of their times.

Now, I think you are being accused, if you believe in natural law, then that means that would make you a conservative judicial activist. Now, I have to tell you, as much as I care for you and as much as I know you and believe in you, if you are going to go on the bench to be a conservative judicial activist, I am going to be against you as much as if you were a liberal judicial activist, because I do not think that is the purpose of that role on the court.

Judge THOMAS. Senator, I think that was the point, and I have to go back and read the speech involved, but that was the point of the criticism of Macedo, that he indeed was an activist and I think there was some debate about that, and I do not think the role of the Court is to have an agenda to say, for example, that you believe the Court should change the face of the earth. That is not the Court's role.

There are some individuals who think, for example, as the Chairman mentioned earlier, that the whole landscape with respect to economic rights should be changed, and I criticize that.

Senator HATCH. As I understand both of our personal discussions and also from reading some of the things you have written, you recognize the natural law principles of the Declaration of Independence as reflected in the written Constitution, that they constrain both legislative majorities and the courts. Am I correct on that?

Judge THOMAS. That is correct.

Senator HATCH. Moreover, many who criticize you today for acknowledging the existence of natural law were the most vociferous critics of Judge Bork 4 years ago for not acknowledging the existence of natural law. I just want to make that point.

By endorsing Lewis Lehrman's article in the American Spectator, some say that you have signaled that you would vote to overturn *Roe* v. *Wade*. Well, I think you have made it pretty clear. You were complimenting Lehrman as trustee of the Heritage Foundation in the Lehrman Hall when you made that particular remark in a nine, single-spaced-page talk that you gave. As Senator Danforth has said, to say that Judge Thomas thereby adopted or endorsed Lewis Lehrman's entire article is like suggesting that any of our references to a "distinguished colleague" in the Senate is a full-fledged endorsement of everything that "distinguished colleague" has ever said. Now, that is ridiculous, and I personally think the implication is ridiculous as well.

But let me just ask you the question. Have you made up your mind, Judge Thomas, on how you will vote when abortion issues are before the Court as a Justice on the Court?

Judge THOMAS. Senator, there is a lesson that I think we all learn when we become judges, and I think it happens to you after you have had your first case; that you walk in sometimes, even after you have read the briefs and you think you might have an answer. And you go to oral argument, and after oral arguments you think you might have an answer.

Senator HATCH. That is right.

Judge THOMAS. And after you sit down and you attempt to write the opinion, you thought you had an answer, and you change your mind.

I think it is inappropriate for any judge who is worth his or her salt to prejudge any issue or to sit on a case in which he or she has such strong views that he or she cannot be impartial. And to think that as a judge that you are infallible I think totally undermines the process. You have to sit. You have to listen. You have to hear the arguments. You have to allow the adversarial process to think. You have to be open. And you have to be willing to work through the problem.

I don't sit on any issues, on any cases that I have prejudged. I think that it would totally undermine and compromise my capacity as a judge.

Senator HATCH. I think that says it all. But let me just say this: I have been interested in some of these questions about substantive due process issues. As you know, the first substantive due process case was the *Dred Scott* case in 1857. That is where the Supreme Court held that the "Liberty prong" of the due process clause prevented Congress from forbidding slavery in the territories.

Now, later in the 19th century and the early 20th century, the Supreme Court employed substantive due process in *Lochner* v. *New York*—that is the case that came up earlier—to strike down astute law that limited the numbers of hours that bakery workers could work in a week. The New York legislature passed the law, and *Lochner* struck it down.

There were other substantive due process cases up until the 1930's, and all of those struck down efforts by the States to regulate the workplace and the economy. And substantive due process was basically dormant from that time until the early 1960's when the Court, of course, began to use substantive due process to achieve liberal results, or should I say liberal social policy results.

Now, according to some of my liberal colleagues that was all right, but the earlier use of substantive due process was wrong. I am telling you both of them are wrong. The fact of the matter is that nobody in his right mind believes that you are going to go strike down all of the social policy results that the Congress has passed, including OSHA, food safety laws, child care legislation, welfare laws, fair housing laws, low-income housing, and so forth.

Is there even any shred of evidence or any shred of thought that you would be the type of judge that would be a substantive due process judicial activist that would take us back to the *Lochner* days?

Judge THOMAS. To my way of thinking, Senator, there isn't. I think that the post-*Lochner* era cases were correct. I think that the Court determined correctly that it was the role of Congress, it was the role of the legislature to make those very, very difficult decisions and complex decisions about health and safety and work standards, work hours, wage and hour decisions, and that the Court did not serve the role as the superlegislature to second-guess the legislature.

I think that those post-Lochner era cases were correctly decided, and I see no reason why those cases and that line of cases should have been or should be revisited.

Senator HATCH. Well, I agree with you. I have to note that it is somewhat ironic for my liberal colleagues to express concern that judges might start striking down economic regulations the way the

liberal judges in some ways have invented criminal rights, struck down pornography restrictions, have run local high schools, and imposed taxes on cities and local governments. And you could go on and on with some of these things that activist courts have been doing up to today. And I too think that it would be wrong for judges to strike down economic regulation, just like you do.

But what the liberals really ought to understand is that no one is safe when judges depart from the text of the written Constitution, and that is what has been happening from time to time. What we need are judges that won't make up the law in order to institutionalize their own social policy ideas or to impose their own values, liberal or conservative, on the American people.

I think the people can choose between liberal and conservative policies, but they should choose between them where they ought to choose between them, and that is in the elective process. That is what we are here for. They can choose by voting for whoever they want to in the elective process to make these laws, not judges on the bench. And that is what really is at stake in this.

I could go on and on. I notice that everybody is probably pretty tired by now, but let me just say this: In fulfillment of your duties as a Justice on the Supreme Court, are you going to be guided by Stephen Macedo and his ideas?

Judge THOMAS. Absolutely not.

Senator HATCH. I didn't think so. And I don't think anybody else thought so.

Do you intend to elevate property rights over individual rights and liberties, as was done in the early part of this century under the *Lochner* case its whole progeny of cases?

Judge THOMAS. I certainly have no intention of doing that, Senator. The Court has attempted to approach rights such as on the economic decisions of the legislature, the classifications according to race, et cetera, in a way that I think is appropriate. It attempts to accord a value to these.

The point that I was making is that the notion of property is in the Constitution. That in no way says how those cases should be adjudicated.

Senator HATCH. Well, you know, in those days they elevated the so-called right of contract above the individual rights of individual human beings. And the right of contract took precedence over individual rights and freedoms where the right of government to ease the burdens and the pains and the difficulties of the working-class and the poor through health and welfare programs, wage and hour legislation, and other matters that they chose to do. The Court at that time said that that was all outweighed by the right of contract.

Well, I don't know of anybody that wants to go back to those days. Now, some can misconstrue Professor Epstein to believe that that is what he wants to do. I don't believe he wants to do that.

But to make a long story short, Judge Thomas, I personally am very proud of your nomination, and I believe that you will bring a dimension to this Court that really hasn't been there before, because I don't think you are going to be characterized in any particular pocket of anybody. And I know you well enough to know that you are fiercely independent and that you will do what you

believe is right within the Constitution. And I believe we have covered this principle of natural law, at least as much as we could here today.

I want to commend you for this opportunity. A lot of us intend to see that you have this opportunity, and I sure wish you the best in being able to serve on that Court and to do it in the best interest of all Americans and in the right way, and within the confines of the Constitution, and in the way that I think you have been chatting with us today. So I commend you for what you have said, and I hope we can enjoy the rest of your testimony tomorrow.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Let me conclude today by pointing out one thing. No one, notwithstanding my distinguished friend, thus far has criticized your view on natural law or whether or not natural law is beneficial. We are just trying to find out if you have a view on natural law and what it is. For the record, no one is criticizing your view. Professor Bork criticizes natural law. I do not. No one has criticized your view. We are just going to try to find out what it is.

Senator HATCH. I am sure glad to have that on the record, I will tell you.

The CHAIRMAN. With that, the hearing is adjourned until tomorrow at 10 o'clock.

[Whereupon, at 5:30 p.m., the committee recessed, to reconvene at 10 a.m., Wednesday, September 11, 1991.]

NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 11, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice at 10:05 a.m., in room 325, Senate Caucus Room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge. It is a pleasure to have you back. Let me very, very briefly explain to you, your family, and everyone else the process this morning. I expect that we will have four Senators question before we break for lunch. If I were you, I would probably want to break after 2, but it is up to you. I will go through four Senators until lunchtime unless there is some indication from you or anyone else that you would like to stop and take a break. I will be glad to give you a break to get a cup of coffee or anything else you want.

Now, we need to get started. Do you have a preference, Judge, as to how you would like to proceed? Really, I am not kidding. Any way you want to do it.

Judge THOMAS. We will play it by ear.

The CHAIRMAN. Play it by ear. I agree with you. All right.

Now, we will start this morning's questioning in the same format as before; each Senator will have ½ hour for his questions and your response. We will start this morning with Senator Metzenbaum.

I might add that we do not plan on going beyond 5 o'clock today unless we are very close to finshing. We are going to try to end the hearing today at 5 and we will pick up tomorrow at 10 o'clock no matter what. I expect we will still have questions for the judge if people haven't had their second round.

With that, let me yield the floor to Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Good morning, Judge Thomas. Nice to see you again. You have an extensive record of speeches and published articles. Judge, I have made no secret of the fact that I have serious concerns with many of the things in your record.

Yesterday I thought we would finally get some answers about your views. Instead of explaining your views, though, you actually ran from them and disavowed them.

Now, in a 1989 article in the Harvard Journal of Law and Public Policy, you wrote, "The higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for just, wise, and constitutional decisions."

Judge you emphasized the word "constitutional" by placing it in italics. By that emphasis, you made it very clear you were talking about the use of higher law in constitutional decisions. But yesterday you said, "I don't see a role for the use of natural law in constitutional adjudication. My interest was purely in the context of political theory."

Then in 1987, in a speech to the ABA, you said, "Economic rights are as protected as any other rights in the Constitution." But yesterday you said, "The Supreme Court cases that decided that economic rights have lesser protection were correctly decided."

In 1987, in a speech at the Heritage Foundation, you said, "Lewis Lehrman's diatribe against the right to choose was a splendid example of applying natural law." But yesterday you said, "I disagree with the article, and I did not endorse it before."

In 1987, you signed on to a White House working group report that criticized as "fatally flawed," a whole line of cases concerned with the right to privacy. But yesterday you said you never read the controversial and highly publicized report, and that you believe the Constitution protects the very right the report criticizes.

In all of your 150-plus speeches and dozens of articles, your only reference to a right to privacy was to criticize a constitutional argument in support of that right. Yesterday you said there is a right to privacy.

Now, Judge Thomas, I am frank to say to you, I want to be fair in arriving at a conclusion, and I feel that I speak for every member of this committee who wants to be fair. Our only way to judge you is by looking at your past statements and your record. And I will be frank; your complete repudiation of your past record makes our job very difficult. We don't know if the Judge Thomas who has been speaking and writing throughout his adult life is the same man up for confirmation before us today. And I must tell you it gives me a great deal of concern.

For example, yesterday, in response to a question from Senator Biden, you said that you support a right to privacy. Frankly, I was surprised to hear you say that. I have not been able to find anything in your many speeches or articles to suggest that you support a right to privacy.

Unfortunately, the committee has learned the hard way that a Supreme Court nominee's support for the right to privacy doesn't automatically mean that he or she supports that fundamental right when it involves a woman's right to abortion. At his confirmation hearing, Judge Kennedy told us he supported the right to privacy. Since he joined the Court, Justice Kennedy has twice voted with Chief Justice Rehnquist in cases that have restricted the right to abortion.

Likewise, Justice Souter told us that he supported the right to privacy, and then when he joined the Court, Justice Souter voted with the majority in *Rust* v. *Sullivan.*

My concern is this—and I know I have been rather lengthy in this first question. Your statement yesterday in support of the right to privacy does not tell us anything about whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy. I fear that you, like other nominees before the committee, could assure us that you support a fundamental right to privacy, but could also decline to find that a woman's right to choose is protected by the Constitution. If that happens soon, there could be nowhere for many women to go for a safe and legal abortion.

I must ask you to tell us here and now whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy, and I am not asking you as to how you would vote in connection with any case before the Court.

Judge THOMAS. Senator, I would like to respond to your opening question first and, if you think it appropriate, to consider each of your questions seriatim.

Yesterday as I spoke about the Framers and our Constitution and the higher law background—and it is background—is that our Framers had a view of the world. They subscribed to the notion of natural law, certainly the Framers of the 13th and 14th amendments.

My point has been that the Framers then reduced to positive law in the Constitution aspects of life principles that they believed in; for example, liberty. But when it is in the Constitution, it is not a natural right; it is a constitutional right. And that is the important point.

But to understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body, to get your understanding. But in constitutional analysis and methodology, as I indicated in my confirmation to the court of appeals, there isn't any direct reference to natural law. The reference is to the Constitution and to using the methods of constitutional adjudication that have been traditionally used. You don't refer to natural law or any other law beyond that document.

What I have attempted to do with respect to my answers yesterday is to be as fair and as open and as candid as I possibly can. I have not spoken on issues such as natural law since my tenure as Chairman of EEOC. At that time it was important to me—it was very important—to find some way to have a common ground underlying our regime and our country on the issue of civil rights. I thought it was a legitimate ground. I wondered. I looked back at Lincoln, saw him here in Washington, DC, surrounded by a pro-slave State yet pro-Union, and a Confederate State. And I asked myself what was it that sustained him in his view that slavery was wrong. And it was through that progress that I came upon the central notion of our regime, All men are created equal, as a basis or as one aspect of trying to fight a battle to bring something positive

and aggressive to civil rights enforcement. And I thought it was a legitimate endeavor.

At no time did I feel nor do I feel now that natural law is anything more than the background to our Constitution. It is not a method of interpreting or a method of adjudicating in the constitutional law area.

With respect to your last question—and I assume for the moment that perhaps you don't want me to address each of the underlying questions or specific questions seriatim. I would say this about them, though: I have written and I have been interviewed quite a bit. I have been candid over my career. My wife said to me that to the extent that Justice Souter was a "stealth nominee," I am "Bigfoot." And I have tried to think through difficult issues without dodging them.

As a judge, though, on the issue of natural law, I have not spoken nor applied that. What I have tried to do is to look at cases, to understand the argument, and to apply the traditional methods of constitutional adjudication as well as statutory construction.

I am afraid, though, on your final question, Senator, that it is important for any of us who are judges, in areas that are very deeply contested, in areas where I think we all understand and are sensitive to both sides of a very difficult debate, that for a judge—and as I said yesterday, for us who are judges, we have to look ourselves in the mirror and say: Are we impartial or will we be perceived to be impartial? I think that to take a position would undermine my ability to be impartial, and I have attempted to avoid that in all areas of my life after I became a judge. And I think it is important.

I can assure you—and I know, I understand your concern that people come here and they might tell you A and then do B. But I have no agenda. I have tried to wrestle with every difficult case that has come before me. I don't have an ideology to take to the Court to do all sorts of things. I am there to take the cases that come before me and to do the fairest, most openminded, decent job that I can as a judge. And I am afraid that to begin to answer questions about what my specific position is in these contested areas would greatly—or leave the impression that I prejudged this issue.

Senator METZENBAUM. Having said that, Judge, I will just repeat the question. Do you believe—I am not asking you to prejudge the case. I am just asking you whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy.

Judge THOMAS. Senator, as I noted yesterday, and I think we all feel strongly in this country about our privacy—I do—I believe the Constitution protects the right to privacy. And I have no reason or agenda to prejudge the issue or to predispose to rule one way or the other on the issue of abortion, which is a difficult issue.

Senator METZENBAUM. I am not asking you to prejudge it. Just as you can respond—and I will get into some of the questions to which you responded yesterday, both from Senators Thurmond, Hatch, and Biden about matters that might come before the Court. You certainly can express an opinion as to whether or not you believe that a woman has a right to choose to terminate her pregnancy without indicating how you expect to vote in any particular case. And I am asking you to do that.

Judge THOMAS. Senator, I think to do that would seriously compromise my ability to sit on a case of that importance and involving that important issue.

Senator METZENBAUM. Let us proceed. Judge Thomas, in 1990, I chaired a committee hearing on the Freedom of Choice Act, where we heard from women who were maimed by back-alley abortionists. Prior to the *Roe* decision, only wealthy women could be sure of having access to safe abortions. Poor, middle-class women were forced to unsafe back alleys, if they needed an abortion. It was a very heart-rending hearing.

Frankly, I am terrified that if we turn the clock back on legal abortion services, women will once again be forced to resort to brutal and illegal abortions, the kinds of abortions where coathangers are substitutes for surgical instruments.

The consequence of *Roe*'s demise are so horrifying to me and to millions of American women and men, that I want to ask you once again, of appealing to your sense of compassion, whether or not you believe the Constitution protects a woman's right to an abortion.

Judge THOMAS. Senator, the prospect—and I guess as a kid we heard the hushed whispers about illegal abortions and individuals performing them in less than safe environments, but they were whispers. It would, of course, if a woman is subjected to the agony of an environment like that, on a personal level, certainly, I am very, very pained by that. I think any of us would be. I would not want to see people subjected to torture of that nature.

I think it is important to me, though, on the issue, the question that you asked me, as difficult as it is for me to anticipate or to want to see that kind of illegal activity, I think it would undermine my ability to sit in an impartial way on an important case like that.

Senator METZENBAUM. I have some difficulty with that, Judge Thomas, and I am frank to tell you, because yesterday you responded, when Senator Biden asked you if you supported the right to privacy, validated in *Moore* v. *City of East Cleveland*, by agreeing that the Court's rulings supported the notion of family as one of the most private relationships we have in our country. That was one matter that might come before the Court.

You also responded, when Senator Thurmond asked you whether, following the Court's ruling in *Payne* v. *Tennessee*, families victimized by violence should be allowed to participate in criminal cases. You went on to respond by indicating that the Court had recently considered that matter, and you expressed concern that such participation could undermine the validity of the process.

You also responded to Senator Thurmond's questions about the validity of placing limits on appeals in death penalty cases, the fairness of the sentencing guidelines, which was another one of his questions, and the good-faith exception to the exclusionary rule, which was another one of his questions.

Finally, you responded, when Senator Hatch asked you whether you might rely on substantive due process arguments to strike down social programs such as OSHA, food safety laws, child care legislation, and the like, by telling him that "the Court determined

correctly that it was the role of the Congress to make complex decisions about health and safety and work standards."

Now, all of those issues could come before the Court again, just as the *Roe* v. *Wade* matter might come before the Court again. So, my question about whether the Constitution protects the woman's right to choose is, frankly, not one bit different from the types of questions that you willingly answered yesterday from other members of this committee.

So, I have to ask you, how do you distinguish your refusal to answer about a woman's right to choose to terminate her pregnancy with the various other matters that may come before the Supreme Court, to which you have already responded to this committee?

Senator THURMOND. Mr. Chairman, since my distinguished colleague has mentioned my name several times, I would like to make a brief comment here and take it out of my time when I am called on again. I think it is pertinent to just take a little time, if you have no objection.

Senator METZENBAUM. I did not see fit to interrupt my colleague during his line of questioning. After the Judge——

Senator THURMOND. It is right on this point, you have just mentioned my name——

Senator METZENBAUM. But after the Judge responds, then I would——

Senator THURMOND [continuing]. And if I can take it out of my time, I would like to do that.

The CHAIRMAN. I would be delighted to let the Chair do that, but the witness is about to answer the question. Immediately after Judge Thomas has answered the question, then I will yield to the Senator from South Carolina to make his point, whatever the point is.

Judge THOMAS. Senator, I responded to and discussed, I believe, with Senator Thurmond, questions and concerns that he raised about these particular cases that you mentioned. I do not believe—and I have not had an opportunity to review the transcript—I do not believe that I either indicated that I agreed with the outcome in those cases that I raised with him or not. I simply raised the concerns, the discussions, and the Court holdings, and I believe some of the problems that might occur in some considerations in the future. I tried to discuss it openly with him, without reaching a judgment with respect to the outcome.

With respect to the *Lochner* era cases, I thought that my view was that these are cases that were decided in the 1930's or the post-*Lochner* era cases, and that I do not think the Court is going to revisit that area in the very near future. It is certainly not one that, to my knowledge, is——

Senator METZENBAUM. I am sure you are not suggesting that all of those matters about which Senator Thurmond inquired of you were all decided in the 1930's. Many of them are very pertinent and very much within the last few years.

Judge THOMAS. I may not have made myself very clear, Senator. The questions that Senator Thurmond and concerns that he raised about cases, those were recent cases. I do not believe—again, I have not had an opportunity to review the transcript—that I commented

on or that I agreed with or supported or sustained the judgment or the outcome in those cases.

Senator METZENBAUM. That is all I am asking you on this, to do the same kind of response that you gave Senator Thurmond. I am not asking you to speak about how you would vote on the Court. And just as you commented on those cases, what you thought about presentencing guidelines, habeas corpus matters, and various other questions that the Senator asked you, all I am asking you to do is give me the same kind of response with respect to the woman's constitutional right to choose in the same area.

Judge THOMAS. Senator Thurmond, I do not believe asked me whether I agreed or disagreed with the particular outcome. Again, I have not reviewed the transcript. The point that I am making with respect to the *Lochner* cases, the post-*Lochner* era cases, is that they were decided in the 1930's and that I do not think that they will be revisited.

I am not, nor would I have it suggested—and I think this is an important point, Senator—I think that if there were, if I could retain my impartiality and study those cases and think about them, I think that there would be room for comment. I do not believe that a sitting judge, on very difficult and very important issues that could be coming before the Court, can comment on the outcomes, whether he or she agrees with those outcomes as a sitting judge.

I think those of us who have become judges understand that we have to begin to shed the personal opinions that we have. We tend not to express strong opinions, so that we are able to, without the burden or without being burdened by those opinions, rule impartially on cases.

Senator METZENBAUM. I understand that, Judge, but I want to point out the similarity of this matter as compared to the question I am asking you about a woman's right to choose. Senator Thurmond said to you, "In fact, the Court recently used in the case of *Payne* v. *Tennessee* that the use of victim impact statements in death penalty cases does not violate the Constitution." He goes on to say, "In your opinion, should victims play a greater role in the criminal justice system, and, if so, to what extent should a victim be allowed to participate, especially after a finding of guilt against the accused?"

You responded, "Of course, Senator, that is a matter the Court, as you have noted, recently considered." You go on to say, "My concern would be, in a case like that, we don't in a way jeopardize the rights of the victim. Of course, we would like to make sure that the victim is involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process."

Now, I am not questioning your position. Whatever your position is, that is perfectly fine. What I am saying is that if you were able to respond as you did yesterday to questions from Senators Thurmond, Hatch, and Biden with reference to matters in the Supreme Court or may return to the Supreme Court, and why, Judge Thomas, can't you tell us about a woman's right to choose, which is understandably one of the most controversial issues in the country?

I am not asking you as to how you will vote in connection with that issue.

Senator THURMOND. Mr. Chairman, it is on that very point that I would like to make a statement.

The CHAIRMAN. The Senator is recognized, and the time will not come out of the Senator from Ohio's half hour.

Senator THURMOND. I want to say that no question I asked Judge Thomas to answer in any way required him to comment about how he would rule on a case that could come before the Supreme Court.

My distinguished colleague, Senator Metzenbaum, as a lawyer, must know that the questions I asked the nominee were areas where the law is well settled. I strongly believe it is inappropriate to ask the nominee how he would rule in a particular case. Judges must be impartial. For a judge to have preconceived notions about how he would rule in a case would clearly undermine the independence of the judiciary.

Additionally, I specifically told Judge Thomas, and these are words that you can quote, "If I propound any question you consider inappropriate, just speak out, because I strongly believe a nominee should not be compelled to answer how he would rule on any specific case that may come before the Court."

The CHAIRMAN. Thank you very much, Senator.

I point out that the ruling on victim impact statements was, I think, a 6-to-3 decision, and it is far from well-settled. It is still in controversy, both here and in the Court. Now, I will yield back to the Senator from Ohio.

Senator METZENBAUM. And it overruled previous Court decisions, so it still is in controversy.

Let me go on. Yesterday, you were asked about a 1986 report produced by the White House Working Group on the Family. You testified you had not read a section of the report which criticized as fatally flawed a lien of cases upholding the right to privacy in a woman's right to abortion. Two of the cases criticized by the report were *Roe* v. *Wade* and *Planned Parenthood* v. *Danforth*, both of which protect a woman's right to an abortion.

The report also declared that State-imposed restrictions on a woman's right to an abortion should not be challenged by the Supreme Court. Judge Thomas, it appears to me that you were the highest ranking administration official on the White House Task Force, and this report was recommending policy changes that would have a profound and sweeping impact on the lives of millions of American women.

In the months leading up to your confirmation, this report has been the subject of considerable discussion. As a matter of fact, the Chairman of the Commission is also, as I understand it, chairman of the committee to help promote your candidacy.

How is it possible that, until yesterday, you had never read this section of the report and—well, not guess that I would ask that question.

Judge THOMAS. Senator, I think it is important to understand how the domestic policy shop in the White House worked. What it would do is that it would assemble a group of people who had expressed an interest in an area across the administration, and it would, in essence, use that group as a resource.

My interest during the meetings—and I believe there were three, perhaps four meetings, I cannot remember—was in low-income families, families that I believed were at risk in our society. I submitted to that working group, I believe to the head of the working group, who was not myself, a document, a memorandum on low-income families. The group itself did not meet, nor were we called upon to draft the document.

The document itself was, I believe, circulated and final, although I cannot remember exactly the procedure, but it is not uncharacteristic that, after you have participated in a working group or after one participated in a working group with the White House or with the domestic policy branch, that the report itself would not be made available for comment, and that others would simply finalize the report. Again, I cannot remember how that precisely worked.

My interest was limited to low-income families and I was thankful that certain portions of that was included. I did not have an interest in, nor expressed comment on the other portions of the report.

Senator METZENBAUM. Yesterday, the chairman stated that one of the privacy decisions criticized as fatally flawed in the report was *Moore* v. *City of East Cleveland*. The chairman also noted that the report calls for the appointment of new Justices on the Court, to change the result in the *Moore* case in another decision.

In response to the chairman, you stated that, "If I had known that section was in the report before it became final, of course, I would have expressed my concerns." Judge Thomas, if you had known that the report characterizes two abortion cases as fatally flawed and suggests that these decisions can be corrected, directly or indirectly, through the appointment of new judges, would you have objected to that, as well?

Judge THOMAS. Senator, let me respond to that in this way: I thought that the report—and, based on the submissions, I think this underlines that—that the report should have been focused on how do we help existing families, not debating some of the more controversial and difficult issues in our society. I thought that it would be an opportunity and would be an occasion to find ways to take families that are at risk and families that are having difficulties and to help those families in whatever form we find them.

Senator METZENBAUM. I guess my question is—I will repeat the question: Would you have objected, if you had known that language was within the report, as you indicated you would have objected with respect to the langauge in connection with the *East Cleveland* case?

Judge THOMAS. I think I would have, Senator, raised concerns of the nature and with the underpinning that I just gave you, and that is that I thought it would have been appropriate for the report to have focused expressly on families that were at risk and how we could help families in their current conditions nor out of their current conditions.

Senator METZENBAUM. Well, you told Senator Biden you would have objected to the language with reference to the *East Cleveland* case, and so I am only asking you whether you would have objected to the langauge with respect to the abortion cases.

Judge THOMAS. Senator, I believe—again, I have not reviewed the transcript—I believe I indicated that I would have raised concerns, and I believe that those concerns would have been of the same character and the same nature as the concerns that I would raise in this case. I thought that we had a grand opportunity there to focus governmental policy on existing low-income and at-risk families.

I felt that was very important, and it was very important in this context, it was important to me: It was important, because you had I think about one-third or more of the minority kids in our society being under the poverty limit, and I felt that the administration could have addressed that in a policy that was important to the entire administration.

Senator METZENBAUM. My time is up, but, Judge Thomas, I am really asking you specifically yes or no. You indicated you would have objected to the *East Cleveland* decision, had you known that language with reference to the *East Cleveland* decision, had you known it was in there. So, I am asking you if you had known about the abortion case references, would you have objected, and the answer is just yes or no.

Judge THOMAS. Senator, I would have raised concerns for the reasons I have expressed to you.

The CHAIRMAN. Thank you very much, Senator Metzenbaum.

Dr. Hatch——

Senator SIMPSON. Dr. Hatch?

The CHAIRMAN. Excuse me. I am so accustomed to attempting to avoid the Simpson-Metzenbaum skirmish that I guess it was a reflex action. I do apologize. I was so impressed with Senator Hatch's rehabilitation yesterday that I just wanted to hear more. [Laughter.]

Senator HATCH. With Senator Simpson's permission, I would be really happy to pick up with this.

The CHAIRMAN. I apologize, Senator Simpson. I am sorry. Senator Simpson.

Senator SIMPSON. Mr. Chairman, you have often left the Senator from Ohio and I to our own skirmishes, which we certainly enjoy.

The CHAIRMAN. You will understand if both Senator Thurmond and I just reflexively push our chairs back. If you will notice Senator Thurmond has already started back. I am heading back, too, so you can see one another. [Laughter.]

Senator SIMPSON. I want to get a little eye contact with Howard. Get out of the way, Ted.

Well, let me say that you see one of the great pleasures of being on this committee. It is a splendid committee, and we have a splendid chairman. And the members I think have a comity and a nature of dealing with each other which is something I think that no nonlawyer could understand. It is a little tough for my friend from Iowa; sometimes he will say, "What are you guys up to?" But it is part of the practice of law. You whack around on somebody all day long, and then you go off and have dinner together or visit with each other, and that is the best way to legislate.

I have the highest regard for every single member of this committee, and my spirited friend from Ohio and I had one one time where we were both just standing going toe to toe. I think it was

during the Rehnquist hearings. And let me tell you, our neck muscles were bulging in the hall. And Howard said, "Well, smart alec, here they come, here come the media. They have seen what we are up to." And we both said, "Yes, but by the time they get here, we will be smiling and clapping each other on the back." And by the time they made it there, we were chuckling and doing our chicken dance, whatever it is we do. Anyway, it is interesting work.

I want to welcome the family here: The son and the mother and the daughter, Jamal and Ginnie, who I think I knew before she knew you, with the Department of Labor when I was working on immigration issues. Very splendid lady.

I go back to the words of probably our most respected colleague, Jack Danforth. He mentioned that you had a great propensity for laughter and good humor. You display that. I have a propensity to sometimes cross the line between good humor and smart alec. And when I do, I certainly pay for it dearly, and should.

My dear mother taught me that humor was the irreplaceable solvent against the abrasive elements of life, and that remarkable lady, in her ninth decade, will be critiquing whatever I say. And I must be very diligent and clear in saying it.

I think you can already see the hazards of speaking out. Your collected speeches—I heard Dr. Hatch yesterday. The reason the chairman refers to him as "Dr. Hatch," he is the great rehabilitator. He can take broken bodies and stretch them back into proper shape after Kennedy or Howard or whoever have raveled them unyielding. And so that was just a slip there.

But what has happened is you took the collected ramblings of all of us, and we were sitting there, and they said Senator Biden or Senator Metzenbaum or Senator Kennedy or Senator Simpson, do you remember a speech you gave to some institute in Detroit on the night of October 1, 1981? You probably scribbled it on the back of a matchbook. Then you did it, and you either got carried away with the crowd or you didn't, or you took them or you didn't. And to think that you can go back in life and try to put those things together as something that has to do with now is a very difficult thing for me to believe in life. But I am one who believes that if they were putting together the life of Al Simpson at the age of 60, at which I arrived September 2, and the Al Simpson of 17 or 35 or 40 or 45, no one can pass that test. There may be a lot of people here that say they can pass that test, but nobody—nobody—can pass that test.

So you see the hazards of this, and I think it is very important that we heed the warning—I read it as a warning—of Jack Danforth not to pay one bit of attention to snippets and pieces and bits and shards and jagged edges, or whatever you have said in the past, unless you have a little stack of it right there. And every time somebody pulls one out, you just say, "I ask that the entirety of that speech go into the record." We will make that an automatic. I think that is a very important thing because there isn't anything that I have read—and I have read a great deal—and knowing others on this panel, Senator Leahy or Senator Specter, and I know how they burrow in stuff and read extensively everything you probably have done. I think it is critically important that it all be presented. Because, indeed, in looking at the questions that have been

presented and then looking at the speeches, it just doesn't fit, unless, of course, you are just taking the one phrase.

Well, I must comment on the so-called confirmation conversion. That seems to be a bit of a topic of the day. I mentioned in my opening statement that certain special interest groups would go after you in a rich and vigorous way. That is not exactly what I said, but it could be rancorous and it could be contentious. And I said that, and that now is, you know, coming to pass.

And after you explained to us yesterday, I thought rather clearly, on this issue of natural law that you had used it as a basis for political theory but not as a basis for constitutional adjudication. That was your statement. And this issue of natural law, it would be really interesting to know what that is. But since you don't know what it is, it is kind of tough to talk about it I would think.

These are the reasons why I struggled in law school. Little sessions like that used to just leave me huddled in the corner as to what it was that was trying to be developed, losing track of how do you assist a person in extremity, what is a lawyer supposed to do, what is your duty to society, and real life things that have to do with a lawyer-client relationship.

But, anyway, one of the leading spokesmen, or at least one of the continually most vocal spokesmen for some civil rights groups have accused you of a confirmation conversion. Let me read the quotation in one of today's journals. It says, "The Executive Director of the Leadership Conference on Civil Rights said that Judge Thomas was running from his record"—"He seemed to be sprinting from his record," not running from his record. "He seemed to be sprinting from his record." That was the earlier confirmation conversion we have witnessed.

I think that is a bit of an overreaction, but I think that is but a portrayal of a sound bite syndrome that suddenly overcomes some people in that line of work. And I think it is an inaccurate accusation, and I think it is untrue. And I use that word without being light about it. Untrue. An act of desperation, if you will, and that is used often by that group.

Here is their publication of July 17, 1991, of this Leadership Conference on Civil Rights. By the way, the record should disclose that more than several of their membership organizations dropped out of the fight here with you and decided not to join them in denouncing you. That is clearly of record.

Then in July, they didn't know what to do with you. You got them. They are very frustrated about you. And they said that if they decided to oppose you—and, believe me, from my experience with them, I know that they were ready to oppose you on July 17, 1991—but if they decide to oppose you, it will come only after the most serious consideration.

In that same document, they go on to say about what is at stake for them. So far they say, "The right wing of the Court, led by Chief Justice William Rehnquist and Justice Antonin Scalia, have had to compromise on many occasions in order to get their 5–4 and 6–3 majorities. If Justices Rehnquist"—and I emphasize this—"and Scalia get one more like-minded Justice, they will have without question the votes to overturn directly Supreme Court decisions.

Overnight, constitutional and statutory rights Americans have had for decades could vanish."

Now, that is half hysterical stuff there. You only get one vote, as far as I am aware. But here is the part that deserves, I think, the attention of fair-thinking people. Here is what you said to this chairman on February 6, 1990. Everybody had a good look at this. They scoured your record with a brush, a wire brush.

So you said to this chairman and this committee on February 6, when you were nominated to the circuit court, with regard to the issue of natural law—and everybody knows this. Let us try to stay at least basic, in fairness. You said:

> But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents.

Now, that is what you said. You made that quite plain 17 months ago, the exact distinction that you were making yesterday. I might ask you, then, to set the record straight: Is it accurate to say that on the day of September 10, 1991, was that the day on which Clarence Thomas changed his views or had a conversion or sprinted from his previous record on natural law? Or were those the views you explained so well and ones that you have held for some period of time?

Judge THOMAS. Senator, I have been consistent on this issue of natural law. As I indicated, my interest in the area resulted from an interest in finding a common theme and finding a theme that could rekindle and strengthen enforcement of civil rights, and ask the basic or answer a basic question of how do you get rid of slavery, how do you end it.

Our Founders, the drafters of the 13th, 14th amendments, abolitionists, believed in natural law, but they reduced it to positive law. The positive law is our Constitution. And when we look at constitutional adjudication, we look to that document. We may want to know, and I think it is important at times to understand what the drafters believed they were doing as a part of our history and tradition in some of the provisions such as the liberty component of the due process clause of the 14th amendment. But we don't make an independent search or an independent reference to some notion or a notion of natural law.

That is the point that I tried to make, and there was no followup question, as I remember it, at my confirmation to the court of appeals. But that has been a consistent point. We look at natural law beliefs of the Founders as a background to our Constitution.

Senator SIMPSON. Have you seen anything come up at this hearing thus far that is really anything different, much different than what happened when we confirmed you for the circuit court, other than the fact that you have remained absolutely silent as those out there decided to distort these issues?

Judge THOMAS. Well, I think the one difference, Senator, of course is that I am a sitting Federal judge now. When I came before this committee the last time, I was a policymaker. I was

someone who had taken policy positions, and those questions and concerns were raised of me as Chairman of EEOC.

Today I am a sitting Federal judge, and I find myself in a much different posture. It is a different role. I have no occasion to make policy speeches, have no occasion to speculate about policy in our Government, or to be a part of that policy debate. And I believe at my last confirmation, much of that debate or those debates were explored in the hearings.

Today I have refrained from it, from those debates, primarily because, as I have said before, engaging in such policy debate, particularly in public, I think undermines the impartiality of a Federal judge. Taking strong positions on issues that are of some controversy in our society when there are viewpoints on both sides undermines your ability.

My Dallas Cowboys, for example, played the Redskins on Monday night, and I am totally convinced that every referee in those games is a Redskins fan. But none would admit to it.

I think that in something as simple as that, even though we have strong views about who should win, something as simple as that, we would want to feel that the referees—and judges are, to a large extent, referees—are fair and impartial, even when we don't agree with the calls.

The CHAIRMAN. Judge, are you for the Dallas Cowboys or the Redskins?

Judge THOMAS. I am a lifetime—I have been a Dallas Cowboys fan for 25 years.

The CHAIRMAN. Thank you very much. [Laughter.]

Senator SIMPSON. That didn't come off of my time, did it?

The CHAIRMAN. No. It doesn't come off your time. I am just curious.

Judge THOMAS. I am certain that that will probably have someone else express his concern about me.

Senator SIMPSON. I think that will create more concern than anything thus far. To have you in this nest of Redskin fans, to be a Dallas Cowboy fan certainly discloses a degree of independence which will serve you very well on the Court. [Laughter.]

Let me ask a couple more. My time is running down. Some have raised a litany of questions about this issue of natural law. I think some of your critics—and I do not say this about the chairman because I know the way he does his research, in a powerful, skilled way, using resources that are available to him. But it seems to me that as I read stuff about, it has been selected as an issue to try to confound people because natural law is an inherently vague concept. And then your detractors can conjecture all kinds of things about you and your philosophies without being taken to task for the obvious inaccuracies and vagueness.

Now, for example—and I love this definition—the commentator in the Legal Times—I didn't get the name, but I love the quote. He recently wrote, he or she—

Of all the perplexing questions surrounding the Supreme Court nominee, few are more nettlesome than natural law. It is sure to come up at confirmation hearings, but don't expect any clear answers, and don't blame Thomas for being unclear. Natural law philosophy and its adherents live in a world apart, a world that is dense

and combative and, above all, unclear. A journey to the world of natural law is not for the faint of heart.

That is a quote from the Legal Times. In the article, it says:

Tap into the natural law crowd, and you quickly learn that there are factions of adherents who hate each other. There are the East Coast Straussians and the West Coast Straussians, both followers of philosopher Leo Strauss but sharply in disagreement with each other. You are instructed if you talk to Walter Byrnes, a leader of the East Coast faction, you don't mention the name of Harry Jaffa, the West Coast leader, until your conversation is nearly over. And it is true. When asked about Jaffa, Byrnes said, "At one time we were close friends, but ten years ago we parted company."

Yesterday I saw a report in a national publication that had four paragraphs of Jaffa. I don't even know what he has to do with this. As far as I know, he is not going to testify. But if he does, I certainly want to be here. He has got some unique ideas and concepts I would like to ask about.

So it goes on to say, "It goes on like that"—I am quoting from the article—"propelling one on a fairly fruitless search through writings by the likes of St. Thomas Aquinas and Abraham Lincoln in hopes of discovering how Clarence Thomas would carry out natural law precepts. The simple answer, the one that frightens liberals, is that nobody knows."

And then, of course, it was interesting to me—and it was mentioned yesterday—that Laurence Tribe, who I greatly respect and who I know and feel quite certain that when the Democrats wrench the Presidency back to their bosom, he will be exhibit A right here. And I want to talk with him and visit with him and hear his views, but we won't have to look far because he has a ton of opinions that he has written. And I admire his guts. Because there aren't going to be people who are bright and energetic who are ever going to write much more again as long as this committee continues to do what we do. And there is a purpose for what we do, and I am not challenging that. And it is done with fairness.

But, in any event, you were asking about natural law solely on the basis of something that was deep in your craw, and that was slavery. Isn't that correct?

Judge THOMAS. Senator, that is correct. The issue of civil rights has been something that, of course, has affected my entire life, and which I indicated in my opening statement, but for those changes I would not be here.

My concern was how do you, from a standpoint of our political philosophy, how do you end slavery and how do you reinvigorate civil rights enforcement. How do you convince people who may be skeptical of aggressive enforcement that it is actually central to our country?

I think that those who heard me during that time understood how deeply I felt about that and continue to feel about that. And I think that anyone who grew up where I grew up, in the world that I grew up in, would be deeply impassioned about civil rights enforcement. But I was trying to engage not only the passion but the intellect, and it was an effort to help and to add to and to support and sustain that I was looking at the whole area of natural law; not as an effort to undermine or destroy individual freedoms in our society, but to actually support it and to defend it and enhance it.

Senator SIMPSON. Well, I think that that is a very good answer. Obviously I concur with it. But it seems to me that this natural law business, if I can understand it, does have a very clear foundation. And it has been used by anyone of both parties, and I have quotes of members of this committee who have used it to talk about racism in South Africa or what we have done with the disadvantaged in society. Professor Tribe has used it, the other side of it with Judge Bork. Good heavens.

But I think if you asked us what is a natural law, it has to do with things like the right of privacy—and that is a critical right, in my mind, in life, a principle shared by all of us about inalienable rights, the Declaration of Independence itself. That, I gather, is what you were referring to, that we hold these truths to be self-evident, or, rather, natural—if I may interpret it—that all men are created equal, which must have puzzled you greatly from your résumé of life that you have presented to us; that all men are endowed by the Creator with certain inalienable rights, which must have stunned you, too.

So I can hear it from that standpoint, and although I hesitate to use today's trendy jargon, I believe one would have to be terribly insensitive not to hear what you are saying and the way you are saying it and understand your explanation of your exploration of this thing called natural law in an effort to find meaning in a Constitution that apparently permitted slavery in the United States. That must have been a most torturous path to travel, one that I nor any one of us could even conjecture.

So I fear that we lawyers have become fascinated with this new vague theory of law which most of us never heard one whit about in law school. This is like the doctrine of Renvoi. I never tried a case with the doctrine of Renvoi, but it sounded good, and one guy talked about it all day. And he got an A, and I got a D. So I knew he was on the right track.

So I believe this fascination has caused us to elevate this rather peripheral matter to a central issue in the confirmation, kind of a penumbra of stuff floating around, to quote another Justice.

You have told us so clearly that you feel that natural law is not applicable to constitutional adjudication, is the word you used, or interpretation. You testified that you had not considered it in your adjudications on the circuit court and that you hadn't spoken publicly or written on it since you left the EEOC. Now, that seems to me pretty well to cover it, but I don't think it will.

So my final question for you, do you believe that that passage that I just moments ago quoted from the Declaration of Independence has meaning, perhaps the meaning I attached to it? Is the belief that all men are endowed with certain inalienable rights one that you would consider well accepted within the judicial mainstream and consistent with most Americans' values and principles?

Judge THOMAS. Senator, I think that most Americans, when they refer to the Declaration of Independence and its restatement of our inherent equality, believe that. And I believe that our revulsion when we think of policies such as apartheid flow from the acceptance of our inherent equality.

Now, we haven't always lived up to that. And, indeed, principles or concepts such as liberty were added by individuals who believed

that we were all created equal, abolitionists some of them, to the Constitution itself. But once it is in the Constitution, then our rights are set out. It is no longer an ideal. It is a constitutional right—liberty. And once it is in the Constitution, we adjudicate it, we interpret it, understanding what our Founders believed. But adjudicate it, looking at our history and our tradition, not just what their beliefs were when they drafted the document.

Senator SIMPSON. Mr. Chairman, I am going to conclude. I know I have a couple of minutes left, but I would be starting on another approach on issues that I think I would not be able to properly address. I thank you for your courtesy.

The CHAIRMAN. Thank you.

I am going to suggest that we take a 5-minute break, to accommodate the Judge. If I may, Judge, I want to put one notion to rest here.

Number 1, do not count me as one of your detractors, because I ask you tough questions. No. 2, the issue of natural law may confound the people, to use Senator Simpson's phrase, but not a single legal scholar in America. I hope you meet that criteria, or you should not be on the Supreme Court. You must have a knowledge and insight to the Constitution that is better than the average lawyer, and I am sure you do. That is why I am sure you understand what I am about to say.

Not a single legal scholar in America fails to understand the significance of whether or how one applies natural law. Judge Bork devoted a chapter in his book about how those people who want to apply natural law are bad, not bad in a moral sense, but wrong.

There is an entire school of thought with which you are fully familiar. I did not fail to accept your answers yesterday. I just want to make sure we all know what we are talking about here. You and I know, at least, what we are talking about.

There is not a single legal scholar who does not understand that there is a fervent, bright, and aggressive school of thought that wishes to see natural law further inform the Constitution than it does now. The positivists, led by Judge Bork, argue against this school.

Again, that may be lost on all the people, but you know and I know what we are talking about. Now, all I am out to do in my second round is to find out whether you, in fact, do apply natural law, and, if you do, how. You answered that partially yesterday, and yet I am still somewhat confused, so I plan to come back to it. But for the record and for all the press to know, whether someone applies natural law is of phenomenal significance, and there is not a single legal scholar in America who will disagree with this statement.

Now, someone may apply it in a way, like Moore, who leads him in a direction that is liberal. You may apply it in a way that leads you in a direction that is conservative, or you may, like many argue, not apply it at all. Nevertheless, it is a fundamental question that is going to be almost impossible for nonlawyers to grasp and exchange, but you know and I know that it is a big, big deal.

In conclusion, the only reason most of us asked you about natural law, is that is how you gained your reputation. Rightly or wrongly, when you are spoken about by other lawyers or when you

were spoken about in the press, you are spoken about in terms of your speeches on natural law.

Now, I accept for the moment that everybody misunderstood you; let me be precise, that your speeches were just philosophic musings. I accept that for the moment. But, I do not want any Senator to think that your detractors are out there searching for a theory that doesn't have significance.

I, like Senator Simpson, did not do well in law school, probably worse than Senator Simpson.

Senator SIMPSON. I did pretty well. [Laughter.]

The CHAIRMAN. I did very poorly in law school, but I have spent an awful lot of time since law school dealing with this subject. I know and you know that what a judge's view on this issue is of phenomenal consequence to the future of this country.

Again, I need to explore your view further, but if it is, as you have stated, "Senator, whenever I speak of natural law, they are philosophic musings, they in no way impact upon my view on the Court," fine, that answers the question. But please, let no one misunderstand, this question informs every other application of the law and the Constitution. It is that basic, it is that simple. I accept your assertion that it doesn't for you, I accept that. I want to go back and discuss it more. This discussion is less for you than it is for Senator Simpson and others.

Lastly, let me point out that you say a right must be in the Constitution, for example, liberty. Well, you know, liberty means different things to different people. It is in the 14th amendment.

Now, as you well know, some people interpret liberty in terms of natural law. Some people interpret it only in terms of tradition and history, and some people, when they look at history and tradition, interpret it a different way. Scalia says when you look at tradition, you've got to look at it very narrowly. Others say you look at it broadly.

So, it makes a big difference. It is going to be impossible to communicate these ideas to the people, however, at this point, my job is not to communicate to the people. My job is to make sure that we know what your basic philosophic point of view is relative to the Constitution. I am not a detractor asking you these questions. It is not meant in any way, I hope you understand, to be a detraction or distraction. It is tantamount to understanding how you approach constitutional interpretation.

We will recess for 10 minutes.

Senator SIMPSON. Mr. Chairman, may I——

The CHAIRMAN. Excuse me, the Senator wants to make a comment.

Senator SIMPSON. I have 30 seconds at least left.

The CHAIRMAN. You can have any time you want.

Senator SIMPSON. No, I don't. I would just say I think it is very important to make a distinction here between natural law as an academic exercise or discussion or a flight for law review editors and a political confirmation process. Those are two entirely different matters, and I was referring to the latter, and I would just say that to me, in my studies, your life in public is not based on a reputation bogged down in the definition of natural law. I don't know where that came from.

Thank you.

The CHAIRMAN. Well, I will point out later where it came from. I thank you very much. We are going to recess for 10 minutes. [Recess.]

The CHAIRMAN. The committee will resume now.

Judge, I did not give you a chance to say anything. Did you want to say anything after my little discussion with the Senator? I am not asking you to, but did you?

Judge THOMAS. Senator, the one point, and perhaps it is one that you probably already knew, I did not consider you a detractor of me. I think that the dialog on natural law is an important one and it is one that, of course, you indicated we would have, and I welcome the opportunity to explain to you——

The CHAIRMAN. I want to make clear, also, I did not think that you thought I was a detractor, and I am sure that Senator Simpson is not. But all kidding aside, that was really a discussion between Senator Simpson and me on whether or not this issue is of consequence.

Thank you, and let me now yield to the Senator from Arizona, Senator DeConcini.

OPENING STATEMENT OF HON. DENNIS DE CONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you very much.

Members of the committee and Judge Thomas, I regret that I was unable to be here yesterday for the opening testimony. I did read your statement and have heard a lot about it. Indeed, it was a moving statement and I compliment you for your candidness and openness.

As Cochairman of the Helsinki Commission, I had to attend or felt I had to attend the opening of the International Human Rights Conference in Moscow prior to being here today. Our delegation, traveled to the Baltic states and several other republics and had an interesting opening session in Moscow.

As I was traveling through these republics and listening to Gorbachev and others make speeches about human rights in Moscow, I couldn't help but think about the process that we are going through here today. The fundamental rights, the freedoms which Americans have enjoyed for 200 years are just now coming to pass, perhaps, in the Soviet Union. My thoughts kept returning to these hearings and the Founding Fathers, of how they struggled with this and did not do a perfect job. It took a long time before we finally did some of the things we should have done earlier on.

It is our Constitution which these small democrats were looking to for the equality of human beings, and we see how they struggled with it, and your opening statement certainly expresses how you have struggled with that, like no one on this committee could really appreciate.

It is particularly fitting that my first duty upon returning to the country is to consider the confirmation of the successor to a man who has been the champion and in the forefront of the rights of the individuals during his long and distinguished service on the Supreme Court, of course, that is Thurgood Marshall. His legacy will

surely serve as a model for the jurists in these emerging democracies and the justice system, as they seek to protect their hard-fought struggle for individual rights and their freedoms.

It is against this backdrop that I will listen to the responses to some of the questions that I will submit to you and those that have already been asked to you. I hope that I will be able to conclude, Judge Thomas, that your judicial philosophy will first and foremost be dedicated to the protection of the rights of individuals.

Mr. Chairman, I request that the full statement that I would have given yesterday be inserted in the record in the proper place, if I may.

The CHAIRMAN. It will be placed in the record in its entirety.

Senator DECONCINI. Thank you, Mr. Chairman.

[The statement of Senator DeConcini follows:]

STATEMENT OF SENATOR DENNIS DeCONCINI
NOMINATION HEARING OF CLARENCE THOMAS
AS AN ASSOCIATE SUPREME COURT JUSTICE
SEPTEMBER 10, 1991

I AM PLEASED TO JOIN MY COLLEAGUES ON THE COMMITTEE IN WELCOMING JUDGE THOMAS TO HIS CONFIRMATION HEARINGS. AT A TIME WHEN OUR CONSTITUTION IS SERVING AS THE BLUEPRINT FOR DEMOCRATIC REFORM THROUGHOUT THE WORLD, WE BEGIN, TODAY, THE PROCESS OF ONE OF THE MORE INTEGRAL COMPONENTS OF THAT GREAT CHARTER -- THE SENATE'S DUTY OF "ADVICE AND CONSENT" TO THE PRESIDENT ON JUDICIAL NOMINEES.

THE ADVICE AND CONSENT DUTY OF THE SENATE IS ONE OF THIS BODY'S MOST IMPORTANT CONSTITUTIONAL POWERS. BUT THIS PROVISION PROVIDES NO IMMUTABLE STANDARD FOR SENATORS TO LOOK TO WHEN FACED WITH THE RESPONSIBILITY OF VOTING ON A SUPREME COURT JUSTICE. I HAVE OFTEN STATED AND BELIEVE THAT THE SENATE SHOULD GIVE THE PRESIDENT'S NOMINEE THE BENEFIT OF THE DOUBT. BUT THIS IN NO WAY MEANS THAT WE SHOULD CONFIRM A NOMINEE WITHOUT THOROUGHLY EXAMINING HIS OR HER QUALIFICATIONS. AS THE SENATE DOES NOT EXPECT THE PRESIDENT TO RUBBER STAMP ITS LEGISLATION, THE PRESIDENT SHOULD NOT EXPECT CONGRESS TO RUBBER STAMP HIS NOMINEES.

A SUPREME COURT JUSTICE IS NOT A CABINET MEMBER WHOSE JOB IS TO SERVE THE PRESIDENT. IT IS NOT SUFFICIENT THAT THE PRESIDENT AGREES WITH THE VIEWS OF THE NOMINEE. THE SENATE HAS A RIGHT, INDEED A CONSTITUTIONAL OBLIGATION, TO EXAMINE A NOMINEE'S

COMPETENCE, INTEGRITY, EXPERIENCE, AND YES -- HIS OR HER JUDICIAL PHILOSOPHY. FOR THE SUPREME COURT IS UNDENIABLY A POLICYMAKER. OUR FRAMERS DRAFTED THE CONSTITUTION IN BROADLY-WORDED PRINCIPLES THAT WERE INTENDED TO PROTECT AN EVOLVING SOCIETY. CONSTITUTIONAL INTERPRETATION REQUIRES AN EXERCISE OF DISCRETIONARY JUDGMENT. THUS, WE MUST CAREFULLY CHOOSE THE CONSTITUTION'S MOST IMPORTANT INTERPRETERS.

WE HAVE HEARD FROM VARIOUS GROUPS WHO EITHER OPPOSE THE NOMINATION OF JUDGE THOMAS OR HAVE GRAVE CONCERNS IN PLACING HIM ON THE COUNTRY'S HIGHEST COURT, INCLUDING NATIONAL GROUPS REPRESENTING THE INTERESTS OF WOMEN, HISPANICS, AFRICAN-AMERICANS, AND THE ELDERLY. NO ONE DOUBTS THAT JUDGE THOMAS HAS THROUGHOUT HIS CAREER TAKEN ACTIONS OR ANNOUNCED POSITIONS THAT HAVE INVOKED CRITICISM. BUT I BELIEVE THAT JUDGE THOMAS' OPPONENTS HAVE THE BURDEN IN PERSUADING THIS SENATOR THAT JUDGE THOMAS SHOULD NOT BE CONFIRMED. GROUP POSITIONS MUST BE SUPPORTED BY MORE THAN A BOARD VOTE. THE OPPOSITION TO THIS OR ANY NOMINEE MUST SUBSTANTIATE THEIR CASE THAT THE NOMINEE IS COMMITTED TO IMPOSING HIS OR HER OWN EXTREMIST AGENDA UPON THE COURT.

THE COURT IS GOING THROUGH A TRANSITION PERIOD. IN MANY AREAS OF THE LAW I AGREE WITH THE DIRECTION THAT THE CURRENT COURT HAS MOVED. HOWEVER, THERE ARE CERTAIN AREAS IN WHICH I BELIEVE THE COURT HAS BEEN DEAD WRONG. THAT IS WHY I VOTED IN FAVOR OF THE CIVIL RIGHTS BILL LAST CONGRESS. THE EXCESSES OF THE WARREN COURT IN ONE DIRECTION SHOULD NOT BE REPLACED BY EXCESSES IN ANOTHER DIRECTION. THE COURT LOSES ITS LEGITIMACY AS

AN INSTITUTION IF ITS EDICTS ARE SOLELY DEPENDENT UPON ITS PERSONNEL.

IN JUDGE THOMAS, I HOPE TO FIND A CANDIDATE WHO RESPECTS THE COURT AS AN INSTITUTION. AS AN INDIVIDUAL, HE DESERVES PRAISE FOR HIS NUMEROUS ACCOMPLISHMENTS IN A SHORT PROFESSIONAL CAREER. I AM VERY IMPRESSED BY HIS INTELLECT AND LEGAL ACUMEN. HIS PERSONAL STORY IS ONE THAT SHOULD BE TOLD OVER AND OVER AGAIN. HE LEFT ME WITH A POSITIVE IMPRESSION AFTER HIS OFFICE VISIT EARLIER THIS SUMMER. I FOUND HIM TO BE VERY ENGAGING AND PERSONABLE. AND IMPORTANT IN THIS SENATOR'S MIND IS THE STRONG SUPPORT HE HAS FROM MY DISTINGUISHED COLLEAGUE SENATOR DANFORTH, WHO HAS ATTESTED TO JUDGE THOMAS' SKILL AND INTEGRITY.

OVER THE YEARS JUDGE THOMAS HAS WRITTEN ARTICLES, DELIVERED NUMEROUS SPEECHES, DIRECTED A FEDERAL AGENCY, TESTIFIED BEFORE CONGRESS, AND AUTHORED FEDERAL JUDICIAL OPINIONS. HE HAS A RECORD THAT WE CAN ALL EXAMINE. WE HAVE AN AMPLE BODY OF EVIDENCE ON JUDGE THOMAS'S VIEWS ON VARIOUS IMPORTANT AREAS OF THE LAWS AND HIS CRITIQUE ON SOME MOMENTOUS CONSTITUTIONAL CASES. BUT AS HE STATED AT HIS COURT OF APPEALS NOMINATION HEARING, HE HAS YET TO FORMULATE HIS OWN CONSTITUTIONAL PHILOSOPHY.

AFTER THESE HEARINGS CONCLUDE, THE SENATE AND THE AMERICAN PUBLIC SHOULD HAVE A VISION OF CLARENCE THOMAS' CONSTITUTIONAL PHILOSOPHY. I HOPE TO FIND A JURIST WHO IS RESPECTFUL OF PRECEDENT RATHER THAN A JURIST WHO IS ON A MISSION TO IMPOSE HIS PERSONAL BELIEFS OR HIDDEN AGENDA ON THE COUNTRY THROUGH BROAD SWEEPING OPINIONS. IN RESPONSE TO THE JUDICIARY COMMITTEE'S QUESTIONNAIRE, A RECENT SUPREME COURT NOMINEE CHARACTERIZED

JUDICIAL RESTRAINT AS A JUDGE HONORING "THE DISTINCTION BETWEEN PERSONAL AND JUDICIALLY COGNIZABLE VALUES." I NEED TO BE CONFIDENT THAT JUDGE THOMAS CAN FULFILL THIS DEFINITION OF JUDICIAL RESTRAINT.

NO ONE IN THIS BODY WILL EVER BE SATISFIED WITH EVERY RESPONSE OF A NOMINEE; THAT IS IMPOSSIBLE. I KNOW AND EXPECT THAT JUDGE THOMAS AND I WILL DISAGREE ON PARTICULAR ISSUES. WHAT IS IMPORTANT IS THAT AT THE END OF THE DAY, WHEN ALL IS SAID AND DONE, EACH SENATOR MUST ANSWER ONE QUESTION BEFORE VOTING -- DO YOU FEEL SECURE ENTRUSTING THIS NOMINEE WITH THE TREMENDOUS RESPONSIBILITY OF PROTECTING THE RIGHTS -- WHETHER ENUMERATED OR UNENUMERATED -- IN OUR CONSTITUTION?

ONE FINAL NOTE -- AS OCCURRED WITH HIS NOMINATION TO BE A JUDGE ON THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, QUESTIONS HAVE ARISEN, ONCE AGAIN, CONCERNING JUDGE THOMAS' COMMITMENT TO THE LAW. THE CONCERN STEMS FROM JUDGE THOMAS' CONTROVERSIAL TENURE AS CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS WELL AS RECENT REVELATIONS REGARDING HIS ACTIONS AT THE OFFICE OF CIVIL RIGHTS IN THE DEPARTMENT OF EDUCATION.

I HOPE TO EXPLORE THROUGH THESE HEARINGS WHETHER JUDGE THOMAS WAS ACTING WITHIN HIS ADMINISTRATIVE CAPACITY IN CARRYING OUT THE POLICY OF THE ADMINISTRATION OR WHETHER HE WAS UNWILLING TO ENFORCE LAWS THAT CONFLICTED WITH HIS PERSONAL VIEWS.

IN CLOSING, I JOIN MY COLLEAGUES IN EXTENDING A WARM WELCOME TO YOU, JUDGE THOMAS. I LOOK FORWARD TO THE QUESTIONING AND WITNESSES. AND I LOOK FORWARD TO LEARNING MORE ABOUT YOUR

JUDICIAL PHILOSOPHY AND YOUR THOUGHTS ON THE GREAT CONSTITUTIONAL ISSUES OF OUR DAY.

Senator DECONCINI. Judge Thomas, I would like to pursue the equal protection clause, the 14th amendment and how it relates to discrimination. As you so well know, but for purposes of clarity, the 14h amendment prohibits a State from depriving a person of life, liberty, or property, without due process of law or equal protection of those laws.

The equal protection clause provides the primary constitutional protection against laws that discriminate on the basis of gender. And as we also know from previous hearings, there are three tests. There is the rational relationship test, which is the most lenient of those tests, there is the intermediate scrutiny test or a heightened test, which has been used in gender cases, and then there is the scrutiny test, which has been used in race and national origin.

Judge Thomas, there has been much discussion already regarding reliance on natural law. Unfortunately, or maybe fortunately, depending on how you define it, natural law has been invoked historically, and goes back a long time.

For example, in 1873, in the *Bradwell* v. *Illinois* case, the Supreme Court denied a woman a license to practice law, arguing the following:

> Civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. The natural and proper delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life. The paramount destiny and mission of women is to fulfill the noble and benign office of wife and mother. This is the law of the Creator.

Now, I know you went on with Senator Kennedy at some length about your position on natural law, which I did review this morning, and I welcome some clarification that you can give. But with the *Bradwell* case, we see that those Justices applied natural law.

I know that you stated that your duty would be to uphold the Constitution and not a natural law philosophy, but I would like to just clarify for the record, do you disagree with the Justices' decisions that were held back in 1873 in the *Bradwell* case?

Judge THOMAS. Senator, I do.

Senator DECONCINI. Thank you. That is really all I want to know. I want to be very clear, based on your statements to Senator Kennedy, that you do not have any lingering thoughts that stare decisis, when dating back to a clear case where natural law was used, poses any problems to you.

Judge THOMAS. No.

Senator DECONCINI. Thank you.

Judge Thomas, when you were nominated to the court of appeals, because of time constraints and other things that prohibited me from coming to those hearings at any length and waiting my turn to ask you questions, I submitted written questions requesting your comments on the court's approach to the equal protection clause. We also discussed this before these hearings when you were in to see me, where I told you I would address some questions to you and offer some thoughts on it.

In response to my written questions, your partial response was, "Though I do not have a fully developed constitutional philosophy, I have no personal reservations about applying the three standards as an appellate court judge in cases which might come before me."

Now that you have been on the court for 18 months and may soon be making decisions on important equal protection cases on the highest court of the land, let me ask you if you have developed a constitutional philosophy regarding the Court's three-tier approach to the equal protection cases.

Judge THOMAS. Senator, I have no reason and had no reason to question or to disagree with the three-tier approach. Of course, the rational basis test being the least structured or least strict of the tests, the heightened scrutiny test, which has been used in the area of gender and alienage and legitimacy, and the strict scrutiny test, which has been used in the area of fundamental rights and race, Senator, I think that those tests attempt in our society to demonstrate the concern that we have for classifications that could infringe on fundamental rights, and I believe that underlying, when we move away just from the legalese—and I do accept this structure of the three-tier test—when we move away from it, at bottom what we are talking about is are we going to allow people to be treated in arbitrary ways, either because of their gender or because of their race, are we going to defer to classifications based on gender or race, and what the Court is attempting to do in an important way is to say no, we are going to look at those classifications.

Senator DECONCINI. Thank you, Judge Thomas. That is helpful, and I guess it goes without saying, but I am going to say it anyway, you have no agenda or hidden belief or anything else regarding the present position that the Supreme Court has taken with these three tiers on equal protection as they relate to gender or any other minority or class that it may be applied to.

Judge THOMAS. Senator, I think it is important for judges not to have agendas or to have strong ideology or ideological views. That is baggage, I think, that you take to the Court or you take as a judge.

It is important for us, and I believe one of the Justices, whose name I cannot recall right now, spoke about having to strip down, like a runner, to eliminate agendas, to eliminate ideologies, and when one becomes a judge, it is an amazing process, because that is precisely what you start doing. You start putting the speeches away, you start putting the policy statements away. You begin to decline forming opinions in important areas that could come before your court, because you want to be stripped down like a runner. So, I have no agenda, Senator.

Senator DECONCINI. Thank you, Judge Thomas.

Is it fair to say that your philosophical approach, not going to any specific case, is that you would agree with this statement: If the Court were to abandon the heightened scrutiny test as it is applied to sex discrimination, gender cases, et cetera, that it would be turning the clock back on equal protection rights of women?

Judge THOMAS. Senator, I think that would be an appropriate statement, if you said either abandon or ratchet down.

Senator DECONCINI. Thank you very much. Because it concerns me a great deal, if the Court moves in that direction, without touching the issue of abortion or what have you. Having studied it and having posed these questions to a number of nominees here, I really feel the Court has, to the best it can, with the variance of

people that are on there, come to some relatively good conclusions. And though the intermediate scrutiny or heightened scrutiny may not be enough to satisfy the inequities in women's position in jobs and pay and what have you today, at least I am satisfied that it gives a court an opportunity, as the cases come before it, to continue to improve the inequities that I believe women still suffer in our society, and I am pleased with your responses.

They are similar to those responses that Judge Souter gave, and maybe you listened to his testimony, but I am very thankful for your candid approach, and also your comments about an agenda, because I agree with you, Judge Thomas, there is no place on the Court for someone who has an agenda. We all have ideas and we have to express them. We are all raised in a certain way and we all have certain convictions that we have to express and follow through, once we are in a position of making a decision. But indeed, I take that as a very serious statement on your part.

Justice Marshall had his own distinct approach to equal protection claims, as you may recall. Marshall believed that the Court does not apply a three-tier approach to equal protection claims, but, rather, a "spectrum of standing" review. Thus, the more important the constitutional and societal right given to an interest, the greater the scrutiny should be applied.

Do you have any feelings about this distinction that Justice Marshall makes regarding the three-tier system that you clearly said that you support and the spectrum of standing in total society?

Judge THOMAS. Senator, I have not examined Justice Marshall's approach in any detail and not had occasion to employ it in any of my analysis. But I think that what he is attempting to do is precisely what you are attempting to do with the three-tier analysis, and that is to adjust the scrutiny and to make it more exacting, the more significant and more important the right we are protecting. Maybe it would accomplish the same ends or be pretty close to the three-tier analysis, but it seems as though the objective is the same. But I have not had occasion to use——

Senator DECONCINI. Is it fair to say from your comments, then, that if you came across a case regarding sex discrimination—it could fall into the strict scrutiny, if it was such a blatant case that was not unisex toilets or something that is always used in the area of the intermediate scrutiny to show the difference in applying a strict scrutiny, in an effort to all sex cases? Is that a fair statement or can you comment on it?

Judge THOMAS. Senator, I think that discrimination is, as I have said, a cancer on our society. There could be instances where one would want to apply a more exacting standard even than the current heightened scrutiny test. I would be concerned if we were to see a movement down toward the rational basis test. But I think that discrimination and classifications based on race or sex are so damaging to our society, and to individuals in particular, that one could consider and be open to ratcheting up or applying a more exacting standard.

Senator DECONCINI. Thank you, Judge Thomas.

I know yesterday with Senator Kennedy you discussed the 1987 Atlantic Monthly article by Juan Williams—"A Question of Fairness" I believe it is called—which was based on the extensive inter-

view with you. In that article, Williams writes that you stated, among other things, "Blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks chose not to study chemical engineering and that women chose to have babies instead of going to medical school."

You also discussed with Senator Kennedy your support of the writings of Thomas Sowell. In an article you wrote for the Lincoln Review in 1988 titled "Thomas Sowell and the Heritage of Lincoln," you praised Sowell's analysis of working women. And Sowell contended in a 1984 book that inequities in pay and career advancement stem from women's own behavior and preferences, claiming that women choose jobs and careers with lower pay and greater flexibility to accommodate their roles as wives and mothers. And I agree with you that Mr. Sowell certainly has a right to express his views.

But my question to you is: Do you agree with his conclusions on this particular statement and issues?

Judge THOMAS. Senator, I think as I alluded to yesterday, to say that women brought discrimination on themselves or lower pay on themselves is going too far. The point that I attempted to make yesterday with Senator Kennedy was that you have to begin to disaggregate the numbers. You have to look more at the particular categories. You can't just have the average and say this is the problem. If you are going to address the problems, you have to engage in a process of disaggregation.

There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who employed a significant number of women, I did not find that to be true and made that very clear.

Senator DECONCINI. Sowell also explained pay inequities between the genders by claiming that "Women are typically not educated as often in such highly paid fields of mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumberjacking, coal mining and the like."

What are your thoughts about that conclusion?

Judge THOMAS. Well, I can't say whether or not women are attracted or not attracted to those areas. I think that is a normative comment there. But I do think his point that there are not women in some of the higher paying professions begs the question.

Senator DECONCINI. I do, too.

Judge THOMAS. There are reasons why, and some of those reasons could involve discrimination.

Again, my point in saying that his arguments could be an anecdote to the debate is because he attempts to disaggregate and to not simply say all of the reasons are simply discrimination. There could be other reasons. It is not to say that I adopted, as I said yesterday, I believe, to Senator Kennedy, all of his conclusions and his assertions. I simply don't and did not at that time.

Senator DECONCINI. Thank you, Judge Thomas.

Judge Thomas, I want to go into some areas that deal with Hispanic concerns. As a former Chairman of the Equal Employment Opportunity Commission, you weren't responsible for, but I am sure or I hope you are familiar with the 1983 charge study—enti-

tled "Analysis of the EEOC Service by Hispanics in the United States," which was conducted by the EEOC-appointed task force. That task force concluded that the needs of Hispanics were not being adequately addressed by the EEOC.

At the time, the task force indicated a need to improve EEOC's record of investigations of Hispanic charges and to increase outreach and education efforts within the Hispanic community.

Now, as the Commissioner, what programs did you initiate to improve the accessibility of the EEOC within the Hispanic community?

Judge THOMAS. Senator, when I arrived at EEOC, one of the first concerns among many—believe me, there were many—with which I was met was that EEOC was underserving the Hispanic community; for example, in Los Angeles and certainly in your home State.

There were a number of hearings, some of which I participated in, across the country in various major cities discussing the problem and what the probable or possible responses could be. A number of the, I think, concerns were that the national origin charges were low. The problem there, of course, is that not all of the charges which we received from Hispanic employees or Hispanic-Americans are national origin charges. They go across the line. They can involve age; they can involve gender discrimination also.

A number of the things that we did included opening offices in predominantly Hispanic communities, satellite offices. That was a part of our expanded presence program. I made sure that we developed public service announcements that were bilingual. I installed a 1-800 number at EEOC so that the agency could be accessible. We developed posters that were bilingual. We took all of our documents, our brochures, and translated them into Spanish.

The effort was to make sure that we reached out, that we included, and also in areas where we had—there was a significant Hispanic population, we made every effort to see to it that the top managers and the investigators spoke Spanish. Again, the effort, the overall effort was to reach out, and that was consistent with the recommendations.

I might also add that during the major part of my tenure, two of our five commissioners were also Hispanic. So there was considerable interest on my part, on their part, and, indeed, the Commission's part, in being of greater service to Hispanic-Americans.

Senator DECONCINI. How many offices did you open in the Hispanic community.

Judge THOMAS. We opened—that is a good point. I can't remember the satellite offices, the exact number. I know we opened one in east L.A., and we upgraded the office in San Antonio, TX, from a smaller area office to a full-scale district office to better serve that area.

Senator DECONCINI. Did any of these programs include plans to recruit more Hispanics for the agency itself?

Judge THOMAS. We attempted to do that in coordination with various individuals, but that is a more difficult proposition, and also to promote internally and to make sure that we had Hispanics promoted to jobs.

But that can be frustrating. My efforts sometimes were met with individuals after you position them for the senior position, they

find other alternatives and leave the agency, or other difficult personnel actions.

Senator DECONCINI. Judge, an interim result of a study conducted by the National Council of La Raza indicates that since the 1983 task force study, the situation at EEOC with regard to Hispanics has not improved. While the Hispanic population in the United States has grown in the last decade from 6 percent of the total U.S. population in 1980 to over 9 percent of the total population today, the percentage of the EEOC total charge caseloads filed by Hispanics was only 4.15 percent.

Given your efforts to improve the EEOC record with regard to Hispanics since 1983, how do you account for the disproportionate small number of charges filed by Hispanics?

Judge THOMAS. Again, Senator, I have and had the very same concern that we were underserving—or that EEOC during my tenure and when I arrived there was underserving the Hispanic community. I don't know how the numbers were arrived at. To my knowledge, the agency does not keep data in areas that do not involve national origin charges by national origin. So I don't know, for example, whether we are looking at numbers reflecting only the national origin charges as opposed to other areas.

I can say this: That we made every effort during my tenure to change the Commission's accessibility to Hispanic-Americans, to individuals across this country. That was the purpose for our expanded presence program, for our satellite offices, for our educational programs, all of which were started during my tenure. Our outreach efforts were all designed so that we are not sitting in our offices waiting for people to come in, but we actually go to them.

Sometimes it is frustrating because they don't all work, but it certainly was not because of a lack of trying.

Senator DECONCINI. Well, I'm certain it must be frustrating. Judge, another area of concern is the disposition of charges filed by Hispanics. According to the National Council of La Raza report, the percentage of cases which were administratively closed without remedy to the charging party has increased from 45 percent in 1985 to 72 percent in 1990. I realize a little bit of that time you weren't there. But does this figure reflect a weakness in the EEOC effort to pursue complaints filed by Hispanics, or does it suggest that the incidence of discrimination against Hispanics is lower than other protected groups?

Judge THOMAS. Senator, again, I don't have that data, and this is the first I have heard of those numbers. I would not think, particularly with the office heads and the employees who would certainly be interested in the communities in which they investigate those charges, that it is a weakening in EEOC's efforts.

Again, I don't have the data. It certainly does not reflect—not to my way of thinking—a reduction or decline in discrimination.

Senator DECONCINI. Is it your position that you were taking and following the recommendations of the 1983 task force?

Judge THOMAS. We did everything in our power during my tenure to reach out.

Senator DECONCINI. Well, did you, really, Judge? Did you go and meet with the Council of La Raza, the GI Forum, or any of the other national or local Hispanic groups, to see what they would

suggest you do, or to ask for their counsel and suggestions and advice?

Judge THOMAS. Senator, I can't name, again, sitting here, all of the groups that I have met with, but one of our Commissioners in particular was very, very active, and he and I spent a great deal of time together, because he would go, and he would report back on what the perceptions of the problems were and approaches that we could take. Again, he and I were there the entirety of my tenure, with the exception of a few months. And a second Commissioner who was also Hispanic, he and I worked very closely together to begin to address some of these problems. And I am sure both of them were very active and very involved, and I think they would both tell you that I always——

Senator DECONCINI. Judge, I appreciate that, but it doesn't answer my question. What did you do? Did you go out and seek to sit down with some of these national Hispanic groups regarding the problem, or was it kind of your attitude that, look, I've got two Hispanics here; I'll let them take care of that; I am going to take care of other areas that I think are of primary concern to me?

I get a feeling that you did not pay attention yourself to Hispanics—and that doesn't mean I am going to vote against you or for you because of that single issue, because I don't make any decisions that way, but I get a feeling that while you were there that that was not high on your priority list, that you left it to the two Hispanic Commissioners, and you did something else, but yet you were the Chairman.

Judge THOMAS. Senator, I can assure you that I traveled over this country to meet with various groups. I can't tell you precisely right now which groups I met with. I know I met with any number of Hispanic groups in my efforts to change the way that the agency was responding.

I believe that discrimination in this country—whether it is race, gender, national origin, religion, age—that all of it is wrong, and——

Senator DECONCINI. I don't question that, Judge, I don't question that.

Judge THOMAS [continuing]. And what I attempted to do was to equalize treatment at the agency of all the areas. I was outside of the agency to visit with these organizations. I can't tell you which ones. I certainly tried to work with a number of the organizations. Some, I had better relationships with during my tenure than others.

Senator DECONCINI. Well, maybe you could help us—and I don't know if you have time, or somebody could help you to go back over your calendar. I'd like to know whom you did meet with in the Hispanic area. The feeling I have is that you really were not paying attention to Hispanics—maybe not because you didn't like them—I'm sure that isn't the case—maybe it is because you were so busy dealing with women's issues and black discrimination, I don't know. But I get that feeling, and from the opposition that has come forward from the Hispanic community, you certainly didn't leave them with any great impression that you were interested in their problems, Judge.

Judge THOMAS. Well, Senator, I was, and I tried to resolve the problems. As all of us know, when you run an agency as spread out as EEOC, and with the difficult mission that we had, you have your frustrations, and I certainly had my share, but I can assure you that I tried to reach out to all the groups.

Senator DECONCINI. My time is up, Judge. I will come back to this and a couple of other areas later. Thank you, Judge Thomas.

The CHAIRMAN. Thank you very much.

Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I would like to make sure that a letter sent to you and Senator Thurmond from former Attorney General Benjamin Civiletti is introduced in the record, and I would like to note as a statement in that record besides the fact that Mr. Civiletti served the Carter administration, he has testified in support or has asked to testify in support of Judge Thomas, and these are some words he used, "finding his tenacity and strength of character to be positive attributes for the work of the Court." So, I would like to submit that for the record.

The CHAIRMAN. Without objection, and I can assure the Senator that General Civiletti has been invited to testify and we look forward to hearing his testimony.

[The letter referred to follows:]

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September 9, 1991

Honorable Joseph R. Biden, Jr., Chairman
United States Senate
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Re: Clarence Thomas Nomination

Dear Mr. Chairman:

I write in support of the nomination of Clarence Thomas to the Supreme Court and to respectfully request that if time and the calendar permit that I be invited to be a a witness before the Judiciary Committee on this matter.

I support this nomination for many reasons but first because Judge Thomas is qualified by education, training and capacity to be a Supreme Court Justice. Further, I believe that diversity of experience, age, geography, and background is desirable on the Supreme Court, and Judge Thomas' age, background, and upbringing differ from other members of the Court. I also admire greatly Judge Thomas' tenacity and strength of character in the successful pursuit of his legal and public service career, positive attributes for the work of the Court.

On a personal note, one of my partners, for whom I have the greatest respect, was a classmate of Judge Thomas in law school and has kept in touch with him since then, and this partner endorses Judge Thomas without reservation as an outstanding choice for the Supreme Court.

Sincerely,

Benjamin R. Civiletti

BRC:jb
cc: Honorable Strom Thurmond

42-25/BLULIT

Senator GRASSLEY. Judge Thomas, again I want to welcome you, and particularly welcome you and your family, and I admired how patient they have been sitting through all of this. They are to be complimented, and particularly complimented for their support of you during this time of trial, although you tend to be handling the trial very well.

I do not know what your son's career is going to be, but I am sure it is not going to be in law, after he observes what you go through. [Laughter.]

Much of the discussion has focused on natural law, and while I have listened intently to this and have some questions in that area, I would like to pursue what I believe is a related subject, judicial restraint. An understanding of your view on the role of the courts in our democracy will, I really think, give us a better understanding of where natural law fits into your judicial philosophy.

The Founding Fathers, as Alexander Hamilton wrote in the Federalist Paper 78, intended the judiciary to be, in their words, the least dangerous branch of government. Now, in your writings and speeches, you have cited Hamilton's framework for Federal power, power based on the sword, the purse, and the power of reason. Hamilton said the President would hold the power of the sword, the Congress the power of the purse.

The judiciary, having neither power of the purse nor sword, would derive its power and influence from its ability to provide reasoned and persuasive decisions, establishing sound legitimate reasons for every dispute that it decided.

I understand this to mean that judges would have to be fair, unbiased, openminded, devoted to addressing the facts and the law before them, without freedom to apply their own values in reaching a decision. I would like to refer to what Judge Harlan Fiske Stone expressed well, when he wrote—and then this will bring me to a question for you—and this is Justice Stone, "While the unconstitutional exercise of power by the Executive and Legislative Branches of government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint."

Yesterday, you told Senator Hatch that there was no room to apply personal philosophies in one's effort to adjudicate cases. In my first question, I hope that you will reaffirm what you said along this line in your confirmation hearings for the Court of Appeals of the D.C. Circuit. You said, "The ultimate goal should always be to apply the will of Congress, the will of the legislature, I don't think it is ever appropriate for a judge to replace the intent of the legislature with his or her own intent." Is that something you can reaffirm today, after being on the circuit court of appeals?

Judge THOMAS. Senator, when I spoke those words in my confirmation hearing for the court of appeals, of course, I had not been a judge. But now I can reaffirm those words with the experience of having had to be a judge and having had to judge in some difficult cases.

I do not believe that there is room in opinions in our work of judging for the personal predilections, the personal opinions and views of judges. I think in statutory construction, the ultimate goal for us is to determine the will of the legislature, the intent of the

legislature, not what we would have replaced the legislative enactment with, if we were in the legislature, and we have no role in legislating.

Senator GRASSLEY. To continue along the same line, it seems to me your notion of the role of courts is very similar to that of Justice Anthony Kennedy. He cautioned that judges are not to make laws, they are to enforce the laws. He said the courts could not be "the aristocracy of the robe," that is to say black robes of a judge give the individual no special mandate to declare the law. How close would you be to the statement made by Judge Kennedy?

Judge THOMAS. I think, Senator, that we all who have been judges are pretty close to the same statement. We recognize that when we sit to judge cases, one, that we have to be open and we have to think and we recognize our fallibility, as I said yesterday, but we also have to recognize—and this is something that I do before I sit down in each case, and in each of the cases that I sat on on the court of appeals, I ask myself a very simple question, what is the role of a judge in this case. I think that is an important question. It is not so much to determine that we are going to in any way constrain the development of individual rights. Indeed, I am for the robust development of those rights. But, rather, it is a question to restrain judges and to restrain me, so that I have a confined and defined role.

Senator GRASSLEY. I like those responses, but let me now refer to a speech you gave that maybe on my reading of it bothers me, and maybe on your explanation of it, you can clear it up. But I would like to contrast what you said and also what you said in the earlier confirmation hearing for the D.C. Circuit Court of Appeals with a speech at Wake Forest University in 1988, and I do have a copy of the speech, if you want me to give it to you.

There you said, "Once a law passes, the action shifts to the problem of administration, it is up to the courts and the bureaucracy to fill in generalities and sometimes resolve the contradictions of the law."

Now, the reason this concerns me is because it is vaguely like something Justice Souter said in response to some of my questions last year, that the courts—and these are his words—"fill vacuums left by Congress." That statement, of course, troubled me a year ago. He later somewhat qualified it in responses to additional questions the following day.

I guess my question is very basic. How much filling in are you going to do, as a Supreme Court Justice? I hope you can clarify something here. Do you think there is a role for the courts to be activist this way in the terms of filling vacuums or, as you said, filling in the generalities and resolving contradictions of the law?

Maybe, you know, in a wider area, I would want you to explain when is judicial activism legitimate.

Judge THOMAS. I do not think that it is legitimate, Senator, and perhaps let me respond to your specific question.

Senator GRASSLEY. Surely.

Judge THOMAS. The point that I was making there, and it is one that was an important point, is that when an agency, an administrative agency receives a statute, it is called upon to implement that statute, to develop regulations, perhaps internal rulings or

procedures, but it is always called upon to do that consistent with the intent of this body. The statute on its face may be general, it may be ambiguous. The agency has to go through a process, however, of determining in a reasonable way what your intent was.

I think a court does the same thing, that when there is ambiguity in the statute, the court simply goes back to your legislative history and attempts to discern what was Congress' intent. To the extent that we are talking about filling in in that instance, I think it is simply a process of statutory interpretation and development of rulemaking within the agency or the administrative bodies in the executive branch.

Senator GRASSLEY. Judge Scalia testified here, and has practiced it as a Justice, that in looking at history, he is not going to look to the committee reports, he is not going to look to congressional debate, he is going to look at the statute and just determine congressional intent from the language of the statute. Is that where you are going to get congressional intent?

Judge THOMAS. Senator, I don't know how you can resolve ambiguities in statutes, and when we do have ambiguities in statutes, then we look to legislative history, we look to the debates on the floor, of course, we look to committee reports, conference reports, we look to indications, the best indications of what your intent was.

Of course, some legislative history is perhaps more accurate or better than others, but the point is our effort is always to look for your intent, to discern your intent. I don't know how one can go about that process, the process of interpreting ambiguous statutes, without looking to legislative history.

Senator GRASSLEY. Let me go to maybe, along the same line, but to some specific cases you have been involved in, because the docket of the court you now sit on is filled with regulatory cases, and in this position I think a judge could be tempted, with such a big caseload, to direct and manage bureaucracy and, of course, thereby substituting his or her own judgment for that of a more politically accountable administrative agency.

In fact, one of your colleague, Judge Mikva, has written that the court should be on the lookout for—and this is as he termed it—a sudden and profound change in agency policies, as such changes constitute, in his words, danger signals and give license for court intervention in agency action, in his view.

Considering this, I was struck by your opinion in *Citizens* v. *Busey*, and that is the Toledo Airport expansion case. Your opinion expresses some important elements of judicial restraint. You found that the FAA, in reviewing the expansion plans, carried out its lawful authority. The plaintiffs wanted more review of the environmental issues. What did you base your decision on—your opinion, I should say?

Judge THOMAS. First of all, let me say, Senator, that Chief Judge Mikva and I and our other colleagues worked together very well and have very vigorous debate internally on these important issues, and I enjoy sitting with him as a colleague.

In this case, the initial question was this: In determining whether or not or where Burlington-Northern was to place its hub, who makes that initial decision or who determines the objective or the goal of the project. And if the objective or the goal of the project is

determined in a broad way, that is, Burlington-Northern is entitled, the goal is a hub, then the alternative to be explored can be very significant, they can be countless, a hub where in the United States, or is a determination of the goal or objective to be made by the city of Toledo and Burlington, that is, Burlington wants a hub in Toledo, then the question becomes that the alternative is between that specific hub and no project at all.

What we, in essence, found was that the decision should have rested, the goal, the objective of the project rested with the individuals who were applying for the FAA permission to build the hub, rather than this broad expanse of possibilities.

Senator GRASSLEY. Let me quote briefly from that opinion of yours, and I guess not that you need to react, but I want to know if this is good basis for me to judge your opinion of judicial restraint:

> Federal judges enforce the statute—

In this case, it was the National Environmental Policy Act—

> by insuring that agencies comply with NEPA's procedures, and not by trying to coax agency decision-makers to reach certain results. We are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport. We are required, instead, only to confirm that the FAA has fulfilled its statutory obligation. Congress wanted the agencies, not the courts, to evaluate plans to reduce environmental damage, but the Federal courts are neither empowered nor competent to micro-manage strategies for saving the Nation's parklands.

That is you.

Judge THOMAS. I think that, Senator, was my view, my opinion as to what the intent of this body was, and my effort was to faithfully apply that in adjudicating in that particular case.

Senator GRASSLEY. There are a lot of other cases like that I would like to go over, but let me just do one more. It is your concurrence in the *Cross Sound Ferry* v. *Interstate Commerce Commission*. The case involved the issue of standing. You agreed with Judge Mikva's result, but just not the reasoning; is that correct?

Judge THOMAS. That is right. I concurred in the result in that case, Senator.

Senator GRASSLEY. I would like to have you elaborate on those differences of views between Judge Mikva on the one hand and your reasoning on the other.

Judge THOMAS. My concurrence, the purpose was really a simple question, one of the challenger. The case involved two ferry companies. One was an established ferry company, and there was a newcomer who wanted to travel back and forth across Long Island Sound. ICC determined that the newcomer was exempted from regulation. As we received the cases, one of the challenges was by the existing ferry company that the ICC should have required of the newcomer a filing or compliance with two environmental regulations, NEPA and the Coastal Zone Management Act.

The question was for me initially the question that I ask in all cases and in all areas: Do we have jurisdiction to consider this? And there is an argument sometimes that when the merits of the case are easy and the jurisdictional component of the case is hard, that it is easy enough to skip over determining jurisdiction and determine the easy-merits portion of the case.

My point in the concurrence was that it was inappropriate to skip over the jurisdiction determination to get to the merits, that

Federal judges had an obligation to determine at each turn whether or not we as judges had any role in that particular case. And my view was that there was no standing to raise the issue on the part of the existing ferry company.

Senator GRASSLEY. One sentence that you said in that decision, "Federal courts are courts of limited jurisdiction. When Federal jurisdiction does not exist, Federal judges have no authority to exercise it, even if everyone—judges, parties, members of the public—wants the dispute resolved." It seemed to me like you set a very narrow role for the courts. And my question then in regard to going to the Supreme Court, you assume that is going to be the same philosophy you start with, on standing and other things?

Judge THOMAS. Senator, I don't think that we as judges should be stingy or crabbed in our review of individuals' access to our judicial system. I think it is important, as I said yesterday, that the courts and our judicial system be available to all, that they have a place where their case can be adjudicated in a fair way.

My concern, however, is that we are judges who are required to determine what our jurisdiction is before we can decide a case, and I see that more as a restraint on us than it is on the individual having access to the court system, although the two, of course, could ultimately be the same thing in some cases. But the jurisdictional determination to me is an important determination.

Senator GRASSLEY. The doctrine of standing is a limitation on the exercise of judicial power. Your opinions to me are good examples of how a judge must restrain himself or herself in exercising power he or she possesses. Has that general approach—maybe you have had it throughout your lifetime as a lawyer, but has this been strengthened in the year or 2 years you have been on the circuit court?

Judge THOMAS. Senator, a couple of points. I think when one becomes a judge, as I have noted earlier, one begins to realize the difficulty of the cases that come before us. You don't have the comfort of your position as an advocate. You don't reinforce your own arguments. You have got to listen to all the arguments. And the arguments can be equally forceful on either side.

So I think that when we recognize our own fallibility and our own humility, we become concerned about what our role is in each of these cases, which is the second point. And we ask ourselves, Do we belong in this case? What is our role? Do we have the authority? And one learns a sense of humility.

So I would say that my view—and one also recognizes, Senator, I might add, that we are the least democratic branch of the Government, and we have to restrain ourselves as judges. And I think that is important. Indeed, I think it is critical so that we do not begin to see ourselves as superlegislators.

Senator GRASSLEY. Right there let me say that what you have just said it seemed to me like is what Judge Scalia described himself and his colleagues on the High Court as: The unelected and life-tenured judges who have been awarded extraordinary undemocratic characteristics. And that was from a concurrence that Scalia wrote in the *Webster* case. And that is your approach. Your approach would be similar to Scalia's, then? I mean, I think you have said the same thing.

Judge THOMAS. I think if his point is, Senator, that we are not elected to make policy, we are not in the position to make the kinds of difficult decisions that the elected, the political branches make, then I think he is right. We are judges, and I don't think that we should stray beyond our role in the undemocratic, the most undemocratic branch of the Government into the political, the authority and the role of the political branches.

Senator GRASSLEY. Well, the political branches, too, have great responsibility to protect our liberties, and since judges are not accountable to the body politic and should not have the responsibility of deciding sensitive and controversial issues of the day, and that is judicial activism, that is legislating, judges trying to do our job from the bench. I guess I need to have you tell Americans what you see as the dangers of judges substituting their ideas for those of the political branches of government.

Judge THOMAS. Senator, I think that, briefly, the danger is inherent in the fact that there are no checks and balances as you have in the political branches for judges. We don't stand for elections. If we do the wrong things, we are not challenged by an opponent, and we don't lose our incumbencies as an elected official. We don't have to go back to our districts and be told that we have done the wrong thing. We are lifetime appointments. And I think that there is a danger with the lack of that check, the lack of that exposure to elections, and the lack of the tensions between the political branches that we could do things as judges that we think are nothing more than a matter of our personal opinions. And I think it would be inappropriate. I think it is a very significant danger.

Senator GRASSLEY. I would ask if you, in just what you have said, if you would be standing behind a 1987 speech that you gave before the Cato Institute. The quote: "When political decisions have been made by judges, they have lacked the moral authority of the majority. When courts have made important political and social decisions in the absence of majority support, they have only exacerbated the controversies." My question, in a sense, is then you are saying leaving the difficult, sometimes contentious decisions to the elected representatives, then there should be no concern or fear among the American people.

Judge THOMAS. I think that, of course, Senator, we always have concerns and fears and different points of views, and there is always debate and give and take. But I think that those political decisions, those policies should be developed and debated and established in and by the legislature; that the judge's role is not to legislate and it is not to set policy, and it is certainly not to engage in political decisionmaking.

Senator GRASSLEY. There may be a trend away from judicial activism, but I don't think we have seen the last of it. I would like to draw your attention to some recent cases in which district judges engaged in judicial activism. The first is a case that arose in a New Jersey Federal court. It was in Morristown. The public library board of trustees issued regulations designed to ensure that the library did not become home to vagrants. The regulations required that patrons use the library as it was intended to be used; that is, "for reading, studying, or using library material." So the court

struck down the library's regulation saying that everyone has a right to receive ideas, and the library cannot restrict access.

There was a New York Federal judge who just this past June found that panhandling might be protected speech under the first amendment, and this was despite the fact of a second circuit ruling to the contrary from last year.

Now, I realize that you are going to be reluctant to comment on the merits of these cases since such issues could come before the Supreme Court. But I hope—and I suppose this is more of a statement than a question—no, I guess I would really want it to be a question. Can you see these as examples of a court's usurping the function of legislative bodies and making rather than applying or interpreting the law?

Judge THOMAS. Senator, unfortunately, I don't know the full facts in those cases, and I think it would be inappropriate for me to try to comment on those particular cases. But let me just simply say this: That I think that we all as judges should be concerned and should be aware, or at least be cautious not to move into areas that are best left to, as I said, the political branches and to the legislature. But those specific cases, I simply don't know the details of them, and I think even if I did, it would be inappropriate to comment on them.

Senator GRASSLEY. OK. Maybe it is, but let me make this point to you to think about, and whether or not those cases might not be inconsistent with the point you made in that 1987 Cato Institute talk, where you stated, "Maximization of rights is perfectly compatible with total government regulation. Unbound by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. The rhetoric of freedom [license, really] encourages the expansion of bureaucratic government."

My time is up. I just want to leave the subject with a quote from Felix Frankfurter on the role of judges. He found the duty not to enlarge his authority to be one of the greatest challenges of being a judge. He continued, and let me quote probably about 40 words—

> That the court is not the maker of policy but is concerned solely with the question of ultimate power, is a tenet by which all justices have subscribed. But the extent to which they have translated faith into works probably marks the deepest cleavage among the men who have sat on the Supreme Court. The conception of significant achievement on the Supreme Court has been too much identified with largeness of utterness and too little governed by inquiry into the extent to which the judges have fulfilled their professed role in the American constitutional system.

I hope I see your confirmation bringing to the Supreme Court one more person like Felix Frankfurter, who is going to be looking at and inquiring into the extent to which judges have fulfilled their role in the American constitutional system.

Thank you, Mr. Chairman.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you, Senator, and thank you, Judge. We will recess until 2 p.m.

[Whereupon, at 12:40 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Leahy.

Senator LEAHY. Thank you very much, Mr. Chairman.

Judge Thomas, welcome back this afternoon. Judge, I would like to just go over a couple of points prompted by some of your earlier testimony.

A couple of thoughts occur to me. I was looking over the notes of your responses to Senator Kennedy's questions yesterday. You recall that when he talked about the Lewis Lehrman article, "the Declaration of Independence and the Right to Life," he referred to your statement, in which you called the Lehrman article a "splendid example of applying natural law."

I understand your answer was that you were speaking in the Lewis Lehrman Auditorium, with Lewis Lehrman sitting there, referring to Lewis Lehrman's article, and that you intended to make your conservative audience more receptive to natural law principles as it applied to civil rights. Is that a fair restatement of your answer?

Judge THOMAS. I think with the possible exception of "Lew Lehrman sitting there."

Senator LEAHY. Oh, that is my misconception. He was not there, then?

Judge THOMAS. Not to my knowledge.

Senator LEAHY. OK. Was the rest a fair restatement?

Judge THOMAS. Yes.

Senator LEAHY. Thank you. So, granting that it was a strategic remark for the reasons that you stated, did you believe the article was "a splendid example of applying natural law"?

Judge THOMAS. As I indicated yesterday, Senator, that I did not and do not think that natural law can be applied to resolve this particular issue, I think it is a constitutional matter and it has to be resolved under constitutional law, as a matter of constitutional law.

Senator LEAHY. But that is not precisely my question. My question was, did you believe the article was a splendid example of applying natural law? Just on that narrow line: Do you believe the article itself was "a splendid example of applying natural law"?

Judge THOMAS. Let me explain what I was trying to say. What I was trying to say——

Senator LEAHY. You cannot answer that specific question?

Judge THOMAS. What I am trying to say, so I am not misunderstood, Senator——

Senator THURMOND. Mr. Chairman, he has a right to explain his position.

Judge THOMAS. What I was trying to say is here is a good example——

Senator LEAHY. If Senator Thurmond wishes to join him at the witness stand—but go ahead, Judge.

Senator THURMOND. I would be glad to do it, but he has a right to explain his answers.

Senator LEAHY. Go ahead, Judge.

Judge THOMAS. Thank you, Senator.

My point was that here is an example of one of yours using natural law. I was not commenting on the substance of its use, so it was an example, it was a splendid example in the sense that it was a compliment to him and it is a compliment to someone they be-

lieved in, and I would reaffirm what I said yesterday and I have said consistently, and that is that at no time did I adopt or endorse the substance of the article itself.

My interest in that one sentence, I believe, was to get a conservative audience that was skeptical of a concept to be more receptive to that concept in the area that I wanted to use, in the area of civil rights. That speech is on the treatment of blacks by conservatives, treatment of minority issues in the Reagan administration, and a sort of request and a push or a tug to them to be more receptive in this area and to be aggressive in this area. It was not an endorsement of that article.

Senator LEAHY. Do you feel that your answer today is in any way inconsistent with what you said then?

Judge THOMAS. What I said?

Senator LEAHY. At that time?

Judge THOMAS. Yes.

Senator LEAHY. Thank you. And you understand my confusion in the two answers, but you explain that confusion in that the statement then and your answer today are consistent?

Judge THOMAS. I said that they were consistent.

Senator LEAHY. OK. Then you feel your answer today is consistent with what you said back at the time you spoke in the Lewis Lehrman Auditorium?

Judge THOMAS. Senator, my statement today is consistent with what I intended to do and what I did in the Lew Lehrman Auditorium. My interest, as I indicated to you, and I think I repeated a number of times here, it was in civil rights and finding unifying principles in the area of civil rights.

Senator LEAHY. Well, let me make sure that I understand. Is it your testimony here today and yesterday that you do not endorse the Lewis Lehrman article to the extent that it argues under the natural law principles of the Declaration of Independence that a fetus has an inalienable right to life at the moment of conception? Is that your testimony?

Judge THOMAS. I do not—my testimony is that, with respect to those issues, the issues involved or implicated in the issue of abortion, I do not believe that Mr. Lehrman's application of natural law is appropriate.

Senator LEAHY. Had you read that article before you praised it?

Judge THOMAS. I think I skimmed it, Senator. My interest, again, was in the fact that he used the notion or the concept of natural law, and my idea was to import that notion to something that I was very interested in.

Senator LEAHY. Now, you certainly——

The CHAIRMAN. Excuse me, would the Senator yield? I did not understand one answer.

Did you say that you do not believe that Mr. Lehrman's application of natural law in that article was appropriate?

Judge THOMAS. That's right.

The CHAIRMAN. You do not believe it is appropriate?

Judge THOMAS. That's right.

The CHAIRMAN. Thank you.

Judge THOMAS. I said that my testimony has been that that difficult issue is to be resolved as a matter of constitutional law.

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The CHAIRMAN. Thank you.

Senator LEAHY. Well, the chairman has anticipated my next question. When you gave the speech, which was in 1987, as I recall the testimony, did you understand that the consequences of Mr. Lehrman's position were not just that *Roe* v. *Wade* should be overturned, but that abortion, even in cases of rape and incest, should be banned in every State of the Union? Did you understand that to be the position that he was taking in that article?

Judge THOMAS. Senator, until recently, in reflecting on it, I did not know, I could not recall the entire content of that article until I read recent articles about it. Again, my interest was very, very limited——

Senator LEAHY. I understand——

Judge THOMAS [continuing]. And the——

Senator LEAHY. You have read the article now, though, now that it has been brought up——

Judge THOMAS. I have not re-read it. I have not re-read it.

Senator LEAHY. You have it?

Judge THOMAS. I have not re-read the article.

Senator LEAHY. Do you have the article?

Judge THOMAS. I do not have it with me.

Senator LEAHY. Does somebody want to just—I want to make sure somebody gives it to you, Judge. Let me say that the article, as written, takes a position not just that *Roe* v. *Wade* should be overturned, but that abortion, even in cases of rape and incest, should be banned in every State of the Union. Assuming that is the thrust or one of the main points of the article, do you agree with that?

Judge THOMAS. Again, Senator, it would be, I think, for me to respond to what my views are on those particular issues would really undermine my ability to be impartial in those cases. I have attempted to respond as candidly and openly as I possibly can, without in any way undermining or compromising my ability to rule on these cases.

Senator LEAHY. Well, let's just go, then, to Mr. Lehrman's positions. Under his theory of natural law, every abortion in this country would be criminalized. Do you understand that to be his position? I am not asking whether it is yours, but do you understand that to be his position in that article?

Judge THOMAS. Again, I would have to re-read the article, Senator. I understand the criticisms that you have of the article, but my point to you here today, as well as in other questioning concerning this article, is that I did not adopt or import anything more from this article than the use of this one notion of natural law.

Senator LEAHY. Might I ask you to do this, then, Judge, because we will have another go-round on this. It would only take about 4 or 5 minutes to read that article sometime between now and the next go-round. Could you please find the time to read it? And if you get crammed with too many things between now and then when I get my next turn around, I will just stop and give you time to read it right then.

Judge THOMAS. OK. Thank you.

Senator LEAHY. Now, Mr. Lehrman drew a parallel between the struggle for liberty by slaves with a struggle "for the inalienable

right to life of the child-in-the-womb—and thus, the right to life of all future generations." Do you understand the parallel of the struggle for liberty by slaves with the struggle for the inalienable right to life of the child in the womb, and thus, the right to life of all future generations? Do you agree with that comparison?

Judge THOMAS. Again, Senator, I have not re-read this article. I would take you up on your offer to go back and re-read it. My interest was on the issue of slavery, Senator, it was an important issue to me. The concept of liberty and life, et cetera, are very general concepts. I would like to just take the time to go back and re-read it——

Senator LEAHY. Fair enough.

Judge THOMAS [continuing]. And be fair in my response to you.

Senator LEAHY. I absolutely agree.

Judge THOMAS. But let me, if I could say this—my interest in this article was as I have testified before this committee, and I think indicated in some of our prior meetings, it was very important to me to convince conservatives that they should openly support and be aggressive in their support of civil rights.

Senator LEAHY. Judge, does a fetus have the constitutional status of a person?

Judge THOMAS. Senator, I cannot think of any cases that have held that. I would have to go back and rethink that. I cannot think of any cases that have held that.

Senator LEAHY. If somebody were to raise that issue in a court, how would a judge go about making a determination of that? I am not asking you to make a determination, but how would a judge do that? Does he or she go to a medical text, a philosophical text, theological treatises? How does one make such a determination?

Judge THOMAS. Senator, I could only offer this, and I have not made that determination and I have not gone through that kind of analysis, but, of course, one would rely in any case in which one is making a difficult determination, one would rely on the adversarial process to sharpen the issues. One would rely on precedent. One would certainly rely on related areas, such as the area of medicine. In the area of *Roe* v. *Wade,* I think there was considerable reliance on medical evidence. Again, I am doing that in a vacuum, and I was—

Senator LEAHY. I understand that. Of course, even in the adversarial process, a judge can oftentimes shape and direct in a most appropriate way. Any judge I have ever appeared before—if he or she felt that the adversaries did not present enough evidence to help the judge decide—would certainly have the right to ask the adversaries for more information.

In an area like this, do you rely on theology? Do you rely on jurisprudence? Do you rely on medical information? Or do you rely on experience?

Judge THOMAS. Senator, again, I would like to just simply say that, of course, one could see where medical, certainly experience and one could see where precedent would be relevant. I do not see at this point where theology would be relevant.

Again, I would like to refrain from further speculation in this very difficult area. The point that I am making to you, and I think it is an important point, is that when a judge is engaged in any

kind of an effort to make difficult decisions in any area, a judge tries to examine the relevant evidence and tries to reach a reasoned conclusion and tries to reach a conclusion, without implicating or without involving his or her personal opinions.

Senator LEAHY. Judge, you were in law school at the time *Roe* v. *Wade* was decided. That was 17 or 18 years ago. You would accept, would you not, that in the last generation, *Roe* v. *Wade* is certainly one of the more important cases to be decided by the U.S. Supreme Court?

Judge THOMAS. I would accept that it has certainly been one of the more important, as well as one that has been one of the more highly publicized and debated cases.

Senator LEAHY. So, it would be safe to assume that when that decision came down—you were in law school, where recent case law is oft discussed—that *Roe* v. *Wade* would have been discussed in the law school while you were there?

Judge THOMAS. The case that I remember being discussed most during my early part of law school was I believe in my small group with Thomas Emerson may have been *Griswold*, since he argued that, and we may have touched on *Roe* v. *Wade* at some point and debated that, but let me add one point to that.

Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator LEAHY. Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe* v. *Wade?*

Judge THOMAS. Senator, I cannot remember personally engaging in those discussions.

Senator LEAHY. OK.

Judge THOMAS. The groups that I met with at that time during my years in law school were small study groups.

Senator LEAHY. Have you ever had discussion of *Roe* v. *Wade*, other than in this room, in the 17 or 18 years it has been there?

Judge THOMAS. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have ever debated the contents of it, that answer to that is no, Senator.

Senator LEAHY. Have you ever, in private gatherings or otherwise, stated whether you felt that it was properly decided or not?

Judge THOMAS. Senator, in trying to recall and reflect on that, I don't recollect commenting one way or the other. There were, again, debates about it in various places, but I generally did not participate. I don't remember or recall participating, Senator.

Senator LEAHY. So you don't ever recall stating whether you thought it was properly decided or not?

Judge THOMAS. I can't recall saying one way or the other, Senator.

Senator LEAHY. Well, was it properly decided or not?

Judge THOMAS. Senator, I think that that is where I just have to say what I have said before; that to comment on the holding in that case would compromise my ability to——

Senator LEAHY. Let me ask you this: Have you made any decision in your own mind whether you feel *Roe* v. *Wade* was properly decided or not, without stating what that decision is?

Judge THOMAS. I have not made, Senator, a decision one way or the other with respect to that important decision.

Senator LEAHY. When you came up for confirmation last time for the circuit court of appeals, did you consider your feelings on *Roe* v. *Wade,* in case you would be asked?

Judge THOMAS. I had not—would I have considered, Senator, or did I consider?

Senator LEAHY. Did you consider.

Judge THOMAS. No, Senator.

Senator LEAHY. So you cannot recollect ever taking a position on whether it was properly decided or not properly decided, and you do not have one here that you would share with us today?

Judge THOMAS. I do not have a position to share with you here today on whether or not that case was properly decided. And, Senator, I think that it is appropriate to just simply state that it is—for a judge, that it is late in the day as a judge to begin to decide whether cases are rightly or wrongly decided when one is on the bench. I truly believe that doing that undermines your ability to rule on those cases.

Senator LEAHY. Well, with all due respect, Judge, I have some difficulty with your answer that somehow this case has been so far removed from your discussions or feelings during the years since it was decided while you were in law school. You have participated in a working group that criticized *Roe.* You cited *Roe* in a footnote to your article on the privileges or immunity clause. You have referred to Lewis Lehrman's article on the meaning of the right to life. You specifically referred to abortion in a column in the Chicago Defender. I cannot believe that all of this was done in a vacuum absent some very clear considerations of *Roe* v. *Wade,* and, in fact, twice specifically citing *Roe* v. *Wade.*

Judge THOMAS. Senator, your question to me was did I debate the contents of *Roe* v. *Wade,* the outcome in *Roe* v. *Wade,* do I have this day an opinion, a personal opinion on the outcome in *Roe* v. *Wade;* and my answer to you is that I do not.

Senator LEAHY. Notwithstanding the citing of it in the article on privileges or immunities, notwithstanding the working group that criticized *Roe?*

Judge THOMAS. I would like to have the cite to it. Again, notwithstanding the citation, if there is one, I did not and do not have a position on the outcome.

With respect to the working group, Senator, as I have indicated, the working group did not include the drafting by that working group of the final report. My involvement in that working group was to submit a memorandum, a memorandum that I felt was an important one, on the issue of low-income families. And I thought that that was an important contribution and one that should have been a central part in the report. But with respect to the other comments, I did not participate in those comments.

Senator LEAHY. I will make sure that you have an opportunity to read both the footnote citation and the Lewis Lehrman article before we get another go-round. But am I also correct in characterizing your testimony here today as feeling that as a sitting judge it would be improper even to express an opinion on *Roe* v. *Wade,* if you do have one?

Judge THOMAS. That is right, Senator. I think the important thing for me as a judge, Senator, has been to maintain my impartiality. When one is in the executive branch—and I have been in the executive branch, and I have tried to engage in debate and tried to advance the ball in discussions, tried to be a good advocate for my points of views and listening to other points of views. But when you move to the judiciary, I don't think that you can afford to continue to accumulate opinions in areas that are strongly controverted because those issues will eventually be before the Court in some form or another.

Senator LEAHY. Of course, as Senator Metzenbaum pointed out earlier today, you have spoken about a number of cases, and I understand your differentiation in your answers to his question on that. But I wonder if those cases somehow fit a different category. The expression once was that the Supreme Court reads the newspapers, and I suppose we can update that today to say that Supreme Court nominees read the newspapers and know that this issue is going to be brought up.

But, Judge, other sitting Justices have expressed views on key issues such as—well, take *Roe* v. *Wade.* You know, Justice Scalia has expressed opposition to *Roe.* Does that disqualify him if it comes up? Justice Blackmun not only wrote the decision but has spoken in various forums about why it was a good decision. Is either one of them disqualified from hearing abortion cases as a result?

Judge THOMAS. Senator, I think that each one of them has to determine in his mind at what point do they compromise their impartiality or it is perceived that they have compromised their objectivity or their ability to sit fairly on those cases. And I think for me, shortly after I went on the court of appeals, I remember chatting with a friend just about current events and issues. And I can remember her saying to me, asking me three or four times what my opinion was on a number of issues, and my declining to answer questions that when I was in the executive branch I would have freely answered. And her point was that I was worthless as a conversationalist now because I had no views on these issues. And I told her that I had changed roles and the role that I had was one that did not permit me or did not comport with accumulating points of views.

Senator LEAHY. Well, I might just state parenthetically, I have been both a prosecutor and a defense attorney, and I have been before judges who have expressed very strong views on the idea that when they go on the bench, they do not go into a monastery—they still are part of the populace, able to express views. And I have been there when they have expressed views both for and against a position of a client I might be representing, whether it is the State on the one hand or the defendant on another. But I have also felt secure in knowing that they were fairminded people and

would set their own personal opinions aside, as judges are supposed to and as you have testified one should do in such a case.

Let me ask you this: Would you keep an open mind on cases which concern the question of whether the ninth amendment protected a given right? I would assume you would answer yes.

Judge THOMAS. The ninth amendment, I think the only concern I have expressed with respect to the ninth amendment, Senator, has been a generic one and one that I think that we all would have with the more openended provisions in the Constitution, and that is that a judge who is adjudicating under those openended provisions tether his or her ruling to something other than his or her personal point of view.

Now, the ninth amendment has, to my knowledge, not been used to decide a particular case by a majority of the Supreme Court, and there hasn't been as much written on that as some of the other amendments. That does not mean, however, that there——

Senator LEAHY. That is not what I am——

Judge THOMAS. That does not mean, however, that there couldn't be a case that argues or uses the ninth amendment as a basis for an asserted right that could come before the Court that does not—that the Court or myself, if I am fortunate enough to be confirmed, would not be open to hearing and open to deciding.

Senator LEAHY. You are saying that you would have an open mind on ninth amendment cases?

Judge THOMAS. That is right.

Senator LEAHY. I ask that because you have expressed some very strong views, as you know better than all of us, on the ninth amendment. You had an article that was reprinted in a Cato Institute book on the Reagan years. You refer to Justice Goldberg's "invention," of the ninth amendment in his concurring opinion in *Griswold.* And you said—and let me quote from you. You said, "Far from being a protection, the ninth amendment will likely become an additional weapon for the enemies of freedom." A pretty strong statement. But you would say, would you not, Judge, notwithstanding that strong statement, that if a ninth amendment case came before you, you would have an open mind?

Judge THOMAS. Again, Senator, as I noted, my concern was that I didn't believe that—in such an openended provision as the ninth amendment, it was my view that a judge would have to tether his or her view or his or her interpretation to something other than just their feeling that this right is OK or that right is OK. I believe the approach that Justice Harlan took in *Poe* v. *Ullman* and again reaffirmed in *Griswold* in determining the—or assessing the right of privacy was an appropriate way to go.

Senator LEAHY. That is not really my point. The point I am making is that you expressed very strong views—and you have here, too—about the ninth amendment. My question is: Notwithstanding those very strong views you have expressed about the ninth amendment—pretty adverse views about it—would you have an open mind in a case before you where somebody is relying on the ninth amendment?

Judge THOMAS. The answer to that is, Senator, yes.

Senator LEAHY. But if you were to express similar views regarding the principles and reasoning of *Roe* v. *Wade,* you feel that

somehow it would preclude you from having that same kind of objectivity as the views you have expressed about the ninth amendment?

Judge THOMAS. I don't believe, Senator, that I have expressed any view on the ninth amendment, beyond what I have said in this hearing, after becoming a member of the judiciary. As I pointed out, I think it is important that when one becomes a member of the judiciary that one ceases to accumulate strong viewpoints, and rather begin to, as I noted earlier, to strip down as a runner and to maintain and secure that level of impartiality and objectivity necessary for judging cases.

Senator LEAHY. Does that mean if you were just a nominee, a private citizen as a nominee to the Supreme Court, you could answer the question, but as a judge you cannot?

Judge THOMAS. I think a judge is even more constrained than a nominee, but I also believe that in this process, that if one does not have a formulated view, I don't see that it improves or enhances impartiality to formulate a view, particularly in some of these difficult areas.

Senator LEAHY. Thank you, Mr. Chairman. My time is up, but I am sure the judge realizes that we will probably have to revisit this subject a tad more. Thank you.

The CHAIRMAN. Thank you very much.

The Chair recognizes Senator Kennedy for a moment regarding a clarification of a quote that was used this morning.

Senator KENNEDY. Thank you, Mr. Chairman. I think there was just one area of clarification.

Yesterday I questioned Judge Thomas, and I used these words:

> Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers, needs more time off for personal emergencies, that may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

And then the judge went on and gave his response to that question.

In a response to a question earlier this morning from Senator DeConcini, Judge Thomas said, "There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who has employed a significant number of women, I did not find that to be true and made that very clear."

I would just like to ask consent that the record—I understood what Judge Thomas was trying to say this morning, and——

Judge THOMAS. I did not intend to attribute Professor Sowell's quotes to you. [Laughter.]

Senator KENNEDY. So I would just ask consent that the record reflect that modification at the appropriate point.

Senator LEAHY. I thought that was a little out of character there, Ted.

The CHAIRMAN. Without objection, the record will be corrected.

Senator KENNEDY. Thank you.

The CHAIRMAN. The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Thomas, incidentally, last July on a monthly call-in show, there was a lot of interest by people in my State, and some people didn't really understand the process as to what we were doing. And it might be well just to say that when questions are asked, that does not suggest in any way a disagreement with your position, but an effort to draw out how you would function if confirmed as a Supreme Court Justice. In moving beyond your legal qualifications, we are following a practice of going into constitutional law very much as I had said in my opening when Chief Justice Rehnquist, as a lawyer back in 1958, stated the importance of having the Judiciary Committee get into questions of equal protection of the law and due process of law; and that in the thoroughness of our efforts to find out how you would function as a Supreme Court Justice, we do so because of the tremendous importance of the role of a Justice, illustrated by 18 decisions last year by a 5-4 vote. And if you serve as long or to an age of Justice Thurgood Marshall, who is 83, it would put you on the Court for 40 years, or until the year 2031.

So I make those introductory comments, repetitious to some extent of what I said in my opening, to give some parameter as to how I see the confirmation hearings, and the importance of the separation of powers, and the Senate's role in advice and consent. Because under our system of government, the President nominates, the Senate consents or not, and then the Justices on the Supreme Court have the final word in so many issues of such tremendous importance.

Judge Thomas, in my opening yesterday, I outlined the key focus on my concern, and that is on the very fundamental issue as to the Supreme Court's interpreting law and not making law. And there has already been considerable discussion about that subject, and you have articulated your view that the Court should defer to constitutional intent and should interpret law and not make law.

You have dealt, as Chairman of EEOC, with many very important Supreme Court decisions, and there are quite a number that I would like to discuss with you. But I want to start with one for illustrative purposes—and I could pick many—and that involves the case decided by the Supreme Court back in 1987 where a woman had applied for a job as a road dispatcher. There were 238 positions, all held by men. She was competing with a man named Paul Johnson in the transportation system of Santa Clara County, which is the name of the case. Mr. Johnson had a better test score, but as part of an affirmative action program, no quotas but affirmative action, the employer gave the job to the woman.

You had commented about this case in a speech which you made in 1987, and I would like to make available to you two speeches and one article so that you can have them available during the course of my questioning. I agree with Senator Simpson; they all ought to be a part of the record, and I would ask unanimous consent, Mr. Chairman, that they be placed in the record so that the totality of what Judge Thomas had to say in those speeches is apparent.

In the course of the speech in 1987, you said this: "Let me commend to you Justice Scalia's dissent, which I hope will provide guidance for lower courts and a possible majority in future deci-

sions." The comment about guidance for lower courts we will come back to. Perhaps it will be for Senator Simon. He raised that preliminarily yesterday. But the point that I will focus on at the moment is Justice Scalia's dissent as possible guidance for future decisions.

You then said—in the article on "Assessing the Reagan Years" in the compilation by Mr. Boaz, while you did not say that they were enough, you refer to "quick-fix solutions such as the appointment of another Justice with the right views."

You further note in the Boaz article that, "In each case"—and now you refer to a series of them, including the *Johnson* decision—"In each case, Congress could have reinterpreted its legislative intent to rebut the interpretation of Justice Brennan in *Weber*, but, of course, it"—referring to Congress—"demurred."

You have commented very extensively about your view of the Congress. I don't quarrel with your view of the Congress except as it relates—and I don't even quarrel with it then. I just want to find out your views concerning the Supreme Court as to carrying out constitutional intent. And in a speech on April 8, 1988, a copy provided to you, you said, "Congress is no longer primarily a deliberative or even a lawmaking body. There is little deliberation and even less wisdom in the manner in which the legislative branch conducts business." Members act for "their own interests." "Interests of few take precedence over interests of the many."

Now, my question to you is: In a context where you think the *Johnson* case should be overruled, and in the context where you have articulated your regard, such as it is, for Congress, and you have—I really don't quarrel with your view of the Congress. A lot of people have that view of the Congress. I really don't. And I think it is important to back up for just a minute on some fundamentals for a lot of people who were listening, and that is that Congress makes the law, we make public policy, and the Court is supposed to interpret the law. And we all agree on those rules. And there are a lot of illustrations where Congress has overruled what the Supreme Court has done on legislative intent where Congress doesn't like what the Court has done.

And I would ask unanimous consent at this point, Mr. Chairman, that a list of some 23 decisions which Congress overruled between 1982 and 1986 be inserted in the record. And we could talk about those at great length, but the point is that Congress does know how to overrule the Court on matters of constitutional intent.

The CHAIRMAN. They will be included in the record.

[The information follows:]

disrespectful, to treat it as not having yet quite established a settled doctrine for the country."[102]

There is already some evidence that Congress has been less restrained in overruling the pronouncements of the Court. Between 1982 and 1986, Congress overruled at least twenty-three Supreme Court decisions—half within two years of the date of the decision.[103] These enactments cover a wide range of decisions. For example, in three separate instances, Congress directly overruled Court decisions concerning state and local liability under federal acts.[104] In addition, Congress has either passed or is presently considering five bills overruling Court decisions that ease limitations on prosecutions and sentencing.[105] In all, Congress

102. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848-1858, at 401 (R. Basler ed. 1953).

103. INS v. Phinpathya, 464 U.S. 183 (1984), *overruled by* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3439-40; Block v. North Dakota, 461 U.S. 273 (1983), *overruled by* Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351; United States v. New York Tel. Co., 434 U.S. 159, 166-68 (1977), *overruled by* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301, 100 Stat. 1848, 1868-72; Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *overruled by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845; Smith v. Robinson, 468 U.S. 992 (1984), *overruled by* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377 (1922), *overruled by* Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986); California v. Nevada, 447 U.S. 125 (1980), *overruled by* Act of Dec. 23, 1985, Pub. L. No. 99-200, 99 Stat. 1663; Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972), *overruled by* Patent Law Amendments Act of 1984, Pub. L. No. 98-622, 98 Stat. 3383; Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), *overruled by* Act of Oct. 24, 1984, Pub. L. No. 98-544, 98 Stat. 2750; Busic v. United States, 446 U.S. 398 (1980), and Simpson v. United States, 435 U.S. 6 (1978), *overruled by* Department of Interior and Related Agencies Appropriations Act, Pub. L. No. 98-473, § 1004, 98 Stat. 1837, 2138-39 (1984); Washington Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984), *overruled by* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 4, 98 Stat. 1639, 1641; Diedrich v. Commissioner, 457 U.S. 191 (1982), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1026, 98 Stat. 494, 1031; United States v. Davis, 370 U.S. 65 (1962), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421, 98 Stat. 494, 793-95; Commissioner v. Standard Life & Accident Ins. Co., 433 U.S. 148 (1977), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 211(a), 98 Stat. 494, 740-41; NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), *overruled by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390-91; Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968), *overruled by* Shipping Act of 1984, Pub. L. No. 98-237, § 7, 98 Stat. 67, 73-74; Rowan Cos. v. United States, 452 U.S. 247 (1981), *overruled by* Social Security Amendments of 1983, Pub. L. No. 98-21, § 327, 97 Stat. 65, 126-27; Standard Oil Co. of Cal. v. Agsalud, 454 U.S. 801 (1981), *overruled by* Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611-12; Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), *overruled by* Act of Dec. 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964; McCarty v. McCarty, 453 U.S. 210 (1981), *overruled by* Department of Defense Authorization Act, Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980), *overruled by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

104. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

105. *See* H.R. 5269, 101st Cong., 2d Sess. (1990) (Racial Justice Act); 136 CONG. REC. H9001,

overruled more than twice as many decisions in the first four years after President Reagan's first appointment to the Supreme Court than in the entire decade preceding his election.[106] Although there has been no suggestion that the Court's rulings in all these cases were politically motivated, the accelerated pace of overrulings may reflect a dangerous view on the part of Congress that even proper pronouncements of the Court are entitled to less respect.

CONCLUSION

The risks of constitutional quibbling have been recognized for more than a century. In 1883, Justice Harlan complained about the Supreme Court proceeding "upon grounds entirely too narrow and artificial [, sacrificing] the substance and spirit of the . . . amendments of the Constitution . . . by a subtle and ingenious verbal criticism."[107] Around the turn of the century, Dean Roscoe Pound asserted that the laissez-faire judiciary was at grave risk of being cut off from the populace. He stated that the Court, which once stood as a protection to the individual from the Crown and the State, now "really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it."[108] Today, many of these same objections are being directed at the Court: critics complain that the Court's decisions are "needlessly cramped" in order to accomplish other

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H9008 (daily ed. Oct. 5, 1990) (statement of Rep. Harris) (proposing Racial Justice Act to overrule McClesky v. Kemp, 481 U.S. 279 (1987)); S. 1970, 101st Cong., 2d Sess. (1990) (Biden Bill), 136 CONG. REC. S6873, S6875 (daily ed., May 24, 1990) (statement of Sen. Biden) (bill proposed to overrule Stanford v. Kentucky, 492 U.S. 361 (1989), and Penry v. Lynaugh, 492 U.S. 302 (1989), cases permitting the imposition of the death penalty on persons under age 16 or suffering from mental retardation); S. 148, 102d Cong., 1st Sess. (1991), 137 CONG. REC. S579-01 (1991) (Derrick-Hughes amendments to the Omnibus Crime Control Act of 1990) (proposed to overrule McKellar v. Butler, 110 S. Ct. 1212 (1990), and Sawyer v. Smith, 110 S. Ct. 2822 (1990), cases barring courts from applying newly articulated legal principles retroactively to reverse death sentences that became final prior to the ruling).

106. *Compare* note 79 *supra with* 11 cases overruled or modified by Congress between 1970 and 1980: Citizen Publishing Co. v. United States, 394 U.S. 131 (1969), *overruled by* Pub. L. No. 91-353, § 3, 84 Stat. 467 (1970); Alderman v. United States, 394 U.S. 165 (1969), *modified by* Pub. L. No. 91-452, § 702, 84 Stat. 935 (1970); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), *overruled by* Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (1972); Bunte Bros. v. FTC, 312 U.S. 349 (1941), *overruled by* Pub. L. No. 93-637, § 201(a), 88 Stat. 2193 (1975); Administrator, FAA v. Robertson, 422 U.S. 255 (1975), *overruled by* Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), *modified in part by* Pub. L. No. 94-559 § 2, 90 Stat. 2641 (1976); Wingo v. Wedding, 418 U.S. 461 (1974), *overruled by* Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976); *Ex parte* Peru, 318 U.S. 578 (1943), *overruled by* Pub. L. No. 94-583, § 4(a), 90 Stat. 2892 (1976); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *overruled by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978); District of Columbia v. Carter, 409 U.S. 418 (1973) *overruled by* Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1980); Zurcher v. Stanford Daily, 436 U.S. 547 (1978), *modified by* Pub. L. No. 96-440, § 101, 94 Stat. 1879 (1980).

107. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

108. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

Senator SPECTER. But here you have been explicit in the quick fix of judges who have the right view. You have identified the *Johnson* case as one where you hope that the dissent will provide the basis for a majority when judges are added. You have stated what you think of the Congress. And the question is: What assurances can you give to the Senate that you will follow constitutional intent as opposed to your own public policy views on those cases?

Judge THOMAS. Senator, when one is involved in the midst of a debate in the executive branch and advocating a point of view, as I alluded to earlier, one continues to advocate that point of view as an executive.

When I moved to the judiciary, as I noted earlier, I ceased advocating those points of views. I think that you can have the comfort of your position, and I felt that in those cases that the constitutional intent was one of nondiscrimination that was explicit in the language of the statute and clear in the language of the legislative history. That was my reading of constitutional intent.

Of course, the Court took a different point of view, and those of us who may not have agreed with that point of view simply had to swallow hard and go along.

I might add here that I think—and I feel very strongly—that this matter of disagreeing over what the appropriate remedies are—and this, just parenthetically, does not in any way indicate the depth of my commitment to fighting discrimination. I think it was an important disagreement as to how far you can go with your efforts to move people into the work force that you believe should be in the work force who had been left out, and the effort of trying to also preserve that notion of fairness and nondiscrimination that I thought was central in the statute.

With respect to my disagreements with Congress, I think that those of us who were in the executive branch—and I am certain that those who are in Congress have their disagreements with the members of the executive branch, that there is tension between the two political branches. And certainly I have had a sufficient number of oversight hearings and a sufficient number of battles to know that that tension was alive and well. But when one goes to the judiciary, I think it is important to remain neutral in those policy battles, and that is something that I have certainly attempted to do.

With respect to whether or not a policy point of view or a view that I advocated as a member of the executive branch will undermine my ability to rule on cases as a judge, my answer to you, Senator, is that it will not. I advocated as an advocate, and now I rule as a judge. And I think that that is important. I think it is an important distinction. I think it is a requirement that I be impartial, and I have attempted to do that.

Senator SPECTER. Well, Judge Thomas, I am going to come to the issue of remedies, and I can understand your disagreement on oversight. Both of those are different issues. And I understand your assertion of impartiality, and I do not question it. But where you have repeatedly over such a long period of time expressed a very strong view as to congressional ineptitude—and you did that in the *Fullilove* case: "What can one expect of a Congress that would pass the ethnic set-aside law?" And you have, again in the speech on

April 8, 1988, referred to the extensive policymaking role of the Court: "When they have made important"—referring to the courts—"made important political and social decisions in the absence of majority support, they have only exacerbated the controversies they have pronounced."

If the Court rules in the presence of majority support, does that give the Court any license to act? It suggests that it does.

The problem I have, Judge Thomas, is that if you take a large body of your writings, where you disagree with these cases and you disagree to the core with the congressional function, what assurances will we have that you will respect congressional intent?

Judge THOMAS. Senator, I throughout my writings—and I can't find all the quotes now—made it clear that those difficult policy decisions debating the large issues are precisely the role of Congress. There may be disagreements when one is in the executive branch, but those disagreements cease and policymaking debates cease when one goes to the judiciary.

The difficulties that I have expressed differences, particularly as one who has been involved in the oversight process, but I think I have made it clear that the legislative function of Congress, that the oversight function of Congress are very appropriate. And, again, I can't go back through all the speeches, but my view would be that the Court—it is the Court that cannot legislate, not Congress, and that the Court would be misplaced in attempting to establish policy, not Congress.

Senator SPECTER. Judge Thomas, I am not talking to you about oversight now. That is the second time in response to a question about carrying out congressional intent you have referred to the congressional oversight function. I know you had very severe disagreements, and I hope to have a chance to ask you about that later. But congressional oversight is very different from a clear-cut expression of congressional intent.

We had Justice Scalia before us, and it has already been referred to, the difference and what happens on the bench as opposed to in the nomination process, and that is understandable. Justice Scalia doubts that there is any such thing as congressional intent. And when he writes about the absence of congressional response—and this is enormously important because we have the 1964 Civil Rights Act. And it was interpreted in 1971 by a unanimous Supreme Court in an opinion written by Chief Justice Burger. And Congress was satisfied with that interpretation, left it alone. Then 18 years later, the Supreme Court comes up 5-4 and changes that law and does so with four Supreme Court Justices who put their hands on the Bible in this room, or similar rooms, swore to interpret the law and not to make new law.

Justice Scalia writes in his dissent in the *Johnson* case that when Congress doesn't act, it could be a result of many things, including political cowardice. I think Justice Scalia might have a point, but the major area of congressional or Senate political cowardice perhaps came when we didn't ask him very many questions in his confirmation hearing.

I would be interested in your observation. I won't ask you what you think of Justice Scalia's comment, but I will re-ask the question that Senator Grassley put to you. When Congress doesn't act,

would you agree that that is a sign that Congress doesn't think anything should be done?

Judge THOMAS. Senator, I think that if there is a long-standing interpretation of a congressional legislation——

Senator SPECTER. Is 18 years long enough, like in *Ward's Cove* and *Griggs*?

Judge THOMAS. If there is a longstanding interpretation and Congress does not act, that certainly would seem to be considerable evidence of Congress' intent. And it certainly would be, at least from my way of looking at a statute, evidence that cannot be ignored in revisiting that particular statute.

Senator SPECTER. Two subquestions. No. 1, is 18 years long enough?

Judge THOMAS. Eighteen years is quite a long time. I don't know whether we could put a mathematical or a numerical standard on that, to have that kind of quantification as to whether or not that would be enough not to revisit a statute. But I think that when you have a statute that has been interpreted for that long a period, that is so well known, that Congress is very aware of, that it would be an important consideration in finding that to be the appropriate interpretation, the fact that Congress didn't act for such a long time.

Senator SPECTER. Well, Judge Thomas, I have a problem, and I am not saying any of this is determinative. We are just talking about your approach as a prospective Justice if confirmed. But I have a problem with long enough not being enough in the context of *Griggs* and *Ward's Cove*, and I have a problem with "cannot be ignored," which are your words, as opposed to being determinative. It seems to me, that when a unanimous Supreme Court decision stands for 18 years, that is long enough. Or if it is not, I would like to know what is long enough. And when you talk about "cannot be ignored," I would look for something more there as to a sign of what does establish what the Congress expects the Court to do.

Judge THOMAS. The point I was attempting to make, Senator, was this: That when Congress doesn't act, I think it is more difficult to determine precisely why Congress doesn't act. For example, if Congress takes an explicit action and fails to change a particular statute, then that might be more evidence than simply not doing anything.

But the additional point that I was attempting to make was this, that the fact that Congress did not act for 18 years is an important consideration in determining whether or not the prior ruling or the prior interpretation was the correct interpretation. It would be a part of the calculus of legislative history.

I think it would be going too far to say definitively that definitely 18 years or 15 years or 10 years is the cutoff period, but I understand the point that you are making and I do not think that a judge or a court can simply ignore the fact that Congress has not acted in an important area.

Senator SPECTER. Judge Thomas, in my questioning you on how you handle the cases of *Johnson* and also the predecessors of *Weber* and *Fullilove*, we do not have time to go into all the facts now, I do so for a number of reasons. One is the one we have already examined, and the other is that you had shifted a position on it, that in

1983 you appeared to be in agreement with *Fullilove* and with *Weber*, and then your reconfirmation hearings came and you agreed to abide by them, and they relate to your approach to affirmative action and to your development of your legal thinking as you have taken the problem of discrimination and racism and how you have analyzed affirmative action, and in your career in the early 1980's stated that you favored it, and then appeared to accept the Supreme Court decisions, and then later disagreed with those decisions, although you agreed to abide by them, and still later just absolutely plundered those decisions with the very strong hostile comments about Congress.

In your writing, Judge Thomas, you have made a very strong comment that I agree with. You said that the *Dred Scott* decision upholding slavery and Chief Justice Taney's opinion in that decision provide a basis for the way we think today. You wrote that in 1987, "Racism and discrimination are deeply rooted in the history of the United States." I agree with you about 1987 and 1991.

And then there was the article by Mr. Juan Williams in Atlantic Monthly, which sought to provide an understanding of your philosophy and your approach to programs against discrimination, and quoted you as saying this, and these are the words which he says are yours, "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do, you'll never know the same contacts or opportunities, you will never be seen as being equal to the whites."

Now, given that very strong statement, black skin, given your very strong statement about things being in 1987 like they were in the 1950's in *Dred Scott*, and given the fact that it is just not possible for the Equal Employment Opportunities Commission to take care of all the cases, one by one, why is it that you come down so strongly against any group action to try to put minorities or African-Americans in the position that they would have been as a group, but for the discrimination?

This is a broad subject, but let's get it started with just a few minutes to go of my time.

Judge THOMAS. Senator, I think that over my years in public life, as well as my adult life, I have made it clear what I think of racism and discrimination. I made it clear during my tenure as the Chairman of EEOC that it had to be eliminated, and I did everything within my power.

I have also, even in the heat of debate, attempted to talk reason, even though I, like perhaps everyone else, was susceptible to the rhetoric in that debate. I think that we all have to do as much as possible to include members of my race, minorities, women, anyone who is excluded into our society. I believe that. I have always believed that, and I have worked to achieve that.

Senator SPECTER. What is the best way to do it?

Judge THOMAS. And that is the question, how best to do it. I think that you have a tension, you want to do that and, at the same time, you don't want to discriminate against others. You want to be fair, at the same time you want to affirmatively include, and there is a real tension there.

I wrestled with that tension and I think others wrestled with that tension. The line that I drew was a line that said that we

shouldn't have preferences or goals or timetables or quotas. I drew that line personally, as a policy matter, argued that, advocated that for reasons that I thought were important.

One, I thought it was true to the underlying value in the statute that would be fair to everyone, and I also drew it because I felt and I have argued over the past 20 years and I felt it important that, whatever we do, we do not undermine the dignity, self-esteem, and self-respect of anybody or any group that we are helping. That has been important to me and it has been central to me.

I think that all of us who are well-intentioned, on either side of the debate, at any given time, wanted to achieve the exact same goal. I would have hoped, if I could revisit the 1980's, that we could have sat down and constructively tried to hammer out a consensus way to solve what I consider a horrible problem.

Senator SPECTER. But the problem I have with that response, if you take a case like Local 28 of the Sheetmetal Workers, where the New York City Human Relations Commission cited them for discriminatory practices in 1964, and EEOC finally brought a lawsuit in 1971, and there was a finding of discrimination in 1975, and there was a court order to correct that discrimination, which there was contempt in 1977 and again in 1982 and contempt again in 1983, and you have written that you are astounded that there is more of a penalty for breaking into a mailbox than for discriminating against a minority or African-Americans, and you have advocated jail sentences and heavy fines for those who are in contempt of court, and you have this kind of outrageous conduct that spans a 20-year period, and then EEOC comes in at the latter stages of this litigation in the 1980's and takes a different position and argues against the court orders to stop the flagrant discriminatory practices and the practices which have been labeled by the courts repeatedly in violation, contempt of court, and you criticize the Supreme Court's decision in trying to do something to deal with proved discrimination, not taking a class which wasn't discriminated against and giving them a boost forward, but in dealing with laborers who were discriminated against, judicial determinations, contempt citations, ignoring by the people who were the discriminators, and you, as Chairman of EEOC come in and oppose it, and then you sharply criticize the decision of the Supreme Court of the United States in upholding that kind of a remedy.

That seems to me to come right within the purview of what you say ought to be done to remedy active discrimination, and yet you take the other side.

Judge THOMAS. With respect to the weight of that case proceeded through the court, Senator, the Commission itself, to my knowledge, did not approve and it was not required to approve that litigation, because the general counsel had already been authorized at the lower courts to pursue that, but the point is well taken.

My view with respect to cases like that has been that, as a policy matter and one that I have stated clearly on the record, is this: I think that, rather than a court attempting to punish these individuals with a quota or preferential treatment, I thought that in this case and in the egregious cases there could be criminal contempt citations, I felt that there should be appropriate roles for heavy fines, I think or I felt that individuals who discriminated against

other individuals should be subject to the same kinds of fines and penalties that are available in some of the antitrust litigation.

I felt that there was an undervaluation of the effects and the damage done by discrimination, and I felt that this kind of a case was very susceptible and appropriately susceptible to criminal contempt citations.

Senator SPECTER. I have been handed a note that my time is up, and we will return to it with my first question being why did EEOC, in your tenure, join with petitioners in trying to upset the contempt citation and taking the position that the discriminators ought not to be held for contempt and ought not to be punished.

Thank you, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge Heflin. Senator Heflin. Just so everybody does not think it was a slip, you were a judge. Senator Heflin.

Senator HEFLIN. Judge Thomas, I try to approach these hearings on the basis of fairness, fairness to you, fairness to the President, fairness to your opponents, and try to consider all of the evidence before I make up my mind. I tried to follow that procedure in the other confirmation processes, not only of the Supreme Court Justices, but of all appointments to the judiciary.

So, I do not at this time have any firm opinion one way or the other. I have done a good deal of reading and tried to listen to testimony. Of course, it has entered into my mind from your testimony, as opposed to some of the spoken and written words that you have given in the past, an appearance of confirmation conversion.

Now, this term is a term that came from the mouth of my colleague Senator Leahy here in the Bork hearings, which would indicate that the confirmation processes cause one to change his mind or to give answers that will hurt him in regards to seeking the confirmation. But it also can raise issues that can affect the evaluation that members of the committee may give as to integrity and temperament.

Now, in reading some of the articles and reading speeches that you had given beforehand, most of them in about the last 5 years, or at least since you have been on the EEOC, not back when you were 20 years of age or 25 or 30, but fairly recently, there appears to be a conflict on natural law between what you have stated in the past and what you state here at these hearings.

You are stating in these hearings basically that you do not think that natural law ought to be used in constitutional adjudication. Some interpretation—and it depends on how you interpret your written and spoken words beforehand—would lead one to believe that you had previously advocated the use of natural law in constitutional adjudication.

Now, natural law, of course, is a term that is broad and there seem to be at least two schools of thought, and there may be many others, one a liberal school of thought, another a conservative school of thought on the use of natural law. Those who are of the conservative viewpoint indicate that it would be using the ninth amendment, where there is no deprivation of unenumerated rights that a judge could pick an unenumerated right, something that he said was and then defend it under the concept of natural law.

On the other hand, from a political theory viewpoint on possible constitutional adjudication, there are those that advocate that natural law be used as a defense for judicial restraint, as being a defense for limited government and being a defense for economic freedom and certain other freedoms.

As has been pointed out, those that would advocate the use of natural law, and there have been those in the past in the Supreme Court decisions, particularly in the *Lochner* era, who say that the economic right of the freedom to contract should be allowed, without any government restrictions, and, therefore, that minimum wage laws, health laws, job safety-type laws are restrictions against the right to contract and economic freedom, and, therefore, they follow the concept of judicial restraint or follow the concept of limited government.

Now, you have been asked some questions about this issue and you, of course, have very clearly stated that you do not believe that natural law ought to be used toward constitutional adjudication, and you have mentioned that you so testified in your court of appeals hearing, and that was quoted to you from the court of appeals hearing, statements that you made, and this appears—and I want you to have an opportunity later to read it, and you can give a fuller answer after you are thoroughly advised, because it is not my purpose to ambush you or to make any statement, without you having a thorough right to review what you said before.

But here you say:

> But recognizing the natural rights is a philosophical, historical context of the Constitution, is not to say that I have abandoned the methodology of constitutional interpretation as used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure, I would have to look at the prior Supreme Court precedents on these matters.

That is what was quoted to you.

The next sentence says—and this was your answer then—"and as a lower court judge, I would be bound by the Supreme Court decisions." Now, reading that answer, it is subject to two or more interpretations. One is that you were speaking of natural law as it would apply to your functions as a court of appeals judge, and the other would be whether you would apply it as to the broad general theory of constitutional adjudication.

Now, if you want to read this and read the whole thing, I will do it, or if you want to answer as to where it may have an appearance of either an ambiguity or of being contradictory. Whatever you want to do, if you want to study it and read it and give me an answer later, or if you want to give me an answer now.

Judge THOMAS. Let me comment on what you have said, Senator. My view is that I have been consistent. On natural law, my interest, as Chairman of EEOC, was as I have stated. It was as a part-time political theorist, someone who was looking for a positive way to advance the ball with respect to individual rights in our political debates, as well as on the issue of civil rights.

I have not advocated or suggested that it should be used in consitutional adjudication. Our Founders and our drafters did believe in natural law, in addition to whatever else, philosophies they had, and I think they acted to some extent on those beliefs in drafting

portions of our Constitution, for example, the concept of liberty in the 14th amendment.

I think that knowing what their views are is a context for understanding our Constitution, knowing what they believed in is a context for understanding the separation of powers or perhaps even understanding the notion of limited government and the rights of individuals.

But when the rights are in the Constitution, then one resorts to constitutional adjudication. Now, the beliefs of the Founders could be a part of the history or tradition to which we look, but you do not make an independent search of natural law, and I have not suggested that. I think my writings have made clear that natural law is the background of our Constitution, that it does not move to the front and that it is not positive law. They are two separate things.

Senator HEFLIN. You have indicated that your writings and speeches were directed toward natural law more as a political theory and you have used the illustration dealing with slavery. How is slavery related to a political theory?

Judge THOMAS. Well, the issue there was for Abraham Lincoln, how do you, when the stated ideals of our country are that all men are created equal, how do you end slavery, and what is the underpinning, what does that promote in our country, the notion that all men are created equal.

Once you have the adoption of the 13th and 14th amendments, you have a positive law, but I think it was important to understand what that meant. It is just a notion, for example, of why do we feel strongly that apartheid is wrong, why do we feel strongly that discrimination is wrong, outside of the law.

But my point is very simply that Abraham Lincoln was sitting here, I think at the time I had read "The Battle Cry of Freedom," I wondered how or what gave him the strength to survive the onslaught that he was faced with, and it was then that I began to refer back to his beliefs and the beliefs of the abolitionists as a backdrop to the Constitution, as a background to the Constitution.

Senator HEFLIN. I am going to ask that someone on the staff here hand you two documents. One is a speech to the Federalist Society, an address, University of Virginia, March 5, 1988, and the other being an article that appears in the 1988 Harvard Journal of Law and Public Policy, entitled "Higher Law Background of the Immunity Clause of the Fourth Amendment," if they will hand you that.

Again, if any question that I ask, if you want to have time to read or review those, I would certainly want to do it, because I will have another opportunity to ask you questions, where you can fully understand it.

These two appear to have much relationship. This speech appears to be a speech, and then it appears that it was put in more of a law review form and was published. Is that a correct——

Judge THOMAS. What you do normally with these is that you give a speech and the review edits it and converts it to a law review piece. That is essentially what happens.

Senator HEFLIN. I see. Now, on the speech, on the first page, if you will look, tell us, bearing in mind as to whether or not you at that time were expressing a view that higher law or natural law—

as I understand it, they are used interchangeably—could be used as a part of constitutional adjudication.

Now, on the speech, starting it, you say:

I appreciate this opportunity for a practitioner, the head of a law enforcement agency, to give his opinion on our subject. I do not pretend to be a legal scholar, but I have a strong practical interest in the crucial part of our conference topic, namely, the grounding of our Constitution in higher or natural law. The expression "unenumerated rights" makes conservatives nervous, as it gladdens liberals, for the reasons our previous discussions here have indicated.

I want to take a different approach to this theme, which provides necessary background for the very abstract issue of the privileges or immunity clause today. Briefly put, I argue that the best defense of limited government and the separation of powers and judicial restraints that flow from that commitment to limited government is the higher law political philosophy of the Founding Fathers.

Far from being a license for unlimited government and a roving judiciary, natural rights and higher law arguments are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of a court that is active in defending the Constitution, but judicious in its restraint and moderation. Higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges.

Now, in regards to the question of higher law, how do you interpret that? It seems to me that you are advocating or at least it has the appearance—maybe I withdraw saying it appears to me, because I have not made up my mind, but it at least appears that that is an advocation of the use of natural law toward constitutional adjudication.

Judge THOMAS. It is not, Senator. The point there is that, in our regime, if you notice, I speak to the higher law political philosophy of the Founders. Their philosophy was that we were all created equal and that we could be governed only by our consent, and that we ceded to the Government only certain rights, and that, to that extent, the Government had to be and was a limited government.

But beyond that—and the judiciary, of course, was a part of that limited government—but in no sense, and I do not mention here or say higher law should be pointed to in adjudicating cases. It is nothing more than the background, the—I think I say here provides the necessary background, it provides us an understanding of our form and our structure in our Government. It is not a methodology in constitutional analysis. I think it would have been easy enough to have said that directly.

Senator HEFLIN. Well, you use the words "higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges." Now, how can higher law through a political theory serve as a protection against willfulness of run-amuck majorities or run-amuck judges?

Judge THOMAS. The theory would be, Senator, essentially this: That the individual is to be protected, that the individual can only be governed by consent, so that the majority cannot take rights away from the individual that have not been conceded or that have not been consented to be given to the Government by that individual. It is not a notion that in your adjudication you look to this higher law. It is simply an explication or an indication that this is the theme of our underlying background political philosophy and that the Constitution protects these rights.

Senator HEFLIN. All right. If you turn to page 7 and 8 of that speech, you make this statement starting at the beginning of the last sentence on page 7:

> Similarly, an administration inspired by higher law thinking would not have argued on behalf of Bob Jones University. The higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for a just, wise, and constitutional decision.

I am taking that out of context. If you want to read——

Judge THOMAS. The point there was that I felt that as a policy matter, as a political branch of our Government, that the administration of which I was a part made an inappropriate decision about being involved in the Bob Jones University case; a decision that had it been informed with the notion that we were all created equal or the notion of how important it was not to have discrimination in our society, that it—not the courts but our administration—would not have made as a policy matter. I thought it was a wrong decision.

Senator HEFLIN. All right, sir. Now turn to your law review article. Again, you—by the way, that thing that Senator Leahy was talking about, that footnote, I believe, appears here if you wanted to later, when Senator Leahy returns—it is footnote 2 on the first page.

I think basically the first part of that you use the term "run-amuck majorities" and "run-amuck judges" in that regard. But in the context of economic freedom or the freedom to contract on the concept of higher law, if you were to read it in that context, "Moreover, without recourse to higher law, we abandon our best defense of judicial review, a judiciary active in defending the Constitution but judicious in its restraint and moderation. Rather than being a justification for the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges."

Now, in the context of economic freedom, right to contract, and the fact that any governmental restrictions placed upon those freedoms would be, in effect, restrictions and could be looked upon as being run-amuck majorities, do you still maintain that that does not—well, I am just saying it is subject to an interpretation that you are referring to constitutional adjudication there.

Judge THOMAS. I am not in this sentence. Let me make a point about my interest in the economic aspect of this. I was asked on—I did not just simply sit around and spend time just trying to spin theories. I had certain experiences that prompted me to think about some of these issues. And with respect to the issue of having a right to run my grandfather's business, for example, I simply looked at what in theory was his right. After slavery, what was his right or the rights of people who were near me, who lived around me, to just simply use their land and grow their food and be able to eat it or to sell it?

Those were the kinds of examples that I would use. I, for example, remember vividly my grandfather, whom I thought was a strong man—and when you are small, it is a giant of a man, and certainly a man with great pride. He would literally have to get a drink before he went to the licensing bureau in Savannah to get

the license that he needed to drive his oil truck. Those were the kinds of questions I was looking at.

Now, I did not intend, first, to say that this was a basis for constitutional adjudication. I think I could have said that if I had intended that. The second point is that I have said and I believe that the *Lochner* era cases were properly overruled and that the health and safety—the Court does not serve as a superlegislature over this body or the political branches.

Senator HEFLIN. Well, you said you could have stated that. On the other hand, in all of these writings on natural law, you could have made the distinction, could you not, that you were speaking of a theory and not a constitutional adjudicatory process?

Judge THOMAS. I think, Senator, if I were a judge, if I gave some of these speeches after I went to the bench, I would have made that distinction. But at the time, I was not a judge and certainly did not think at that time that it was necessary to draw that distinction when it really at that point wasn't relevant.

I felt, as I stated in my hearings for the court of appeals, that this is political theory. This is not constitutional adjudication or methodology. And I stand by that. I think the distinction is an important one, and it is one that certainly I didn't draw a clear and exacting line sometimes, simply because I wasn't in the judiciary. I didn't say I am not saying this or I am not saying that, but it was not my intent at any point to provide a basis for adjudicating constitutional law cases.

Senator HEFLIN. In this article in the Harvard Journal of Law and Public Policy on page 66, this statement appears:

> To believe that natural rights thinking allows for arbitrary decisionmaking would be to misunderstand constitutional jurisprudence based on higher law.

That appears—it has the appearance of advocating natural law in the field of jurisprudence and decisionmaking on constitutional adjudication.

Judge THOMAS. Senator, no, I still—my point is that—and jurisprudence that I would use there would be in the broadest sense. I still take the position and took the position then that this would serve as a background to understanding what our Constitution was for. I was not speaking as a judge. I was not setting out rules of analysis or adjudication. I was trying to establish a sense among conservatives or among the audience that here is the background to our Constitution.

Now, our Founding Fathers took bits and pieces of what they believed may have been natural law, and they placed that in the Constitution. But once it is in the Constitution, it is no longer required that anyone refer to natural law. It is a part of our positive law. And I think that that is the appropriate distinction. It is the one that I certainly attempted to make there. At no point did I intend to say, look, this is an approach or methodology for constitutional adjudication. And that was the point I attempted to make again in my court of appeals confirmation. It has no role.

I think that if as a judge I had stated here is a new approach for constitutional adjudication, then I think you would be right, that there would be concern. But I was speaking solely as a chairman of

a commission who was interested in this debate and advancing this idea, but not in adjudicating cases.

Senator HEFLIN. The concept that natural law is a political theory, most political theories that are developed involve protections, adjudicatory concepts, or processes. You eliminate as a part of the comprehensiveness of the natural law theory or natural law philosophy the protection of rights or adjudicatory rights.

Now, in most political theories, you would have something, if it is adopted, that would provide for protection, which is judicial decisionmaking. Are you separating from the natural law theory adjudicatory processes?

Judge THOMAS. What I am saying, Senator, is this: That the individuals who drafted our Constitution, let's say our 14th amendment, the abolitionists, for example, believed in natural law. And to the extent that they reduced it to a positive document, it appears in the Constitution. But one need not appeal to whatever they believed beyond the understanding of what they intended to do, that the law—that our rights don't flow from what their beliefs were, but rather from the appearance of those rights in the Constitution.

Senator HEFLIN. Well, if it became positivism or the positive law of the Constitution, then why is natural law being advocated? The concept that if it is constitutional law, if natural law has progressed to the extent that it is positivism, it is a part of the Constitution, then why all the great discussion today on natural law?

Judge THOMAS. Well, for me it was just a matter of discussing and understanding the issue of slavery and the issue of the underlying values and the underlying ideals of our country. I thought it was important. I thought it was a way of discussing an issue that was important to me, rather than simply constantly arguing about goals and timetables and quotas. It was a way of attempting to find a way to—a theme to unify us on this debate and a way to convince individuals whom I felt should be supportive of civil rights. And I am not saying that it worked. I certainly never thought that I would be having this discussion about it. And I did not intend it certainly as a method of adjudication.

Senator HEFLIN. Well, let me ask you this last question. I understand my time is about up. How does natural law as a political theory provide protection for limited government or for judicial restraint if that political theory excludes constitutional adjudication?

Judge THOMAS. I think, Senator, it offers an understanding of why it was necessary or why our Founding Fathers felt that we should have a government that did not infringe on the rights of individuals or a government by consent rather than our rights emanating from that government.

It gives us an understanding of why government ought to be limited, why it ought not to intrude on the individual, why there is a line between the individual and the government. It gives us a sense of why the government shouldn't require that black people live over here or white people live over there. But it doesn't adjudicate it. It gives us an understanding of why slavery was wrong, but it doesn't provide for the manumission of slaves. That had to be done by the Constitution.

Again, it is theory. It was an endeavor that I thought was an appropriate endeavor at that point in my career. I did not intend for it to involve constitutional adjudication.

The CHAIRMAN. Thank you.

Before we take a break, just out of curiosity, you keep talking about the need to get conservatives to be more supportive of civil rights. Does that mean they are not supportive of civil rights?

I am not being facetious, because it goes to the question of your intentions here. Are conservatives supportive of civil rights?

Judge THOMAS. I was giving them reason to be strongly supportive and more aggressively supportive of civil rights. I don't think they were necessarily against civil rights, but I thought that there was a comfort level in being opposed to quotas and affirmative action. And I thought that we should advance the ball, that the issue of race has to be solved in this country and that we have to stop yelling at each other and we have to stop criticizing each other and calling each other names. And I was involved in that debate, and I was a pretty tough debater, too. But at some point we have got to solve these problems out here.

The CHAIRMAN. I think the State Department is the place for you, Judge. [Laughter.]

We will recess, to give you a chance to have a break, for 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Brown?

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, I have heard a number of criticisms of the chairman's style of conducting this hearing. The substance of those criticisms have revolved around the fact that he clearly is too soft on you, has not brought the tough questions out. And I just wanted to serve notice on the chairman that this love-in that he seems to be presiding over will come to an end.

Reflecting on my own children—I have two daughters and a son—it is clear to me that if I want to get the inside information on my son, I ask one of his sisters, and we intend to call your sister as a witness later on, whenever the chairman will allow that measure. I don't know if that is——

The CHAIRMAN. You just scared the living devil out of him. He is not sure whether you are serious. [Laughter.]

See the look on his face. He is only kidding, Judge.

Judge THOMAS. I would be more concerned if he called my brother.

Senator BROWN. I think we can make arrangements for that, too.

Senator SIMPSON. Mr. Chairman, let me correct the record. That is Clarence's sister there and not his daughter. We want to get all this sibling stuff straightened out.

The CHAIRMAN. As far as his sister is concerned, she would rather it not be corrected, she would rather be a daughter.

Senator BROWN. Judge, earlier in this hearing you were asked about the right to privacy, and as I recall your answer, you indicated that you recognized a right of privacy within the Constitution. Since that is one of the cornerstones that leads to decisions in-

volved in *Roe* v. *Wade*, I think that was of some real significance and interest to this committee.

You have been asked specifically about *Roe* v. *Wade*, and you have declined to answer on the grounds that you may well be called upon to rule on those specific issues as a judge of the Court.

I would like to ask a related question that is slightly different. I can understand the reluctance to indicate how you would rule, but I would be interested to know if in your own mind you have come to a decision on the right to terminate a pregnancy. I am not asking what that decision is, but I would like to know within your own mind if you are at a point where you have decided that.

Judge THOMAS. Senator, I think, as I have noted earlier, that for me to begin to state positions, either personal or otherwise, on such an important and controversial area, where there are very, very strong views on both sides, would undermine my impartiality and really compromise my objectivity.

I think that it is most important for me to remain open. I have no agenda. I am open about that important case. I work to be open and impartial on all the cases on which I sit.

I can say on that issue and on those cases I have no agenda. I have an open mind, and I can function strongly as a judge.

Senator BROWN. Well, I thank you. I think that willingness to look at the facts and review them objectively is an important factor for us to look at.

Mr. Chairman, I think it is appropriate here to at least put into the record something that was said by Justice Marshall upon his confirmation. He was asked by a variety of Senators to indicate how he would have ruled on a number of cases. The *Miranda* case was brought up as well as several others.

In the *Miranda* case, or at least in response to the *Miranda* case, Justice Marshall said this, and I quote: "I am not saying whether I disagree with *Miranda* or not because I am going to be called to pass upon it. There is no question about it, Senator. These cases are coming to the Supreme Court."

Justice Marshall remarked at a different stage of the hearings, "My position is—which in every hearing I have gone over is the same—that a person who is up for confirmation for Justice of the Supreme Court deems it inappropriate to comment on matters which will come before him as a Justice." I thought it appropriate to have that in the record. The position you have taken with regard to announcing an opinion in advance of hearing the case is certainly in line with other people who have been advanced to the Supreme Court, and in this case specifically Justice Marshall.

But I must say I do appreciate your answer to my question. I think a critical issue for us here is to know that you are willing to listen to the facts in those cases.

The CHAIRMAN. If the Senator would yield, did you have more than you read that you want to place in the record?

Senator BROWN. I think I would leave it at that, Mr. Chairman.

The CHAIRMAN. Second, did the witness answer your question? I didn't think he answered your question. That is, did he make up his mind? Not what is it, but just has he made up his mind?

Judge THOMAS. I indicated that it would be inappropriate to explain to him or to say whether I did or not.

The CHAIRMAN. Thank you.

Senator BROWN. At least my interpretation—and I appreciate the chairman mentioning this. At least my understanding was that the judge indicated that his mind was—he was willing to listen to the facts on this, and his mind was open in terms of this particular case.

Have I——

Judge THOMAS. That is correct.

Senator BROWN. I am assuming that you have not made a final decision in your own mind on the *Roe* v. *Wade* case?

Judge THOMAS. That is right.

Senator BROWN. Earlier the chairman had brought up I thought some very important questions involving economic rights in the Constitution. I know you commented further on that and answered Senator Hatch's question specifically with regard to several lines of cases that I know our chairman was concerned about. In addition, you had commented with regard to whether or not you would be a disciple of several philosophers that were mentioned, indicating that you would not.

I would like your views, though, on a different aspect of this economic question. As I just glance through the Constitution, we have a variety of provisions in the Constitution that deal specifically with property rights: Articles I, IV, VI; amendments II, III, IV, V, VII, XIII, I suspect many others. These are property rights, economic rights if you will, that are specifically addressed in the Constitution and protection provided.

It has been suggested, I think by the chairman, or at least an observation, perhaps I should say, by the chairman, that in the past some Supreme Court cases have accorded property rights or economic rights a lesser degree of protection than other rights in the Constitution.

My own view of it is that it is very difficult to separate rights. It strikes me that if someone cuts off your salary because you have said something, you may have denied freedom of speech but you have done it through a deprival of economic rights, property rights. At least it occurs to me that if the 13th amendment means anything, it means that you have justifiable property rights in the fruits of your labor. And if you are not going to protect the property rights of your labor, then the 13th amendment doesn't mean much.

Now, I broach this subject because I think it is important. In my mind it is difficult to separate property rights and personal rights. It does appear to me that both are protected in the Constitution, and I guess I would like an indication from you as to whether or not you think property rights deserve a lesser protection in the Constitution, greater protection under the Constitution than other rights, or whether it is a balancing between rights when these questions arise. Would you share with us your view on that?

Judge THOMAS. Senator, my point has been that property rights, of course, deserve some protection, and I think they are, as are our other rights, important rights. The Court in looking at the economic regulations of our economy and our society has attempted to move away from certainly the *Lochner* era cases and not as a superlegislature. And I indicated that that is appropriate, particular-

ly in the area as I have noted—the health and welfare, wage and hour cases.

I think that some of those cases, the area, I think there is some developing in the taking area, and perhaps if I am fortunate enough to be confirmed to the Court, perhaps I would be called upon to rule on those issues. But I would be concerned about the diminishment or the diminishing, diminution of any rights in our society. But that is not to say in any way that I disagree with the standards that the Court applies to protecting those rights today.

Senator BROWN. Thank you. I wanted to address the subject of stare decisis. It has been raised by other members of this committee. I think the distinguished Senator from Ohio has discussed the concern about the overturning of previous decisions and precedents.

As I see the figures, from 1810 through 1953 we had a total of 88 cases that were overruled, where a previous decision of the Court was simply and flatly overruled by the Court. That is 88 cases in 143 years.

Interestingly, I think, in the next 36 years, 37 years, we had 112 cases overruled. Really starting with the Warren Court on, you had a much greater movement on the part of the Court to overrule previous decisions.

I mention that because apparently the modern courts, at least since the Warren Court, have been much more inclined to move in that direction, not less so, in terms of observing stare decisis. But at least I observe those cases as ones that were important landmarks: *Brown* v. *the Board of Education* addressing segregation; *Mapp* v. *Ohio*, an illegal search; the *Gideon* case, involving the right to counsel. These are areas where we have overturned precedent, but I think with a very significant and real reason behind those changes.

I mention all of this because I wish you would share your view with us as to the kind of standards you are going to use in sitting on the Court as to whether or not you will choose to overrule a previous decision of the Court. What kind of standards are you going to be looking to apply?

Judge THOMAS. Senator, I think that the principle of stare decisis, the concept of stare decisis is an important link in our system of deciding cases in our system of judicial jurisprudence. The reason I think it is important is this: We have got to have continuity if there is going to be any reliance, if there is going to be any chain in our case law. I think that the first point in any revisiting of the case is that the case be wrongly decided, that one thing it is incorrect. But more than that is necessary before one can rethink it or attempt to reconsider it. And I think that the burden is on the individual or on the judge or the Justice who thinks that a precedent should be overruled to demonstrate more than its mere incorrectness. And at least one factor that would weigh against overruling a precedent would be the development of institutions as a result of a prior precedent having been in place.

But, again, I think the first step is that the precedent be incorrect, and the second step in the analysis has to be more than the mere incorrectness of that precedent.

Senator BROWN. I am wondering if the standards that you will be applying will vary depending on the constitutional issues involved. Is this the standard you would apply in every area?

Judge THOMAS. I think, Senator, that the standards that I gave you should be as uniform as possible. I don't think, for example, as I have read someplace, that the standard should be less for individual rights than for commercial cases. I did not understand that comment, but it would seem to me that individual rights deserve—or the cases in the individual rights area deserve the greatest protection and should be considered with the application of the highest standards of stare decisis.

Senator BROWN. Thank you.

I want to change subjects on you for a moment and take you back to the EEOC, during that 8-year period that you directed that agency, Commission. My recollection is that in 1983 you changed policy for the Commission, that the Commission adopted a resolution to shift its presumption in favor of rapid charge processing to one of case-by-case investigation.

I wonder if you would be willing to outline for us this policy initiative, and if you would relate what kind of results it achieved or didn't achieve. What kind of changes occurred?

Judge THOMAS. Senator, when I arrived at EEOC in 1982, among the many problems that I incurred—and, indeed, there were many—was that the existence of a rapid charge system, that system was designed to reduce the backlog that had plagued EEOC for so many difficult years. I felt that the system, which in essence brought the charging party who filed the claim of discrimination and the employer together and required them to reach a settlement, without investigating and determining whether or not there was actual discrimination, I felt that that system shortchanged both parties.

The Commission voted in the policy that as an ideal, felt that—or indicated that cases should be investigated as fully as possible before there is any determination. That took quite some time to implement. But the sense of it was this: That if someone—and there were approximately 60,000 charges filed a year. If someone filed a charge, that that person had the right to have it investigated and to have a determination made as to whether or not there was discrimination.

One of the results of this approach is the increased number of cases that were litigated. I think also an important result was that we were more consistent, and I think more faithful to the statute that required us to investigate these charges.

Again, this effort was not without its glitches, but I think it was a very important move in the right direction and brought about the appropriate results for an agency that enforces nondiscrimination laws.

Senator BROWN. One of the changes that at least I have understood that you focused on during that period was an effort to automate the office, adopt computers and computer systems. I wonder if you could summarize what you did and whether or not you thought it was a wise investment.

Judge THOMAS. Again, Senator, we automated in a number of ways. The first area that I was told when I was confirmed that I

had to clean up was the financial management area. The then-chairman of the Labor and Human Resources Committee told me that he would call me on the carpet if that was not done.

We were able to automate that area and as a result achieved savings that we could then use to automate other areas. And then that necessity for automating is quite simply that when you receive 60,000 charges a year in 50 offices across the country, in order to manage and in order to understand your agency and in order to be able to understand the type of discrimination that is taking place in this society, you have to have a database. You have to have a database in each of the offices, and you have to have a national database to manage that national workload from the central office here in Washington, DC.

One of the problems that you have when you don't have that database is simply you don't know what is going on in the agency. You don't know what changes there are, and quite frankly you have no idea what is in your workload except the most general of ideas. Without additional resources and over a period of time, we were able to build a database, to put the automated management systems in the offices across the country, and as well as develop a national database that is so important in managing our workload and actually enforcing the equal employment opportunity laws.

Senator BROWN. Thank you.

Judge, I must say I was shocked at hearing comments that you had made about Congress. Those harsh views are ones, of course, we have never heard before. As one who came to Congress some 11 years ago with the thought that we would balance the budget within a couple of years, the concept that perhaps a $250 billion to $300 billion deficit a year leaves something to be desired I suspect is not new to the American people. But sometimes saying the emperor has no clothes is not always the greatest help for you in the confirmation process.

Be that as it may, I think the underlying question is an appropriate one, and that is: What will your attitude be as a Justice of the Supreme Court in reviewing the constitutionality of legislation in which you find yourself in disagreement with the policy judgments of Congress? Are you going to be able to separate out your objections to congressional policy in making the determination of whether or not that law is judged constitutional?

Judge THOMAS. Senator, I think it is one thing to be in the executive branch and to come back and forth to oversight hearings and budget hearings and to disagree on policy decisions and to argue and debate and advocate for a particular point of view. There is a tension there, and sometimes those of us who have been nominated and needed to be confirmed have deep regret about negative comments about this body or any body, but the appropriate role for a judge totally precludes being a part of that tension and that debate and that advocacy.

A judge must determine what the will of this body is. A judge does not have to agree, a judge does not have to think it is the most wonderful legislation in the world. Indeed, that is irrelevant. The judge's role is, as impartially as possible, to determine what the will of this body is, and that is precisely what I have attempted to do in my current position as a judge on the U.S. Court of Ap-

peals for the D.C. Circuit, and never to supplant my personal views.

As I indicated earlier, when I pick up a case for consideration, the first question I ask myself is what is my role as a judge in this case, and that role never includes bringing personal views or predilections to that case.

Senator BROWN. I appreciate that. I expect that is not the easiest portion of your duties or task. It would not be for me.

You have mentioned several times in the course of these hearings your experiences in dealing with congressional inquiries involved in the various agencies you have either directed or been involved in. It is my understanding that you have appeared and responded some 57 times, in addition to the I guess 5 times you have been up for confirmation. I wonder if you would give us an idea, in those 57 inquiries, how much time was involved, what it involved on your part, your agency's part in terms of staff time, commitment of resources.

Judge THOMAS. Well, Senator, I would have to put that inquiry into two separate categories. The least amount of involvement are the instances in which there is significant cooperation between the staff of a particular committee and the agency. The difficulty arises when there is, in the second category, significant disagreements or where there is significant information or document requests involved.

But as a rule of thumb, when I prepared for a hearing, any of the hearings other than my own confirmation hearings, I would allow, at a minimum, 4 to 8 hours of personal preparation, in addition to whatever staff time it took to gather documents and to address the issues that concern the committee involved.

Senator BROWN. What about the agency itself?

Judge THOMAS. The involvement of the agency, again, depends on the range of the inquiry. There have been instances when the involvement has been quite overwhelming, as a result of the amount of data involved.

Generally, however, the agency's involvement has been sometimes exacting, it has been within manageable ranges.

Senator BROWN. Judge, in the past you have expressed some concerns about racial quotas. If I understand your position as it has been articulated at this hearing, it has been an interest or an advocacy of affirmative action, but an opposition to racial quotas as a method of achieving those advances. I wonder if you could articulate the differences you see and the reasons for them.

Judge THOMAS. As I indicated earlier, Senator, throughout my adult life, I have advocated the inclusion of those who have been excluded. I have been a strong advocate of that. I advocated that in college and I advocated that in my adult life, and I certainly practiced that during my tenure at EEOC.

I felt, for example, that there were many opportunities to include minorities and women and individuals with disabilities in our work force, and I took every occasion to do that in the Senior Executive Service Program, the top level of Government managers, our record is superb on the efforts that I was able to achieve in agreements, scholarships for minorities and women across the country,

colleges and universities programs, internship programs, mentor programs, stay-in-school programs, et cetera.

I think that many of us of good will and many of us who, though we do not necessarily share the same approach, agree with that goal that we have to include individuals who have been left out for so long.

The difficulty comes with how far do you go without being unfair to others who have not discriminated or unfair to the person who is excluded, and at that range I thought—and, again, this was the policy position that I advocated—that it was appropriate to draw the line at preferences and goals and timetables and quotas.

I also felt that those approaches, the objectionable approaches had their own consequences, and that is I felt that they had the tendency of undermining the self-esteem and dignity of the recipients. That is again something that others can debate, but I thought it was a valid point of view, and that those approaches, if we went too far, actually could be harmful to the very individuals whom we all care so much about.

But I am very firmly for programs to include those who have been excluded. That has been a passion of mine throughout my adult life.

Senator BROWN. In describing your views on racial quotas, unless I have missed it, you have not anchored them based on constitutional arguments, but anchored them in your own feelings about what makes sense, what makes the reason.

Yet, I notice the *Plessy* v. *Ferguson* dissent that you have referred to, or at least it has been attributed to you, that you found some interest in Justice Harlan's dissent there in that case includes this quote:

> But in view of the Constitution, in the eye of the law there is in this country no superior dominant ruling class of citizens, there is no cast here, our Constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Now, my recollection is I did finish saying I understand your reluctance to rule on cases in advance, but do you attribute your concern over racial quotas to reading the Constitution, as well?

Judge THOMAS. I think, Senator, in the appropriate circumstances, we all are concerned with the underlying value of fairness that is expressed in our Constitution, as well as in our statutes. But I would like to make one comment with respect to that quote, and I think it is an important comment, that we have to remember that, even though the Constitution is color blind, our society is not, and that we will continue to have that tension.

Senator BROWN. Judge Thomas, I bring this subject up not to cause you personal concern, but because it has become part of the debate over your nomination. I preface it that way, because it is not normally the type of thing that I guess I would bring up at a hearing of this kind.

But one of the charges that has been brought against you in this nominating process is that you benefited by quotas or affirmative action, but do not support them. I guess the question is directly in entry to Yale, were you part of an affirmative action quota, were you part of a racial quota in terms of entering that law school?

Judge THOMAS. Senator, I have not during my adult life or during my academic career been a part of any quota. The effort on the part of Yale during my years there was to reach out and open its doors to minorities whom it felt were qualified, and I took them at their word on that, and I have advocated that very kind of affirmative action and I have done the exact same thing during my tenure at EEOC, and I would continue to advocate that throughout my life.

Senator BROWN. Mr. Chairman, my time is up. I would merely note for the record that the judge was an honors graduate of Holy Cross undergraduate school.

The CHAIRMAN. We will suspend just for a moment.

[Pause.]

I was just conferring with staff about the timing. Just so you have a sense of how much longer you are going to sit there, I think we should go with one more Senator. Today we will hear from the Senator from Illinois, and then we will take up tomorrow morning at 10 o'clock with the Senator from Wisconsin, followed by a second round beginning with me.

The Senator from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge Thomas, I will try to avoid doing what Senator Danforth said we should not do and just read little snippets from what you have written and said. I have read now over 800 pages of Clarence Thomas' speeches and opinions. I have read more of Clarence Thomas than any author I have read this year. I regret to say I do not think you have a best seller in the works. [Laughter.]

But it is important, because when you say you have no agenda or when you say you are not a policymaker, the reality is you become a policymaker on the U.S. Supreme Court. If I may quote from Justice Frankfurter, "It is the Justices who make the meaning," talking about the law and the Constitution. "They read into the neutral language of the Constitution their own economic and social views. Let us face the fact that five Justices of the Supreme Court are molders of policy, rather than the impersonal vehicles of revealed truth."

If, for example, in this committee, my colleagues, Senator Heflin and Senator Hatch, have a disagreement and work out a compromise and the law is not completely clear, then ultimately you may have to decide and make policy. That may be a 5-to-4 decision of the Court.

I mention this, because, generally, while it is not always true, you can usually tell where a Justice of the Court is going to go by looking at his record. For example, Justice Marshall has been talked about here. Generally, we can say there were no great surprises in Thurgood Marshall's record on the Court, because we knew where he had been.

When I look at your writings, I find a somewhat different tone, frankly, than the response to questions here, or a somewhat different tone in the quotes Senator Danforth read—with great respect to my colleagues, Senator Danforth, who gave as strong and eloquent an endorsement as I have ever heard of any candidate. But what I read is somewhat different from the tone of the remarks, the quotes that he made there. And when I read attacks on mini-

mum wage, for example, I would defer to your sister and mother on whether or not we ought to have a minimum wage law rather than to Judge Thomas. Or when I read and when I hear you mention public housing that your mother was able to move to, and then I read your statement—and I have almost—well, I have 16 similar in tone here, but let me read the one that I read in the opening statement:

"I for one don't see how the government can be compassionate. Only people can be compassionate, and then only with their own property, and their own effort, not that of others."

Now, in the case of public housing, my feeling is we are talking about government being compassionate, taking a little of your money, taking a little of Jack Danforth's money, taking a little of my money, but doing something that is very constructive and very needed.

I find an inconsistency there, and I—well, let me just ask you to comment on what I see as inconsistency and maybe you do not see as an inconsistency.

Judge THOMAS. Senator, with respect to—let me just address the minimum wage. The concerns that I raised in a policy debate were something that I felt should have been taken into account. I think we are all for a decent wage. The one factor that I thought should be taken into account is the impact it would have particularly on minority teenage employment, and if that was considered in the calculus, then that was fine. But that was an important consideration. That is a policy decision. It is not one that judges make.

With respect to public housing or comments about compassion, I don't think in all of those that you found one word saying that we shouldn't spend money to help people who are poor or downtrodden.

Senator SIMON. But isn't that what you are——

Judge THOMAS. I think that we have an obligation, an obligation to help those who are down and out. That is what I tried to point to in my opening statement; that as a part of our community, I think it is important for us to be willing to pay taxes so that people have a place to live.

Senator SIMON. And so when you attack, for example, redistribution of wealth—and one statement I read could have been made by an early king of France, very negative on the redistribution of wealth. But, in fact, when we have public housing——

Judge THOMAS. I think that is very important.

Senator SIMON. And that does not offend you?

Judge THOMAS. No.

Senator SIMON. All right.

Judge THOMAS. Senator, let me make one point. I think that it is important that we recognize, whether we have public housing or any other policies, that we make sure that we are doing good for the people who are the beneficiaries or recipients of this. Years ago I think we remember that there were public housing in certain cities that ultimately had to be torn down because they turned out to be more harmful to the inhabitants than they were helpful.

Senator SIMON. One of them in St. Louis that all three of us know about here.

Judge THOMAS. The debates that I requested and would have hoped to have been a part of is, Look, let's reexamine the pros and cons. Let's have a constructive debate about it. The problem is still going to be there.

I called a debate over affirmative action a pointless debate because at the end of the day there are people who are still not a part of our economy. We can agree or disagree all day. It is as though we are fiddling while their chances burn.

So I do think that those efforts are important, Senator.

Senator SIMON. In that connection, affirmation action, Senator Brown just asked you about college programs. One of your successors in the Office of Civil Rights in the Department of Education has criticized setting aside scholarships for minorities. Washington University, headed by a distinguished chancellor, William Danforth, has graduate fellowships for minorities in the field of science and math. Does that offend you in any way?

Judge THOMAS. It is my understanding, Senator, that there may be litigation about that particular policy, but let me answer that in this way:

When I had the opportunity to establish a program at EEOC that provided scholarships for minorities and women, I did. And it is a program that I think now has about $10 million in endowments. When I had an opportunity to establish a program or to participate in the establishment of a program here in Washington for minority interns, I did. I think that it is important for them to be here, to participate in this process, to learn from this process, to grow. I wish that when I was a kid I had had this opportunity also.

So I think that there are steps that need to be taken, but I can't—on that specific policy, I think it would be best that I not comment explicitly on that.

Senator SIMON. That is a perfectly legitimate response.

Again, so that I can get a feel of where you are coming from to judge where you are going to be going, Newsday magazine describes James J. Parker as a mentor and the person who introduced you to the Reagan White House. Is that an accurate description?

Judge THOMAS. Jay Parker has been a friend since I worked here on Capitol Hill. He was not the person who introduced me to the White House.

Senator SIMON. He has been, for many years, a lobbyist for the Government of South Africa. Were you aware of that?

Judge THOMAS. I became aware of that, interestingly, even though he is a friend, I can tell you that I do not question—he is an honest individual, and I didn't question him about his personal activities and his businesses. I became aware that he—through the news media, as you did, about this particular activity.

Senator SIMON. Now, he is quoted at one point as saying he informed you in 1981 about that. You don't recall that.

Judge THOMAS. I don't recall it. I knew he represented some of the homelands in South Africa at some point. I think the Mandela family or some individuals in South Africa. I was not aware, again, of the representation of South Africa itself.

Senator SIMON. He and a fellow named William Keyes, who are both editors of Lincoln Review, which is frequently given a far-

right label—whether it is justified or not, it is frequently given that label. But the two of them over the course of the years received well over $1 million from the Government of South Africa. They also, in editing this publication, have had a number of articles critical of sanctions, antichoice articles, other things. For 10 years you were an editorial adviser to that publication. Did you at any point question whether these articles that, while critical of apartheid, were in agreement with the policies of the Government of South Africa or also the antichoice articles? Did you at any point suggest that those were not proper?

Judge THOMAS. Senator, 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 the material that was included in the journal. Indeed, I don't think that I have read a copy of the Lincoln Review in 2 or 3 years. I haven't received one in the mail in the last 2 or 3 years.

On the issue of South Africa, however, let me make this point: That even as I was aware of Mr. Keyes' involvement with South Africa, I was not aware of Mr. Parker's. But even as they took that position, I took a strong position on the board of trustees of Holy Cross that we divest of stocks in South Africa. That was important to me then, and, of course, that is contrary to a position that they might take. But it is one that I felt strongly about.

Senator SIMON. I was not aware of that, and I think that is significant.

You joined Clarence Pendleton and Steven Rhodes in criticizing those who were protesting at the South Africa Embassy on South African policy. At least the Washington Post reports this. Did you do this on your own? Were you requested by someone to do this? Do you recall this?

Judge THOMAS. I have no recollection of that at all, Senator.

Senator SIMON. Somebody give that to Judge Thomas.

If you can just look at the article and see if you do recall this. [Pause.]

Judge THOMAS. I think the quote that if these were protests about the quality of education black kids in the United States receive, about the high crime rate in black neighborhoods, I would be right out front in that kind of a march. It is probably the kind of statement I would have made.

Senator SIMON. But the three of you did this in a coordinated way. Obviously, you know, it didn't just happen that all three of you said that the same day.

Judge THOMAS. Well, the only way that I think that something like that could happen would be that we were called the same day by the reporter. I had no involvement on that issue within the administration. I would assume that the reporter simply picked up the phone and looked for individuals to get a comment.

Senator SIMON. If on further reflection you or anyone else has any further background on that, when we get around to the second round——

Judge THOMAS. I simply don't remember a coordination. If anything comes to mind or if I can reflect on that, I will certainly apprise you of it.

Senator SIMON. On the question of privacy, you have been critical of the use of the ninth amendment. And when you were asked by Senator Metzenbaum, I believe, about the question of privacy, you referred to the 14th amendment.

There are at least three members of the Supreme Court who have referred to the right of privacy as a fundamental right. The ninth amendment, as I am sure you are aware, grew out of correspondence between Madison and Hamilton, where Hamilton said, "If you have a Bill of Rights, some people will say these are the only rights people have." And so the ninth amendment was added which says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

That amendment is not just in isolation. In the Constitution you also have a provision which states that the Government can't search your home without a search warrant. That is in a sense a right of privacy. The Constitution says you can't have militia quartered in your home. That is in a sense a right of privacy.

When you put that all together, together with the ninth amendment, it seems to me that there is fairly clearly a right of privacy implied.

Now, that becomes significant because if you use the 14th amendment as a basis for the right of privacy, that comes later in our history. It has not been a part of our whole tradition of our country to have a right of privacy.

Do you have any reactions to that, and do you consider the right of privacy a fundamental right?

Judge THOMAS. Senator, to my knowledge, the Supreme Court, no majority has used the ninth amendment to establish as the basis for a right. Of course, it was used by Justice Goldberg and by Justice Douglas in *Griswold.*

With respect to the approach that I indicated that I thought was the better approach, it was Justice Harlan's approach. But with that said, my bottom line was that I felt that there was a right to privacy in the Constitution, and that the marital right to privacy, of course, is at the core of that, and that the marital right to privacy in my view and certainly the view of the Court is that it is a fundamental right.

Senator SIMON. Let me shift to another area, and that is the church-state area where you have not written very much. In fact, the only thing I have is in response to a question about religion in the schools in Policy Review magazine. You say:

> My mother says that when they took God out of the schools, the schools went to hell. She may be right. Religion is certainly a source of positive values, and we need all the positive values in the schools that we can get.

It is the only thing I have found in this whole church-state area.

This is an area where, again and again, during your years on the Court you will be asked to make decisions. Since 1971, the Court has followed a three-part *Lemon* criteria that you may be familiar with. It is Jefferson's wall of separation. It is not quite that clear. When the Methodist church is on fire, you call the fire department. You don't say separation of church and state. We can't put out the fire because of a number of factors.

But the *Lemon* criteria are: No. 1, does it have a secular purpose? No. 2, is its effect to advance or inhibit religion? And, No. 3, does it excessively entangle government and religion?

That is what the Supreme Court has been using since 1971.

I guess I have a twofold question: No. 1, are you familiar with the *Lemon* criteria? And, No. 2, if you are, do you think they are reasonable criteria that should be used in the future?

Judge THOMAS. Yes, Senator, I am aware of the tests enunciated in *Lemon* v. *Kurtzman*. The Court has applied the tests with some degree, I think, of difficulty over the years. I have no personal disagreement with the tests, but I say that recognizing how difficult it has been for the Court to address just the kind of problem that you have pointed out when the church is on fire or when there is this closeness between the activity of the Government and the activity of the church.

I think the wall of separation is an appropriate metaphor. I think we all believe that we would like to keep the Government out of our beliefs, and we would want to keep a separation between our religious lives and the Government.

But the Court has had a great deal of difficulty, and there is some debate on the Court as to how far you should go; whether or not there should be this complete separation; whether or not there should be some accommodation and certain circumstances; or whether or not even there should be a movement as far as just simply to the position where the Government isn't establishing a religion or coercing individuals to be involved in a certain kind of activity.

But I think it is a vibrant debate. I have an open mind with respect to the debate over the application of the *Lemon* v. *Kurtzman* test, and I recognize that the Court has applied it with some degree of difficulty. But at the same time, I am sensitive to our desire in this country to keep government and religion separated, flawed as it may be by that Jeffersonian wall of separation.

Senator SIMON. Let me give you a very specific instance that you are not going to be confronted with, though the issue may be one that you will be confronted with. We have a House colleague by the name of Dan Glickman, a Congressman from Kansas. He told me the story, and I repeat it with his permission.

When he was in—I think it was the fourth grade, they had prayer in the schools in Wichita. He happens to be Jewish. A large majority of this population in Wichita is not. Every morning when he was in the fourth grade, he was excused while they had school prayer, and then he was brought back in. Every morning little Danny Glickman was being told, you are different, and all the other fourth graders were being told he was different.

Does this strike you as something that is offensive in terms of where we have been, and where we ought to go?

Judge THOMAS. Senator, I think that when we engage in conduct such as that, when someone feels that he or she is excluded because of certain practices, such as those religious practices, I think we need to question whether or not government is involved. I think it is wrong.

You know, as you were talking, something came to mind. I remember being excluded from conversations about the war of North-

ern aggression, which for those who don't know about the war of Northern aggression, it is the Civil War. And it is refought, for those who think it ended at some point. But it is a sense of exclusion. And for those of us who have felt that sense of exclusion, I think that we have a strong sense that any policy that endorses that exclusion—and I think Justice O'Connor points that out—should be considered inappropriate.

My concern would be with someone like Danny Glickman that when we consider cases in a constitutional context that we understand the effects of government's perceived endorsement of one religion over another, and that we take that into consideration when we analyze those cases.

Senator SIMON. I don't think since you have been on the appellate court you have had any chance to rule on any of these church-state issues. Have you?

Judge THOMAS. In my way of recollection or in my knowledge, I have not, Senator.

Senator SIMON. If you or anyone—Ken or Fred or anyone, if you have written anything in this field, I would be interested in seeing it.

Judge THOMAS. I think my writings in this area are mercifully minor, if any.

Senator SIMON. My time is just about up, and rather than start the next subject—when you are the last in line, you have to skip from subject to subject, whatever hasn't been covered. I will hold off until the second round.

Thank you very much, Judge. Thank you, Mr. Chairman.

Judge THOMAS. Thank you so much, Senator.

The CHAIRMAN. Senator, all the writings are in the area of natural law. There aren't any on religion.

Senator I understand that you don't mind if we start tomorrow, do you?

Senator KOHL. No.

The CHAIRMAN. Tomorrow we will start at 10 o'clock, Judge. I am going to give you a copy, which you already have, of some of your speeches that occurred post-1984. I believe, almost all of these speeches have been discussed, but I want to make sure you have copies of them, because tomorrow I am going to ask you to help me understand some of them.

If there is no further business, I have been asked to accommodate the President's request to continue to allow district court and circuit court judges to be reported out during this process. In order to honor that request we will have a very brief—which will make no sense to anyone except White House staff that is here and the committee—exec tomorrow to vote on reporting out 13 Federal judges and 4 U.S. attorneys. So as a practical matter, I say to the press that we will begin questioning closer to 10:30 than 10. But the purpose of that is to report out these Federal judges. We might as well just do it right here so we don't have to move around.

But we are going to try to start as close to 10 as we can with you, judge. This exec won't take very long.

With that, if there is no further business coming before the committee this evening, we will adjourn until 10 tomorrow.

[Whereupon, at 5:15 p.m., the committee recessed, to reconvene at 10 a.m., Thursday, September 12, 1991.]

NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, SEPTEMBER 12, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice at 10:22 a.m., in room 325, Senate caucus room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

The CHAIRMAN. Let's officially begin the hearing with Judge Thomas.

Judge, welcome. We are delighted to have you and Mrs. Thomas back. We will follow, business as usual, and begin with the Senator from Wisconsin, Senator Kohl who will have one-half hour of dialogue with the witness.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman.

Good morning, Judge Thomas.

Judge THOMAS. Good morning, Senator.

Senator KOHL. Glad to see you this morning.

Judge Thomas, Monday's New York Times said that you were "involved in mock committee sessions in which your answers were tried out in front of lawyers pretending to be committee members."

My question is three-fold: First, who played me? [Laughter.]

Was it Kevin Costner or Mel Gibson? Second, I would like to know who played Senator Metzenbaum? [Laughter.]

Senator HATCH. Nobody would have that——

Senator KOHL. Third, Judge Thomas, I would like to know who could possibly have played Senator Simpson?

Judge THOMAS. That is a good question, Senator. I don't remember precisely, but I think that it may have been Senator Danforth who played all three. But I can't remember precisely.

Senator KOHL. All right. Judge Thomas, I would like to ask you why you want this job.

Judge THOMAS. Senator, being nominated to the Supreme Court of the United States is one of the highest callings in our country. It is an opportunity. It is an entrustment, an entrusting of responsibility by the people of this country, by this body, to make some of the most difficult and important decisions in our country.

It is an opportunity to serve, to give back. That has been something that has been important to me. And I believe Senator, that I can make a contribution, that I can bring something different to the Court, that I can walk in the shoes of the people who are affected by what the Court does.

You know, on my current court, I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload. And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I.

So you feel that you have the same fate, or could have, as those individuals. So I can walk in their shoes, and I can bring something different to the Court. And I think it is a tremendous responsibility, and it is a humbling responsibility; and it is one that, if confirmed, I will carry out to the best of my ability.

Senator KOHL. All right. That is good.

Judge Thomas, if I understand you correctly, you are going to leave behind almost all of your views about what type of society we ought to be and what type of policies we ought to apply. Two questions. First, why after 20 years in the forefront of these battles do you want to leave all of this behind? And the second question is: If you do leave so much of this behind, what is left?

Judge THOMAS. Though it may sound rather strange to some individuals, the kind of fighting and the in-fighting and certainly the difficulties of battles, those kinds of battles in the political process I think are wearing. So it is not the confrontation that I ever relished or enjoyed. In fact, that is the opposite of my personality. I like to try to find consensus. So I don't miss and have not missed on this court having those kinds of battles. We have reasoned, constructive debate on the court.

But with respect to the underlying concerns and feelings about people being left out, about our society not addressing all the problems of people, I have those concerns. I will take those to the grave with me. I am concerned about the kids on those buses I told you. I am concerned about the kids who didn't have the strong grandfather and strong grandparents to help them out of what I would consider a terrible, terrible fate. But you carry that feeling with you. You carry that strength with you. You carry those experiences with you. I don't think you have to carry the battles with you. It is a difficult weight.

Senator KOHL. Judge, I would like to come back to a question about preparation. When I was running for the Senate, I worked with people who helped prepare me for debates, so in my mind there is nothing wrong with getting some advice and help in preparing for this hearing. But I would like to ask you some questions about the process.

When you were holding practice sessions, did your advisers ever critique you about responses to questions in a substantive way? Did they say, for example, "You should soften that answer," or "Don't answer that question, just say that you can't prejudge an issue that may come before the Court"?

Judge THOMAS. Senator, the answer to that is unequivocally "no." I set down ground rules at the very beginning that they were

there simply to ask me and to hear me respond to questions that have been traditionally asked before this committee in other hearings and to determine whether or not my response was clear, just to critique me as to how it sounded to them, not to myself, but not to tell me whether it was right or wrong or too little or too much.

Senator KOHL. Good. Judge Thomas, most Americans believe that the Supreme Court should have a fierce independence. Do you see any problem in terms of the system of checks and balances, and separation of powers in having members of the executive branch detailed to assist in the confirmation of a member to the Supreme Court? Do you think that such assistance creates an appearance of impropriety, because it blurs the lines between the branches of Government?

Judge THOMAS. Senator, the process of confirmation, as you can imagine, is a difficult one. The last 10 weeks have involved my answering countless questions, responding to significant document requests that I personally could not respond to, and information that was contained in the executive branch.

Traditionally, individuals in the executive branch have assisted, but, again, there I made it clear what my rules were. They were to do nothing more than provide me with information such as case law, documents that I needed to prepare myself at my request. They in no way did anything more than provide that information.

For example, they would be more in the order of what I would have my law clerk do, provide me with the material that I need.

Senator KOHL. But it is said in the New York Times—perhaps they were misquoting—that there were mock sessions between you and people from that branch during which questions were asked and answers were given. That is entirely different from what you just said.

Judge THOMAS. To my knowledge, there was one individual from the—there were a number of individuals from the executive branch, that is right. I thought you were talking about the individuals who assisted me with the documents, not the individuals in mock sessions.

Senator KOHL. No, no. We are talking about the whole process, the preparation, the involvement, the fact that the executive branch and you have been working together on this nomination in all the various ways, including preparation for this hearing. And I am asking you not whether or not you have the right to do it. You do. I am asking whether or not that blurs the separations that are supposed to exist as between the branches of Government.

Judge THOMAS. I am sorry I was not responsive. I think that there would be certainly be no more conflict than one would have when a clerk from your staff argues before you in the subsequent years. I do not think there would be, Senator. I can see the concern, but I do not think that there would be at all.

Senator KOHL. All right.

Judge THOMAS. And the preparation is dearly needed, the help, the assistance is dearly needed.

Senator KOHL. Good. Judge Thomas, I would like to talk to you about the right to privacy for just a minute. Yesterday, you told Senators Leahy and Metzenbaum that you had no opinion, either personally or professionally, about the legal issues raised in *Roe*,

and that you have never had an opinion and never discussed it. That is a very strong statement to make to this committee and to the American people.

I would like to ask you a related, but nonlegal question. As Clarence Thomas the man, a human being, do you have a personal view on whether society ought to provide women with the option of having an abortion?

Judge THOMAS. Senator, I would essentially reply as I have yesterday, and that is this or in this way: I think that in this area that the need for a judge such as myself to maintain impartiality is critical. I think that whether or not I have a view on this important issue is irrelevant to being an impartial judge and having one could undermine or create a perception that could undermine my impartiality. That is very important to me, and I think it is critical, if not important to any other judge.

Senator KOHL. That is fine, but the question I asked is whether you have, as a human being, a personal view on this subject.

Judge THOMAS. Senator, I understand the concerns on both sides of the issues. I am certainly a citizen who attempts to keep abreast of the news and to be aware of the issues in this country. But as I indicated before, whether or not I have one I think is irrelevant to my being impartial or considering this issue as a judge.

Senator KOHL. Judge Thomas, yesterday you reminded us that the panel that is judging you is all white and all male. Do you think that your responses on this question would have satisfied a panel composed of 14 women, instead of 14 men?

Judge THOMAS. I don't know, Senator. I would hope that the manner in which I am judged, in a fair and impartial manner, does not depend on the gender or the race of those judging me.

Senator KOHL. In 1987, Judge Thomas, you said that you believed, and I quote, "Our civil rights policy should be based on fundamental principles and the assumption that Americans are basically decent, and that they prize fairness." Yet you told Juan Williams, for an article in the Atlantic Monthly, that you believe that the white world is wrought with racism. "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do, you will never be seen as equal to whites."

Judge Thomas, those are contradictory statements and I would like to ask you: First, how you can oppose most forms of affirmative action, if America is basically racist; and second, how can you support any type of affirmative action, if Americans are as basically decent and fair as you have suggested?

Judge THOMAS. Senator, it is clear from the testimony that I have given you here about where I grew up, that I understand the realities of our country. It should be clear from my biography that I understand that racism exists. Throughout my speeches, I have made it clear that there is unfairness, in speeches at commencements of Savannah State College, Compton, wherever, places that I have had occasion to speak to minority students and to others, I have pointed out this unfairness, but I appealed.

There is an individual I heard recently who said that we can seek revenge or prosperity. I have tried to appeal to that which is good. I have been there where I have been angry and upset, and I

understand what it means to be angry and upset. But what I have tried to do during my tenure at EEOC, during my public life, recognizing that there are these contradictions in our society, I have tried to appeal to what is good, what can move us forward, not backwards.

With respect to affirmative action programs, I tried to explain yesterday the tensions between the notion of fairness to everyone and this desire to help people who are left out. There is a tension, and how far do you go in trying to include people who are left out, and not be unfair to other individuals, and it is one that I had hoped that we could wrestle with in a constructive way. But as the debate went on, unfortunately, we were not able to, and the rhetoric was heated.

But I have initiated affirmative programs, I have supported affirmative action programs. Whether or not I agree with all of them I think is a matter of record. But the fact that I don't agree with all of them does not mean that I am not a supporter of the underlying effort. I am and have been my entire adult life.

Senator KOHL. All right. Judge Thomas, I would like to talk about a subject which is somewhat sensitive, but it seems to me we ought to address it openly. In the article by Juan Williams, you said you were troubled with the possibility of being selected for a position because of your race. In that instance, you were speaking about your appointments to the head of the Office of Civil Rights at Education, and also to head the EEOC. Did you have similar thoughts when you were nominated for the Supreme Court, Judge Thomas?

Judge THOMAS. Senator, my concerns were in being selected for the two positions that you stated, was that I sensed that it was automatically assumed that, since I was black, these are the positions for me, it is expected that I would go to that sort of a position, as opposed to the Energy Department, for example.

The President indicated that he nominated me as a result of his search, as limited or as broad as it may have been among those individuals, he felt that I was the best qualified. I take him at his word, but I also believe that there is a need in all of our institutions, on the Supreme Court and elsewhere, in diversity. I think it is important to our society.

Senator KOHL. Well, are you troubled by what mainstream periodicals have been saying now for several weeks. I quote just one, U.S. News & World Report. They said you were "picked from a pool of one to fill a quota of one." That has been said in some way by half a dozen or a dozen mainstream periodicals around the country. Does that bother you?

Judge THOMAS. Senator, there is much that has been said over the past 10 weeks that has troubled me. To say that is the most troubling thing that has been said, I think would not be accurate, but that would trouble anyone, and also I think it is inaccurate.

Senator KOHL. Judge Thomas, you have had some harsh things to say about Congress—so have I and so have most of the American people. But unlike most of the American people, you have worked in the Congress. In fact, you have worked in the executive, legislative and the judicial branches. I would like to ask you a few questions about your experience in these areas.

In a 1988 speech at Wake Forest, you said that legislators "browbeat, threaten and harass agency heads." In the Wake Forest speech and in another 1988 speech, you said that Congress was, and I quote, "a coalition of elites which failed to be a deliberative body, which legislates for the common or the public interest," and that Congress was "no longer primarily a deliberative or even a law-making body."

So, Judge Thomas, why would a man like you, with strongly held ideas about public policy, ever want to work in this branch of government, the courts, where you have an obligation to uphold the bad laws that you say Congress makes?

Judge THOMAS. First, let me go back to the position that I was in as a member of the executive branch. As I indicated yesterday, there is tension between the two branches, and particularly in the oversight process. I felt, as the head of an agency who had been called to the Hill on a number of occasions in some very difficult circumstances, that particularly some of the staffers went too far in micromanaging the agency and made it very, very difficult.

I think that the legislative role of Congress, as well as the oversight roles of Congress, are very, very important. It is a little easier to see, when you are not the object of an oversight hearing.

In my current job, our role is to determine the intent of Congress. I believe that I have done that fairly and impartially. I have stated very clearly that my job is not to engage in a policy debate with Congress. I am out of that role. I am not in the political branch. I am in the neutral branch, and my job is to remain neutral.

When I was in the political branch, I think I fought the policy-making battles, and I am sure that individuals on this side has some——

Senator KOHL. That is all right. I just want to go back and quote to you what you said, and ask you, do you remember saying it? Is it true? And do you believe it? You said that "Congress was a coalition of elites which failed to be a deliberative body that legislates for the common good or the public interest," and you said that "Congress was no longer primarily a deliberative or even a law-making body." Is that how you feel?

Judge THOMAS. Today?

Senator KOHL. Today. [Laughter.]

Here, sitting before 14 of us who are going to vote.

Judge THOMAS. I can't, Senator, remember the total context of that, but I think I said that and I think I said it in the context of saying that Congress was at its best when it was legislating on great moral issues. Now, I could be wrong. I think I have turned over 138 speeches, and I can't remember the details of all of them, but I did say and I do remember saying that Congress was at its best when it was deliberating the great moral issues of our time, such as, for example, our involvement in the Persian Gulf conflict.

Senator KOHL. All right. Judge, I would like to briefly follow up on Senator Simon's church-state questions. During your appellate court confirmation hearing, we discussed your views on school prayer and I asked you about your 1985 statement where you said, "As for prayer, my mother says when they took God out of the schools, the schools went to hell. She may be right. Religion cer-

tainly is a source of positive values, and we need to get as many positive values in schools as possible." You said that was your personal view, but of no consequence; that as an appellate judge, you would be bound to follow Supreme Court precedent.

Now, however, you are being considered for the Supreme Court and you will be in a position to set precedent. Your personal views are of great consequence, so I would like to ask you this: The Supreme Court has repeatedly ruled that prayer in the schools violates the first amendment. Given your statement in 1985, could you explain your views on prayer in school today?

Judge THOMAS. Senator, as I indicated yesterday, my comments there were not taken to in any way reflect on the legal rulings on the establishment clause or the free exercise clause. As I indicated yesterday, that from my standpoint, as a citizen of this country and as a judge, that the metaphor of the Jeffersonian wall of separation is an important metaphor. The Court has established the *Lemon* test to analyze the establishment clause cases, and I have no quarrel with that test.

The Court, of course, has had difficulty in applying the *Lemon* test and is grappling with that as we sit here, I would assume, and over the past few years, but the concept itself, the Jeffersonian wall of separation, the *Lemon* test, neither of those do I quarrel with.

Senator KOHL. All right. In your view, Judge, what is the current state of the law with regards to the establishment clause of the first amendment?

Judge THOMAS. The Court now, in the application of the *Lemon* test, that is that there be a secular purpose to the legislation or the action, that there be no primary sectarian effect and there be no unnecessary entanglement of government in the affairs of religion. It has been difficult for the Court, as I noted, to apply. The Court has been split between I think those who feel that there should be some accommodation and those who think there should be an absolute separation.

Justice O'Connor, of course, has offered some movement in the area, as well as Justice Kennedy I think has applied a coercion test. I think the judges are grappling at, when church and the government are inexorably in contact with each other, how much separation can there be and how do you draw the line.

I think it is difficult. It has been difficult for the Court. We see it in the cases with the Christmas displays and the Court has not resolved it, but I think the analysis, the *Lemon* test, as well as the understanding that the separation must be there is important, but, in practice, it is difficult.

Senator KOHL. How do you reconcile your willingness to discuss this area of the Constitution, which is still unsettled law, with your unwillingness to discuss another area of the Constitution, which is the woman's right to choice?

Judge THOMAS. Senator, I think what I have attempted to do is, to the best of my ability, without judging or prejudging the case, to simply set out in an area that you have requested the analysis of what the Court has done and where it has gone.

I have indicated and I think it is important to indicate that the area of *Roe* v. *Wade* is a difficult, it is a controversial area. Cases

are coming before the Court in many different postures. And I think it would—and I think it is a judgment that each member of the judiciary has to make. I think it would undermine my ability to impartially address that very difficult issue, if I am confirmed, to go further than I have gone.

Senator KOHL. All right. Finally, Judge, with respect to all the things that you have said and written in the past and the things that you have asked us to discount today—I am thinking also about the meeting we had in my office when you said that we should for the most part forget about what we have read and written about you—you said that the real Judge Thomas would come out at the hearings. My question is, Why is it inappropriate for us to make an evaluation of your candidacy based upon all the things that you have written and said—particularly in view of the fact that you have been on the court for only 16 months? If we are going to make an informed judgment on behalf of the American people, why are your policy positions not important? How are we supposed to make a judgment on you? Is it fair for you to say to us, for the most part: members of the panel, just view me on what I am saying here this week; don't view me on what has been written about me—about my speeches, the things that I have said? Does that give us the most complete opportunity to make the evaluation that we need to make on behalf of the American people?

Judge THOMAS. Senator, I think that I have turned over in responding to requests, as a result, I think 32,000 pages of documents. I have spent the last decade in the Government. I think that the material is there. I think that a fair reading of my record is a reading which indicates that I am one person who has attempted to be involved and attempted to do some good, who did not hide, who did not sneak away from the problems, who tried to grapple with them, who tried to take them head on, and who tried to make a difference. I think the record is relevant, but I think it has to be understood that when I was in the executive branch, I was in the executive branch. I am a member of the judiciary, and I think it is a fair question from me to you is to see whether or not my policy positions have tainted my role as a judge.

Senator KOHL. Well, you have only been on the court for 16 months, and so we are not in a position to see how your policy positions are, either consistent or not consistent with the things that you have done on the court. But in many areas, you are asking us to recognize that, some of the policy positions that you have taken in the past, were just that—policy positions—and they don't have any relevance to your court experience or the kind of experience or expertise that you will bring to the Supreme Court.

For example, you say you turned over 32,000 pages to us, and yet when we come back to you and say, well, what about this or what about that, you are saying that doesn't count or that doesn't count. In your opening statement, for example, for the most part you said that you are an example of a person who has pulled himself up by the bootstraps, who is a good, honest, decent, hard-working, effective, intelligent man—which you are. And I think to an extent this approach troubles me. Your hearing has been a continuation of that kind of experience and you have encouraged us to judge you on that. But I think that we and the American people, Judge

Thomas, should be given the full opportunity to judge you on the whole range of your life experiences, which does include the things that you have said and written and done, just like it does for the rest of us.

When I ran for office, I wasn't able to say don't consider this or don't consider that. The voters wouldn't allow that. And they consider everything I have done, everything I have said. And I think that that is the way the process should work in a democracy. And to the extent that you think I am exaggerating, I would be interested in your response, and then I am finished.

Judge THOMAS. Senator, I think that if this were an oversight hearing and I could go back and discuss all the policies and tell you that, yes, it is relevant to me going back and running my agency, running the agency that I have been asked to run or permitted to run.

When one becomes a judge, the role changes, the roles change. That is why it is different. You are no longer involved in those battles. You are no longer running an agency. You are no longer making policy. You are a judge. It is hard to explain, perhaps, but you strive—rather than looking for policy positions, you strive for impartiality. You begin to strip down from those policy positions. You begin to walk away from that constant development of new policies. You have to rule on cases as an impartial judge. And I think that is the important message that I am trying to send to you; that, yes, my whole record is relevant, but remember that that was as a policy maker not as a judge.

Senator KOHL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge, before I begin my questioning, I would like to point out for the record there are 32,000 pages of documents, but I would guess 31,000 pages of those have nothing to do with what you have written, nothing to do with what you said. They are agency documents. So the implication should not be left here that anybody has questioned you on even a remotely large part of those 32,000 pages.

All you have been questioned on so far and all I think the Senator was making the point about is that we are trying to figure out, as you said, how you would rule—we don't want to know how you would rule on cases. We want to know how you think about ruling on it. And all the questions asked of you, none of them thus far have had anything to do with 32,000 pages of documents. They have to do with probably—if you added up all the speeches you gave that would give us insight into how you think, maybe there is 1,000. Maybe there is 500; maybe there is 1,200 pages. But that is what we are talking about. I know you know that. I just want to make sure that the public doesn't think you have to go back and look over 32,000 pages of documents and analyze it. That is sort of the Wall Street Journal argument. You know, this has nothing to do with 32,000 pages of documents.

Now, Judge, I want to see if I can come away from this round of questions with a better understanding of the method—not the result, the method—that you would apply to interpreting the very difficult phrases in the Constitution, which have been phrases that have been matters of contention for 200 years or more and, when interpreted, have sent the country off in one direction or another.

Now, you will be pleased to know I don't want to know anything about abortion. I don't want to know how you think about abortion. I don't want to know whether you have ever thought about abortion. I don't want to know whether you ever even discussed it. I don't want to know whether you have talked about it in your sleep. I don't want to know anything about abortion. I mean that sincerely, because I don't want that red herring, in my case at least, to detract from what I am just trying to find out here, which is how do you think about these things.

When you and I talked on Tuesday in this hearing, you said, and I quote, "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."

Now, that struck me as something different than you said in many speeches, and I gave you some of those speeches yesterday so that you would know what I wanted to talk about today. And you know I want to talk about this subject with you so I can understand it better.

So let's start with not what you said in the speeches but what you told the committee so far about whether natural law does or does not impact on the Constitution.

Yesterday you told us that the Framers of the Constitution "subscribed to the notion of natural law." But you emphasized that any such belief, any belief held by the Framers based on natural law had to be reduced to positive law; that is, put in the Constitution for it to have any effect or impact on adjudication.

The Framers, you said, sometimes "reduced to positive law in the Constitution aspects of life principles they believed in; for example, liberty. But when it is in the Constitution, it is no longer natural rights. It is a constitutional right, and that is an important point."

So as I heard that statement, I began to think I am beginning to understand your thinking on this, but I want to be sure. Do you recall saying that yesterday?

Judge THOMAS. I generally recollect.

The CHAIRMAN. And is that a fair rendition?

Judge THOMAS. I think it is.

The CHAIRMAN. Then you went on to say, and I quote, "Positive law is our Constitution, and when we look at constitutional adjudication, we look at that document." So it is purely positive law. It is purely that Constitution, this document. When you as a judge are interpreting it, the fact that the Framers may or may not have based the Constitution on natural law—and you and I think they did—that does not impact on adjudication unless it was reduced to writing in the Constitution. Then it is positive law. That is what you mean by positive law, right?

Judge THOMAS. That is right.

The CHAIRMAN. Now, so it is purely positive law that you as a judge look to in order to decide a case; is that right?

Judge THOMAS. I think I indicated in later testimony—and this is an important point, and it is one—as I read your op-ed piece, it is one that I think you ask in a different way. You say, Is it rigid or is this concept of natural law rigid? For me, that question would be, Is the concept of liberty rigid?

The CHAIRMAN. I see.

Judge THOMAS. And in our constitutional tradition, the concept of liberty, liberty is a concept that has been flexible. It is one that has been adjudicated over time, looking at history, tradition, of course starting with what the Founding Fathers thought of the concept of liberty, but not ending there.

The CHAIRMAN. OK. I am beginning to understand. So natural law informed the notion of liberty. You and I have both read—because of our backgrounds, I suspect we have both read—I won't get into Aquinas and Augustine and all of that, but Locke looked back to the concept of natural law as an evolving notion. Montesquieu talked about it. Jefferson understood it. He was in Paris. He was probably the only one that fully understood it. But others who were there writing the Constitution, they talked about it. They had what they wrote about the Declaration, as you say in other places, and in the Constitution they reduced these broad notions of natural law, the natural rights of man, to this document.

Now, you say that they put some of these natural law principles in the document in words like liberty, you just mentioned. You indicate that once liberty was in the Constitution, it becomes positive law. But now comes the hard question, as you and I both know. A judge has to define what liberty means. Now, how does a judge know what the ambiguous term liberty means in the Constitution? And I want to start with a key term in the Constitution, one that protects the right of privacy and many other rights. And that is the word you mentioned yesterday and you mention again here today—liberty.

Yesterday you told the committee our founders and our drafters did believe in natural law, in addition to whatever else philosophers they had, and I think they acted to some extent on those beliefs in drafting portions of the Constitution; for example, the concept of liberty in the 14th amendment. So the concept of natural law, liberty, is embodied—you say, and I agree with you—in the 14th amendment.

You also then said, "To understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body to get your understanding."

Now, as I understand this, Judge, while you reject any direct application of natural law—that is, you sitting there and saying "I think natural law means * * * therefore, I rule." Even though you reject the direct application of natural in constitutional adjudication, you would use natural law to understand what the Framers had in mind when they interpreted these broad notions. Isn't that correct?

Judge THOMAS. Not quite, Senator. Let me make two points there.

The Framers' view of the principle of liberty is the important point.

The CHAIRMAN. Right.

Judge THOMAS. Whatever natural law is, is separate and apart. The important point is what did the Framers think they were doing. What were their views.

The CHAIRMAN. Got you.

Judge THOMAS. The second point is this: That is only a part of what we conceive of this notion in our society. The world didn't stop with the Framers. The concept of liberty wasn't self-defining at that point.

The CHAIRMAN. Right.

Judge THOMAS. And that is why I think it is important, as I have indicated, that you then look at the rest of the history and tradition of our country.

The CHAIRMAN. I agree with you completely—which may worry you, but I agree with you completely.

Now, as a matter of fact, you used that argument to take on the original intent people in some of your speeches. You basically say, hey, you folks who just go original intent and are pure positivists, you have got to look at intent, real intent. And the real intent of these guys is not just static. It goes on. It is informed by changes in time, and also you have got to understand, as I understand you, that they used the word liberty because they believed it to be a natural right of man. I mean, to be specific, you say—and this is what you said here: "Our founders believed in natural law, but they reduced the natural law to positive law." And one of those concepts in natural law they reduced was liberty to positive law because the word liberty appears in the Constitution, in the 14th amendment in particular.

Now, in a speech before the Pacific Research Institute, which I gave you yesterday, you praised the opinion of Justice Scalia in *Morrison* v. *Olson.* That is the case where the Supreme Court upheld, as you know, 7-1, the right of the Congress to say there can be a special prosecutor, like Walsh, like the Iran-Contra. It wasn't about Iran-Contra but the special prosecutor.

But Scalia filed a lone dissent, and you praised his dissent, and you said the following: "Justice Scalia's remarkable dissent in *Morrison* points the way toward the correct principles and ideas. He indicates how again we might relate natural rights to democratic self-government and thus protect the regime of individual rights."

You go on to say that, "The principles and ideas indicated by the opinion and the Massachusetts Bill of Rights"—which you quote—"refers to"—and you are referring now, you say "summarizes well the tie between natural rights and limited government. Beyond historical circumstances, sociological conditions and class bias, natural rights constitutes an objective basis for good government. So the American founders saw it and so should we. But we don't. Try talking to a Justice Department attorney about natural rights, and when you mention the venerable term, they assume that you want an activist Court along the lines of Mr. Justice Brennan. That such an assumption must be fought reveals the extent to which the term natural rights has been corrupted and misunderstood, and not only among the class of conservative sophisticates in Washington."

Now, I don't know any other way to read this passage than to conclude that you believe that natural law and natural rights should help judges decide constitutional decisions.

Judge THOMAS. No, Senator. I have said that over—I have repeated that continually here.

The CHAIRMAN. I know, but that does not jibe.

Judge THOMAS. But, Senator, I was speaking as the Chairman of EEOC, and let me explain to you what my interests were. I have under oath, in my confirmation for the court of appeals and for this Court, tried to explain as clearly as I possibly could what I was attempting to do. In speech after speech, I talked about the ideals and the first principles of this country, the notion that we have three branches, so that they can be intentioned and not impede on the individual. That is what this case is about. At bottom, the case is about an individual who could be in some way, whose rights could be impeded by an individual who is not accountable to one of the political branches. That was the sole point.

The CHAIRMAN. I understand the point.

Judge THOMAS. I have not in any speech said that we should adjudicate cases by directly appealing to natural law.

The CHAIRMAN. What was Scalia doing?

Judge THOMAS. Senator, he was——

The CHAIRMAN. He was adjudicating a case, wasn't he?

Judge THOMAS. Senator, he was pointing out the relationship, the purpose of the relationship among the branches.

The CHAIRMAN. Right, but, Judge, wasn't the reason he was pointing it out—if need be, we will spend all day Friday on this—wasn't the reason he was pointing this out because he wanted the case adjudicated, decided in a way differently than the seven Justices who decided in favor of the existence of, the constitutionality of? He was adjudicating. Now, what is this, it seems like we are engaged in a little bit of sophistry here. Wasn't he adjudicating a case?

Judge THOMAS. He was adjudicating a case. I am only pointing to, as I say here, the concern that I had between the relationships in the branches. If, Senator, I as a sitting Federal judge had written this speech, considering the fact that I adjudicate cases as a sitting Federal judge, and did not draw a clean distinction between a speech that is talking generally about the protection of individuals, then I think you have a very valid point.

The CHAIRMAN. What did Scalia do, Judge? Didn't Scalia do just what you said? Scalia applied natural rights in making a decision, a decision before the Supreme Court of the United States of America. You say that is what he did and you recommend to everyone else, look at what he did, it is a good thing.

Judge THOMAS. Senator, I beg to differ.

The CHAIRMAN. OK.

Judge THOMAS. I have attempted, in good faith and under oath twice, to make clear that I don't think that an appeal, a direct appeal to natural law is a part of adjudicating cases.

Now, the point that I was attempting to make here, as I indicated to you, is simply he indicates how, again, we might relate natural rights to democratic self-government.

The CHAIRMAN. Right, that is what he was doing.

Judge THOMAS. Relate. I didn't say adjudicate cases.

The CHAIRMAN. All right.

Judge THOMAS. Senator, I am interested, I was interested in the notion that you have the three branches of Government and——

The CHAIRMAN. Right.

Judge THOMAS [continuing]. And you have an individual. Now, let me give you an example of my point, talking about the ideal. I think that we agree that the ideal that all men are created equal is an ideal.

The CHAIRMAN. Right.

Judge THOMAS. It is certainly one that was in our Declaration——

The CHAIRMAN. Is it based on natural rights?

Judge THOMAS. It was based on our Founders' belief in natural right.

The CHAIRMAN. Right.

Judge THOMAS. But slavery existed, even as that ideal existed.

The CHAIRMAN. Right.

Judge THOMAS. That did not mean that slavery was right or comported with that idea. It did not mean that you could end slavery, without a constitutional amendment.

The CHAIRMAN. Agreed. That is the point, Judge. The point is you say our Founders looked to natural law to inform what they put in the Constitution, but it doesn't matter. The fact they said all men are created equal didn't mean anything until the 13th and 14th amendments to stop slavery. But once they put it in, this natural law principle in 1866, it became part of the law and now we have to treat it as law. But because it is uncertain what that means—for example, does "all men" mean all women? That is what the 14th amendment was about and we have concluded it does.

Because we don't know what it means, because it is broad and ennobling, we have to go back, you said, and look at the Framers and what they meant.

Judge THOMAS. As a starting point.

The CHAIRMAN. As a starting point. So, at least, Judge, will you not acknowledge you conclude that natural law indirectly impacts upon what you think a phrase in the Constitution means?

Judge THOMAS. To the extent that it impacts, to the extent that the Framers' beliefs comport with that.

The CHAIRMAN. Right, what the Framers thought natural law meant.

Judge THOMAS. But the important point is what the Framers believe. I, for example, I think I said in—I am trying to find the precise statement here——

The CHAIRMAN. Take your time. We have a lot of time. Take your time.

Judge THOMAS. I think in referring in the speech to what a plain reading of the Constitution——

The CHAIRMAN. I read it.

Judge THOMAS [continuing]. It is to indicate that Harlan's dissent relies on his understanding of the Founders' arguments——

The CHAIRMAN. Right.

Judge THOMAS [continuing]. Not some direct appeal to any broad law out there that we don't know.

The CHAIRMAN. But how did he figure out what the Founders meant by natural law?

Judge THOMAS. Again, I think, Senator, you look at the debates, you look at whatever it was that Harlan had available to him.

There is not an explicit direct reliance on anything other than what he could find the Founders meant.

The CHAIRMAN. Right.

Judge THOMAS. How do we look at history and tradition, how do we determine how our country has advanced and grown, it is a very difficult enterprise. It is an amorphous process at times, but it is an important process.

The CHAIRMAN. Well, that is the one we are trying to find out you used, Judge. For example, before I leave the Pacific Research speech, let me digress for just a moment. In that speech you said, and I quote, "Conservative heroes such as the Chief Justice failed not only conservatives, but all Americans in the most important case"—that is *Morrison*—"the most important case since *Brown* v. *Board of Education*. I refer, of course, to the independent counsel case of *Morrison*." And you said the *Morrison* case upheld the constitutionality of independent counsel, which did uphold it, and you thought Scalia was right that it shouldn't have upheld it.

Now, Judge, why is a case upholding the legality of an independent counsel the most important case since *Brown* v. *Board of Education?*

Judge THOMAS. Senator——

The CHAIRMAN. Why do important cases, *Baker, New York Times,* and the *Pentagon Papers,* why does that one, just out of curiosity?

Judge THOMAS. Well, the reason that I use that approach was for most people it had to do with an obscure point, the separation of powers, so that doesn't exactly excite people in an audience. The point, though, that was I was trying to indicate to them is that when we address cases involving the structure of our Government, there is a subsequent impact or could have a direct impact on individuals, and I think that is the point that I made in the speech, and that was the central part of the speech. It was not an exegesis of the Supreme Court opinion itself, but how it affected the relationship of the Government to individuals.

Again, it is a point that I would have to make again, Senator, that underscores much of the discussion of natural law. It has to be understood that I took on this endeavor, as the Chairman of EEOC, because of my general view that the last great person who was able to inspire our country toward an ideal was Martin Luther King and the notions of the poor treatment of people in our society.

The CHAIRMAN. I agree with you, Judge.

Judge THOMAS. It was not an effort, as I indicated in my confirmation hearings for the Court of Appeals, to establish a constitutional philosophy to adjudicate cases.

The CHAIRMAN. Well, Judge, I don't know how you can possibly say that, since you say the Framers—let's just stick to liberty—the Framers put liberty in the Constitution, because they thought it was a natural law principle, they put it in the Constitution, it became positive law, nobody knows what liberty means, for certain, so judges today have to go back and look at what the Framers meant by it. How you cannot examine what their view of natural law was, in order to know what they meant is beyond me, but——

Judge THOMAS. Well, that's the point, we agree there.

The CHAIRMAN. OK. We agree, all right. Now——

Judge THOMAS. That's for starters, though.

The CHAIRMAN. So, you are going to apply, at least in part, the Framers' notion of original intent of natural law, right?

Judge THOMAS. As a part of the inquiry.

The CHAIRMAN. As a part. OK. So, how do we know what the Framers of the 14th amendment had in mind, when they said "liberty"? How do we know they had the same version of natural law in mind, say, the Framers in 1789, when they talked about "all men are created equal" in the Declaration, and then enshrine that principle in the Constitution later? How do we know?

Judge THOMAS. Senator, again, I have not used or interpreted that provision in the context of adjudication, but the important starting point has to be with the debates that they were involved in and their statements surrounding that debate.

The CHAIRMAN. In the debates, don't they use phrases like "God-given rights" and "they came from God."

Judge THOMAS. Let me move forward.

The CHAIRMAN. Don't they use those phrases? I read them.

Judge THOMAS. But let me move forward. I also indicated that the concept doesn't stop there, it is not frozen in time. Our notions of what liberty means evolves with the country, it moves with our history and our tradition.

The CHAIRMAN. All right. Well, Judge, what happens if the tradition and history conflict with what you and I would believe to be the natural law meaning that the Founders had at the time, even though it has been reduced to positive law? The word "liberty" was reduced to positive law in 1866. Tradition and history demonstrated when that happened; for example, women didn't have the right to vote, women were not allowed to be everything from lawyers to whatever. So, you look at tradition in history and you conclude, obviously, they didn't have women in mind. Yet, when you look at the natural law principle they had in mind, they must have had women in mind when they talk about all men and the rights of individuals.

Now, when they conflict, natural law, underpinning of the Founders or the Framers of that amendment's notion and history, which do you choose?

Judge THOMAS. Senator, let me make that point or let me address that by saying this: The concept is a broad concept.

The CHAIRMAN. Right, and that's the problem.

Judge THOMAS. That's it, but maybe that is one of the reasons the Founders used that concept. It is one that evolves over time. I don't think that they could have determined in 1866 what the term in its totality would mean for the future.

The CHAIRMAN. I see.

Judge THOMAS. But in constitutional adjudication, what the courts have attempted to do is to look at the ideals, to look at the values that we share as a culture, and those values and ideals——

The CHAIRMAN. Change.

Judge THOMAS [continuing]. Have evolved, in that specific provision have evolved over time.

The CHAIRMAN. There are a lot of other provisions that have evolved, too, Judge.

Judge THOMAS. But in that provision——

The CHAIRMAN. Sure, in liberty. Let's just stick to the liberty clause, they have evolved. Now, some argue, a number of very distinguished jurists before us argued that that evolution of those views should be bound by the history and their tradition, and Justice Scalia, whom you quote often, fundamentally disagrees with your view about going back and looking at the natural law tradition.

You said yesterday, for example, that there is a right to privacy in the 14th amendment, and it was made clear that this was a marital right to privacy. Now, Judge, I assume you find that right in the liberty clause, this right to privacy.

Judge THOMAS. The liberty component of the due process clause.

The CHAIRMAN. Right. Now, let me ask you this, if I can move along, in light of my time here: The discussion of this question yesterday about the right to privacy, yesterday it was Senator Leahy. You told the committee, "I believe the approach that Justice Harlan took in *Poe* v. *Ullman* and reaffirmed again in *Griswold* in determining the right to privacy was the appropriate way to go." Is that correct?

Judge THOMAS. That is what I said, I believe, yesterday.

The CHAIRMAN. Now, I find this still hard to understand, in light of the fact that Justice Harlan in *Poe* relied specifically on natural law. Let me read the quote to you. He says, "It is not the particular enumeration of rights in the first eight amendments that spells out the reach of the 14th amendment due process, but, rather, it was suggested in another context long before the adoption of that amendment"—meaning the 14th amendment—"it is those concepts which are considered to embrace rights 'which are fundamental' and which belong to all citizens of a free government." And he is quoting the *Corfield* case there.

Now, Justice Harlan reaches his judgment based on natural law, and he quotes the *Corfield* case, which I might add, Judge, this is not something new. As late as 1985, in the Rehnquist court, they quote the *Corfield* case, as well.

This is what confuses me. You say natural law is no part of adjudication of a case, that you rely on——

Judge THOMAS. That it has to be——

The CHAIRMAN. Let me just finish, and you can tell me I am wrong. You rely on Justice Harlan in *Poe* as the rationale as to how you find a right to privacy in the 14th amendment, Justice Harlan adjudicates that there is a right, because it is a natural right, and you say natural rights have no part of the adjudicating process of whether or not the word "liberty" means A, B, or C, or any other provision of the Constitution that we have difficulty understanding means anything. Explain that to me.

Judge THOMAS. You missed an important point, and maybe I am not making myself as clear as I could be. What I said was this, that there is no independent appeal to natural law.

The CHAIRMAN. What do you call *Poe?*

Judge THOMAS. What one does is one appeals to the drafters' view of what they were doing and they believe in natural law, what were their beliefs, and one moves forward in time.

The CHAIRMAN. Let me stop you there for a second, so I understand now. I am not trying to confuse you. I am trying to under-

stand. The drafters had different views of natural law. You and I both know that. Some agreed with the Thomistic view—not you, Thomas Aquinas—some agree with the Thomistic view that the natural law is not revealed all at once, but natural law is a process that reasonable men, reasoning together over time, will determine what it is.

Others believed, more in the Augustine tradition, he didn't call it natural law, that it is revealed, God just sent these down on high, and some people believe that it is even defete doctrine, you know, boom, this is the law. They had different views.

Now, you're saying you have got to go back and look at what their view of natural law is. How do you determine which view it was?

Judge THOMAS. Well, I think it is difficult in any enterprise, when you attempt to determine what other people were trying to do. But I think the important point that has to be made——

The CHAIRMAN. It is subjective, isn't it, ultimately?

Judge THOMAS. It is an important point and it is a difficult point and it is a difficult determination, just as it is difficult to determine after that how our tradition and our history and our culture evolves, and what are the underlying values. I think that is the point that Justice Harlan and others have attempted to make, that it is not to constrain the development or rights, that you would want this adjudication being tethered to our history and tradition, but, rather, to restrain judges.

The CHAIRMAN. Judge, Justice Harlan had no problem. He didn't have your problem, this tortuous logic which I think borders on—anyway, this tortuous logic. He had no problem. He went straight to the heart of it in his dissent. He said you don't look to any one of the amendments to inform or all of the amendments to inform the 14th. I, Harlan, I don't have that problem, he said to the world, I go straight to natural law, and, by the way, I'm not the first one to do that, in *Corfield* they did that.

And you say you base your conception of privacy in the liberty clause based on Harlan in *Poe*.

Judge THOMAS. Exactly.

The CHAIRMAN. And now you're telling me that you don't think natural law plays—he didn't fool around, he went right to the heart of the matter.

Judge THOMAS. What I said was, again, Senator, is that one goes to what the Founders and the drafters believe——

The CHAIRMAN. And he believed——

Judge THOMAS [continuing]. As you indicated, that there were competing notions of natural law. I think it is an important, though difficult inquiry and that it is one that the Court undertakes, as well as the subsequent development and expansion and growth of the liberty component of the due process clause through referring to history and tradition.

The CHAIRMAN. Well, Judge, I don't know why you are so afraid to deal with this natural law thing. I don't see how any reasonable person can conclude that natural law does not impact upon adjudication of a case, if you are a judge, if you acknowledge that you have to go back and look at what the Founders meant by natural

law, and then at least in part have that play a part in the adjudication of——

Judge THOMAS. I am admitting that.

The CHAIRMAN. Pardon me?

Judge THOMAS. I am admitting that.

The CHAIRMAN. Oh, you are admitting that?

Judge THOMAS. I have. I said that to the extent that the Framers——

The CHAIRMAN. Good. So, natural law does impact on the adjudication of cases.

Judge THOMAS. To the extent that the Framers believed.

The CHAIRMAN. Good. We both admit, you looking at the Framers and me looking at the Framers, we may come to two different conclusions of what they meant by natural law.

Judge THOMAS. But we also agree that the provisions that they chose were broad provisions, that adjudicating through our history and tradition, using our history and tradition evolve.

The CHAIRMAN. All right. Let me move on. I am trying to get through this as quickly as I can here.

Judge, if you are confirmed, you would go about interpreting the Constitution, prior to Tuesday I thought and now I understand, with natural law at least playing some part, as you described it.

Now, that still leaves me in the dark about how you would interpret the broad principles of the Constitution in terms of what kind of natural law informed our founders, and as to whether the right of privacy protects certain family and personal decision or it doesn't. As you point out, after all, the 14th amendment is broadly phrased. It speaks of liberty and of due process.

Now, the Court has used this broad language in the past, the courts—the Supreme Court not the founders—to recognize that certain types of personal decisions about marriage, child rearing and family are "fundamental to liberty." That is the phrase they use. That means that government must have an extraordinary, as you know, or compelling reason for interfering with the decisions. I am not talking about abortion. I don't want to talk about abortion. I will answer no questions on abortion. All right? [Laughter.]

Now, do you agree that the right to marital and family privacy is a fundamental liberty?

Judge THOMAS. Yes.

The CHAIRMAN. Let me ask you a second question. You have written a great deal about the rights of individuals as opposed to groups, that human rights, natural rights, positive law rights apply to individuals not to groups. And in fairness to you, you have done it almost always in the context of talking about civil rights as opposed to civil liberties. That doesn't mean exclusive of civil liberties, but you have made your point about affirmative action, I mean quotas and other things, through that mechanism.

Now, am I correct in presuming that you believe that the right of privacy and the right to make decisions about procreation extend to single individuals as well as married couples, the right of privacy?

Judge THOMAS. The privacy, the kind of intimate privacy that we are talking about, I think——

The CHAIRMAN. The right about specifically procreation.

Judge THOMAS. Yes, procreation that we are talking about, I think the Court extended in *Eisenstadt* v. *Baird* to nonmarried individuals.

The CHAIRMAN. Well, that is a very skillful answer, Judge. Judge Souter—and I was not fully prepared when he gave me the answer. I am now. Judge Souter waltzed away from that by pointing out it was an equal protection case. So that I want to know from you, do single individuals, not married couples alone, have a right of privacy residing in the 14th amendment liberty clause?

Judge THOMAS. Senator, the courts have never decided that, and I don't know of a case that has decided that explicit point. *Eisenstadt* was, of course, decided as an equal protection case and——

The CHAIRMAN. Not alone, but go on.

Judge THOMAS. My answer to you is I cannot sit here and decide that. I don't know——

The CHAIRMAN. Judge, why can't you? That case is an old case. I know of no challenge before the Court on the use of contraceptives by an individual. I can see no reasonable prospect there is going to be any challenge. And, Judge, are you telling me that may come before you? Is that the argument you are going to give me?

Judge THOMAS. Well, I am saying that I think that for a judge to sit here without the benefit of arguments and briefs, et cetera, and without the benefit of precedent, I don't think anyone could decide that.

The CHAIRMAN. Well, Judge, I think that is the most unartful dodge that I have heard, but let me go on.

Judge, I think the decision in *Eisenstadt* and so do, I think, most scholars think it stands for a much broader principle beyond equal protection. Let me read to you from *Eisenstadt* the majority opinion. "The marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single"—I will stop here. The same point you make about civil rights, individuals.

Back to the quote. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget child." Many Supreme Court cases since then have been decided using the ruling in 1972 that I have referred to, using this basic principle.

So for the time being, let's put aside equal protection again, Judge, and focus on the more sweeping question of the right of privacy. And I ask you again: Do you think that single people have a right to privacy anchored in the liberty clause of the 14th amendment?

Judge THOMAS. I think my answer to that, Senator, is similar to my previous answer, and it is this: that the Court has found such a right of privacy to exist in *Eisenstadt* v. *Baird*, and I do not have a quarrel with that decision.

The CHAIRMAN. So you don't quarrel with the quote I just read to you?

Judge THOMAS. I don't quarrel with the decision in *Eisenstadt* v. *Baird*.

The CHAIRMAN. That is not the question I am asking you, Judge. Do you quarrel with the quote that I read you from the majority opinion?

Judge THOMAS. I don't quarrel with the quote, but——

The CHAIRMAN. Do you agree with the quote? Let me ask you that way.

Judge THOMAS. Well, let me——

The CHAIRMAN. This is getting more like a debate than it is getting information.

Judge THOMAS. The important point that I am trying to make, Senator, is that the case was decided on an equal protection basis.

The CHAIRMAN. I understand that.

Judge THOMAS. I do not quarrel with the value that you are discussing. I do not quarrel with the result in the case.

The CHAIRMAN. Judge, I am not looking for your values because I know you are not going to impose them on us. I am not looking for your judgment on the case as to whether it was equal protection. I am asking you whether the principle that I read to you, which had, in fact, been pointed to and relied upon in other cases, is a constitutional principle with which you agree; which is that single people have the same right of privacy—not equal protection, privacy—as married people on the issue of procreation.

Senator THURMOND. The gentleman can finish his answer.

Judge THOMAS. I think that the Court has so found, and I agree with that.

The CHAIRMAN. All right. Now, let me ask you this: Are there——

Senator THURMOND. How is the time, Senator?

The CHAIRMAN. My time is going real well, Senator. Thank you.

Senator THURMOND. How much time have you got?

The CHAIRMAN. I don't have any idea. Just like you, I am looking at that little clock.

Senator THURMOND. Who sets this clock? Who keeps this clock?

The CHAIRMAN. Some impartial person that works for me, Senator. [Laughter.]

Senator THURMOND. I was afraid of that.

The CHAIRMAN. That is what I thought.

Now, you said that the privacy of right of married couples is fundamental, and as I understand it now, you told me, correct me if I am wrong, that the privacy right of an individual on procreation is fundamental. Is that right?

Judge THOMAS. I think that is consistent with what I said and I think consistent with what the Court held in *Eisenstadt* v. *Baird*.

The CHAIRMAN. All right. Just so we don't have any problem here, I think your friends think you are getting in trouble and they would like for me to stop. So what I will do is I will stop now.

Senator DANFORTH. No. Go ahead. That is not fair.

The CHAIRMAN. Chairman Danforth suggests we can go forward. [Laughter.]

But if we have gone over the time of a half an hour, we should stop. If not, I would be delighted to keep going because I would like to now talk about another phrase in the——

Senator SIMPSON. Mr. Chairman, I wouldn't like to do it like that, because when I started this hearing, I emphasized the issue of fairness. And that is what this is. Every one of——

The CHAIRMAN. If I have gone over a half an hour, I will stop.

Senator SIMPSON. I can assure you you have. You have gone about 35 or 40 minutes.

The CHAIRMAN. All right. If I have gone 5 minutes over, then I stop. Thank you very, very much, and I want to assure you there is no plot back there, Judge, notwithstanding what my friends may think. But thank you very much. I think I have learned a lot more about what you think, and I want to come back—just so you know, so there is no surprise, I am going to come back and talk about other provisions of the Constitution which we don't understand the exact meaning—I don't mean just "we." We, the universe of lawyers.

Thank you very much. I yield now to the distinguished Senator from South Carolina. And if I have gone over any time at all, add that time to the Senator from South Carolina's time.

Oh, I am sorry. It has been suggested that it would be an appropriate time for there to be a 10-minute break. We will recess for 10 minutes.

[Recess.]

The CHAIRMAN. Judge, welcome back.

I want to make clear for the record I was not referring to—when I said your supporters, I was not referring to the distinguished Senator from Missouri or anyone from the White House or your family or you or your friends. I was referring to the intramural scuffle that occasionally we get into here. And I want to make it further clear there was no need for—we had agreed before we began that we would break after two people. I wasn't suggesting, quote, you needed a break because of the relentless questioning. That was no part of it. It was the intramural scuffle that was going on here, which is all intramural scuffles are ended here because there is no problem. And as is always the case, if I went over—and apparently I did go over—the Senator from South Carolina and/or anyone of my colleagues on either side—I don't ever recall cutting anyone off when they have gone 35 minutes if they were in a line of questioning, and I won't do it now. They can have as much time as they want. We will break after two more for lunch, and we will move on from there.

I now yield to my——

Senator SIMPSON. Mr. Chairman?

The CHAIRMAN. Yes.

Senator SIMPSON. Mr. Chairman, I think, too, I want to clarify that I understand that the time and the lapse or the failure to terminate was totally inadvertent, and I want to state that. I understand that was an error. It did occur, but it certainly wasn't anything——

The CHAIRMAN. I think what happened was, remember when you were going through your book? I turned and said, "Hold the clock." And what happened was, this clock is not what you would call—the Navy Department would not use it for its instrumentation purposes. That is what happened. We did go over 5 minutes. We are all squared away.

Senator THURMOND. 18 minutes.

The CHAIRMAN. 18 minutes?

Senator THURMOND. That is what I understood; 48 minutes is what I heard; 48 minutes, that is what they said.

The CHAIRMAN. Well, Senator, you can have 53 minutes if you would like.

Senator THURMOND. I don't care for any more. We will just cut yours the next time. [Laughter.]

The CHAIRMAN. All right. Here we go. The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Judge Thomas, in a 1988 article in the Harvard Journal of Law and Public Policy, you stated, and I quote, "To believe that natural rights thinking allows for arbitrary decisionmaking would be to misunderstand constitutional jurisprudence based on higher law."

Now, the question is: Is it your belief that cases that come before the Court must be interpreted according to precedent, the law, and the Constitution?

Judge THOMAS. That is the case, Senator. I think it is important for any judge to recognize that when he or she is engaged in adjudication that you must start with the text and structure of the document. And, of course, it is important in some of the open-ended provisions and constitutional adjudication to look to our history and our tradition.

I think that the importance of doing that is not so much to restrain or constrain, as I said before, the development of important rights and freedoms in our society, but rather to restrain judges so that they do not impose their own will or their own views or their own predispositions in the adjudication process.

Senator THURMOND. Judge Thomas, you said in your opening statement that you benefited greatly from the efforts of certain civil rights leaders. You further said that but for them, there would be no road to travel. Could you generally describe how you benefited by the efforts of certain civil rights leaders?

Judge THOMAS. Senator, I speak with caution. I guess I have spent so much time on my own biography that it may be a matter of concern. But let me just make this point.

There were any number of friends of mine whom I considered when I grew up to be much, much more talented. There were individuals who had enormous ability to remember, individuals who had tremendous capacity with numbers, and you wonder whether or not they would have gone on and become physicists or writers or business persons, what have you.

But somehow, with the impediments—impediments that said you couldn't go to a library, that you could not go to certain schools, that you could not walk across certain parks, go into certain neighborhoods, impediments that said that you could be picked up and put on the chain gang for just standing on the corner—somehow with all those impediments, any number of them were prevented from moving on. Relatives, friends—my grandfather is a perfect example. Enormously talented man.

Unless someone removed those impediments, unless there was a civil rights movement, not all the talent in the world would get me here or get me actually even out of my neighborhood in Savannah.

That is the point; that the civil rights leaders opened the doors, that the civil rights movement opened the doors that permitted individuals like myself to then move on.

My further point was this, and that is that when others, either directly or indirectly, in a broad or a specific way, make the effort to create these opportunities, then I believe that I have an obligation and I believe that others have an obligation to repay them by taking full and complete advantage of those opportunities. As Martin Luther King said, we have to burn the midnight oil. And I think it is important to repay individuals, individuals with those kinds of efforts. And I have tried to do that, and I would encourage others to try to do that and remember those leaders and remember what they gave for us to have these opportunities.

Senator THURMOND. Judge Thomas, I often ask potential judges for their comments on the topic of judicial temperament. How important do you believe this quality is in a judge? And what are your views on this topic?

Judge THOMAS. Senator, I think it is important, actually critical for a judge to be able to listen, to be open to the arguments, to be open to the different points of views, to look for all arguments on all sides, to explore them in depth, not to reject any.

I think the essence of temperament is that receptivity and that openness, because, as I said, before the process is over, a judge has to feel that he or she got the decision right, and there is no better way to get it right than to allow the adversarial process to work to its fullest, and you can do that by having the temperament and the receptivity and the openness throughout the process, so I would say it is critical.

Senator THURMOND. Judge Thomas, I noticed in your background that you worked with poor and indigent clients as a student attorney in the New Haven Legal Assistance Bureau, covering a broad range of legal issues. Some bar associations have debated the question of making pro bono representation mandatory. Aside from this issue, what are your views as to the importance of pro bono work?

Judge THOMAS. Senator, I would look at pro bono work on two levels, first the need of the individuals. I think there are individuals in our society who, for whatever reasons and a variety of reasons, primarily socioeconomic reasons, cannot afford the kind of representation that they deserve or that they need.

I think it is important for all of us in the society to feel and to know that our judicial system is open to everyone, and the representation of poor or indigent individuals, I think, is critical to that, and it says a lot about our system.

The second point is this: I think it is important, as I indicated earlier, for those of us who have gained so much from this society to give back. What I was attempting to do while I was in law school, as well as any number of friends of mine, is to take the opportunities, the abilities, the analytical skills, the energy that we had as law students and to translate that into concrete help for people who needed things, such as how to get their welfare check, how to get a pair of shoes, how to keep from being evicted, how to get their driver's license.

Those are very basic things, and they may not be the sorts of things that will change the judicial landscape, but for those indi-

viduals it was critical and I felt a sense of satisfaction, a sense that I was giving back when I was able to work at New Haven Legal Assistance.

Senator THURMOND. Judge Thomas, early in your life, you personally struggled to overcome difficult circumstances. You have prevailed over many obstacles to attain great success. As a result of this, are there any special qualities that you believe you would bring to the Supreme Court, if you are confirmed?

Judge THOMAS. Senator, first, with respect to the opportunities that I have had and the help that I have gotten from other people, and as I noted in my opening statement, there have been just countless numbers of individuals who have helped me when I needed help.

I can remember, for example, wanting to take a reading course and not having the money, and I remember someone, still to this day, someone I don't know left $300 for me to take that reading course in 1970 or 1971. So, the people who have helped me have been countless. But if there is one thing that I have learned, it is that you have to commit yourself to working hard, and you have to understand that that alone will not do it.

But going to the Court, the experience that I would bring is something that I said earlier today, and that is that I feel that, since coming from Savannah, from Pin Point, and being in various places in the country, that my journey has not only been a journey geographically, it has also been one demographically.

It has been one that required me to at some point touch on virtually every aspect, every level of our country, from people who couldn't read and write to people who were extremely literate, from people who had no money to people who were very wealthy. So, what I bring to this Court, I believe, is an understanding and the ability to stand in the shoes of other people across a broad spectrum of this country.

Senator THURMOND. Judge Thomas, the power of the judiciary is limited by article III of the Constitution to cases and controversies. Its jurisdiction is not unlimited, as the Court must decide disputes between parties. Could you please describe the limitations on Federal jurisdiction and what role that would play in hearing cases before the Court?

Judge THOMAS. Senator, I think it is important for any judge to ask that critical question, what authority do I have or what jurisdiction do I have to review this case or to adjudicate this case. I think that is important, and that is critical in the judge being able to restrain himself and rightfully restrain himself. I do that myself, and in my own cases, either explicitly or implicitly, go through that sort of analysis and self-questioning.

Senator THURMOND. Judge Thomas, how would you resolve a conflict between your own conscience or your own sense of justice and the clear meaning of a statutory or constitutional provision?

Judge THOMAS. Senator, if I was unable to adjudicate a case impartially, I don't think that—in fact, I would consider recusing myself from that case, and probably would or more likely would. I think it is essential that a judge be impartial.

With respect to my own personal views, my views have no place, my personal views have no place in adjudication. The object of ad-

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judicating a statute, or interpreting a statute, or applying a statute is to determine the intent of this body, the intent of the legislature, whether or not one would agree, if one were in a policy position, with that intent or with that policy. It is the will of the legislature.

Senator THURMOND. Judge Thomas, in an effort to provide the public with a more accurate and fair understanding of what actually occurs in the court room, the Judicial Conference has recently authorized a 3-year program to allow photographing, recording, and broadcasting of civil proceedings in certain Federal courts.

As you are aware, many State courts have also permitted the use of cameras in the court room. Of course, this situation must be carefully balanced, to insure that the integrity of the court room is not compromised, in an effort to provide the public with better information. Judge Thomas, could you provide us with any comments you may have on the use of cameras in the court room?

Judge THOMAS. Of course, Senator, at our court, we are an appellate court, and there isn't much activity, other than fairly intricate and detailed oral arguments. But I would have no personal objection—of course, I can't speak for the other judges or for the courts—to cameras being in courts, as long as they were unobtrusive and did not disrupt the proceedings.

For the life of me, though, I can't imagine how someone would spend any significant amount of time watching a program that involves oral arguments in appellate cases. After they have had their fill of three or four FERC cases, I think that they would probably tune out.

Senator THURMOND. Judge Thomas, the concept of judicial immunity is deeply imbedded in our common law heritage. Judicial immunity insures that judicial officers will be free to make appropriate decisions, without the fear of reprisal from the parties involved in the lawsuits. If judges are subjected to legal actions based on their decisions, what impact would this have on the independence of the judiciary?

Judge THOMAS. Senator, I think that when judges engage in conduct that is inappropriate, the grievance process seems to work well. Of course, we have our own Code of Judicial Conduct. I would be concerned, if a judge is put in the position where he or she feels that the judge could not make a decision, without fear of a lawsuit. It is important that a judge be able to impartially and objectively rule on cases, without the external pressures that are not relevant to that particular case.

Senator THURMOND. Judge Thomas, some have recommended imposing a requirement that the losing parties in a lawsuit be responsible for the legal fees of the opposing party, in an effort to reduce frivolous lawsuits. Do you think that such a proposal would chill the filing of meritorious lawsuits, because of the fear of such financial sanctions if a party should lose?

Judge THOMAS. I think that one should be concerned that if a change in the manner in which legal fees are paid would chill the filing or the litigation in appropriate cases. I have not studied that particular issue, but my concern would be that our system has seemed to work well, and there may be instances in which individuals may think that there have been abuses. But I would be careful in changing the system wholesale, without understanding what the

unintended consequences could be, and indeed having a chilling effect on litigation in appropriate cases might well be such one unintended consequence.

Senator THURMOND. Judge Thomas, if you are confirmed, what do you believe will be the most rewarding aspect of serving on our Nation's highest court?

Judge THOMAS. I think the reward, Senator, for being entrusted with that great a responsibility is actually discharging that responsibility in a dignified, professional and judicial or judicious way, and to realize that you are doing all you can to preserve and protect the Constitution and the freedoms of the people in our country. I think the reward itself is in the doing of the job and doing it right.

Senator THURMOND. Judge Thomas, international drug cartel members have sometimes avoided prosecution as a result of the difficulty of finding the appropriate forum of prosecution. International drug courts have been discussed as an option. Would you discuss whether you believe our Nation's concept of due process can be reconciled with other countries' principles of what constitutes due process, if such a court was implemented?

Judge THOMAS. Senator, I think that our notions of due process in criminal cases is so imbedded and so important in our way of life and important to our way of life and to us, that I would be concerned if there was any diminution of our respect for those rights and our regard for those rights in the creation of other tribunals.

Senator THURMOND. Judge Thomas, you mentioned yesterday in your opening statement that you wished your grandparents, who were a major influence in your life, could be here today. What do you think your grandfather would say, and what advice would he give you?

Judge THOMAS. Well, I used to go back home and visit him after I was a member of the Reagan administration, and the one thing he would always say is, "Tell that Mr. Reagan don't cut off my social security." [Laughter.]

Senator KENNEDY. What did you say? [Laughter.]

Judge THOMAS. I told him I would look out for him and make sure that didn't happen. He was a wonderful man. I can only repeat, the last time I saw my grandfather was in the hospital, we were visiting my grandmother, who was ill, and they both died. They died about a month apart.

I can remember having had a long conversation with him in the lobby of the hospital, St. Joseph's Hospital in Savannah, and the elevator door, he marched me to the elevator and I was waiting on the elevator and we were talking away, and his final words to me, because I was complaining about the difficulty of doing my job and the criticisms and thinking about giving up, and his last words to me, as I can remember, in 1983, February of 1983, was "Stand up for what you believe in," and I think he would give me the same advice.

Senator THURMOND. Judge Thomas, in a speech before the Palm Beach Chamber of Commerce in 1988, you spoke about the implementation of civil rights legislation and its complex relationship between Congress and the executive branch. Would you care to

expand on this for us and include the courts in describing the roles of the three branches of Government in the area of civil rights?

Judge THOMAS. I think that we have an obligation in this country, and I have tried to do that in writings and speeches and efforts to open this country up to everyone, and we have an obligation to aggressively enforce laws that require people to not discriminate, to enforce laws that say you can't treat a person arbitrarily, to push for programs that say let's open up our society.

Now, there is disagreement on how far you should go and what is the precise approach, but there is no disagreement that we have got to eradicate discrimination, and I think all three branches have a role in that. I also believe that we have got to open up doors, and there may be disagreements over that, but it has just got to happen.

I don't think that we can be content in this society, when the gap between have's and have not's continues to expand, and I don't propose to have all the answers and I am sure that there will be debates about how best to do that and whether or not there would be drawbacks to a certain approach, but at bottom I do know it has got to be done.

Senator THURMOND. Judge Thomas, would you please give us your view of the role of antitrust today, including those antitrust issues which you believe more seriously affect competition and the consumer.

Judge THOMAS. Senator, I think it is important that we recognize that, in a country such as ours, where we have an economy and a free enterprise system that has the capacity to absorb a variety of individuals and to allow people to participate, a small business person like my grandfather, that it is important to keep that economy open to access and open to competition, and I think that the antitrust laws are important. I think they are important for those individuals who do want access, and I think that they are important for individuals who use the products of that process, from a price standpoint, quality standpoint, and efficiency standpoint.

Senator THURMOND. I don't have any more questions at this time. I would like to take this opportunity to commend you for your calmness, steadfastness, and courtesy in answering questions of the members of this committee.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Judge Thomas, one of the Supreme Court's most important roles under the Constitution is to resolve the disputes between the President and the Congress about the limits of executive power. The role of the Court has grown more independent, important in the past quarter century because we have had a divided government for most of the last 25 years.

The Framers of the Constitution believed that unchecked executive power is one of the greatest threats to freedom and individual liberty. You yourself have made many strong statements in your speeches about the need for limited government. Yet you harshly criticized a Supreme Court in 1988, *Morrison* v. *Olson,* which upheld the constitutionality of a statute authorizing the appointment of independent special prosecutors to investigate criminal conduct by high officials in the executive branch.

The Supreme Court upheld that law by 7-1, the opinion written by Chief Justice Rehnquist. Justice Scalia was the only dissenter, and in a speech that same year, you condemned Chief Justice Rehnquist's decision. You praised Justice Scalia's dissent. You said, and I quote, "Unfortunately conservative heroes such as the Chief Justice failed not only conservatives but all Americans in the most important case since *Brown* v. *Board of Education*. I refer, of course"—and this is your quote. "I refer, of course, to the independent counsel case, *Morrison* v. *Olson*. As we have seen in recent months, we can no longer rely on conservative figures to advance our cause. Our hearts and minds must support conservative principles and ideas. Justice Scalia's remarkable dissent in the Supreme Court points the way toward those principles and ideas."

Now, that is a very strong statement opposing the validity of independent special prosecutors. But no branch of the Government should be trusted to investigate itself. Independent prosecutors are sometimes needed to ensure that high executive branch officials do not violate the law. We all remember Watergate. The Justice Department voluntarily appointed Archibald Cox as a special prosecutor. Mr. Cox began to do his job too well, fired by President Nixon in the Saturday Night Massacre.

So Congress enacted legislation authorizing the courts to appoint independent special prosecutors to prevent that from ever happening again.

Now, the Iran-Contra scandal could never have been fully investigated and the wrongdoers brought to justice without the appointment of the special prosecutor. And if the circumstances warrant it, a special prosecutor should be available to investigate the savings and loan scandal. Yet you say that special prosecutors are unconstitutional. Why?

Judge THOMAS. I don't think that my point of departure was that it was unconstitutional, although I disagreed and argued that the Scalia opinion was the better approach.

Let me make a couple of points. I discussed that with Senator Biden earlier. My concern was this: I——

Senator KENNEDY. Well, I am not interested in so much Scalia's rationale in terms of the natural law. I was here during your response. I am taking a different approach, and that is with regards to the decision, only one dissent on the issue of the constitutionality of the special prosecutor. And in that one dissent, in which Justice Scalia developed his opposition to the strong majority opinion, he expressed his view that it was not constitutional.

Now, why shouldn't we have the capability when there is the wrongdoing in the executive branch? Why isn't it important that we maintain the majority's opinion in that special prosecutor case?

Judge THOMAS. I think that is a fair question. The point that I was trying to make there was not that there shouldn't be a way to aggressively investigate and determine wrongdoing. I agree with that. I think that is very important. That is the way you keep government honest. And I think you find ways to sustain people's belief in Government by making sure that it is honest.

The point that I was trying to make there was that when you have an individual that—the way that our Government has protected the individual is the tension between the branches, that you

have three branches, none really dominating the other; and that when you have one member or one individual that is not directly accountable to either, then the consequence could be—and I thought in this case, again speaking broadly—the consequence was that individual rights were at stake, the individual rights of an individual who is investigated, not responding to Congress or responding to the Executive, but to a person who was not responding to either.

Senator KENNEDY. Well, all of the rights and protections of the Constitution are still there even under the special prosecutor. All of the other kinds of protections of the Constitution are there. This is basically a question about whether, as the Founding Fathers pointed out, spelled out very clearly, article II, section 2, permits Congress to vest appointments of such inferior officers, as they think proper, in the courts of law. We have seen both in Watergate, potentially in the whole savings and loan scandal—no one is prejudging that at this time, but there may very well be those within the executive department that ought to be subject to that particular kind of process and procedure. And all of the constitutional rights and liberties are still retained by those that are going to be found by the special prosecutor to be subject to prosecution. So why aren't those rights and protections sufficient?

Judge THOMAS. I agree with you that where there is wrongdoing, it should be ferreted out aggressively.

Senator KENNEDY. Well, how are you going to do that in the executive branch if they have the responsibility of investigations?

Judge THOMAS. The point that I was making was very simply this: that it wasn't that it should not be determined or that wrongdoing should not be ferreted out, nor did I indicate that perhaps there could not be—that the executive could necessarily totally oversee itself. I don't think that was my point.

My point was that the individual, when an independent body was involved in the investigation and conducted the investigation, that there wasn't that responsiveness directly to either one of the three branches, and that that concern led to a view that an individual—that that lack of accountability could actually undermine the individual freedom of the person who is being investigated. That was the totality of that point. And that is, I think, an important point, and it was one that I made in the context of a speech about individual freedoms.

Senator KENNEDY. Well, the Attorney General can remove a court-appointed special prosecutor for cause. Isn't that enough protection?

Judge THOMAS. Well, again, that may be—the Court found it to be enough, and I would assume that case stands decided, that that is enough in order to—from a standpoint of constitutional law that is enough protection in a legal sense. But my point was just simply—and I think the Court also found that none had been removed or that that had not been used. But my point was not so much the legal analysis per se, but rather what the effect of a ruling that allowed a person to investigate someone who is not responsive to either of the branches of the Government.

Senator KENNEDY. Well, do you feel now that as a matter of law that there is the special prosecutor process and procedure decided by the Supreme Court overwhelmingly is the law of the land?

Judge THOMAS. That is right. I agree with that, Senator. I think it is. It is a decided case. I was simply expressing, from a point of view as a member of the executive, my disagreements with it.

Senator KENNEDY. Let me, if I could, go back to a case that was discussed earlier, the *Johnson* v. *Santa Clara Transportation.* Just quickly to go over the facts, this is a leading case in the rights of women to be free from job discrimination in the 1986 the Supreme Court decision in *Johnson* v. *Santa Clara* agency. In that case, a male worker challenged the promotion of a woman to the job of road dispatcher. She was the first woman ever to hold that kind of job in the county. In fact, she was the only woman to hold any of the 238 skilled positions in the agency.

The county was making a voluntary effort to bring qualified women into these positions, and the woman had experience comparable to the men who had applied for the job, and she had been rated qualified by the county. She had scored 73 out of 100 in her subjective oral interview. The man had scored 75 on the oral interview. But the employer said that the different scores were not significant. There were actually seven, as I understand it, employees that met the qualification standard which had been established.

The man took the agency to court saying he had been the victim of sex discrimination. The woman had had more than ample experience on the job. She was found qualified for the job. She ranked only two points below the man on a subjective interview, according to the agency. She had demonstrated that she was qualified. In fact, she was a pioneer, willing to be the first and only woman on road maintenance crews in the county.

How could you conclude that she was not qualified to receive the job?

Judge THOMAS. Senator, the point that I was trying to make was this—and I think I alluded to it earlier—that when you have a statute that seems to be clear that there should be no discrimination and it doesn't prefer or it doesn't deter any particular group or individual, and you do something that seems not to comport with that language, there is a problem. I for one agree that, and I certainly did it in my job at EEOC, that there are ways and it is important to include minorities, women, and individuals with disabilities in the work force and to aggressively do so. And I am proud of that record.

But there is this value in the statute that does not—that makes discrimination wrong on any basis, whether you want to do good or you want to do bad. And I think it is important to recognize that. Now, that can be changed; that can be altered; that can be adjusted perhaps. But that value is in the statute, and it was that movement away from that that I was criticizing.

Senator KENNEDY. The movement away is effectively two points, and this was on the basis of a subjective interview. That was only part of what the agency looked at. The record shows that one of the officials who interviewed her had previously refused to issue coveralls when she worked on the road crew until she had ruined her clothes and filed a grievance, although he did issue coveralls to

male workers. The second member of the three-person interview panel had described her as a rabble-rousing, skirt-wearing person. So two of the three officials who participated in the interview had clearly displayed a bias against her. She endured that discrimination as a road maintenance worker, and her employer found that she was among the best qualified to be the road dispatcher. And yet you would hold that the law bars that employer's decision.

Judge THOMAS. Senator, it is clear that if the hiring process is discriminatory that she has a direct claim; that is, she can argue that the individuals who interviewed her engaged in discriminatory conduct. And I would clearly be in favor of actions such as that. That is my point.

The question in this case wasn't that there was discrimination in the application process or in the employment process with respect to the woman in the case. The question was whether or not the man who was rated higher in that process, again without challenge to the selection process, the question was whether or not he was discriminated against because of his gender, because at the end of the process he was rated most qualified.

Now, let's turn it around. If at the end of the process the woman had been rated most qualified and the man was not rated as qualified, and the man was hired and the woman brought a sex discrimination charge, what the agency would have to do is process a charge indicating that there was gender discrimination against the woman.

Senator KENNEDY. Well, the fact remains that seven individuals were qualified, according to the scores. So the employer made the selection that they had 238 individuals that are serving in these positions and not a single woman. There are seven in the pool that the employer says are qualified, voluntarily selects this individual who only scored two points lower than the one who brought the case on a subjective test where two of the individuals clearly expressed some bias against that individual. And you are suggesting, well, they are going to have to—the employer is going to have to state that they have some kind of a plan of discrimination in the past. If any employer were to make that kind of finding or judgment based upon the past, they would be subject to a good deal of liability, wouldn't they?

Judge THOMAS. Well, they should be if they were discriminating.

Senator KENNEDY. All right. Well, how are you going to encourage people, how are you going to encourage any of those employers? How are you going to encourage employers such as the Santa Clara County who said that we have got 238 executive positions, all men. We have this one woman who has been a real pioneer in terms of striking down the stereotyped jobs and is able to perform that. The employer says qualified to perform it. And a clear kind of bias in terms of the subjective test, expressions, refusing to provide the coveralls and the other statements about it. And you are prepared to say to us now that you would continue to deny that woman who has been found qualified by the employer of that particular job.

Judge THOMAS. Well, let me answer it this way, Senator. The problem that has to be confronted is that the statute does not make that distinction.

Now, with respect to the underlying concern that you have in the treatment of individuals in our society based on gender or race, I think that many of these exclusions, many of the problems that we have are abhorrent. And I have said so on the record, and I have conducted myself consistent with that. I believe that one way to address some of these concerns where there does not seem to be an effort to include minorities and women is something that you and I have discussed in the past, and I still think—I thought as Chairman of EEOC—I won't comment on legislation as a judge. But one of the major weaknesses in that statute is that there are no real deterrents. There is no real damage. All you have to do if you discriminate against someone is to give that person the job he or she would have had or the back pay involved.

I was convinced as Chairman of EEOC that if there was real teeth in that statute, that would more than encourage employers to do the right thing.

Senator KENNEDY. Well, of course, the Court decided 6-3 that it was consistent with the statute.

Now, you have expressed your opinion about the hiring of a woman. Wasn't the county just opening its doors to a woman whom it felt to be qualified in attempting to provide some degree of diversity in its institution, like Yale was in its institution? Why isn't it the same?

Judge THOMAS. Senator, I have looked at that hiring process in this case. There is an explicit statute on its face that says here is how it is supposed to occur. I agree with the notion of diversity. I am a strong supporter of including people who have been excluded. Yale went about it in a way where it looked all over the country. It looked for people to include in its class, individuals it felt were qualified from among a number of qualified individuals. It made the decision that certain minorities were qualified, as it did with respect to certain whites. And it found that individuals, including myself, were qualified. We were not talking about two people competing for one job. We were talking about an educational institution that was very subjective in its selection process.

Senator KENNEDY. Well, of course, educational institutions have to conform as well under title VI.

Judge THOMAS. They have to conform, Senator, but we are not, again, talking—there is nondiscrimination. It gives you what the selection process is.

Senator KENNEDY. You don't see any similarity with what Santa Clara is trying to do in terms of providing some degree of diversity and what Yale was attempting to do——

Judge THOMAS. I do, Senator. That is the point I am trying to make; that the problem that I have wasn't in what Santa Clara was trying to do. The problem is that you have got a statute that provides for a fairly neutral principle, and that is that you cannot discriminate based on race or sex or national origin.

Senator KENNEDY. Before winding up on that, that decision was 6 to 3; was it not?

Judge THOMAS. I believe it was, Senator.

Senator KENNEDY. You were an official of EEOC at that time, you were part of the administration, and yet you recommended to courts, though your speeches recommended that lower courts

follow the Scalia decision, did you not? You said, "Let me commend to you Justice Scalia's dissent, which I hope will provide guidance to lower courts." Weren't you inviting lower courts to find ways to disregard the majority ruling in that case in a way that would make it even harder than it already is for women to prevail against sex discrimination on the job and achieve equal opportunity?

Judge THOMAS. Senator, I think that, in using the word "guidance," I suggested what we do in our job now, and I think most any judges do, is we look at the opposite side of the argument. But let me make a point with respect——

Senator KENNEDY. Well, the majority is 6 to 3, that is the law of the land, and if the Cato Institute—you used those words, "Let me commend to you Justice Scalia's dissent, which I hope will provide guidance for lower courts." Now, you are an executive official. Why are you recommending that they follow the dissent in that case, when the 6-to-3 majority says that is the law of the land?

Judge THOMAS. Senator, I think that if I wanted to say follow that, I would have said it, and I don't think that any of us is sufficiently off our rockers to say that dissenting opinions are controlling. In fact, in my confirmation before my second term at EEOC, I indicated just that point to you.

But the point that I am making is that, even as I had my own concerns, we used that precise case, *Johnson* v. *Santa Clara*, in our development of rules for affirmative action in the Federal Government and we refer to *Johnson* explicitly for affirmative action in the Federal Government.

Senator KENNEDY. Well, hopefully, since it is the law of the land——

Judge THOMAS. It is the law of the land and that is the point I am making.

Senator KENNEDY. But your language will, I believe, state, at least, your position to the Cato Institute.

Let me go into a different area. I noted with interest that you were asked by Senator Simon yesterday about the constitutional issues involved in a case on freedom of religion and the so-called *Lemon* test used by the Supreme Court to decide cases involving the separation of church and state, and you answered, "I have no personal disagreement with the test," and you repeated that view this morning in response to a question from Senator Kohl. You said, as I recall, that you have no quarrel with the *Lemon* test.

Now, as a matter of fact, the Supreme Court is scheduled to hear a particular case this fall on that issue, the *Lee* v. *Weisman* case. The Supreme Court has been called upon to consider its earlier decisions, and the Justice Department has already filed a brief in that case calling for the Supreme Court to abandon the constitutional test it has been using, the *Lemon* test. I have the brief here: "The case offers the Court the opportunity to replace the *Lemon* test with the more general principle implicit in the traditions relied upon in *Marsh* and explicit in the history of the establishment clause."

So, if you are confirmed as Justice, you will be sitting on that case this fall as a member of the Court. Yet, you did not hesitate yesterday and today to tell us that you have no personal disagree-

ment with the *Lemon* test now being used by the Supreme Court. My question is, do you have any personal disagreement with the test used by the Supreme Court in *Roe* v. *Wade* to decide the cases on abortion? That test requires the State to have a compelling State interest, if it is to justify an infringement on a woman's right to choose an abortion.

Judge THOMAS. Senator, without commenting on *Roe* v. *Wade*, I think I have indicated here today and yesterday that there is a privacy interest in the Constitution, in the liberty component of the due process clause, and that marital privacy is a fundamental right, and marital privacy then can only be impinged on or only be regulated if there is a compelling State interest. That is the analysis that was used in *Roe* v. *Wade*, you are correct.

I would not apply the analysis to that case or can't do it in this setting, and I have declined from doing that in this setting, the analysis separate from that case, if that is the test, the compelling interest test. I don't have a problem with that particular separate analysis separate and apart from that case, but I think it is inappropriate for me to sit here as a judge and to say that I think that should be used in a case that could come before the Court, for the reasons that I have stated previously.

Senator KENNEDY. Judge, you have indicated a willingness to comment on the constitutional cases affecting the establishment clause, the test which you would be willing and do support under the *Lemon* case. I am not asking you how you would rule in *Roe* v. *Wade*. All I am asking you is, since you have been willing to state your agreement with the current test in the *Lemon* case and you will be sitting on the Court in October on that case, if confirmed, and you have been willing to express your opinion here on the test that is used in terms of the establishment clause.

My question is, without getting into the outcome of *Roe*, whether you have any problem in the test, the compelling State interest test.

Judge THOMAS. What I have said, Senator, is that the *Lemon* test I had no quarrel with, but the Court has had difficulty in its application. I think that was my complete statement.

With respect to the compelling interest test in the application of that to fundamental rights, fundamental privacy rights, I have said that I have no problem with that, so I have said that the compelling interest test I have no problems with. I said that yesterday, I believe, with Senator DeConcini, when we were talking about the equal protection analysis. What I have said that I cannot do is now import that and superimpose it and apply it to a specific case.

Senator KENNEDY. I am not asking you to do that. As I understand, you do not have a disagreement with the compelling interest test, when it was applicable in the abortion standard.

Judge THOMAS. Could you repeat the question, Senator?

Senator KENNEDY. You don't have, as I understand you, you don't have a quarrel with the compelling interest test used in *Roe*.

Judge THOMAS. As I have indicated, Senator, with respect to the application of the compelling interest test to that——

Senator KENNEDY. I am just talking about the test. That is all I am talking about, is the test.

Judge THOMAS. You are doing two things, and I am trying to separate them.

Senator KENNEDY. I think I understand what you are trying to do. [Laughter.]

Judge THOMAS. What I am saying is that the compelling interest test I do not quarrel with, and I do not quarrel with the application of the compelling interest test where the right of privacy is found to be fundamental. My point is that I cannot apply that test in the specific instance involving the issue of abortion involved in *Roe* v. *Wade*. That is what I am declining to do.

Senator KENNEDY. What test are you going to apply?

Judge THOMAS. I think, Senator, that is what I am trying to remain impartial to——

Senator KENNEDY. We are just talking about the test, not what the outcome is going to be, what the standard is that you are going to use. We found out that the Supreme Court has applied this test. I am not trying to make the judgment of what the outcome would be. You have been willing to express your view about tests with regard to another extremely important provision of the Constitution. My question again is whether you are prepared to make that same kind of comment with regards to the application of that test in abortion cases.

Judge THOMAS. Senator, what I think I have done is I have said that the *Lemon* test, I had no quarrel with the application of the *Lemon* test generally to establishment clause cases. I have said that I had no quarrel with the application of the compelling interest test to the area of privacy cases, when privacy is a fundamental right.

Senator KENNEDY. Including abortion?

Judge THOMAS. And what I have done is left open, and I think appropriately so, for the reasons that I expressed yesterday and again this morning, is not apply that to the difficult issue of abortion and the case of *Roe* v. *Wade*. I think that is important for me to do, in order to not compromise my impartiality.

Senator KENNEDY. Well, do I understand that you may overrule it or you may sustain it?

Judge THOMAS. I have no agenda, Senator. I have tried to here, as well as in my other endeavors as a judge, remain impartial, to remain open-minded, and I am open-minded on this particular important issue.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

We have been breaking for an hour and a half, giving us time to go back and return calls and the rest. We have been running a little late this morning, so we will break until 2:15.

[Whereupon, at 12:53 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Hatch for as much time beyond 30 minutes as he thinks he needs. [Laughter.]

Senator HATCH. I certainly appreciate that special deference and I will probably take it.

Judge Thomas, I think it is appropriate at this point for us on the committee to remember a very important point, and that is that you are a sitting Circuit Court of Appeals judge in what many feel is the most important Circuit Court of Appeals in this country, the Court of Appeals for the District of Columbia Circuit. It is considered to be so important because of the wide ranging matters it handles.

So, you are a sitting judge on one of the Nation's highest courts, and whatever the outcome of these hearings may be, you are still going to be a judge for the rest of your life, for the rest of your professional life, if you so choose to be.

You simply do not have the freedom to answer every question as a sitting judge, every question that every Senator might have on this panel or might wish to be answered, and that goes for questions from both sides of the aisle, not just the other side of the aisle.

Now, I kind of resent the implication made several times that you are selectively answering only those questions that suit your political agenda. Believe me, I have many questions I would like to ask you about your own political beliefs and your particular political philosophy, and I would enjoy having answers to them. But I respect your duties as a sitting judge and your responsibilities as a nominee to our Nation's highest Court, when you say that you don't want to impinge upon your right to sit on some of these very important issues as they come up in the future, nor do you want your right to sit on those issues and to hear those issues questioned. And they could be questioned, if you got into your particular points of view at this time, assuming you have them.

So, I suggest to you, just keep answering the questions in the very responsible manner that you have been answering them. That is the way any good judge would answer these questions, in my opinion.

Now, Judge, the court on which you sit, the Court of Appeals for the District of Columbia Circuit, handles quite a few cases of statutory construction; is that correct?

Judge THOMAS. That is correct, Senator.

Senator HATCH. Now, you have sat on approximately, as I understand it, 170 judging panels; am I right?

Judge THOMAS. I think 150 or so cases I have sat on.

Senator HATCH. More than 150 cases, and let me just ask you this question. In your decisions, have you resorted to legislative history in construing these statutes?

Judge THOMAS. Senator, as I have indicated, when the statute is ambiguous, and in an effort to discern the intent of Congress, there have been instances in any number of cases when either myself or another judge with whom I sat, an opinion which I signed onto referred to and included legislative history. Where relevant, it is an important part of our interpretation of statutes from this body and in other areas.

Senator HATCH. Well, in your decisions, have you relied upon natural law?

Judge THOMAS. No, Senator. As I indicated earlier in my prior discussions with the Chairman, I indicated that, in adjudicating cases, the limited role of natural law with respect to our Framers, but beyond that the reference is to the history and tradition of our country.

Senator HATCH. Well, I think that is an important distinction.

Now, when a Senator asks you, as the nominee, do you believe the Constitution protects the woman's right to choose to terminate her pregnancy, I believe the nominee is being asked to decide the principal underlying issue in abortion cases, and certainly in a number of cases that are expected to come before the Court in the immediate future.

Now, it is irrelevant, in my opinion, if the Senator adds, "Oh, but don't tell me how you're going to decide a particular case." Once you give the answer to the first question, does the Constitution protect a woman's right to choose to terminate her pregnancy, if you give the answer to that question, you are well on your way to deciding particular cases involving abortion which are certain to come before the Supreme Court.

Now, let's not kid ourselves, we all know that. It is, in my view, inappropriate to keep this up. Thus far, you have been asked about 70 questions on abortion. Now, I don't know why you are being singled out, because Justice Souter was only asked 36 questions on abortion, and that was way too many, since he hadn't decided how he was going to vote, either.

Now, as I heard your testimony the day before, you said that you are basically undecided on that issue, and that you are reserving your judgment until the time when you can listen to all the facts and all of the issues and all of the case law and all of the other materials pertaining to that particular issue. Am I wrong in stating it that way?

Judge THOMAS. Senator, I indicated that I think it is important that I retain an open mind and that I don't have an opinion on that important case.

Senator HATCH. Well, if you answered that question that I cited at the beginning, which is probably the pivotal question, I think questions would be raised as to whether or not you would be impartial in cases that may be in front of you in the next year or so.

I would just add that I do not recall you replying to questions Tuesday or yesterday with the specificity that you have been pressed with these abortion cases. One year ago this week, Justice Souter declined to say anything about abortion. He was approved 13 to 1 in this committee, 13 to 1, and he refused to say anything about it. I think the burden is on those who would condition your confirmation on answering questions about abortion to tell the American people why you are being treated any differently from Justice Souter—70-plus questions thus far, versus 36.

I think when you say you are going to keep an open mind, you are undecided, you are going to look at everything and you are going to do it in the best way you can and make a decision in the best way you can, I think we ought to take your word for that, especially since you have a reputation for integrity and honesty. I don't think anybody questions that.

So, I ask the question, why are you being treated differently from all of these confirmable people in the past? Now, I know it cannot be that throwaway line in a 9-page single-space speech to the Heritage Foundation. I don't think you should be judged by that. I think you should be judged by your testimony here. I think that reed is so thin, that it is invisible. But so much for that.

I just have to say that you have been asked double the questions of Justice Souter. What are we going to have, 64,000 questions on abortion before we are done with this approach? You would think, from listening what is going on here, that it was the only issue the Supreme Court has to decide.

I have to say I think it is a tremendous mistake to condition the confirmation of a Supreme Court nominee on any single issue. I have to admit, I feel very deeply about abortion, too, and I wouldn't mind knowing, if you knew, how you would rule in advance myself. But, I am not going to ask you, because it is a controversial issue, it is a difficult issue. It is one you are going to have to hear, it is one where, if you gave your opinions now, I think you would seriously erode any confidence anyone would have when you are on the bench trying to make the final decision on any number of cases that might come before you that you will fairly weigh the arguments in that case.

So, I think there is a time when enough is enough. Frankly, I think you have more than adequately said you will do the very best you can honestly to decide those issues, based upon the materials that are brought before you when you are sitting on that Court, and that as of the present moment you haven't an agenda and you have not made up your mind how you will vote on those issues. Indeed, how could you, because nobody knows what those facts are going to be, nobody knows what the particular case is going to be, except some of those that may be pending at the present time. Well, enough on that.

The subject of affirmative action came up on yesterday and today, I have to say, and I have some questions on that, but let me just make a few comments first.

Affirmative action can mean different things. It can mean reviewing one's employment practices to eliminate discriminatory practices. It can mean increasing an employer's outreach and recruitment activities aimed at increasing the numbers of minorities and women in the applicant pool from which all applicants will then be considered fairly, without regard to race or gender.

There are similar activities aimed at widening the pool of applicants, and I am going to ask about those. This form of affirmative action has widespread support in this country for it. You have spoken and you have written about it and you have written for it, and I am not aware of any single Member of the U.S. Senate who opposes that position.

Now, I believe that discrimination against anyone should be ended and it should be remedied, and there is still much discrimination against minorities and women, and I think we should do everything we can to root that out in this society, and I favor the kind of affirmative action that I have just described, which you have supported in the past.

But there is another form of affirmative action which is highly controversial, deeply divisive, and I have to say, wrong. By whatever euphemism or label used to describe or mask it, this form of affirmative action calls for preferences on the basis of race, ethnicity, and gender. Lesser qualified persons are preferred over better qualified persons in jobs, educational admissions, and contract awards, on the basis of race, ethnicity, and gender.

Some argue that there is a distinction between a quota and so-called goal and timetable, but that, in my view, is misleading and it is of no practical meaning. It isn't the label that is objectionable, but the practice, and the practice is unfair preference given to one American citizen over another. It doesn't matter what one labels a numerical requirement that causes or induces preferences. If you are discriminated against because of it, the harm is all the same, regardless of the "feel good" label someone else might happen to put upon it, and the harm to the victim is the same, if the employer is private or public.

Yesterday and today, reference was made to the *Johnson* case. This is a 1987 Supreme Court decision. All 238 positions in 1 job category were held by males at this particular employer's business—and this is an important point, this next point: There was no finding in this case of discrimination against women by the employer. Notwithstanding the out-of-context quotes from the lower court record that we heard today, there was no finding of discrimination.

Under a nondiscrimination standard, Mr. Johnson would have been selected. Among the seven qualified persons, he was recommended for the job and did have a slightly higher rating than the woman who was ultimately selected. What happened next is that the county affirmative action office got involved and the county affirmative action coordinator recommended to the hiring official that the woman be hired.

Now, he did hire her, taking into account qualifications and affirmative action matters. Now, promoters of preferences, they like to say, well, the person preferred was qualified. But, if a better qualified person, even if ever so slightly, loses a job to someone less qualified because race or gender counts against him or her, that is unlawful discrimination.

Now, I have to say it is unfair, and I think that is what basically you have said. This preference was taken under a plan that I believe one of my colleagues yesterday described as not a "quota," but just an "affirmative action plan." But I stress the label, whether it is called a quota or affirmative action plan or anything, is not the key. It is the practice of preference based on race, gender, and other irrelevant characteristics that is the key here.

The reason to oppose a quota is because it causes preferences, not because the word "quota" sounds bad. So, it is not enough to say we oppose quotas. We must oppose preferences and we have to oppose the various means by which preferences are required, caused, or induced.

Now, title VII as enacted bans preference. Title VII is not a heavy-handed interference with the private sector, as its opponents claimed back in 1964. It is the embodiment of the principle of equal opportunity and nondiscrimination.

In a 1979 decision that George Orwell could appreciate, the *Weber* case, the Court construed title VII to permit preferences in training. Now, there a white male was discriminated against. In the *Johnson* case, the Court extended its creative interpretation of title VII to hiring. Five members of the *Johnson* court said *Weber* was wrongly decided, that it turned title VII on its head, but two of those five adhered to stare decisis and not only let *Weber* stand, they extended it.

It is desirable to increase minorities and women in various jobs, and that is a desirable thing and I am for that and you are for that, but not at the price of discriminating against other hard-working innocent persons who are not privileged people in this country. I have to add that there have been many instances where preferences for members of one minority group have disadvantaged members of other minority groups and women. Preferences for women have disadvantaged minority males as well as white males. In an increasingly multicultural society, the preference problem is less a black-white issue.

The victims of preference do not have 150 groups out there lobbying for them, but they do have a moral right to be free of discrimination. That moral right was codified in the statute, at long last, in 1964 for all Americans. I think it is that statute to which all judges ought to be faithful. The victims of preference know that, however labeled or candy-coated, preferences are unfair, they are immoral, and they don't even have to be lawyers to understand it turns the statute on its head.

I don't think it is divisive to defend the principle of equal opportunity for every individual. I think it is divisive to compromise that principle. If one wishes to require equal opportunity for all individuals, regardless of race, ethnicity, and gender, our laws and Constitution as written already require that. There is no need to establish a numbers requirement.

A racial, ethnic, or gender numerical requirement, however labeled, is intended to be met. It is not intended merely to increase recruitment of minorities and women into the applicant pool, which can be required in its own right. It is intended to induce preferences of lesser qualified over better qualified persons, in order to reach the so-called "right numbers" in hiring and promotion, educational admissions, and contract awards, and that is as true in the private sector as in the public sector.

Now, Judge Thomas, you criticized this kind of preferential affirmative action while in policy positions, so I want to explore just for a minute forms of affirmative action and ask your position on them while at the EEOC. These are things I agree with and I would like your opinion, to see just where you come down.

Judge, let me ask you this: While you were at the EEOC, how did you feel about companies seeking referrals of applicants from organizations such as the Urban League, LULAC, the GI Forum, colleges and high schools with high minority enrollments, national organizations for women, black fraternities and sororities, and similar groups? How did you feel about that?

Judge THOMAS. Senator, I think that particularly in those instances in which the question is how does a company reach minority applicants, I have felt that those avenues, among others, were

very, very helpful. You can use similar approaches in education in which you have contact with organizations that are supportive of minority students and who can provide access with that student to the institution.

I think that all of those accesses are important. Again, those are efforts to get minorities at the door of employment and to make that opportunity available to them.

Senator HATCH. Good. How did you feel about employers providing briefings to the groups I mentioned on the employers' premises, as well as plant tours, explanation of job openings and so on? Do you have any problem with that?

Judge THOMAS. Senator, I think those are important. Again, the idea is to get information, and I think some employers go so far as to actually have programs in high school in which they mentor the students or programs in which they actually provide summer training.

We had one at EEOC in which we had interns who were hired into the agency, as well as stay-in-school programs and co-op programs where we had an opportunity to take a look at the students and to really provide them with opportunities down the road.

Senator HATCH. I agree with that. What was your view about employers asking their minority and female employees to refer job applicants to the employer?

Judge THOMAS. Again, it is a way to provide access to individuals. It works both ways. It is a two-way street. Individuals who might not have come to that employer or, on the other hand, the employer may not have known of are provided access, and I think that is, again, as important as the other avenues that we have mentioned.

Senator HATCH. I agree with that, too. What was your view about employers actively recruiting at predominantly minority and female schools, colleges, and universities?

Judge THOMAS. Similarly, Senator, it is an opportunity for an employer to find individuals at institutions that have trained them and prepared them for the workforce. As you know, I have been very supportive of efforts of that nature. There are programs that we had—again, the co-op programs that I mentioned—at predominantly minority institutions, and the idea was to actually not only help in preparing a student to become a part of the work force, but also for us to conduct an interview over time. And we have been able to get, or were able to get some very, very good employees out of that program.

Senator HATCH. That was one of the methods that helped you, wasn't it?

Judge THOMAS. It was.

Senator HATCH. I certainly agree with it. What was your view about an employer recruiting in schools where there were fewer minorities or women, seeking out those fewer minorities or women to encourage them to apply?

Judge THOMAS. Again, I think that that is an important effort. Again, Senator, it provides access and it provides contact.

Senator HATCH. What was your view about employers advertising for applicants in media with a predominantly minority or female audience?

Judge THOMAS. Again, Senator, when you are attempting to recruit and you are looking for employees, individuals who are minorities, you have to, again, look at the readership or the distribution of the media that you choose. And I think it is important. It may not be as aggressive sometimes as I think it should be, but I think it is very, very important.

Senator HATCH. What is your view about employers establishing motivation, training, and employment programs for hard-core unemployed of all races and both genders?

Judge THOMAS. I think it is consistent with what I have said earlier, Senator. I think we have an obligation to include those individuals who have been left out of our society in our society, in the economy, in our schools, our educational programs, et cetera. I think that that is an important obligation and one that is certainly discharged in part in that way.

Senator HATCH. Did you object to employers establishing equal opportunity offices?

Judge THOMAS. I support that, in fact encourage it. I had felt that those offices should actually be enhanced. They shouldn't be afterthoughts in organizations, that they would have to be a part of the employment decision or the promotion decisions. They would have to be in the chain of command as opposed to a satellite office.

Senator HATCH. So these and other affirmative action steps can be taken to enhance the opportunity to compete for jobs. But when the time comes for hiring and promotion, has it been your view that these decisions should be made without regard to race or gender?

Judge THOMAS. Senator, that has been my view, and at EEOC we were able to accomplish both ends. We were able to improve the number of minorities and women in the upper ranks of the agency, and at the same time make the decision based on the best qualified. It is a record that I was particularly proud of and one that I think exemplifies the approaches that you are talking about.

Senator HATCH. Judge, could you explain your views about the adequacy of the current title VII penalties for intentional discrimination?

Judge THOMAS. Senator, let me just simply restate what I have said in the past. I think that title VII—for the kind of injury that we are talking that title VII needs to be stronger. I have said that in the past, and that is an important point.

A lot is being demanded or was demanded of title VII, and as Chairman of EEOC I felt that it was undervalued, that the damage to individuals was being undervalued, that there should be more damages and that there perhaps should be stronger penalties.

Senator HATCH. Well, I agree with your comments, and I agree with your statement. And there are many ways that we can accomplish the integration of minorities, women, and others into the work force without using preferences. And your effort have been a prime example of how to get that done, and your tenure at the EEOC shows that. And I want to compliment you for it.

Now, some have charged you and your statements in these hearings that natural law is not an independent rule of decision in adjudication, that your testimony on that is inconsistent with your

earlier writings and speeches, and that this represents a confirmation conversion. Now, that is pure nonsense as I view it.

First, if you did think that independent recurrence to natural law in adjudication was proper, one would expect to see some evidence of that in your decisions on the court upon which you now sit, the Court of Appeals. But what your opinions show is a careful consideration of the written law, and that is why I started off with questions about construing statutory law. Moreover, a careful review of your writings and your speeches reveals a recurring theme that natural law demands limited government and limited government demands that judges not overstep their constitutional authority. Is that a fair comment?

Judge THOMAS. It is a fair comment.

Senator HATCH. In the September 9, 1991, New Republic magazine, no shill for the Bush administration, reporter Jeff Rosen reviewed the judge's writings, and he concluded that they "show that his views have been not only caricatured but turned on their head. Far from being a judicial activist, Thomas has repeatedly criticized the idea that judges should strike down laws based on their personal understanding of natural rights. Far from being bizarre or unpredictable, Thomas' view of natural rights is deeply rooted in constitutional history. Like many liberals, Thomas believes in natural rights as a philosophical matter, but unlike many liberals, he does not see natural law as an independent source of rights for judges to discover and enforce."

Now, I am personally delighted that this particular reporter understood your use of natural law before these hearings began. And I think he pretty well summed it up.

Now, you have indicated to us that natural law is enforceable as a matter of adjudication only to the extent that natural law has been incorporated into the constitutional or statutory provision before you. Is that correct?

Judge THOMAS. That is accurate, Senator.

Senator HATCH. OK. Now, many constitutional and statutory provisions do reflect or incorporate natural law and appropriately restrict private moral choices. For example, the 13th amendment forbids anyone from choosing to enslave another human being. There is nothing novel about this.

Similarly, the Civil Rights Act of 1964 forbids hotels and restaurants from making the private moral choice to exclude black people from being their patrons and employers from making the private moral choice to exclude black people from jobs.

Likewise, the Fair Housing Act restricts the rights of landlords and realtors to make private moral choices to discriminate on the basis of race.

Now, Judge Thomas, I understand that it is your position that your personal views of natural law are not independently enforceable under the liberty component of the due process clause. Is that correct?

Judge THOMAS. That is right, Senator.

Senator HATCH. What you are telling us, as I understand it, is that your approach to the due process clause would be similar to that taken by Justice Harlan; namely, that history and tradition provide the substantive context to that clause.

Judge THOMAS. That is right, Senator.

Senator HATCH. Now, isn't this approach to interpretation of the due process clause that you and Senator Biden agreed upon a traditional approach to the interpretation of the amendment? Isn't it a traditional approach?

Judge THOMAS. Senator, I believe that the approach that I have suggested is, indeed, a traditional approach.

Senator HATCH. I need approximately a minute, Senator Biden, if I may.

The CHAIRMAN. Sure. Go ahead.

Senator HATCH. Indeed, isn't it a basic principle of constitutional interpretation that we look to the natural law or other consideration when, but only when, it aids us in understanding the written law of the basic document?

Judge THOMAS. I think we look to the Framers' intent. We look to what they were attempting to do in an aid to interpret those provisions. I think that is correct.

Senator HATCH. So as I understand it—and I think as anybody who has been watching these proceedings who has listened carefully would understand it—is it your position that natural law is not an independent basis for decision, but rather it can inform our understanding of the substantive context of the document, including history and tradition?

Judge THOMAS. That is right, Senator. To the extent that the Framers reduced their beliefs or their principles to the document, it could aid in determining what the Framers thought.

Senator HATCH. Well, so in this regard, it seems to me it is apparent that you follow in the footsteps of Abraham Lincoln and Martin Luther King, Jr., who argued that natural law informs the Constitution. Do you agree with that?

Judge THOMAS. I think it informs and inspires it the way that we conduct ourselves in this country, Senator, in our political processes.

Senator HATCH. Well, I agree with that, too.

Let me just say in closing of my questioning that I don't think that we should have a single litmus test to exclude somebody from serving on the Court. And I frankly don't think that it is fair to keep bombarding you with questions about abortion when you have said you are undecided on that issue. Now, any Senator can ask any question he or she desires to ask. But I think there is a point where it is overdone, and in your particular case, I think you have been singled out. And I have even heard some Senators say that unless you answer the question the way they want you to answer it, that they may not vote for you. Well, that is a decision that an individual Senator has to make, but I think it is an abominable approach. Because I don't think anybody should be rejected or should be voted against for the Supreme Court of the United States on a single issue or a single litmus test. I just don't. And if we get to that point where this becomes a politicization of the courts, we are all going to lose.

I have been very proud sitting here and listening to you, and I just personally want to congratulate you on the good way that you have answered everybody's questions and your demeanor and the

approach that you have taken. I think you are doing a great job. Just keep it up.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator Hatch.

Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

I would just like to make a comment before getting into another line of inquiry. My colleague from Utah wants to know why you are being treated differently than Judge Souter with respect to the question of a woman's right to choose. I think it is pretty obvious that——

Senator HATCH. Not just Justice Souter; all of the prior justices.

Senator METZENBAUM. Well, all of them. You have written very extensively and have spoken out quite extensively in this area, and I think it warrants that inquiry. Beyond that, I think there is a greater sense of alarm as to the direction in which the Court seems to be moving, and I think to fail to inquire of you in that area would be irresponsible on our part.

But, Judge Thomas, to another area. In the past, you and I have had disagreements over policies which you pursued at the EEOC. But there is one area of your record at the Commission which is particularly troubling to me, and that is your record with respect to age discrimination, discrimination against senior citizens. Discrimination against the elderly does not always receive the same amount of attention or provoke the same degree of outrage as racial discrimination or sexual discrimination. But employers who dismiss or refuse to hire individuals because of age, as you know, violate the law every bit as much as employers who discriminate on account of race or sex.

That is why, Judge Thomas, in reviewing your record, I was shocked to come across a 1985 statement you made in an interview with the ABA Banking Journal, a banking industry trade publication. In that article, you suggested that discrimination against the elderly could be justifiable. You are quoted as saying that, "The age discrimination issue is as complicated an economic issue as any we confront in the equal opportunity area." You continued on, "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical or economic reasons, make sense. Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary. In an economic downturn or when technology calls for staffing changes, employers tend to eliminate the most experienced and costly part of their work force."

Judge Thomas, at that time, you were the chief Federal official in charge of enforcing the law against age discrimination. Yet here you were characterizing age discrimination as an economic issue, and then stating that many violations of the age discrimination law make sense.

My question to you is: How could you, as a law enforcement official, make a public statement which could easily be interpreted by employers as condoning violations of that law?

Judge THOMAS. Senator, if I could have the whole quote, it would be helpful to me so I could look at the context. But let me say this: I have never condoned violations of the Age Discrimination in Em-

ployment Act. In fact, just the opposite. The act itself has made some very difficult decisions.

For example, in the mid-1980's, the act itself covered the ages from 40 to 65 and then from 40 to 70—actually earlier than that. From 40 to 70, then uncapped during the 1980's. The age act also makes clear that there can be factors other than age that could result in those sorts of distinctions. That is in the statute. Those aren't my decisions.

I have not, do not, and never did condone discrimination, unlawful discrimination under the Age Discrimination in Employment Act.

Senator METZENBAUM. Well, Judge Thomas, what concerns me is that when the chief Federal official in charge of enforcing the age discrimination law says that many technical violations of that law make sense, it sends a signal. It suggests both to employers and even to EEOC personnel that age discrimination issues are not a high priority within the Commission.

Weren't you concerned about sending that kind of signal? Now, it is my understanding that you do now have a copy of the article.

Judge THOMAS. I have a copy of the article. The point that I am making is this: To individuals—and I don't think that I suggested that it made sense to or condoned the violation of the act. But it would make sense to an employer to think that, well, this approach is OK. That is a violation of the Age Act to say that we are going to pinpoint or focus on older workers. The important issue is not so much for me whether or not to the individual the employer says—the employer says we want to make the decision of downsizing our work force. The employer says, well, that makes sense. Perhaps what we could do is look for the highest paying jobs.

Well, that might make sense to the employer. The problem for us when an employer makes a decision of that nature is: Does that violate the Age Discrimination in Employment Act? And as you remember, during the 1980's, during those significant downturns, during those mergers and acquisitions, employers were making those decisions and we were bringing a significant number, a larger number of lawsuits to counter that. So it might have made sense to them. The problem is that it violates the Age Act.

Senator METZENBAUM. My point is, Judge, that you sort of indicate you weren't sending a signal, but you made that statement to the ABA Banking Journal, which, as you know, is a trade journal for the banking industry.

Now, would you have made that same statement if you had an interview with the AARP's publication? Do you think you would have said that many technical violations of the Age Discrimination in Employment Act make sense?

Judge THOMAS. I think, Senator, if you would look at the whole article, the point that I was trying to make in the article—and I haven't had a chance to review the entire article—is that we were actually upgrading enforcement; that, indeed, this is one area that was technically very complex; that, indeed, employers were at a greater risk.

Later in the article, for example—and I just had a chance to skim it here—I say, "Under Thomas, the EEOC has changed to a system that investigates all cases that fail conciliation." Well, that

is actually a misstatement, but it says, " 'About 85 to 90 percent of cases probably will go on to court,' Thomas said." That is an increase in enforcement, and that is something that we did over time.

The article also refers to, I believe here, the automation programs that I was beginning at that time so that we could better enforce the law.

I have not in any place condoned a violation of the Age Discrimination in Employment Act. These efforts on the part of employers may make sense to them. But if they are wrong, they are wrong. If they violate the act, they violate the act.

Senator METZENBAUM. Well, I guess words speak for themselves when you say that technical violations make sense. I think that it certainly sends a signal.

In that same interview, after you assert that there are many technical violations of the Federal age discrimination law which make sense, you go on to say:

> Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary. In an economic downturn or when technology causes staffing changes, employers tend to eliminate the most experienced and costly part of their workforce.

Now, Judge, many older workers, as you well know, are really the people who built the company. They were there for 20, 30, 40 years. They are loyal, long-term employees. Courts have consistently held that employers may not target older workers for layoffs.

In a 1988 opinion of the Second Circuit Court of Appeals, after examining cases that were decided well before you made your statement, that case summarized the law in this area by stating:

> Courts have emphatically rejected business practices in which the plain intent and effect was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts.

In view of that court decision and the law, the specifics of the law, why would you publicly suggest that it was sensible for employers to lay off older workers because of higher salaries when the courts had made it clear that the age discrimination law forbids such a practice?

Judge THOMAS. Senator, let me repeat what I have said. It may make sense to the employer, but if it is a violation of the Age Discrimination in Employment Act, it is a violation. We at EEOC I think pursued those cases aggressively. Just because it is logical to them that this is an area that perhaps they could make changes, if it is a violation of the Age Discrimination in Employment Act, then it should be addressed. Those cases were investigated to the best of our ability. They were litigated, and they were pursued.

As you remember, during that time those were difficult issues in the downturn in the economy. And I think that we wrestled with them in a professional and an appropriate manner. There were differences of opinion as to how that should be best done.

I don't think that I am saying here that it is OK, that it is acceptable, that it is fine to violate the law. The line that I am trying to, I think, and I haven't had a chance to read the entire article, to point out here is this: That it does perhaps make sense to the employer. But that is a violation of the Age Act.

Senator METZENBAUM. Did you say that at the time?

Judge THOMAS. I did not—again, I didn't write the article, Senator. If I had the whole interview——

Senator METZENBAUM. I understand that, but the point is the article is quoting you, and there you are saying to the banking industry that many technical violations of the Age Discrimination in Employment Act make sense for practical or economic reasons. You don't put any qualifier on it. You don't put any condition on it. You don't say it is still a—that you are going to prosecute those cases. You are sending a message that you understand that there are some violations of the age discrimination law that make sense. And that is of concern to senior citizens. It is a concern to many people in this country.

Judge THOMAS. Well, Senator, you state that I put no qualifiers on it. The point that I am making is that, one, I did not write the article. Perhaps I gave an interview. But at no time did I endorse or permit or allow violations of the Age Discrimination in Employment Act. If someone were to ask me the questions, do you find that there are violations out there? Why is it that employers are running into violations in the new era of mergers and acquisitions? Why are they having more violations of the Age Discrimination in Employment Act?, then I would say, well perhaps they think it makes sense or it makes sense to do this.

But that is not an endorsement of a violation of the Age Discrimination in Employment Act.

Senator METZENBAUM. But, Judge, I find again you want to move away from your own statement. You didn't say what some others might think. You are saying, "I am of the opinion." That is a quote. "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical or economic reasons, make sense." It is you who is speaking, not somebody who is interpreting your words.

The Age Discrimination in Employment Act requires older workers to file their age bias claims with the EEOC. The Commission is authorized to investigate the claim and, if it has merit, attempt to work out a settlement or file a lawsuit on behalf of the older worker. The Age Discrimination in Employment Act has a 2-year statute of limitations, meaning that either the EEOC or the older worker who brings the age discrimination charge to the EEOC's attention must file a lawsuit within 2 years of the alleged act of discrmination. If not, the older worker loses his or her right to seek redress under the law.

As you well know, unfortunately during your tenure as head of EEOC, thousands of age bias claims sat languishing in the EEOC for over 2 years. As a result, thousands of older workers lost their right to bring lawsuits under the ADEA. Congress did not become aware that there was a systemwide problem within the Commission until late January 1988. Then, as you know, Congress moved quickly to pass special legislation in April 1988 which restored the rights of those older workers who believed they had been discriminated against.

As I mentioned in my opening statement, the problem of lapsed age cases happened not once, but twice, Judge Thomas. For now, let's focus on the first batch of lapsed cases.

Your agency's own internal documents show that as far back as January 1986, Commission members, including yourself, were aware that EEOC field offices were having trouble meeting the statute of limitations on age discrimination cases. A January 1986 litigation memo presented to all five commissioners, including you, stated that even though there was substantial merit to one age case, the general counsel's office had to recommend against litigation "primarily due to statute of limitation problems."

An April 1986 litigation memo presented to all five commissioners, including you, in another meritorious age case stated that, "The statute of limitations is already operating to bar individual claims on almost a daily basis."

I have two questions for you, Judge Thomas. First, how could these lapses have happened? Second, given that there were early warning signs going back to January 1986, why did it take almost 2 years before the Commission discovered that it had a system-wide problem which was causing thousands of older workers to lose the chance to vindicate their rights?

Judge THOMAS. First, Senator, with your permission, I would like to just simply comment on to the extent that there is any question about my view of enforcing ADEA claims from the last quote, my point is and remains firmly that I would not tolerate nor permit any violations of the Age Act.

With respect to this particular problem, as you know, this was a very difficult problem and a very difficult period for me during my tenure. I am a lawyer, or I was a lawyer before I went on the bench. And one of the things that I can remember early in my own tenure as a lawyer is making that panicked midnight run to the law office or to the attorney general's office because I thought there was a deadline approaching. I thought that when others heard the word statute of limitation, their reaction or that panic set in in the exact same way.

If I could have investigated every single one of those age charges, I would have. That was the low point of my tenure. I said it then, and I say it now.

I don't have the presentation memos that you are talking about, but let's put that in context a second. If you want to get to them in detail, I will just do that. But let me talk generically about the problem that we were facing in the mid-1980's.

First of all, the initial inkling of a problem that we saw was that when cases were presented after they had been investigated in the field, and those cases were then sent to our headquarters, they were sent to our general counsel's office. When those cases came in, in any number of areas we found that there was this problem. The problem was whether it was title VII or the Age Discrimination in Employment Act. The cases would sit in that office for months and sometimes years.

We immediately changed that policy. I think I changed it sometime in the early 1980's, perhaps 1984 or 1985, so that when these investigated cases recommending litigation came from the field offices, they immediately came to the full Commission.

As a part of that, what we noticed was that cases could, while sitting in the general counsel's office or in the regional attorney's office in the district offices, they could miss the statute of limita-

tion. That was a separate problem from the one that you and I have talked about.

One of the things that we did was this, with respect to those cases: The problem with respect to the lapse is separate from that. That is an administrative problem in the field offices. It is not a problem that comes from the period that the cases are sent to the headquarters office, and then those cases sitting there waiting to be attended to by an attorney. The administrative problem results from this, or resulted from this: When I went to EEOC——

Senator METZENBAUM. Could you wind up shortly, please?

Judge THOMAS. When I went to EEOC, there was a process—EEOC did not investigate routinely age discrimination charges. Myself and the other commissioners felt that they should be investigated, and we introduced a policy to do that. That took more time.

The second component of that is this: that the Age Act has a 2-year statute of limitations, unlike title VII. Our first initiative when we changed the policy, recognizing that it would take longer to investigate the cases, was to require the district directors to monitor their workload more closely. Some district directors, unfortunately, did not do this, and unfortunately some cases missed the statute of limitations.

I found out about this in December 1987. I notified Congress as soon as it returned from the Christmas break, and my staff or EEOC's staff worked closely with your staff to develop legislation, which was introduced and passed and enacted I believe in April.

Senator METZENBAUM. Judge Thomas, I just have to take issue with you that Congress acted at your behest.

Judge THOMAS. No. We cooperated with you.

Senator METZENBAUM. Well, you didn't oppose it. A 1988 report by the staff of the Senate Aging Committee concluded that, "The EEOC misled the Congress and the public on the extent to which age discrimination charges had been permitted to exceed the statute of limitations." That is a quote.

The report states that when it initially requested data on this issue in September 1987, the EEOC responded that only 70 cases had lapsed. But at that time, an internal EEOC survey revealed that over 900 Federal age discrimination charges had lapsed the statute of limitations. In December 1987, EEOC told the Aging Committee that only 78 cases had lapsed, but a trade publication reported that nearly 988 charges had exceeded the statute of limitations. One month later, in January 1988, you formally advised the Aging Committee that 900 cases had lapsed.

Senator David Pryor, the current chairman of the Aging Committee, has stated that, "After months of fruitless attempts to obtain additional and accurate information on this matter, the Aging Committee issued a February 1988 subpoena to Chairman Thomas to provide data on the lapsed charges."

The EEOC now acknowledges that the age bias claims of over 4,000 workers lapsed due to your agency's failure to process those claims in a timely manner. Both the Senate and the House Aging Committees have estimated that as many as 13,000 older workers may have lost their rights due to your agency's inaction. Congress

was trying to find out the extent of the lapsed cases problem at your agency.

The Senate committee which deals with senior citizen issues was attempting to determine whether older workers were losing their rights. The current chairman of the committee has stated that the committee's efforts to inform itself on this issue were being frustrated, and so a subpoena was issued. Ten Democrats and three Republicans on the committee supported the issuance of the subpoena. No member of the Aging Committee objected, and yet here is how you characterized that subpoena in a speech prepared for delivery on April 7, 1988, the exact same day that the President signed the law passed by Congress restoring the rights of older workers. You said, "My agency will be virtually shut down by a willful committee staffer who has succeeded in getting a Senate committee to subpoena volumes of EEOC records. It will take weeks of time and cost hundreds of thousands of dollars, if not millions. Under the guise of exercising oversight functions, the staffer seeks to implement the program of the American Association of Retired Persons. Thus, a single unelected individual," said you, "can disrupt civil rights enforcement all in the name of protecting rights."

Now, Judge Thomas, those comments were absolutely astounding. Congress was trying to find out the scope of a problem that affected thousands of senior citizens. Congress had to enact two pieces of legislation restoring the rights of lapsed cases because the statute of limitation that applied. We were trying to find out how to keep it from happening again. You declare that the Aging Committee acted improperly in issuing a subpoena to determine whether or not your agency had neglected the legal rights of thousands of older workers. You also maligned the integrity of the committee which issued the subpoena. It was not my committee. It was Senator Pryor's committee. You suggested the committee was doing the bidding of the American Association of Retired Persons.

My question, Judge Thomas, is: How could you, on the very day on which the law bailing out your agency went into effect, condemn so vehemently Congress' efforts to find out whether older workers were still losing their rights as a result of your agency's inaction?

Judge THOMAS. Senator, there is quite a bit there. We received, on a Thursday afternoon, a very detailed request from the Senate Select Committee on Aging, then under Senator Melcher, concerning very detailed information over Labor Day weekend at EEOC. The request, which was not handled directly by myself, but by our legislative office and our administrative people and our general counsel, the request was for a variety of data, including charges, those are the administrative charges that come in to EEOC, and cases that had passed the statute of limitations.

Our personnel separated those tasks, the requests for charges and the requests for cases, and took those requests, assigned those to the relevant offices. The requests for cases were assigned to the general counsel's office. The requests for charges were assigned to the administrative people. The document request that we responded to about the numbers that had lapsed, that had missed the stat-

ute of limitations, was the request response from the general counsel's office concerning cases, not charges.

There was no effort ever to mislead the committee. In fact, we attempted to have the committee clarify for us precisely what it wanted us to respond to in such a short period, so that we could do that quickly.

Normally, when a request comes to EEOC, the request or the requesting body sits down with our staff people and we go through the documents, we go through the requests and we determine how to respond. In this instance, that did not occur.

Now, with respect to learning about the mischarges, as opposed to the cases, what we attempted to do was, as soon as I found out, was to not only inform Congress, but to make it public. I found out in December 1987 and reported to Congress the day Congress returned for the next term in January.

Senator METZENBAUM. My time is about to expire, but I want to make it clear before it does, that when the lapsed age case issue came to light, you stated that it wouldn't happen again. But as we all know now, after Congress' corrective legislation in 1988, the problem didn't go away, you didn't take care of it. Thousands of age cases continued to lapse, due to your agency's failure to insure that the claims were processed in a timely manner. We had to pass a separate bill in October of 1990, due to the inaction of your commission and, as a consequence, costing thousands of aged workers the loss of their rights.

Judge THOMAS. Senator, we did everything, and I certainly did my tenure, with the resources that I had, we have a very spread-out agency, to respond to that problem. As you remember, it was a difficult problem. If I could have investigated every one of those cases, I would have. There were approximately 2,000 cases within EEOC or charges within EEOC which had missed the statute during over a 4-year period out of the approximately 50,000 or 60,000 that we receive a year, and I believe approximately 100 cases did involve actual—there was as finding of discrimination. But even one, as I have indicated, is too many.

We took steps to solve the problem. We automated or completed automating the automation of the agency, so that the cases could be more accurately tracked, that is both at headquarters and in the field offices. We sent notices to the individuals, so that they would know when the statute was approaching. We held managers more accountable. We had done that before, but we redoubled our efforts.

The point was that we are trying to make an entire agency respond to something that I felt strongly about and I know that you felt strongly about. It was enormously frustrating. I did as much as I could possibly do. I did not want a repeat of that. In fact, I never wanted it to happen. But getting an agency to respond, a bureaucracy to respond is sometimes far more difficult than wanting it done.

Senator METZENBAUM. Thank you, sir.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Well, there are lots of things to talk about. I do agree and I want to say that I agree with Senator Hatch about the issue of abortion. I don't know how many times you can ask that question and however many times it will be asked, it will be answered in the same manner. But it is interesting to me to hear the continual response and the continual asking of it, because I couldn't help but think, after being on this committee for 13 years, back in 1980, Senator Metzenbaum, who was in the majority and chairing hearings with Judge Ruth Ginsburg, was very clear on this issue that seems to have taken over a good deal of discussion, and that is what questions we should ask you.

Senator Metzenbaum was saying, in connection with the Ruth Ginsburg nomination, and he chaired that as ably as he does his work, and talked about her statement and said:

> You don't mean that every nominee up for confirmation ought to have his or her views explored as to what his or her positions are on all of the controversial issues that may come before those jurisdictions, you don't actually mean that, do you?

That was a quote of Senator Metzenbaum.

Then he went on to say:

> Do you think the Judiciary Committee members in days of yore should have refused to confirm Justice Black, who had been a member of the Ku Klux Klan and went on to become one of the more liberal members of the bench, do you think that they would have been doing their job right, or would the Nation have suffered or gained, if he had not been confirmed?

And then it was said:

> Should we then vote against her, or should we look at her and say is this a person who has the kind of integrity, temperament, and ability that can make a good or a great jurist? And if he or she has, then regardless of our agreement or disagreement with his or her particular views, shouldn't we then under those circumstances send that nomination to the floor with our recommendation?

And I concur totally with those views of my senior colleague from Ohio, and that is the way it works in this place.

Senator Kennedy, I served with him and enjoy the service with him on this committee. He said, in a hearing with regard to Justice Sandra Day O'Connor, he said:

> It is offensive to suggest that a potential Justice of the Supreme Court must pass some presumed test of judicial philosophy. It is even more offensive to suggest that a potential Justice must pass the litmus test of any single issue interest group. The disturbing tactics of division and distortion and discrimination practiced by the extremists of the new right have no place in these hearings and no place in the Nation's democracy.

Now, I just happened to think, as I looked at that, that what is true for the new right is also true for the old left. So, that is an interesting thing, but what it shows is that there isn't a thing we couldn't find here in what we do of those of us on this committee, where we haven't said one thing one time 4 years ago or 5 or 10, and another thing last month. I have done it, and I can tell you, if you have been in politics long enough, the wheel will come around and kick you right in the rear-end, and that is the way it works.

So, to put this test on you—and I think you have explained it pretty well, but I think you maybe ought to just say, you know, I've done some things when I was a politician that I sure wouldn't do as a judge, and then we would understand it better. It would fit, it would be something we could grasp, and then you wouldn't have to

say that you were a quasi-public person or that you were in the executive branch. Just say you were a pretty hard-hitting politician at one time. You worked for a President, helped get him elected. I didn't know, did you ever do any precinct work or pack around in that stuff?

Judge THOMAS. No, Senator.

Senator SIMPSON. Oh, you missed something, I will tell you. [Laughter.]

We have all done a little of that, I think. But if you were just to reflect, you know, that, obviously, the things you said as you dealt with emerging thoughts and as a political person serving a President of your party and then part of the executive branch, I think those things need to be very carefully segregated as to the importance.

Unfortunately, I think it is kind of sad to see it turned into something as if it were a confirmation conversion, when there isn't one of us here that could pass that test. You won't pass it, either, but it doesn't have a thing to do with our integrity or with our honesty, and you made certain promises to this panel when you started as to what you would do. You said you would serve with honesty and integrity. It was a very beautiful statement and it is already in the record.

But we as politicians, we have learned that, when those things happen to us, we call it a maturity in thinking that has overcome us or evolution of mental weighing of the issues. We don't lay bad things on it, because this is the ways it is. Facts change, things change, people change.

So, I think that it is very important. I would be quite hurt, if I heard people impugning your integrity or your honesty or your character. You handle that one a hell of a lot better than I would.

Now, if I might get to the Select Committee on Aging. I must be one of the last of the line. I serve on that, and let me tell you what happened when I got on there, because I wanted to get on to see what was going on on the Select Committee on Aging, and what was going on with you was a vendetta by a Senator who is no longer in the U.S. Senate and a staff that had just gone on an absolute hunt. I know, because I used to show up occasionally and pop my head in and I would say what's going on, and the staff members just kind of stood around and kind of salivated. They said, well, what's going on, boy, we're going to get into the EEOC.

It was very curious to me that everything that has been presented here by the senior Senator from Ohio has all been presented before. There is not one thing here that hasn't come up before, and that was before you went on the bench before, because this was the only stuff to use on you, and I won't want anybody to believe that this is new stuff or that somehow this terrible thing that has happened is all brand new.

You could go back and look at the record, go back and look at the Select Committee on Aging record, and it was not at the direction of Senator Pryor that this occurred, it was at the direction of his predecessor, and it got so bad that the members didn't even show up any more. Now, let the record show that. Let the record also show that, after all those months of wasting your time and ours, nothing came of it, because you had a committee staff that

never even understood the difference between a charge and a case and couldn't even compute it correctly, and it was appalling to watch.

Along came Senator Pryor, our wonderful colleague who is back with us now, and, I can tell you, he made some sweeping changes in the staff of the Select Committee on Aging. There ain't anybody left that was involved in that kind of absolute extreme activity.

So, the exaggerations as to the charges and criticisms of your handling of age discrimination cases before the EEOC is really, really old laundry, and some of those exaggerations came from the very tenacious group in the community known as the AARP. I have dealt with them before. I had a full head of hair before I got into it with them. [Laughter.]

But I can tell you, they are tough. You know, whenever we do something that affects them, they say, "Huh, don't forget, there are 32 million of us out here." Of course, that includes the magazines on dentists' stands anywhere in the country, too, of Modern Maturity, which is a better magazine than the Smithsonian. That is what they said. Actually, I think the distinction is that it is of the same paper quality and print quality, but the interesting thing is that in it the advertising is some of the sleekest gray-haired catch you ever saw, but all the editorial comment is about how everybody over 65 is somehow underprivileged, and they lose some credibility in that, and that is how I lost all this hair.

So, the AARP led that charge with a Senator who was willing to lead it, a Senator who is no longer in the Senate, and it was a bust. It didn't go anywhere. It was an embarrassment to some. And another of our colleagues who is no longer with us was the ranking member on that committee, and if he were here, he would put all of this stuff to bed, and that was our friend, John Heinz.

So, I hope we won't spend too much time on that. It was brought squarely before the Senate, and who brought it to the Senate was you, because your predecessor surely didn't. So, every single bit of this was presented to the U.S. Senate by you, and the Senate considered every one of these criticisms in total and rejected every single one of them when we confirmed you previously, so I hope we can keep that old tired issue in its proper perspective.

I think that Senator Metzenbaum quoted a news article, if I heard correctly, to the effect that you said that some violation of age discrimination laws made economic sense to some employers.

Senator METZENBAUM. It was the ABA banking magazine.

Senator SIMPSON. Thank you.

I guess the implication was that not only you understood that, but that you also approved of that. Did that get clarified?

Judge THOMAS. I think my final comment on that was that I in no way endorsed any violation of the Age Discrimination in Employment Act, so I think I did say what my view of it was, and I certainly would not have intended to do that.

Senator SIMPSON. I don't think you ever misled this Senate Special Committee on Aging, not from the times that I knew or my staff was there. I was not there throughout, because I finally just got tired of it, it was too much to—it was so feckless, so silly.

But I don't believe that, in any sense, ever have you misled, and I often thought that you were being blamed for the inability of the

Aging Committee staff at that time, their failure to understand what it was that you did or what the agency did, especially with regard to the interchangeable use of case and charge. I think that 13,000 figure has been terribly overblown and that, of course, has been covered rather thoroughly.

So, I just want to make those comments with regard to the Select Committee on Aging and its hearings on you. Do you have anything to add to how you felt that came about and what the results were as you perceived it, after you sat there patiently for many hours, with your staff? What is your assessment of that?

Judge THOMAS. Senator, as I noted to Senator Metzenbaum, that was an enormously difficult period. There were misunderstandings about information early on. It required a redirection of an enormous amount of resources in the agency, and it was a problem that was difficult to solve and we recognized that. It was a problem that we had to solve with limited resources, and we recognized that.

But the point is that we took every step possible and ultimately, with a refocusing or redoubling of our efforts in paying attention or having the agency staff pay more attention to the statutes of limitations, as well as finalizing a computer data base, not a perfect data base, but a working computer data base. We were able not only to track the time-sensitive age discrimination charges, but we were also able to monitor and to send out notices to the charging parties involved.

Prior to that, and I will end on this note, we were unable to even discern what we had in the agency. We could in no way tell you what kind of problem we had or what was even there. We did not have the data base capability. I think the recognition for us was, and it is an important recognition, is that those time-sensitive charges, perhaps we should have thought about tolling the statute in some way legislatively or perhaps some other action.

But when you attempt to fully investigate time-sensitive charges, it requires that you do more and do it more quickly. Remember that EEOC receives about 60,000 charges a year, and that is something that requires us to manage our work more closely, and we attempted to do that.

Senator SIMPSON. I have noted in recent weeks that your predecessor has been very critical of you, and she speaks critically of you in various forums, which puzzles me because, you know, all of this happened before you got there. And I would like to enter into the record the digest of the General Accounting Office report of April 1981 saying that the rapid charge process has overemphasized obtaining settlement agreements with the result that EEOC has obtained negotiated settlements for some charges on which GAO believes there was no reasonable cause to believe that the charges were true. Settlement agreements for these charges have little substance, and they distort the results of the rapid charge process by inflating the number of settlements. I think the entire digest ought to go in the record.

The CHAIRMAN. Without objection, the entire document will be placed in the record.

[The GAO report follows:]

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BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

Further Improvements Needed In EEOC Enforcement Activities

In 1976 GAO reported that the Equal Employment Opportunity Commission's management problems were thwarting its enforcement activities. Since the report, EEOC has made many changes to correct its problems in handling individual charges of employment discrimination filed with it and in developing and investigating self-initiated charges.

Additional steps need to be taken to help ensure that the changes are effective. For example:

> EEOC needs to cease settling charges that are without reasonable cause because this undermines its enforcement activities.

> The Congress needs to give EEOC authority to sue State and local governments.

In October 1978 EEOC also started to assume enforcement responsibilities transferred to it by the President's Reorganization Plan No. 1 of 1978. Further, the Office of Management and Budget needs to advise the President to consolidate programs now administered by EEOC and the Department of Labor.

UNITED STATES GENERAL ACCOUNTING OFFICE

HRD-81-29
APRIL 9, 1981

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-202516

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the Equal Employment Opportunity Commission's enforcement of title VII of the Civil Rights Act of 1964 and the transfer to the Commission of other Federal civil rights responsibilities under Reorganization Plan No. 1 of 1978. These laws prohibit employment discrimination on the basis of race, color, religion, national origin, sex, or age in public and private employment.

We are sending copies of this report to the Director, Office of Management and Budget, and to the Acting Chairman of the Equal Employment Opportunity Commission.

Milton J. Socolar
Acting Comptroller General
of the United States

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

FURTHER IMPROVEMENTS NEEDED IN EEOC ENFORCEMENT ACTIVITIES

D I G E S T

The Equal Employment Opportunity Commission (EEOC) has taken steps to correct most of the problems pointed out in a 1976 GAO report. (See p. 6.) However, some of EEOC's actions may be thwarting its efforts to eliminate employment discrimination. (See p. 11.)

EEOC enforces title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. (See p. 1.) GAO reviewed EEOC procedures and practices at its headquarters and 3 of 22 district offices. The three offices were "model" offices which EEOC used to test new procedures before implementing them nationally. (See p. 3.)

After GAO's 1976 report, EEOC introduced the "rapid charge process" to resolve discrimination charges filed with it. This process emphasizes prompt charge resolution through negotiated settlements which are obtained in face-to-face meetings among the charging party (employee), the respondent (employer), and EEOC staff. EEOC was settling about 50 percent of its charges through these negotiated settlements. (See p. 8.)

However, the positive results of this process are misleading. The rapid charge process has overemphasized obtaining settlement agreements with the result that EEOC has obtained negotiated settlements for some charges on which GAO believes there was no reasonable cause to believe that the charges were true. The settlement agreements for these charges have little substance--they normally provide for employers to remove information related to the charge from the charging party's personnel file--and they distort the results of the rapid charge process by inflating the number of settlements. (See p. 12.)

Tear Sheet. Upon removal, the report cover date should be noted hereon.

Negotiated settlements of these charges also undermine EEOC's credibility because

--charging parties and employers said they were pressured into settlements they disagreed with and

--charging parties were led to believe that, since the charges were resolved with settlement agreements, their charges had merit but EEOC handled them ineffectively. (See p. 17.)

GAO recommends that EEOC not obtain settlement agreements for charges that, absent a settlement, would be closed as no cause. When EEOC determines that persons have filed such charges, they should be advised to withdraw them or EEOC should close the charges with a finding of no cause. (See p. 26.)

EEOC is required to refer employment discrimination charges filed with it to State and local agencies that have their own employment discrimination laws. It has agreements with 65 of 91 such agencies and refers a significant number of charges to them, reimbursing them for some of the costs for resolving charges. However, there are more opportunities for EEOC to share its charge workload with these agencies, such as arranging with those 26 with whom it does not have agreements, to resolve charges. (See p. 19.)

EEOC also needs to file suit more timely once this decision has been made. GAO's analyses in two offices showed that EEOC averaged more than 7 months to file suits after informal settlement attempts failed. However, title VII requires charging parties to file suit within 90 days after receiving a notice of right-to-sue from EEOC. EEOC should establish similar time standards for filing suit in Federal court for charges on which it decides to sue, such as 90 days after the decision to litigate, to help expedite relief. (See p. 22.)

EEOC does not have authority to litigate charges filed under title VII of the Civil Rights Act of 1964 against a State or local government, but must refer them to the Department of Justice. Because of limited resources, Justice has not pursued many of these charges. Consequently, EEOC does not emphasize them in its enforcement activities.

Under the equal pay and age discrimination acts, EEOC can sue State and local governments. For consistency with other legislation and to ensure greater attention to this area, the Congress should amend title VII to authorize EEOC to litigate such charges. (See p. 23.)

EEOC has improved its system for addressing patterns and practices of employment discrimination, referred to as "systemic discrimination." Each district office has a systemic unit, which is under the management control of the district office but receives technical advice and direction from the headquarter's systemic unit. GAO found that, in two of four district offices, management generally was not supportive of systemic activities because it used systemic staff to resolve individual charges. Consequently, the systemic program began operating slowly, and district offices averaged only about two systemic cases each by the end of fiscal year 1979. (See p. 32.)

EEOC's systemic program is similar to the Department of Labor's activities to enforce Executive Order 11246, which prohibits employment discrimination by Federal contractors and requires them to take affirmative action to employ minorities and women. Consequently, EEOC either had selected for investigation or was investigating employers even though Labor had recently reviewed them. GAO recommends that the Office of Management and Budget (OMB) advise the President that the two programs should be merged to eliminate duplication. A merger would be consistent with other consolidation changes made by President Carter under Reorganization Plan No. 1 of 1978, which was used to reorganize Federal enforcement programs dealing with employment discrimination. (See p. 34.)

GAO recommends that EEOC make other improvements in the systemic program, such as obtaining more complete data from employers about their employment of minorities and women and aggressively monitoring employers' compliance with conciliation agreements and consent decrees. (See pp. 36 and 37.)

AGENCY COMMENTS AND
GAO'S EVALUATION

EEOC disagreed with some of GAO's conclusions and recommendations and stated that it was taking actions related to others. EEOC disagreed, in part, because it said that GAO's draft report was not clear in its use of certain terms related to rapid charge processing. GAO has clarified this in the final report, but believes that further improvements are needed. (See pp. 26 and 39.)

OMB said it generally concurred with GAO's findings that EEOC had made progress since GAO's 1976 report. (See p. 30.) But OMB did not agree with GAO's recommendation to consolidate EEOC's and Labor's programs, as well as some of GAO's recommendations to solve problems identified. GAO believes its recommendations will improve the Federal equal employment opportunity program. (See p. 39.)

Senator SIMPSON. Then if I might return to this issue, because you get into—and I talked about abortion, but let's get to privacy. That keeps coming up because it is an attempt—and you handle it very deftly—to simply lead you from the issues of privacy to abortion. And that hasn't worked so far. It didn't work with anybody that I have had the opportunity and the pleasure to serve on this committee while they were presenting themselves to the Senate. Sandra Day O'Connor, Justice Kennedy, Justice Scalia, Justice Souter—none of them answered these questions.

But just a quick word on privacy. You told me in a private meeting earlier this year that you honestly had not made up your mind on the terribly searing issue of abortion. I accept that statement. And it is tough for me because I am pro-choice. I have always believed that a woman should have this choice. And it didn't come from confirmation hearings. It came from practicing law with real live human beings. So I have not come to that position through a rigorous analysis of the U.S. Constitution, but through life as a lawyer, dealing with the real live problems of real live people in extremity, who came to me for, I hope, honest and real assistance and that is what I tried to give; like, you know, I am going to commit suicide if I have to carry this child to term. That is when as a lawyer, a male lawyer, you really don't want to go much further. At least I didn't. So at least here is what I hope is my common sense, real life interpretation of privacy and how that might extend to a right to abortion.

Privacy in the west is a very extraordinary thing, perhaps not more than any other State in the Union or place in the Union, but in Wyoming, by God, it is the right to be left alone. And it means a lot to people.

This often-mentioned doctrine of family privacy protects against legislation that interferes with certain universally respected rights. But family privacy is not an absolute. It does have some limits. Few things are absolute. It seems its most appropriate power is when it protects the right of one individual without imposing in any way on the rights of another individual.

The Supreme Court has clearly established that a family has the right to send their children to a private school—that is the *Pierce* case; that a family may decide which family members may live in their home—we have talked about that one, *East Cleveland;* that the family has the right to decide whether or not to practice contraception, *Griswold.* All in which I concur. However, that family privacy doctrine is not absolute. A husband or wife does not have a family privacy right or a constitutional right to batter and maul the other one. And according to *Roe* v. *Wade,* a woman does not have an unfettered right to abort her unborn child once the fetus has become viable.

Family privacy then does stop at certain barriers and boundaries when the right of one person impinges on the right of another.

My question to you is this: Is not the family privacy doctrine a question of degree and not an absolute, clearly defined thing in stone?

Judge THOMAS. Senator, the courts have wrestled with defining the contours of the right of—that important right of privacy. I think I come from a part of the country where privacy is treated

pretty much as the way it is treated out west; that you really value your privacy, you learn to respect your neighbor's privacy. You don't just ride onto someone's land without being invited, and you certainly don't walk into someone's house, and definitely not their bedroom, without being invited. So it is important.

The Court, though, has wrestled with how far does this right extend. What portions of this right are to be considered fundamental? And those contours I think over time will be defined in Supreme Court cases.

Senator SIMPSON. Is it not inevitable that reasonable people would disagree about whether a woman has a constitutional right to abort a nonviable unborn child?

Judge THOMAS. It is certainly an issue in the general public that people have very strong opinions about, and as I have indicated earlier, I can understand the depth of feelings and passions on both sides of the argument.

Senator SIMPSON. Well, many special interest groups and many politicians paint abortion as some black-and-white issue. And my personal experience is that abortion is a numbingly difficult and anguishing and ghastly issue just because it is not a black-and-white issue. The toughest one perhaps that could ever be made by a woman. But in my mind that is the only person that can make that decision. I feel it very strongly, so I ought to be really zeroing in on you more. But I am not because these other things that we are going to see and we do see about you—integrity, honesty, character, judicial temperament—and you have got that, my friend. I don't know who is keeping the score book, but judicial temperament, you have won the Oscar because I can see you on a bench, in the midst of clamoring counsel—you won't get as many in the U.S. Supreme Court, but they are there.

So in my mind there is that decision to be made by the woman, and I have trouble with it myself. It should not be made by legislators or judges, especially male legislators and male judges.

I am going to ask you only one more question on that topic, and it won't be the last one you will hear. I can assure you that.

Do you promise—you used the word "promise" when you sat before us first, that first day. Do you promise this committee to consider the abortion issue as you face it on the Court with an open and equitable and fair mind and with sympathy and compassion for all who are involved in that terrible decision?

Judge THOMAS. Senator, I would not only make that promise on this important issue, not only to this committee but, if confirmed, to the American people, and to myself. It is my solemn oath. I cannot sit as a judge if that is not the way that I proceed on those cases. And that is a promise that I take very deeply and understand and appreciate and feel strongly about, on all cases, that I approach them with an open mind and for the individuals involved with an open heart.

Senator SIMPSON. One final point. Earlier this morning Chairman Biden asked you about the—I think it was the 1972 *Eisenstadt* case which held that a State could not prohibit a single person from purchasing contraceptives. That holding was extended in a 1977 case of *Carey* v. *Population Services,* which struck down a New York statute which allowed only licensed pharmacists to distribute

contraceptives to persons over 16 and prohibited the sale of contraceptives to persons under 16 except by prescription. However, I ask you, these use-of-contraceptives cases do not imply that there is a fundamental right somewhere of privacy for every single aspect of sexual relations, do they?

In other words, for example, the Court ruled in 1986 that there was no fundamental privacy right to engage in homosexual sodomy. I believe that was the decision. And I ask this question because I think you were hindered by a lack of time in your response, partly because of my urging to conclude. And so I would ask you to conclude that. I don't know that you did. I am not here to rehabilitate you. I didn't hear what came out.

Did you have anything further to add on that?

Judge THOMAS. Nothing more than this, Senator: The Supreme Court, as I noted earlier, has wrestled in cases such as the one you just mentioned, *Bowers* v. *Hardwick*, with the contours of the right of privacy. And it is a difficult area, and it is one that I am sure that the Court will be revisiting. But beyond that, I think that my comments on the whole issue in the area of privacy have been pretty full.

Senator SIMPSON. Well, Mr. Chairman, I will go on to a different subject, and there is no time for that. But I did want to——

The CHAIRMAN. Take some more time, seriously.

Senator SIMPSON. No, no, Joe. That is fine. I will come back. I am going on to the issue of affirmative action. I wouldn't have time. But I did want to share with you what I found on the outside of the Justice Department building—would you like to hear that?—up on the wall there.

Senator METZENBAUM. Why don't you continue on?

Senator SIMPSON. What is that?

Senator METZENBAUM. I like a sedative in the afternoon.

Senator SIMPSON. You would like me to go on?

Senator METZENBAUM. A sedative.

Senator SIMPSON. Are you trapping me? You would like me to—no, I shan't.

Senator METZENBAUM. Continue on.

The CHAIRMAN. I would love to hear what is on the wall.

Senator METZENBAUM. Please, don't stop.

Senator SIMPSON. This is over the main entrance. This is in my 35 seconds left.

The CHAIRMAN. I don't want any graffiti.

Senator SIMPSON. No; it is no graffiti. I didn't put it on there, nor did any of the committee.

It says over the main entrance to the Justice Department at 9th and Pennsylvania Ave. in Washington, DC, it says, "Justice is founded in the rights bestowed by nature upon man. Liberty is maintained in security of justice."

Isn't that fascinating? [Laughter.]

I just thought I would throw it in there.

The CHAIRMAN. It is not only fascinating, but I wish more judges believed it.

We will recess for 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

We are going to try our best, Judge, to see if we can hear from two more Senators, and hopefully three before we finish. Again, Judge Thomas, it is a long time for you to sit there, from 10 in the morning, even with a break at lunch. Everyone should understand that it is one thing to sit at a hearing on this side, where we only have to be at the top of our form for one-half hour, and then we get to rest. You have got to be at the top of your form the entire time, so it is a tough job.

Let me now yield to our colleague from Arizona, Senator DeConcini, and then we will go to Senator Grassley.

Senator DECONCINI. Thank you, Mr. Chairman.

Good afternoon, Judge.

Judge THOMAS. Good afternoon, Senator.

Senator DECONCINI. I want to just finish up on yesterday's discussion of issues and complaints that have been brought to this Senator's attention from different Hispanic groups.

Let me first say that I have received a number of Hispanic complaints about your handling of EEOC. However, I would like the record to show and to reflect that my office was also contacted by Fred Alvarez, who was a Hispanic Commissioner at the EEOC during your tenure, Judge, and Mr. Alvarez indicated to us that the EEOC, under Clarence Thomas, and these were his words—"under Clarence Thomas' direction, we attempted to reach out and assist Hispanics more than any other time in the EEOC's history." I don't want the record to be left that no one person or any group in the Hispanic community thinks you did not do a fine job, and perhaps you did.

My concern is that these problems have been raised to me. Yesterday, we touched upon them and your record as the Chairman of the Equal Employment Opportunity Commission. My understanding is that the EEOC is charged with the protection of the employment rights of many unrepresented groups, including blacks and women, the elderly and the handicapped. You and I have had some differences during your last confirmation hearing about what I perceived was some callous approach or, let us say, difference of opinion on how it should be approached as it was to the elderly.

But you did answer my questions that I submitted to you and you did so in comprehensive responses that, though I did not agree, I must say that you laid your case out, and that is all I can ask of a nominee, not that they have to agree with me, but that they are prepared to give me their reasons for their decisions and then I can ask nothing more of them.

So, I want to make that perfectly clear, because I don't want anyone to think that I am only concerned here with the Hispanic issues, because Senator Metzenbaum has dealt with the elderly issues, and I dealt with the elderly issues that I felt were necessary during your last hearing. But I do have a couple of questions.

Yesterday, you listed a number of examples to illustrate your attempts to make the agency more accessible, including the initiation of the 1-800 number, translating materials into Spanish, and public service announcements. But let me get back to the National Council of La Raza recent report on the EEOC, which I understand has been made available to the White House prior to these hearings.

If NLRS' figures are correct, the fact remains that, over the past 10 years, the rate of charges filed by Hispanics lag significantly behind that of any other protected group. Now, as Chairman, do you feel, quite frankly, if you conclude, as I do, that La Raza has done I think an impartial job here, and maybe you disagree with that statement, but do you feel you did everything you could to see that Hispanic charges and claims were filed and Hispanics were educated on the system, or do you think you could have done more?

Judge THOMAS. Senator, first of all, let me just say that I am not going to quibble with the numbers, because I haven't had a chance to go back and look, but let's assume that they are accurate, and I think that is the point you are making.

With that assumption, I think that, on revisiting my tenure of EEOC over the years, in the area that Senator Metzenbaum has touched on a number of times and what you are talking about, in retrospect and with the benefit of hindsight, the wisdom of hindsight, perhaps there would have been some approaches I felt that would have worked better than others.

I thought at the time, as Chairman of the EEOC, that I was doing all I could. I tried to meet with organizations. I met with MALDEF. In fact, one of the early concerns raised about the litigation and litigation not being available to individuals who didn't have large cases, that is, EEOC was not litigating the individual cases, if my recollection serves me right, it was an early meeting with MALDEF. But I feel, in retrospect, that there could have been some things that perhaps, with the benefit of hindsight, that I would have done differently, but at that time I think I did all I could.

Senator DECONCINI. Well, based on that, Judge—and I appreciate that observation, because I think that is a very honest approach. I think we all feel in hindsight sometimes in our life we could have done better on something that we thought we were doing pretty well at the time, and I take that as a strength of yours.

The information that was given to us after my questioning last night from the White House indicates that, within the first year, you as Chairman conducted one-on-one personal meetings with MALDEF and with LULAC and with the National Hispanic Bar and the Cuban-American Men & Women and the Personnel Management Association of ESLON and Los Angeles County Affirmative Action.

First I'd like to compliment you, I am glad to have that for the record, I think it is important. My question is did you have continuous meetings with these people? Did you meet any other times with them and can you give us any background?

Judge THOMAS. The group that I know I have attended functions, I believe, and—again, I would have to go back and do a more thorough search of my calendar, but my recollection, if it serves me correctly, I did continue, but not in retrospect perhaps at a level that would have been more appropriate.

I had meetings from time to time with organizations such as MALDEF. As I indicated, I gave speeches at some of the organizations and I would go to some of their functions. I cannot sit down and tell you explicitly all of the meetings that I had or the routine

meetings that I had. I worked with individuals, some of whom are listed here, over the years in an informal basis, but not the routine sit-down month-to-month sort of meetings.

Senator DECONCINI. Judge, the reason I raise this is that if you are confirmed and you become what is the 106th Supreme Court Justice, you would have, in my judgment, based on your background, your educational background, your family background and who you are, every reason to have a greater sensitivity than anybody here. I really believe that. I would hate to see that sensitivity not directed toward Hispanic and other minority groups. That is why I raised this, in hopes that it might make a small impression that some minority groups are fearful that, yes, you may stand up for minorities that are black, and you have a record of doing that, in my judgment, but what about us.

I can't make you do that and I can't tell you to do that, but I can express a deep feeling of at least Hispanics in my State and outside of my State. I am surprised that they would not be coming forward in support of your nomination, quite frankly, because I would think that they would feel comfortable, and yet they don't, at least as they have expressed to me.

In a speech to the League of United Latin-American Citizens, LULAC, in July 1983, you expressed concern that speaking Spanish in the workplace appears to be a source of increasing tension in the area of discrimination based on national origin, and you mentioned that EEOC had received a favorable decision in a case involving a group of women who had been fired for speaking Spanish in the workplace. Can you elaborate at all, Judge, on the EEOC's position under your tenure with regard to English-only policies? Did you have any policy in the EEOC that you remember, or do you personally have any?

Judge THOMAS. We did have a policy that certainly made sure that—yes, you can sort of flatly that the English-only policy was inappropriate and could violate title VII. I have not had an opportunity to review that policy in preparation for these hearings. I would certainly do that. But we did challenge employers who maintained English-only policies in the workplace.

Senator DECONCINI. You did do that?

Judge THOMAS. We did do that.

Senator DECONCINI. Was that your policy that you established or the Commission policy while you were there?

Judge THOMAS. It was the Commission policy while I was there. I can't tell you—Senator, during my tenure, we continued to redraft and upgrade our compliance manual sections, as well as our procedures. The English-only, the national origin area was one of those areas, so I could provide you with or have it provided to you.

Senator DECONCINI. Would you mind doing that?

Judge THOMAS. I would be more than happy to do that.

Senator DECONCINI. Without too much burden, or maybe somebody could help put it together. I realize that you have got a lot——

Judge THOMAS. I would like to go back to one point, because something came to mind when you mentioned sensitivity, if you don't mind.

Senator DECONCINI. Yes, sir.

Judge THOMAS. When you mentioned that, it brought to mind my trip to Pan American University in Texas, in order to deliver and to participate in events to provide a quarter of a million dollar endowment for student scholarships at Pan American University.

What was so interesting and so warm about that and so good about it is that I remember the tuition per student was less than $1,000 a year, and that a very large number of students, for the first time who were attending college, Hispanic students, were going to have the tuition made available to them as a result of that.

I thought that was important, and it is not listed here. I might add also that I was not in the habit of keeping a running list of the sorts or things that I did. I think that one should do them automatically, rather than as a plan.

The other university that I thought was making an important contribution in a similar way was Native American University, D-Q University in California, where we made a similar grant. It was an effort, as I remember it, to reestablish some of the native American traditions that were being lost, and they were starting a university in an old military facility, and I remember spending a day with them and just how warm they were and how receptive they were to the interest that we were showing in their efforts to develop and restore and renew significant parts and important parts of the native American culture.

Those are just two that happened to come to mind while you and I were talking. But it is important to me, even in my current job, we as judges have a tendency to be isolated—and I was in the seminary, so I know how isolation feels—but it is important to me to always keep contact with the rest of the world, to talk with the real people who are out here every day.

One of the good things that I have seen from some of the articles—I have stopped reading the news accounts recently, and that is not a reflection on my feelings about the first amendment, it is just simply that when one is the object, one has to stay away from——

Senator DECONCINI. You don't have to read the papers.

Judge THOMAS. But one of the things that really made me feel good was that the people in the building where I have spent the last year and a half, the sorts of wonderful things that they have said that suggest that there was some human contact between us, but those two items that I mentioned, of course, were just items that came to mind while you were speaking.

Senator DECONCINI. Thank you, Judge Thomas, for that clarification and expansion. One last question in this area. Would you extend the prohibition of English-only policies in other areas, such as education, and voting, to public service and that sort of thing?

Judge THOMAS. Senator, again, I don't know the answer to that. I would be concerned that there is discrimination, and I think to the extent that it does amount to discrimination, I think as a matter of policy, that we should eliminate it. Again, I cannot predict how the court cases——

Senator DECONCINI. I am not asking for a court case. I just wonder how your feelings are about prohibiting English-only in the area of education. Do you think there is a benefit of bilingual edu-

cation programs? I am not talking about a substitute one, I am talking about a bilingual one, for citizens who can't understand always the English language and may feel that reading a long referendum doesn't give them the same access to information. What are your feelings on that, or do you have any?

Judge THOMAS. Well, we were sensitive to that at EEOC. I think we went so far as to even include our brochures in Chinese, because of the significant population in San Francisco, I believe. I think it is important that this country, as I have said before, be accessible to everyone. I don't think that the language barrier should prevent people or the erection of a language barrier should prevent individuals from enjoying all the benefits of this country. That is my sensitivity to the issue.

Of course, I feel that way in other areas. I have said that with respect to disabilities. You know, as I said, I had a friend in a wheelchair, a quadriplegic, 6 inches, it may as well have been the Berlin Wall to him. There was just no way he could get across that curb. We have tried to make our agency accessible at EEOC, so I think that those barriers, those unnecessary barriers could be discriminatory.

Senator DECONCINI. You would equate English-only as simply one of those barriers——

Judge THOMAS. One of those unnecessary barriers.

Senator DECONCINI [continuing]. That would prevent a citizen to have full enjoyment?

Judge THOMAS. That is right.

Senator DECONCINI. Thank you. Judge, let me turn to a question that there has been a lot of writing on. I do this partly because I think it is fair for you to get an opportunity to explain it. I was not here for everybody's questioning, and if someone went into this I apologize, although I am told that nobody has. I want to talk about when you were head of the Office of Civil Rights at the Department of Education in 1981 and 1982. As I remember, the issue was not addressed during the hearings of your nomination to the circuit court, and so I hope I am not beating anything that has already been discussed.

But while you were at OCR, the agency was under a court order, as you well remember, based on the articles that have been written in the 1970's, the so-called *Adams* v. *Bell* litigation that specified time limits in processing complaints and taking other enforcement actions with respect to discrimination in education. The order was imposed, because of previous delays in a "general and calculated default" in civil rights enforcement in education, so the court said.

Now, while you were head of the OCR in 1982, a court hearing was held concerning charges that the OCR was violating the court order, and under oath you admitted to violating the court order's requirements. Now, I understand that some of the problem in complying with the time delays predates even your tenure there and that you were not the one that entered into that agreement or consent, if that is what it was called.

However, you admitted in court that you were violating the court order rather egregiously, and the court found that the order was being violated in many important aspects. I think you can imagine what the questions are, Judge Thomas. Were you defying the court

order, because you personally disagreed with the *Adams* decision, or were you trying to substitute your own judgment on the policy of the *Adams* timetable? Can you give us an explanation?

Judge THOMAS. Well, let me say that I was absolutely not defying the court order.

Senator DECONCINI. Explain that, would you, please?

Judge THOMAS. And then I will explain. The court order in the *Adams* case involved a consent decree in which there were fairly rigid timeframes in which to investigate the cases that came to OCR. The action I believe that you are mentioning started before I became Assistant Secretary, and even the proceedings that I became involved in and the reopening of that started before I became an Assistant Secretary, I believe early in 1981.

OCR had never been able to meet those timeframes, and indeed we devoted, as I remember in reviewing some of the documents, we devoted about 95 percent of our staff at that time to attempting to comply with the court order and were still—to the timeframes, not the court order, the timeframes, and were unable to do that.

When I was asked in court, are you complying with the timeframe, I think there was a series of questions, my response was no, no, no, and I think ultimately the question was are you in violation of the court order, obviously, as a result of missing the timeframes, and my response was an honest yes, and I believe there was as follow-up question—and I don't have the record in front of me—can you violate the court order, with impunity, and my response was no.

The problem was that we were attempting, as I remember, and that is now about 10 years ago, we were attempting to develop a study so that we could propose new timeframes that were more consistent with the way that we operate. Subsequent, of course, to all of this, the order itself, the case itself was dismissed by the court. But I can say uncategorically there that I was responding truthfully to the question asked and was not defying the court order, and I did everything within my power and the agency expended 95 percent of its resources to attempt to comply with that order.

Senator DECONCINI. Let me make it very clear, Judge, I don't question or challenge your administrative skills, and I understand that the case was reversed, so you turned out to be right, in the sense that it was an unreasonable order or an impractical order.

What troubles me about it is, when I practiced law and even though I don't practice law now, an injunction or a court order is pretty powerful stuff, and if you violate it, you can go to jail, if the court so decides that they want to impose that. Also, if I disagreed with it, as I did, particularly when I was a prosecuting attorney, I would immediately file some sort of action to try to get relief in another court, if I had to, whether it was a Federal court or another superior court, instead of violating the court order, like it appears you said I am violating it and that is it, I can't say anything, judge, but I am violating it.

Judge THOMAS. Well, that certainly wasn't my attitude, Senator.

Senator DECONCINI. No, I understand, you have explained that, but I believe that is how it is perceived. You have explained that was not your attitude, and I accept that that was not your attitude.

Why didn't you first go to the court and request that the order either be changed or suspended, while you had a chance to come forward with all the reasons and justifications that you now have pointed out, which are: that you had exhausted all the capabilities of your staff, you couldn't comply, and that your predecessor had the same problems? Maybe you did that, but that is not in the history that I know about.

Judge THOMAS. Senator, I have not gone back and looked at all the documents during my OCR days. I was represented, as the agency was, by attorneys from the Civil Division of the Justice Department, as I remember it. And the communications with the courts were handled through those attorneys.

I can't remember prior to this particular hearing that you were talking about to what extent we had communications with the Court and with the other parties. We were attempting, as I indicated to you—and perhaps we were too slow, and I had expedited a study that was taking place prior to my going to the agency to determine what the timeframe should be. I do not remember, however, to what extent we communicated our efforts to the Court.

Again, that has been some 10 years ago.

Senator DECONCINI. Yes, I realize that, Judge Thomas. But don't you agree that if you had anything filed or pending before the Court, or even if you were prepared to file something you probably should have raised it when the judge said you are violating the court order. Rather you should have said, Yes, I am, but, your Honor, I would like to tell you that we are preparing a suit right now? You don't recall that there was any such action on your part, is what you are saying? There might have been, but you don't know.

Judge THOMAS. I just don't know. That has been so long ago. I did go on—I think there is further discussion in that case about our efforts in trying to provide or to expedite the study that was in place prior to my going to OCR.

Senator DECONCINI. What would you do as a judge today if a person appeared before you and you had written an order to do something, and that person appearing before you said, "I am not going to do it," and you said, "Aren't you violating a court order?" And they said, "Yep, I am violating a court order," and they didn't come up with any plausible other litigation or other solution? How would you treat that as a judge? How would you think about that defendant or that person before you?

Judge THOMAS. Well, first of all, Senator, I would hope that is not the perception of what I did because we did everything we could to comply with that court order. And I think ultimately what the judge realized is that we were doing all that we could, that it was impossible for us to comply with it.

But if someone did come before a judge and refused to comply with the court order, I think the judge would, of course, have to take whatever steps he or she could with respect to——

Senator DECONCINI. To get them to comply.

Judge THOMAS. That is right.

Senator DECONCINI. And there were no steps taken, is that right?

Judge THOMAS. From the court?

Senator DECONCINI. Yes.

Judge THOMAS. I don't remember the outcome, but there were no steps taken, and I think the judge understood that we were doing all we could. That is my estimation. Again, I have not gone back and reviewed the order.

Senator DECONCINI. I raise it because I think it is important for two reasons: One is I think it is important that you get to explain your views and your actions. I really do. Secondly, Judge Thomas, it really surprises me, but, you know, I was a young lawyer once, and certainly I made some decisions before a court that perhaps I wouldn't want to have to explain right now if somebody asked me. But it is of concern to me when someone is going to be in the position that you very likely will be in as a Supreme Court Justice, having had a period of time even as a young green lawyer where you did not, at least on the record there, explain the problems as you have today and just admitted that you were violating the court. I was fearful of saying that to a judge.

Judge THOMAS. I was, too.

Senator DECONCINI. I would have all kinds of reasons that I would propound why I had to violate it. As a county attorney, I remember having to argue that I couldn't comply with a judge's order, but I hopefully always did make enough of a plea to him that he wouldn't hold me in contempt.

Judge THOMAS. Well, I can assure you, I was at that time, I think, 33 years old, and I was scared to death. I had only been at OCR for a very brief time, and there were a lot of decisions, very difficult decisions to make during that period, and this was one of the difficult, difficult problems that I inherited.

Senator DECONCINI. What would you say, Judge Thomas, you learned from that experience?

Judge THOMAS. Again, with the benefit of hindsight and the benefit of more years under my belt—and it is a much bigger belt now——

Senator DECONCINI. That is true of a lot of us on this committee, the chairman being the exception, of course.

Judge THOMAS. I think that I would have perhaps made more efforts along the lines of what you indicated and certainly made sure it was in the record and to give fuller explanations.

Senator DECONCINI. Thank you, Judge Thomas.

Let me turn to a subject that has been touched on here, and that is judicial activism. Over 20 years ago, the *Miranda* v. *Arizona* decision defined the parameters of police conduct for interrogating suspects in custody. I am sure you are more aware of it than I am today, having served on the bench.

As you know, over the years the Court has redefined various elements of the *Miranda* test, a redefining that many describe as chipping away of the *Miranda* rule. *Miranda* is a preventive rule imposed by the Court in order to enforce constitutional guarantees.

My initial question to you on these types of issues is not your opinion of those two rulings such as that, but rather do you believe that it is within the Court's role to be imposing rules such as *Miranda* or, say, the exclusionary rule? Is that, as you have quoted before, considered judges running amuck? Have they gone too far, in your opinion?

Judge THOMAS. Senator, I think that what the Court was attempting to do is to set out some guidelines to prevent, as you have noted, constitutional violations and certainly to deter law enforcement officials in the case of the exclusionary rule from benefiting from improperly or unconstitutionally seized evidence.

Senator DECONCINI. Do you consider that judicial activism?

Judge THOMAS. I do not consider it judicial activism. I see it as the Court trying to take some very pragmatic steps to prevent constitutional violations.

Senator DECONCINI. What do you think judicial activism is? Well, before you answer that, what about the famous tax case where a court, not the Supreme Court, imposed on a local school district to raise the taxes? You were an assistant attorney general in Missouri handling tax issues at one time. Would you consider that case judicial activism?

Judge THOMAS. I think there are some who certainly would. I don't know——

Senator DECONCINI. Your good friend and mine sitting behind you does, and I happen to agree with him.

Judge THOMAS. I think there are some who would because of the extent of the remedy. But I couldn't say because I have not reviewed that case and I haven't studied the record in that case. I think any of us would be concerned in the area of judicial activism when we conclude that a judge is imposing his policy decisions or her policy decisions instead of the law.

Senator DECONCINI. Is that your interpretation or definition of judicial activism?

Judge THOMAS. I think that is one such definition.

Senator DECONCINI. Can you give me any other one? Then I will wind up here.

Judge THOMAS. I wish I had some off the top of my head. I just think that when judges move away from interpreting the law and applying the law as written or interpreting the Constitution in an appropriate way and begins to read his or her views into those documents, I think we are venturing into an area of judicial activism.

Senator DECONCINI. You think, Judge, that you can refrain from that as a Supreme Court Justice?

Judge THOMAS. Oh, I certainly can, Senator.

Senator DECONCINI. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Now we will go to Senator Grassley of Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Thomas, I think maybe just for the record I will go through some of the issues with *Adams* v. *Bell*. I don't know whether there is a necessity for you to answer any questions or not, but just to make the record clear. I think that first of all we need to make clear that not only has this issue been brought up at this hearing, but it was also a basis for some special interest to find fault and try to prevent your appointment and confirmation to the Supreme Court.

You took over as head of the Department of Education on July 3, 1981. You were appointed in May of 1981. The contempt motion that is part of the discussion here was actually filed on April 21,

1981, and, of course, that was before you were appointed and 3 months before you were sworn in. So the contempt motion was based on somebody else's conduct since it was filed before you arrived at the Education Department. That is your understanding of that.

Judge THOMAS. I believe that is accurate, Senator. Certainly something that was in existence before I arrived.

Senator GRASSLEY. Your predecessors at the Education Department were Carter administration officials. They also had difficulties meeting these timeframes. The timeframes were very unreasonable. The Office of Civil Rights had 15 days to acknowledge the complaint, 90 days to investigate it, 90 days to negotiate a settlement, and 30 days to go into an enforcement, which was administrative litigation.

If I could quote from the contempt motion which was based upon actions or inactions of Carter administration officials, the plaintiffs complained that enforcement under Carter appointees "demonstrates wholesale violation by the Office of Civil Rights of the timeframes for compliance review."

"The plaintiffs also cited OCR's large number of very old unresolved complaints pending at the end of 1980." That last sentence was also part of a quote.

So I think it is fair to say, Judge Thomas, that you inherited in that position a very unworkable situation, that you showed no disregard or contempt for the law, that you simply admitted the truth to the judge, the impossibility of meeting those timeframes that I mentioned. And I guess it is a way of saying that you were being very accurate with the judge.

You were not held in contempt by the judge, and, of course, what the judge directed was to go back and ask for more realistic timeframes. And the judge let the parties come up with the timeframes.

I don't think that there is much more to this that we need to go into, but, Mr. Chairman, if there is a lot of concern about this, I would very much ask—and I will leave this up to the judgment of you as chairman, because there is no sense of printing a lot of costly material if not. But if this is going to be in dispute, I hope that we could put as part of the hearing record the transcript of the hearing that has been referred to here, Judge Thomas' appearance before the judge, so that the full explanation and discussion with the judge can be reflected.

The CHAIRMAN. Let me suggest, unless anyone would like me to do otherwise, that I will make copies of that hearing record available as part of the record, rather than have it reprinted in the record now, unless that is the request of the witness or of you.

Senator GRASSLEY. That is OK with me.

Judge Thomas, moving on to another matter, I would like to follow up on the matter of individual privacy. And as Senator Simpson said, the right of family privacy is not absolute. There are limits. The Supreme Court stated it best in the *Bowers* case: The dimension of protected privacy will include fundamental liberties that are either "implicit in the concept of ordered liberty, such as neither liberty nor justice would exist if they were sacrificed," and are "deeply rooted in this Nation's history and tradition."

Let me simply ask you this, whether you have any objections to this test as a method of determining the extent of protectable private interests.

Judge THOMAS. As I indicated earlier in my testimony, Senator, I think that that is an appropriate manner in adjudicating cases on the liberty component of the due process clause of the 14th amendment. Justice Harlan I think appropriately sets out a methodology that I certainly find agreeable.

Senator GRASSLEY. And you don't have any problems with the *Bowers* decision?

Judge THOMAS. Well, Senator, I think I have not commented on the outcome in these important cases, and that particular case is a recent case. It is an important case. The Court is continuing to attempt to define the contours of the privacy interests, privacy protections. It is simply at this moment drawing the line with respect to certain types of intimate relationships.

Senator GRASSLEY. Well, Judge, this morning you said that you didn't have any quarrel with the *Eisenstadt* case, and I don't have any problems with that statement. And I can appreciate the fact that the *Bowers* case is a very recent case. But I would like to point out that the Bowers test was derived from Justice Cardozo's opinion in the *Palko* case, and that dates from 1937, and from Justice Powell's decision in the *Moore* case, 1977, which has been discussed. And so I guess the *Bowers* decision, even though being a recent decision of the Court, is based upon a lot of established precedent. So what objections do you have with the *Bowers* decision based upon my statement to you that it is not really just newly created law, but based upon 14 years back and 50-some years back?

Judge THOMAS. I did not certainly quarrel with the precedents cited in that case, Senator. My point is simply that I am not expressing agreement or disagreement. My point is that I think it is inappropriate for me to—would be inappropriate for me to comment on the outcome in that case.

There are important precedents in that case, and I would not question those underlying precedents, the older precedents that you are discussing, *Palco* and some of the others. My point is that I think it is inappropriate for me to comment on a case, a recent case in this very troublesome and very difficult area.

Senator GRASSLEY. Well, let me think about what you said before. I am not sure I am very happy with that. But we will have another opportunity maybe to go into that.

Let me continue with the subject of privacy. Like several of my colleagues, I want to approach it a little bit differently. I would like to talk to you about an appeals court case. You sat on an en-banc panel on *New York Times* v. *NASA*. Although you did not write the opinion, I think the case illustrates how the Government can recognize and protect the right of privacy.

Let me relate facts briefly. The New York Times filed a Freedom of Information to get a copy of the black box tape from the *Challenger* tragedy, and you know that was the shuttle blow-up. A transcript of the tape had been released, but the tape itself, because of the anguish some of the astronauts expressed, had been withheld. NASA asserted that the tape fell within exemption 6 of FOIA, and that is personnel and medical files and similar files, the disclosure

of which would constitute clearly unwarranted invasion of personal privacy.

The majority opinion found the tape came within exemption 6 but remanded the case to the lower courts so that it could balance the privacy interest with the right of the public to be informed. There was a clear split in the appeals court, and it was 6–5, and the minority would have found the tape to be exempt and would have allowed immediate disclosure.

It seems to me that the majority in this case, some would say the conservative on the court, actually had more sensitivity to the privacy issue. So I would like to have you offer us your perspective on these competing issues, the right of privacy and the right of the public to know.

Judge THOMAS. That was, as you noted, Senator, an en banc case, a very close one and a very important one, and the issue for us was whether or not there was an exemption provided by statute for information about a person. The Supreme Court has held that personal information of that nature is not disclosable, if it would violate the privacy of that individual.

The question was whether or not this was personal information. The transcript of the voices of the astronauts involved in the disaster was made available under the Freedom of Information Act. What had not been disclosed to the public was the voice recordation of the astronauts.

The question became whether or not the information that was disclosable in the record, the recordation of those voices was more personal or different from the information, the actual transcript that had been disclosed, and what the court essentially found is that there was more information in the voice record of the astronauts than there was in the transcripts, and that that information was personal information and could only be disclosed after it was balanced against the interests of the family and the interests of the individuals involved.

Senator GRASSLEY. Your answer is very correct, as far as that specific case is concerned, but from your vote and your reasoning, how do you in your own mind see the right of privacy versus the right of the public to know, in other words, philosophically, as you might approach some cases in the future where this is an overriding issue in the case?

Judge THOMAS. I think, very generally, Senator, we are all concerned, certainly those who are in the public arena and making available to the public information about the operations of those public agencies and about the officials in those agencies in their official capacities.

The concern in these cases, the Freedom of Information Act cases, as I have seen them, and I think it is a general concern, is whether or not one should disclose information that is personal to the individuals, even if they are government officials.

For example, should you disclose a person's personnel record or should you disclose information that is similar to the personnel or medical record. And if that information is a personnel or similar record, then the question becomes what are the interests in disclosing that, are there competing interests that outweigh the public's interest in knowing what is in those records. And what the courts

have attempted to do, and they certainly do at the trial level, is to balance those competing interests, and certainly under the Freedom of Information Act, Congress has made a judgment as to what that standard of review should be.

Senator GRASSLEY. Now, the reason that this case struck me is because of my concern about the individual right to privacy and something you wouldn't know about, but some of my involvement is expressed in Senator Biden's Violence Against Women Act and contains an amendment of mine expressing the sense of the Congress that the name of the rape victim should be kept confidential by the news media.

There are parallels between I think this NASA case and the situation of rape victims. In the *Challenger* case, the transcript of the tape had already been released, and the public could know and read the last utterances of the tragic victims.

There was a lot to be learned without the release of the tape itself. There was a lot made public, without the release of the tape itself. Likewise, of course, the public can learn a great deal about the victim of a rape, without having her name disclosed by the news media, and it seems irresponsible to me that the media would make the victim a victim the second time by dragging her name through the press.

I realize that you cannot comment on protecting rape victims' names, since there are first amendment implications and so-called rape shield laws may come before the Supreme Court, so I think I will leave you with my views on the subject and not ask for a response from you.

I would like to go on to a point dealing with the overall subject of precedent. You have discussed this to a considerable extent even with me. When you came to the Senate Judiciary Committee as a nominee for the court you now sit on, you explained your obligation to follow Supreme Court precedent as an appeals court judge, and I think sitting on that court, I believe that you have carried out that obligation.

In addition, you have shown appropriate deference to the findings of lower courts and administrative agencies. We discussed that some yesterday. Your opinion in the antitrust case of *U.S.* v. *Baker's Shoes* is a good example of that deference. But on the Supreme Court, there are different considerations with respect to precedent.

For example, Justice Frankfurter wrote that precedent "is a principle of policy, and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such an adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder and verified by experience." That is from way back in 1940, the *Helvering* case.

In your discussion with Senator Specter, you referred to the length of time as being part of the evaluation of precedent, and in your discussion with Senator Brown you referred to the development of institutions as a result of prior precedent, and those are your words.

Are there any other factors which the high court should consider, in deciding to overrule a prior case? And how would you weigh or prioritize those factors that you might give me now?

Judge THOMAS. I certainly, Senator, could not give you a precise calculus as to how that would be done.

Senator GRASSLEY. No, but just a general approach.

Judge THOMAS. But I think, as I indicated yesterday, that whenever one begins to reconsider, as a judge, a prior precedent, that one must understand that is a very serious undertaking, that it is a matter, at least from my point of view, the burden is on that judge to demonstrate why that precedent should be reconsidered.

In the statutory area of law, in the case law involving statutes, there seems to be less of an inclination on the part of judges to reconsider or overrule cases, primarily because of the view or the feeling that if it were wrong to begin with, then the legislature would have corrected it, and I think that sort of underscores the point that Senator Specter was making yesterday about revisiting statutory interpretation cases or precedent.

In the area of constitutional cases or constitutional law cases, at least those cases are very, very important, but the feeling is or the sentiment is on the part of the Court that those cases can only be revisited in a realistic way by the judiciary, since the amendment process is one that is very remote, as far as the possibility of occurring, and that those cases are more likely to be revisited or reconsidered.

Again, I don't think there is a precise calculus in approaching those two areas. I do think that you start with the case being wrong, one has to view that case as wrong, and I think one has to understand and take into account the continuity in our legal system and has to understand or I think demonstrate why this continuity should in some way be broken.

I don't think that is necessarily an easy task, and it is certainly one that should be considered with a high level of seriousness and high level of concern about what the judge is doing, even if the case is found to be wrong.

Senator GRASSLEY. I appreciate what you said. I would say that your approach is slightly different from that of Justice Rehnquist in the recent *Payne* case, where he said that the most compelling precedents are those which deal with property and contract rights, and that decisions dealing with procedural or evidentiary rules would be given less weight.

On the other hand, some others have suggested other lines be drawn. Justice Powell and Justice Brandeis have made a distinction between constitutional cases and cases involving interpretation of law, and I guess I would ask you to give attention to a Brandeis quote:

> In cases involving the Federal Constitution, where correction through legislative action is practically impossible, the Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

So, let me as you if you share views of Brandeis that the approach to precedent is different when the cases involve constitutional interpretation.

Judge THOMAS. I think that the underlying considerations, again, without in any way suggesting that the cases aren't of equal, if not in some instances greater importance, that the underlying concern that dictates whether or not the court would revisit these more

readily, those prior precedents more readily, the fact that changes can't be made by the legislative body, that only the Court, if it finds itself wrong, can make that change.

I think that is an important consideration and it is not one certainly that I have a quarrel with, although I might add that I don't precisely know how a judge can quantify the differences between considering reconsideration of statutes, as opposed to constitutional cases.

Senator GRASSLEY. President Lincoln warned, in the context of the *Dred Scott* decision, against Government policy irrevocably fixed by the Supreme Court. He said the risk would be that the people would cease to be their own rulers in those circumstances. The reality is that the Supreme Court has overturned more than 260 of its decisions, and that figure is from the Congressional Research Service. Of course, we never would have had the historic *Brown* case, if the Court had declined to overrule the wrongly decided *Plessey* case, and we wouldn't, of course, be carrying paper money today, if the Court was strictly bound by precedent.

This term, the Court has overruled five prior decisions, and one of them sparked some discussion during these hearings, *Payne* v. *Tennessee*. I am particularly interested in that case, because of my work in the area of victims' rights.

Contrary to how some have characterized your testimony, I reviewed what you said, and I don't believe that you in any way endorsed that decision, much as I would like you to state your approval of that case. But my point is that 5 decisions overturned this term is a very modest number of decisions, when you consider the activism of the Warren and Burger courts, 9 decisions overturned in 1963, 10 in 1964, 9 in 1976, and 11 in 1978.

In the closing days of last year's term, the remaining liberal judges overturned a 1-day precedent which involved the constitutionality of the Arizona death penalty. On one day, the full Court upheld the death penalty, and the next day, in a similar case, but one in which Justices O'Connor and Kennedy had to recuse themselves, the Justices used their numerical advantage to strike down the same death penalty provision.

You know, this ought to bring to quick attention those of us or anybody who speaks so highly of the sanctity of precedent, because it can be a fleeting sort of thing on occasion, as well.

The American people do not want a Justice who willy-nilly overrules prior cases. Stability and predictability have merit, but at the same time I don't think that we can suffer, and I don't believe you would allow us to suffer decisions wrongly decided.

Let me ask you if you would agree with a Frankfurter statement on this point that the test is what the Constitution says, and not what nine people wearing black robes have said about it?

Judge THOMAS. The Constitution is certainly, Senator, the law of the land, and judges are called on to do the very difficult task and engage in the very difficult endeavor of determining precisely in specific cases before the court what that all means.

Senator GRASSLEY. I would like one more comment, before I leave this subject area, and I thank you for your responses. It is interesting to observe that some now want to hold onto the past, whether it is protecting criminals at the expense of victims or sanctioning

special preferences or group entitlements. Some Supreme Court cases have become enshrined.

Justice William Douglas, one of the more liberal activist judges that we have seen, and not someone with whom I agreed very often, was actually quite prophetic when he wrote in 1949, and I quote:

> Today's new and startling decisions quickly become a coveted anchorage for newly vested interests. The former proponents of change acquire an acute conservatism in their new status quo. It will then take an oncoming group from a new generation to catch the broader vision, which may require an undoing of the work of our present and their past.

You may be part of that new generation.

On the subject of natural law—and you are probably tired of talking about this—I had some concerns about your view of natural law when we started these hearings, but I think as I have sat and listened to you respond—and I think I mentioned this with you in the privacy of my office just for you to be thinking about it—but I think I feel comfortable with your approach.

The American people have probably been confused about natural law, but I think you helped clarify things, when you explain it as a basis on which our Government was constructed, the Founders were inspired by higher law to erect a Government of limited powers, one filled with checks and balances and ultimately accountable to the people.

You have indicated that the concept of natural law doesn't play a role in the deciding of cases, and, of course, I am glad to hear that you take that position. After all, Justice Brennan was motivated by natural law and it was license for judicial activism and legislating from the bench. He saw his role as a great effort in achieving what he called the constitutional ideal of human dignity, the meaning of the constitutional text that was constantly, in his words, evolving.

I sense that you see the Constitution more appropriately as an anchor for judicial decisionmaking, and that you will leave morality to us in the legislative branch. Is that a fair conclusion?

Judge THOMAS. I think it is important certainly that judges not confuse their role as judges in interpreting the Constitution with your role in this body, the important role of making policies and determining the statutory or legislative policies that we should have in this country in a variety of areas. I think it is very important that judges realize that their role is a limited one.

Senator GRASSLEY. Can I close with a passage from Robert Bolt's, "A Man for All Seasons." I think it is a passage that you will recognize and I hope that will capture for us a proper place for natural law. Toward the end of the first act, Sir Thomas More is with his wife Alice, his daughter Margaret and his son-in-law Roper. They are clamoring for the arrest of an individual.

Margaret tells her father that the man is bad. More replies, "There's no law against that." Roper tells him, "There's God's law." More answers, "Then let God arrest him." More continues with a lesson to his son-in-law: "The law, Roper, the law, I know what's legal, not what's right and I will stick to what's legal." Roper accused him of setting man's law above God's. More answered, "No, far below, but let me draw your attention to a fact: I

am not God. The currents and eddies of right and wrong I can't navigate, but in the thickets of the law, oh, there I am a forester."

Well, Judge Thomas, we expect you to also see your way clearly through the thickets of the law. We will count on you to understand and apply the law, but natural law can be abstract, elusive and uncertain. I hope we in the legislative branch, like the Founders did, derive some of our inspiration for our work from natural law, but I would equally hope that any individual judge's natural law doesn't come into play as he or she decides a case, and I guess, let me say, I think you would agree with that.

Judge THOMAS. Senator, as I have indicated in my conversations with Senator Biden, with the chairman, and with other Senators, there is a limited role only to the extent that we are looking to what our Founders believe, and that is a part of our tradition and our history in analyzing and in attempting to adjudicate under some of the more open-ended provisions in our Constitution.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I think the best line in that is the one you didn't read, where he says, "And when the devil turns around on you, Roper, what would you do then, all the laws being flat?" I hope we all keep that kind in mind, because he says Roper wants to cut them all down.

At any rate, I don't want to cut any laws down or I don't want to cut anybody off, but it is 5:20 and there is no possibility of us finishing this round today. So we will adjourn until 10 o'clock tomorrow, and then we will begin with Senator Leahy and then Senator Specter.

We are adjourned.

Senator THURMOND. Mr. Chairman.

The CHAIRMAN. I beg your pardon. The Senator from South Carolina.

Senator THURMOND. When we finish two rounds of each Senator——

The CHAIRMAN. If we could have quiet for just a minute. The Senator had something to say.

Senator THURMOND. When we finish two rounds by each Senator, which we will do sometime tomorrow, I was just thinking, on this side of the aisle I think that we will feel that is adequate, except one on this side will probably want to take 30 minutes more. Is there any way we could come in earlier and get through all this testimony with him tomorrow, so we can get through with him?

The CHAIRMAN. We will try very hard to get through all the testimony, but we will not come before 10 o'clock tomorrow. It is not possible to do that before 10 tomorrow. It will depend on whether or not Senators have questions beyond the second round. We unfortunately go through this with every nominee in terms of this discussion. If there are no questions on the Republican side, I am sure that will allow us to move much, much more rapidly. I don't know how many people will have a third round over here, but we will continue——

Senator THURMOND. I don't think that there will be but one on this side that will want to question.

Senator GRASSLEY. Could I correct that? I might want 10 more minutes.

Senator THURMOND. Ten more minutes?

Senator GRASSLEY. Ten more minutes.

The CHAIRMAN. I expect there may be additional corrections as we go, but the point is we will try to finish tomorrow, that is if it is possible to do so within the framework that I set up when we started these hearings on Tuesday.

Senator THURMOND. I think that will be fine. We appreciate it and we will start with the other witnesses next Monday.

The CHAIRMAN. If that is possible. I am not certain that is possible, but we will try.

We will adjourn until tomorrow at 10 o'clock.

[Whereupon, at 5:20 p.m., the committee recessed, to reconvene on Friday, September 13, 1991, at 10 a.m.]

NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

FRIDAY, SEPTEMBER 13, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice at 10:10 a.m., in room 325, Senate caucus room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, Leahy, Heflin, Simon, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

The CHAIRMAN. The hearing will come to order.

Judge, welcome back. Welcome to your family and your extended family, and to all of my colleagues.

We are going to try our best today to go through this process. Judge, it may be hard for you to believe, but there are some members up here who are as anxious to finish this process as you may be—although I doubt it.

Today we are going to try our best to see if we can finish today. But on Tuesday I told Senators they would not be kept late today so they could plan for the weekend. There is a possibility we can finish this thing by 4 or 5 o'clock. That is my objective. If we do, we finish. If we don't and there are Senators who still have questions, then I am going to ask you to come back on Monday. I don't anticipate that. I hope we don't have to do that. But I wanted to tell you that at the outset.

The Chair would suggest that, unless you tell me otherwise, we will proceed essentially as we have in the past. We will go for an hour with Senators and then take a short break. If it looks like as we go on this morning that we may be able to finish today, we will shorten the lunch break

I have done more of these hearings than I want to recall, and I have the fervent hope for the good health and longevity of everyone on the bench. I don't want to do any for a long time hence. For this one, however, I am going to keep to what I have always done. As long as the Senators have questions and they are not badgering—and none have, in my view—we will continue the process.

With that, let me yield to my friend from South Carolina who, I understand, wanted to make a statement, before I yield the floor to Senator Leahy for his questions.

Senator THURMOND. Thank you very much, Mr. Chairman. I think you anticipated what I was going to say and have already agreed to do what I wanted to do.

The CHAIRMAN. Well, that is good.

Senator THURMOND. And that is to finish today.

I want to say on this side we have only one Senator who will take his 30 minutes, another one who will take 5 minutes. And so there will be only about 35 minutes on this side, and I feel certain we can finish today.

I remember with Judge Souter we took only 3 days, and this will be 4 days with this witness. And I think that is reasonable, and I thank you for your cooperation. I feel certain we can finish today.

Senator SPECTER. Mr. Chairman?

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. I don't think that Senator Thurmond——

Senator THURMOND. On the third round. I said second round. On the third round.

Senator SPECTER. On the third round? Well, I just wanted to be sure that Senator Thurmond had not intended to commit this Senator——

Senator THURMOND. I have not precluded you. I told you a while ago you could talk. You will be the only one that is going to talk. We will give you the whole time except 5 minutes.

Senator SPECTER. Well, I am still in some doubt, Mr. Chairman, but I just want to say for myself that I want to see how it goes without making a commitment at this time as to limitation. I want to cooperate with the chairman and with the ranking member in finishing today if we possibly can. I think that is a worthwhile objective, and I want to cooperate toward that. But I do not want to be committed as of this moment until I see how my second round of questioning goes. I have only had one round.

The CHAIRMAN. The one thing I have found, I would say to the Senator from Pennsylvania and to the committee, is that of all the Senators, probably the person who talks the least but asks the most pointed questions is the Senator from Pennsylvania.

Now, let me yield to my friend from Vermont, another one of my colleagues who uses the committee's time well.

Senator LEAHY. Thank you, Mr. Chairman.

Judge, Thomas, welcome back to you, Mrs. Thomas, and the family.

Judge you know, there has been a lot said by commentators and written about the purpose of these hearings. In discussing this with friends of mine back in Vermont, they ask what we are doing. For instance, is it the kind of thing, where we will all ask a certain question and you will give back a response, however prepared? That can be kind of a stylized ritual. I think the press probably correctly reported even in advance of the hearings how some of the questioning and how some of the ritual might go on here.

But I think that if these hearings are to be important for all of us—for me as a Senator and for every other Senator—they require us to have some idea about how you would think when you go to the Supreme Court. None of us is asking you, for example, how you are going to rule on an upcoming case. I think all members of the

committee agree that is an inappropriate question, and you would not answer it if we did ask such a question.

But it is appropriate for us to ask you how you think, what your background is, and what kind of a Justice you might be, if the advise and consent clause means anything. The President is asking us to confirm you to an extraordinary position. There is really no Supreme Court like ours in the world—lifetime positions, enormous power, equal branch of Government; in fact, in some ways more than equal because the Court becomes the arbiter between the other two branches of Government.

And each of us—whether conservatives, liberals, moderates, Northerners, Southerners, white, black, whatever we are—as Americans, we can always say to ourselves, "If somebody tramples on my rights, I can go to the Supreme Court. I am an American; I can go to the Supreme Court." Most Americans want to know that whoever sits on that Court is somebody who is going to have the qualities and the qualifications and the background and the integrity and the impartiality to look at their cases and decide on the merits of each case.

So, with that in mind, and because I still have a difficult time—even having met with you, and I think I have been here for 95 percent of the time you have been in this room—I still do not have quite the sense of how you think and what kind of Justice you would be. So bear with me if I might ask a general question.

Judge, you entered law school 20 years ago this year. In that 20 years, both you and I would agree, there have been some extraordinary cases in the Supreme Court. They have decided hundreds of cases, made rulings perhaps on hundreds more in that 20 years. Some may be routine, but some have been pretty significant cases.

Just tell me, to help me know how you think, what would you consider a handful of the most important cases that have been decided by the Supreme Court since you became a law student 20 years ago?

[Pause.]

Judge THOMAS. Senator, to give you a running list, I would have to go back and give it some thought. But I certainly think that during the time that I was in law school, two of the cases that were considered the most significant cases, or among the most significant cases, would have been certainly *Griggs*, which was decided while I was in law school, and——

Senator LEAHY. Would certainly be which?

Judge THOMAS. *Griggs*.

Senator LEAHY. Yes.

Judge THOMAS. And certainly I think *Roe* v. *Wade*. As you know, during that time when I was in law school, there was significant debate with respect to the inclusion and the rightful inclusion of women in the legal profession, in the law school, in higher education.

I know, for example, my own college, which was all male when I attended, had become coed. There were just very rapid changes, so that certainly would have been a significant part of that change.

Senator LEAHY. So you would include *Craig* v. *Boren*?

Judge THOMAS. *Craig* v. *Boren* also. That would have been during law school. But, you know, I think that one certainly isn't as routinely used in the press as——

Senator LEAHY. Are there some other cases that come to mind from the last 20 years?

Judge THOMAS. There would be others, Senator. I can't off the top of my head—as you mention them, perhaps I could accord some weight to them. Just not off the top of my head.

Senator LEAHY. But there are none that stand out, that might have been cases that have influenced your thinking when you accepted the appointment to the court of appeals or when you accepted this appointment? Did certain things stick in your mind. Did you say, I am being nominated to the Court that decided—whatever the case might be?

Judge THOMAS. Before my lifetime, I am being nominated to the Court that decided *Brown,* and I——

Senator LEAHY. What are some of the other——

Judge THOMAS [continuing]. And I think I mentioned that——

Senator LEAHY. You did.

Judge THOMAS [continuing]. When the President made the announcement that I would be nominated to the Supreme Court. That is certainly one of the cases—even before I knew all of the legal ramifications, it is one that changed my life and changed the South, and, of course, even though I did not go to desegregated schools until I was virtually an adult.

Senator LEAHY. Let me ask you about some of the recent cases that have been decided since you were in law school. One, of course, very recent case is *Rust* v. *Sullivan*. That was the case in which the Court upheld the regulations prohibiting abortion counseling or referral in the title X family planning program.

Now, I am not going to ask you to go into the particulars of that case because it is still a matter of some controversy. But I would like to go into some of the issues raised by the *Rust* decision. One is whether the Government can require a recipient of Federal funds to express only those views that the Government finds acceptable in any broad area. I am obviously thinking of some of the first amendment ramifications.

Let me make some specific examples. These are not cases that are about to come up before the Supreme Court, so let's talk just in the abstract. Suppose the Government wanted to further a policy of participation in the political process. Could they give out subsidies but limit them just to people who say that they will vote Republican or just to people who say they will vote Democratic? Could they do something like that?

Judge THOMAS. Senator, I certainly couldn't absolutely answer that. I would be concerned that if the Government could do that, it certainly would seem to me to be an interference with the way the freedoms that we would expect in our political processes, as well as the way that we think that we can function as citizens in this country.

Senator LEAHY. Well, let's go to another example. Suppose the Government would lay out a policy to protect the public from sexually explicit material. So, say that you are a library and you receive public funds, but you cannot have certain listed books. You

can't have Alice Walker's "The Color Purple." You can't have J.D. Salinger's "Catcher in the Rye" available. Could the Government do something like that?

Judge THOMAS. Again, Senator, I would have the same concern. I think the underlying problem that the Court has wrestled with and certainly in using the receipt of Federal financial assistance to in some way determine what the policies would be, that this body would have to wrestle with also.

I think the first that those sorts of issues arose, to my knowledge, in a general way, would have been in the *Grove City* case, where there were some concerns—at least the argument may have been raised by the educational institutions, and the Court disposed of it. But the concerns would always be whether or not the Government is conditioning the exercise of constitutional rights or the exercise of the engaging in conduct that we think that we are free to engage in this society under receipt of Federal financial assistance.

Senator LEAHY. Well, we understand, and you would accept, of course, the fact that there are times when the demonstration of Government policy or the requirement of Government policy can conflict with the basic constitutional right of freedom of speech. I mean, this has happened in our history over and over again, has it not?

Judge THOMAS. I think that particularly, Senator, with the significant involvement today of Government in virtually every aspect of our lives, the potential conflict between the Government policies or between the Government and rights that we consider fundamental to us or rights that we have considered those that we have been free to exercise, where that conflict—there is more of a potential for that conflict today. And I think that we all have to be on guard when the occasions arise when the conflicts are such that fundamental rights in ways are either denigrated or conflicted or undermined or interfered with in some way.

Senator LEAHY. You mentioned some of the issues that we here in the Congress have to wrestle with, but in addition, there is more and more a feeling that we are putting strings on Federal taxpayers' money. Now, some of those strings, I think most people would accept, make sense. We impose accounting strings; you have to account for where the money goes. I don't think anybody disagrees with that. Road-building funds must be used for road-building and not for something entirely different.

But what happens when you go to the next step—where we send money for a significant purpose, and, by gosh, we are going to tell you how to think to use that money?

For example, say the Government says "We are in favor of nuclear families." A fine, good statement of policy. But then do we also say, now, to any college receiving Federal funds—and most do in one way or another—that they cannot include information in a sociology course on divorce or illegitimacy or homosexuality or heterosexuality—whatever—because we feel it would interfere with this policy? Can we do that?

Judge THOMAS. Senator, I think that as you move more into freedoms that we consider fundamental, I think, as I have noted earlier, that the conflict becomes more accentuated, and I think the conflict becomes more evident. And to my knowledge, in those

kinds of instances, the Supreme Court has to wrestle with whether or not the Government has—if it is a fundamental right involved, for example, whether or not the Government has a compelling interest in doing that.

I understand the concern, but I can't in each specific instance say that I can resolve the problem or the specific problem. But I would have deep concerns myself if someone said that in order to receive financial assistance you are going to have to conduct your life in a particular way.

Senator LEAHY. What I am thinking of is this, Judge: What standards does the Court use—because you are going to become the arbiter of such things. If the Congress sits down and says "Here is our money for a good use"—education, health, research—but in effect, based on whatever the congressional mandate might be, we are also going to tell you how to think.

Now, when that happens, if the Congress does that, people are going to resort to the Court. I am not asking you to prejudge a lot of cases, but what basic standard—if you were to look at a case like that, one in which we send money for a very valid reason, like health care or education, and we say; "Here is what you can talk about," and "Here is what you can't talk about"; "Here is what you can read," or "Here is what you can't read," what standard would you as a judge use to determine whether we have just set aside the first amendment?

Judge THOMAS. Senator, that is, I guess, generally—and we are talking I guess in very general terms. If the right involved, of course, is a fundamental right, of course the appropriate test would have to be the demonstration by the Government that there is a compelling interest in some way infringing on that fundamental right. But let me underscore one other point that does not quite get to that and that would be a part of any analysis when this body expresses its intent to regulate a particular area or to provide assistance in a particular area, and that is accomplished in the administrative agencies.

When those agencies develop their regulations in the areas that do not touch upon and do not involve the fundamental right, of course we would have to defer to some extent to the agency and certainly to the intent of the reasonableness of the agency's regs and certainly the intent of this body.

The separate test that I mentioned initially is to the extent that it does infringe upon a fundamental right, I think the Court would have to undergo the standard kinds of analysis involving the compelling interest test, for example. In other words, hold the Government to the very highest standard to show why it can or why it has an interest in infringing on these rights.

Senator LEAHY. Judge, in my earlier question I asked you about what you considered to be some of the most important cases that have been decided since you were in law school and then we went to the next thing, what you considered some of the most important cases, period, and you mentioned *Brown* v. *Board of Education.* I absolutely agree with you that it is one of the most important cases decided in my lifetime.

But it triggered in my mind a speech you once gave in which you said that you considered *Morrison* v. *Olson*—that is the special

prosecutor case—the most important case since *Brown* v. *Board of Education*. When I asked you about cases this morning, you did not list *Morrison*, but in your earlier speech, you said that it is one of the most important cases since *Brown*.

But in that speech, you were not very kind toward the *Olson* decision. You said it was a very important case, but you did not like it. It was a 7-1 decision; Justice Scalia dissented. You called his dissent "remarkable." But you said that Chief Justice Rehnquist and the 7-1 decision failed not only conservatives but failed all Americans.

I was surprised that you did not list this this morning as one of the most important cases, but let me ask you this specific question about it: Do you feel still today that Chief Justice Rehnquist's decision failed all Americans?

Judge THOMAS. Senator, as I indicated yesterday, the point that I was making there with respect to that speech, and certainly in the rhetorical language, was this: That the structure of our Government as I saw it—and, again, I gave that speech as Chairman of EEOC—was to protect individuals. In other words, the Government is arranged in such a way that individual rights and individual freedoms are infringed upon as little as possible. And the point that I was making was that when that structure was changed and when there was a prosecutor that was not accountable to either one of the political branches, or directly accountable, that that could violate individual freedoms in a way that the three-part Government that we have, the three branches, would not permit and would not allow.

Senator LEAHY. You actually said that the special prosecutor statute could undermine the individual freedom of the person who is being investigated. You said you gave that speech and the rhetoric of it as Chairman of EEOC, but you were also at that time a lawyer and one who had thought about these issues. And what struck me is that when you link it with *Brown* v. *Board of Education*—a case which all of us look at as a most significant case and you certainly would have strong and personal reasons, as you have eloquently stated, for supporting it—when you put them together, it concerns me. In your testimony, you have stated over and over again how you want—even in your testimony here—to guarantee your impartiality. But isn't that what the special prosecutor is about—to make sure that if there is serious wrongdoing in the executive branch, Iran-Contra, Watergate, whatever, that there is an impartial prosecutor?

Should a President be in a position, for example, as President Nixon was in 1973, to be able to fire the person who is investigating him?

Judge THOMAS. With respect, Senator, to discussing that case in comparison with *Brown*, as I noted yesterday, the point was to take a case that most considered obscure and elevate it and attempt to show some of the significance of that. The important point that I was making as I told you; that individual freedoms were at risk. I wasn't looking at the case per se as a lawyer to argue the next case. I was looking at it in the context of the political theory and philosophy that I was discussing at that point. The——

Senator LEAHY. Well, I—go ahead.

Judge THOMAS. The final—if you notice, I did not parse the statute per se. Another point that I would like to make is that at that time, when we are in the political branch, I think that we advocate for the political branch. I have made comment throughout this hearing that when one moves to the judiciary, one must remain neutral in any debates between those two branches. And I certainly have done that in my position as a judge on the court of appeals and would intend to continue to do that. And as you added, this is a 7-1 decision. As I noted to Senator Kennedy yesterday, I believe, this is the—the Supreme Court has spoken. It is the law of the land.

Senator LEAHY. I agree with you on the question of impartiality, but you would accept, I would assume, that people don't expect that the second judges put on robes that it is like an eraser going across a blackboard and their whole lives are wiped out, all their thoughts, all their feelings, their prejudices—and I don't use that in a pejorative form—that all the feelings they have toward everything are suddenly wiped out.

Again, it goes back to what I said before. We are trying to see how you think, so that the American people know how you think. Because there is a great deal at stake for all of us. You or any member of the Supreme Court are one of only nine, and the Court is one of the three equal branches of the Government.

Let me ask about a very important habeas corpus case that was decided this past term, *McCleskey* v. *Zant*. I have seen your speeches and writings, and I understand your feeling that it is one thing to write or speak as a member of the executive branch. But you have frequently attacked what you call the "run-amock" liberal judges.

In *McCleskey*, the Court said that State prisoners should be limited to one bite at the apple in Federal court. I don't want to go into so much the result of that. As a former prosecutor who had to face an awful lot of habeas corpus cases, I felt that the nibbling ought to stop and after a while there ought to be a limit on it. That is fine.

But I look at this case, hailed as the work of a good conservative Court, as exactly what you are talking about in these judges running amock.

In 1989, the Chief Justice appointed a committee that was chaired by former Justice Lewis Powell, and the Powell committee was supposed to study the possibility of limiting the constitutional right to habeas corpus appeals. They testified before our Judiciary Committee and did a great deal of work on it. In fact, they came up with a proposal which would have sharply limited the right to appeal.

Now, the 101st Congress considered these proposals and did not pass the legislation that would enact the Powell committee's proposals. For whatever reason, the legislative proposals were not enacted. So after we did not, the Supreme Court went ahead this spring and, in effect, did the legislation themselves in the *McCleskey* decision.

Is that judicial restraint or is that judicial activism?

Judge THOMAS. Senator, could I address one point you made first and then address the second?

Senator LEAHY. Sure.

Judge THOMAS. With respect to judges and what happens when you become a judge, I, quite frankly, don't know that any of us who, prior to becoming judges, understood exactly how it would change us. I could not have told you when I was here for the court of appeals exactly how it would change me. I can tell you—and I think most judges would tell you—that it is not necessarily like an eraser, but it is a profound change.

With respect to the comment, the question, and the concern that you raise about that case, I think that activism, going beyond either the legislation or beyond the law on either side, is inappropriate. I don't think that any brand, whether it is conservative activism or liberal activism—if I could use those two general categories—is appropriate.

A judge is to remain impartial. I believe that it is one thing to sit in the executive branch and to take policy positions and to advocate and to disagree with the Court and to challenge the Court. It is another thing to be a judge and to be called upon to be the final arbiter in some of the most difficult cases in our country. And I think neutrality is absolutely essential.

Senator LEAHY. Judge, obviously I have dozens of other questions, but I just realized that the time is running down. I assume by now you have had a chance to read the Lehrman article. I see it sitting there. I did not want you to be disappointed. [Laughter.]

I wanted you to have at least one question that the quarterbacks behind you have been expecting here.

You have read the article?

Judge THOMAS. Yes, I have, Senator.

Senator LEAHY. Thank you. So have I.

In 1987, you called that article "a splendid example of applying natural law." Lewis Lehrman's analysis concludes that because the right to life attaches at conception that abortion of any sort is unconstitutional. Do you agree with that conclusion?

Judge THOMAS. As I indicated, Senator, to you in our last discussion, I have read this article; and as I have noted throughout my testimony and in discussions in reference to this article, my only interest was as stated: To demonstrate to a conservative audience that one of their own used this notion of natural rights——

Senator LEAHY. Judge, I——

Judge THOMAS. And the second point is that, as I have indicated, I do not endorse that conclusion. I do not think—and I have said it—that the declaration or the argument should be made in this fashion. And I have not concluded in any way or reached these conclusions or endorsed this conclusion.

Senator LEAHY. I am not sure just which conclusion we are talking about. I am talking about Lehrman's conclusion that all abortion, under any circumstance—which, of course, would go way beyond any overruling of a Supreme Court decision or anything else—his conclusion that all abortion is unconstitutional. Do you accept that conclusion?

Judge THOMAS. Senator, the——

Senator LEAHY. I am not trying to play word games with you, Judge. I am not sure whether it is the natural law or the conclusion that you disagree with. Do you agree with his—let me ask you

this specifically: Do you agree with his conclusion that all abortion is unconstitutional?

Judge THOMAS. And what I am trying to do, Senator, is to respond to your question and at the same time not offer a particular view on this difficult issue of abortion that would undermine my impartiality.

The point that I am making is that I have not, nor have I ever, endorsed this conclusion or supported this conclusion.

Senator LEAHY. Thank you, Mr. Chairman. My time is up. I do not want to intrude on anybody else's time. But I will hold my other questions for the next go-round.

Thank you, Judge. I appreciate it.

The CHAIRMAN. Thank you very much.

I apologize, Judge. It isn't that I am not interested in listening. I am trying to find out what time Senators have to catch planes so we can avoid the seniority route and let people have a chance to ask their questions, if we get that far.

Now I yield to my colleague from Pennsylvania, Senator Specter.

Senator SPECTER. Judge Thomas, one of the reasons that I was pleased to see your nomination was because of your background in civil rights work and employment opportunities. Equality of employment is so very important for the future of America.

I had asked you in the first round questions about affirmative action and about the cases and your positions. I know that early in your career, you took the position that flexible goals and timetables were desirable, and later you have shifted away from that. We all agree that quotas are bad, but you have said in your 1983 speeches that you thought flexible goals and timetables were good.

When you and I finished my first round on Wednesday, I had started to discuss the Supreme Court decision in the *Sheetmetal Workers* case and had not had time to really outline the facts. I had raised a question as to why you opposed the remedy in that case, because it was such an egregious, such a very bad case on discrimination.

Very briefly, the facts are these: In 1964, the New York State Commission found discrimination against blacks, and the New York trial court ordered changes. In 1971, Federal litigation was started to stop discrimination. In 1975, the Federal court found discrimination and bad faith, and it was upheld by the court of appeals. The court found that the union in the employment practices had consistently and egregiously violated the Civil Rights Act, and ordered a goal.

In 1982, there was a contempt citation, and in 1983 a second contempt citation. The discriminators were found guilty of contempt. In 1986, the U.S. Supreme Court upheld the contempt citation, noting a standard of persistent and egregious discrimination and found intentional discrimination. The EEOC took a position that there should be an award of relief only to the actual victims of unlawful discrimination.

Now, given the background of what had happened, it is clear that the future would have held more discrimination for the black workers there. In setting a goal, the Court was putting the employers on notice that they had to move toward hiring blacks. It was a flexible goal and the timetables had been extended.

So, given the history, it was pretty plain that in the future there would be discrimination against specific individuals, and when you dealt with a base of about 3 percent, it was plain that there had to be more blacks qualified. Whether you could get to a higher number or what number you could get to was uncertain. But wasn't that remedy reasonably calculated, in a remedial sense, to prevent discrimination against specific blacks in the context where it was obvious that would happen? Wasn't it in the context where there would be blacks at least equal to, if not superior to, some of the whites who would be competing for the same jobs?

Judge THOMAS. Senator, since you mentioned that in our last round and that you would come back to it, I tried to give that some thought on what the context of that case was. As you know, one among many of those cases involving this difficult area of relief to nonvictims of discrimination during the 1980's, and the Supreme Court was going back and forth, I believe that this case occurred after cases such as *Stotts,* in which the Supreme Court limited relief or indicated that relief should not go to nonvictims.

With that said and noted as I indicated in my prior testimony that this is an issue that reasonable people have disagreed on, I think that people who are well-intentioned all want to make sure that you do include individuals who have been excluded, but at the same time not violate the sense of fairness that is in the statute.

In this particular case—and this is more of an intramural concern of the EEOC and the way that the agency operated—at the lower court level, the general counsel, which is quasi-independent, and we respected that independence, had already been given the authority to litigate the case, so that when it was appealed to the Supreme Court, to my knowledge, there was no additional vote of the Commissioners needed. That decision was made between our general counsel, who has already been authorized to litigate the case, and the Solicitor General.

The argument, as I remember it, was consistent by the Solicitor with what you said, but I will add this point: Independent of our processes and as an individual in reflecting on this, I do recollect urging the Solicitor to argue for contempt proceedings in this case in the brief, and that there be sanctions brought against such an egregious violation of a court order.

That was consistent with the approach that I think I attempted to outline in some of not only my speeches, but in some of my other writings, that when there was a violation of the antidiscrimination laws or a court order that was in place to resolve it, that the appropriate response should not be the numerical approach but, rather, that the appropriate response should be for the court to use its powers, its inherent powers to force compliance.

Senator SPECTER. Judge Thomas, I quite agree with you that reasonable men can differ on these issues, and I think that is one of the good features about your participation in this field. You have been able to advocate positions, as a black American which had unique standing. When you were against affirmative action, that had special significance, because of your unique background.

You have affirmative action having been sanctioned on all sides by the National Association of Manufacturers and the liberals on one side and by the conservatives on the other. When you talk

about contempt citations, I agree with you. But it is very hard—and I have had experience in the law enforcement field—to deter people or to penalize them enough to really get the job done, to materially affect their future conduct. So, that brings us back to the remedy of establishing a flexible goal, which at one time you had agreed with.

Now, you have just repeated the position you have taken consistently, and that is that there should not be relief to nonvictims. My question to you goes to the likelihood of future victims. In a context where blacks have been egregiously discriminated against, it is clear that that is going to happen in the future under the same circumstances, and the way to prevent future victims is to set the goal. My question to you is, isn't that a reasonable course which the Federal court followed and the Supreme Court upheld, and, of course, which you disagreed with?

Judge THOMAS. It is certainly the course that the Supreme Court has upheld, and I disagree with that as certainly a policymaker. The point that I have made that underscored this—and it has to be kept in the context and I have argued for it, it seems as though only one side of the equation finds itself in the debate oftentimes.

I felt, as a policymaker, that the best way to enforce the law, to enforce antidiscrimination laws, is to increase the remedy, the direct remedy for discrimination. I think that my view would be, my view was that the first step should have been that the relief under title VII should have been much stronger.

Senator SPECTER. Well, when you say relief, you mean the sanction——

Judge THOMAS. Right.

Senator SPECTER [continuing]. The contempt citation, the fine or the penalty. But should that be the only relief? Where you have a remedy which is directed to secure the employment of blacks who may be predicted, with reasonable certainty, are going to be actual victims, why not? Why not protect their rights, where you have virtually certain grounds to conclude that they are going to be the next victims, and the remedy is directed to future victims?

Judge THOMAS. First of all, during my tenure at EEOC, Senator, regardless of what my own concerns were, we did approve and did use goals and timetables in instances in which we felt they were appropriate, and the general counsel had developed and the Commission adopted, I believe, if not used, a specific policy on goals and timetables, but there are other approaches.

One of the things that I thought was appropriate—and let's just talk about the case where you are saying making sure, we know these employers are not going to do what they should do. I felt very strongly that EEOC should have been and we did become more intrusive in their personnel matters; that is, that it is one thing to say, well, we are going to have goals and timetables and there is no monitoring, you don't make sure that they are doing specific things to achieve specific goals.

We made sure that there was specific conduct required, and EEOC monitored to determine whether or not that specific conduct was, in fact, taking place or being engaged in. I think that is an appropriate way. And we have talked earlier in these hearings about outreach and recruitment, et cetera, but I felt that we could

be much stronger with a combination of monitoring and a combination of specific activities. Again, I underscore that with saying we did use goals and timetables.

Senator SPECTER. Well, I understand the variety of other processes, but it just seemed to me, in the context of that New York case, where you knew that there would be future discrimination, the remedy was very carefully tailored and that that was an alternative which would be reasonable to use.

Let me move on to the question of—Mr. Chairman, you have asked about the vote on and my preference. Perhaps this is as good a time to break, since we must break and vote and return.

The CHAIRMAN. We have about 10 minutes to get over to the floor to vote, and the Senator has about roughly 15 minutes left in his questioning, so I think it may be appropriate to take a break now. You can decide whether you want to break after this as well. Why don't we recess for—it will probably take us 12 or 15 minutes to go over and back.

[Recess.]

The CHAIRMAN. The committee will come to order.

Judge we will resume now with the questions. I want to make sure my time is precise. I said about 15 minutes, I am told the Senator has about 20 minutes, is that right, to be exact—19 minutes, so I want to be sure we are clear on that. We will now yield back to the Senator from Pennsylvania, and then we are going to go to the Senator from Alabama, and then we will make a judgment whether that is the appropriate place to break for lunch or whether we go back to Senator Brown.

Senator Specter.

Senator SPECTER. Judge Thomas, before the break I had been discussing with you affirmative action, to gauge your own thinking as you have moved in favor of flexible standards and goals to bring against it, against the backdrop of deciding cases. I had asked you about the pros and cons on having a remedy for a category which I classified as affirmative action for future certain discrimination victims. I think this was the fact under the New York case.

Let me move now to another category—regrettably, there is not a great deal of time to cover a matter of this importance, where I think the American people really need to know what is going on. I think there is no better person to tell them than you, sir, with your background—to a category of what I would denominate as affirmative action for previous discrimination victims in another context, where that person has the potential or apparent potential for being as good as, if not better than the person displaced.

I want to come to the Yale Law School admission, and not to personalize it with you, but take Prof. Steven Carter, who is an African-American and a distinguished professor now at Yale. Yale is a very good law school. Professor Carter has just written a book, "Affirmative Action Baby," and he says flat out that he enjoyed the benefits of racial preference.

Let's assume, although it may not apply to Professor Carter, that somebody who comes to Yale, an African-American, a product of inferior elementary school, high school, and college, but has the potential. Why shouldn't Yale give a preference? You in your testimony, in response to my question, oppose a preference. But why

shouldn't the law school like Yale give a preference. Shouldn't a school give that person an opportunity to blossom fully, even though on the test scores at the moment that African-American doesn't measure up quite to the white person he has displaced?

Judge THOMAS. Senator, I guess the difference that we have there is perhaps semantics, but let me explain to you what I have supported and what we argued for when I was in school, and that was that schools like Yale or other schools across the country should look at how far a person has come as a part of the total person, that you can look at kids who had gone to elite schools or had the finest family background and professional parents, or you could take a kid from the inner city who did not have all those advantages, but had done very, very well, and assess whether, one, the fact that this kid has done so well against the odds, is that an indication of what kind of person this is or how good that kids can be, is that an indication of how much drive that person has, how much stick-to-itivity that person has.

I think that during that era, those of us who were then the beneficiaries of what were called preferential treatment programs—I think that was the exact terminology—that it was an effort to determine whether kids had been disadvantaged, had socioeconomic disadvantages, had done very, very well in other endeavors against those odds, and I think that the law schools, that the colleges involved attempted to determine are these kids, with all those disadvantages, qualified to compete with these kids who have had all the advantages.

That is a difficult, subjective determination, but I thought that it was one that was appropriately made. One of the aspects of that is that the kids could come from any background of disadvantage. The kid could be a white kid from Appalachia, could be a Cajun from Louisiana, or could be a black kid or Hispanic kid from the inner cities or from the barrios, but I defended that sort of a program then and I would defend it today.

Senator SPECTER. Judge Thomas, what you are just saying, though, is a preference implicit. If I understand you correctly, the fact that the kid, as you put him, has come a long way, does not at that precise moment, going into Yale, have as good a record as another person. Take an African-American who has come a long way, come from a disadvantaged circumstance, at the moment of critical judgment, that applicant, an African-American, does not have as good a record as a white student. Would you then give him the preference, do I understand you correctly?

Judge THOMAS. What I said is that kid, particularly with the socioeconomic background, I think the law school—we all make that determination, how much drive does this person have. You know, we hear in playing sports, sometimes you hear coaches talk about it's not the size of the dog, it's the size of the fight in the dog. I think that the point that I am attempting to make is that Yale or other schools try to make that subjective determination about the total person, and I thought that was appropriate. I think there are other individuals like myself, when we hire, we look for more than just the person who has had all the advantages. We look for people who have had some of the disadvantages and have overcome those odds. I think it is very important.

Senator SPECTER. Judge, I hear you very close to my position. But what I believe I am hearing is that you are in favor of affirmative action preference, at least in that context.

Judge THOMAS. I think I have said that.

Senator SPECTER. Well, I haven't understood it from all your writings.

The CHAIRMAN. Would the Senator yield for 30 seconds, because I am confused.

Senator SPECTER. You are going to destroy a 5-minute train, Mr. Chairman, but go ahead.

The CHAIRMAN. Is that constitutional?

Judge THOMAS. Senator, I have not looked at it in that context. I assume that it was good policy to help to include others, and I have not looked at it in that context, Senator.

Senator SPECTER. Mr. Chairman, it will only take me 4 minutes to get back on my train of thought. [Laughter.]

If a preference there, Judge Thomas, if a preference there for the disadvantaged kid, as you put it, has come a long way, but he can't quite measure up at that moment, why not a preference in employment?

Judge THOMAS. I think, again, Senator, I have looked at education as a chance to become prepared. I have in my thinking personally—and I am talking totally from a policy standpoint—that education was that chance to be prepared to go on in life. It was an opportunity to gain opportunities.

For example, when we have our programs, even the ones that I established at EEOC, the effort was to give training, to bring kids in, to bring individuals in and give them an opportunity to prepare themselves, not in a way that I thought was offensive or in a way that was strictly based on race but rather, based on a number of criteria, a number of factors, including how far that person had come. I think that is important, and I think that you can measure a person by how far that person has come and by what that person has overcome to get there.

Senator SPECTER. Judge Thomas, that is fine for those of us who have gone to Yale, but what about the African-American youngster who doesn't have an educational background and is fighting for a job. You have a case like *Crawson* v. *Richmond,* which upset a minority set-aside. After that happened, the Philadelphia plan was one of the first in the country to move ahead with affirmative action. You should see the figures taking an immediate nosedive in African-American young people.

So, that if you have a Judge Thomas or a Professor Carter, who comes to Yale Law in that context, that is fine for their next step ahead. But if you have someone who is a 10th grade dropout and is struggling to get a job in a trade union in Philadelphia or in New York in the case we talked about, why not give that person a preference, because of the discrimination which has affected that person in his schooling. Where that person has the potential to be ultimately as good as, if not better than the white applicant who he displaces?

Judge THOMAS. Senator, of course, you do have the question that I have indicated, and I don't think that the cases necessarily break down that way. They don't make the distinction subjectively that

way. I believe it just strictly says it doesn't say that this kid has to come from a disadvantaged background, it doesn't say that the kid has to have had problems in life. It is race-specific, and I think we all know that all disadvantaged people aren't black and all black people aren't disadvantaged.

The question is whether or not you are going to pinpoint your policy on people with disadvantages, or are you simply going to do it by race. That is a difficult question. I was the first to admit that. It is one that needed constructive debate and discussion. But I don't think there is a person in this country who cares more about what happens to kids who are left out. What I have tried to offer and what I have tried to say, from the first days I entered the executive branch, was that we need to look at all avenues of inclusion.

You talk about education. In this day and age of mandatory education up to the 12th grade, I think we should ask ourselves a rhetorical question: Why is it that a kid who completes 12 years of mandatory education can't function in our society. That is particularly detrimental to minorities. We know it, and we know that there is a tremendous correlation between education and the ability to live well in this society, as well as to be employed and to have a good life in this society.

Senator SPECTER. Judge Thomas, I accept and applaud your sincerity, and I agree that there are disadvantaged people who are not in minorities. But focusing on minorities for just as moment, because that is the central problem, when you talk about the lack of educational opportunity for African-Americans, it is true across this country. That is why it seems to me that the logic that you accept on a preference to get into Yale Law School ought to be applied as a preference to get a job in New York City, where the local discriminated, or Philadelphia where the Philadelphia plan had been put into operation, where there is good reason to conclude that that person has the potential to succeed.

Judge Thomas, have you seen this very recent report by the U.S. Department of Labor on the glass ceiling?

Judge THOMAS. I have heard of it. I haven't seen much beyond my backyard in the last 70 days.

Senator SPECTER. Well, it is a stark picture about minorities and women holding less than 5 percent of managerial positions, and one conclusion, to put it plainly, the glass ceiling existed at a much lower level than first thought.

I would turn to one critical line from Professor Carter's book, which I think really puts in a nutshell much of this affirmative action debate. He says, "The reason for the surge is to find the blacks among the best, not the best among the blacks," and that if you have the affirmative action, as you concur, on preference in law school, then the potential is developed through a Professor Carter or a Judge Thomas. I would submit to you that if you give the struggling disadvantaged high school dropout who is African-American a preference, because of the collateral past discrimination, and the high likelihood that he is going to be a victim of future discrimination, that it makes sense.

Judge THOMAS. Well, what I have said—and I don't know, you know, I think it is easy to point out conflicts and to draw very

sharp lines, but let me make a couple of points, Senator, if you don't mind.

I have been an aggressive advocate of giving minorities the opportunity and the occasion to develop potential. We have done that. I have done that as the head of an agency, as well as my own approaches in my personal life. I think it is critical, and I have heard the same arguments for most of my adult life, and we have, of course, many of the same problems.

With respect to the existence, the current existence of those problems, we attempted, when I first arrived at EEOC in 1983, to point that out in a project that we called Project 2000, what would the work environment look like, where would minorities be, where would women be, what would some of the problems be. I think some of what the Department of Labor did later on involved similar approaches. That was an expression of our concern about what was happening in the educational arena.

When I was at the Office for Civil Rights, I think it was clear to us then that there were going to be problems in the future, because of the minority participation in education, and I think we are beginning to see evidence of those problems. At every level, we could begin to attack these problems. I have been concerned about it from a policy standpoint, and I have spent my adult life being concerned about it on a personal level.

Senator SPECTER. You talk about your position in 1983. Judge Thomas, you were in favor then of flexible goals and timetables, and perhaps you will be again. The great advantage of a Judge Thomas or a Professor Carter is a role model, and I think that is one of the aspects which speaks very well for your current position and is a big boost for the Supreme Court of the United States.

There is a good bit of politics at all levels of this proceeding, but one level of the politics which you wrote about in a speech back on April 25, 1988, complaining that the liberals play with the ill-treatment of the blacks and give them give-away programs, and your point that blacks will move toward a conservative line.

You may well be a role model which will attract many, many blacks to the cause of conservatism and to the Republican Party, and that is something that you and I discussed back in 1984, after the reelection of President Reagan. You had made a speech that the Republican Party did not reach out for blacks, and I picked up the phone and you and I had lunch and had a program to bring blacks into the Republican Party. We didn't do very much and we began a year later, and we still haven't done very much, but we may do something now.

As stated in considering your nomination, I am undecided and want to hear all the witnesses, and I am not going to vote for you for helping bring blacks into the Republican Party. My support will be based solely on your qualifications, but I think a collateral consideration might well be the benefit of seeing an African-American with a different line of thought as a role model.

Let me move on to *Rust* v. *Sullivan*. Senator Leahy took it up, but I want to approach it from a little different angle. The question I have, Judge Thomas, turns on the change in the agency regulation and you approve that principle in a speech you gave earlier this year at Creighton University, on February 14. I have a concern

about shifts in regulations, where the Congress has let them stand very much in my first round as I expressed a very substantial concern about disregarding congressional intent and having later Supreme Court decisions like *Wards Cove* reverse cases like *Griggs*.

The background of the controversy arises from the Federal statute which says that no funds shall be used where abortion is a method of family planning, but a regulation was issued in 1971 which said there could be counseling. Then in 1988, 17 years later, the Secretary of Health changed that.

In your speech at Creighton University, you agree with Justice Scalia that agencies should be able to change their regulations. You make reference to political accountability in a somewhat different context, but I think the political accountability is important. And then the Supreme Court, in *Rust* v. *Sullivan*, says that the Secretary can change the position, when the new regulations are more in keeping with the statute's original intent, are justified by client experience under the prior policy, and accord with a shift in attitude against the elimination of unborn children by abortion.

Now, without respect to the abortion issue, I have a grave concern about a shift in regulation based on political considerations which you appear to sanction in your Creighton speech. And I have a very deep concern about the Supreme Court upholding a change in regulation, because they accord with a shift in attitude.

When Congress passes a law that no funds may be used for family planning, where abortion is involved, no procedure where abortion is used for family planning is acceptable, but that does not preclude counseling or the exercise of freedom of speech, and stands for 17 years, what is the justification for changing, when Congress has ordained congressional intent which has stood, because there is a shift in attitude or some political change of wind?

Judge THOMAS. With respect, Senator, to the change in regulations, I think that what I pointed to in the Creighton speech was the line of cases beginning I think with *Chevron*, which involved a change in regulations and whether or not the agency could make those changes. That is the controlling Supreme Court case with respect to the Court's deference to the agencies, when reviewing their regulations, and the point that I was making about accountability is that this body, in its relationship with those agencies, could change the rules for them, and I assume that is the kind of accountability that the Supreme Court was referring to. I don't know.

But if you note in that speech, also, I took issue with the sense that this deference to agency can continue to be expanded and be unlimited. That was a concern, because at some point you would defer so greatly to the agency, even when the Court thinks it is moving away from the intent of Congress, that there is no judicial review, so the question became what are the limits of that. But, of course, in deciding our cases, we would follow the lead case of *Chevron*, which, as I indicated, permits changes in regs.

My concern would be the similar concern that I expressed earlier here, and I think that when you engage in judicial review in administrative law, this would be the same concern and it would be actually the bottom line or the baseline of analysis in those cases, is the agency's interpretation a reasonable interpretation of congressional intent. That is the important line to draw, with the ref-

erence being, as it is in statutory analysis, what is the intent of Congress. if Congress changes that intent, then the agency, of course, can't go beyond that.

If Congress is explicit about that intent, then the agency has very, very little room within which to maneuver. If broad, of course, the agency may be able to engage in a significant range of reasonable conduct and choosing of options. That was the point that I was trying to make in the Creighton speech, but the bottom line for us, the baseline, the anchor in the administrative law cases is always what is the intent of Congress and is this a reasonable interpretation of that intent, whether we agree with the policy of the agency or not or the change in the agency's policy or not.

Senator SPECTER. My time is up. I will return to that in the next round. Thank you very much, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Before I yield to the Senator from Alabama, I would like to make a point of clarification. Did you say, Judge, that affirmative action preference programs are all right as long as they are not based on race?

Judge THOMAS. I said that from a policy standpoint I agreed with affirmative action policies that focused on disadvantaged minorities and disadvantaged individuals in our society.

The CHAIRMAN. For example——

Judge THOMAS. I am not commenting on the legality or the constitutionality. I have not visited it from that standpoint, Senator.

The CHAIRMAN. As we all know, I went to one of those State schools. My son went to one of those Ivy League schools. I didn't realize that in those Ivy League schools you all attended, there are preferences based on whether or not you are a—what is it called if your father went there? A legacy. If you are a legacy——

Judge THOMAS. Or if you are a football player.

The CHAIRMAN [continuing]. Or if you come from a certain part of the country. My son might not have been accepted by the school because his father didn't go there, even though his marks are higher than the kid who got in. That is how it works. As long as everybody knows that. If that is not preference, I don't know what is. But I will come back to that point because it seems to show that preference for whites is OK, but preference for blacks isn't.

Let me go to the Senator from Alabama.

Senator HEFLIN. Judge, just to follow up briefly, it is my information that as the Chairman of the EEOC you hired 49 individuals who reported directly to you in the headquarters office. Of these, 26 were women, 53 percent; 33 were members of minority groups, 67 percent; and that you hired 29 special and executive assistants, of whom 14 were women, 15 were black, 1 was Hispanic, and 2 were Asian.

Did you have a policy of preferences during the time you were hiring them?

Judge THOMAS. Senator, my policies were as I stated. I looked long and hard to make sure that any number of people, whether they were minorities, women, individuals with disabilities, were included in my search. I always, to the best of my abilities, hired the best qualified people.

Senator HEFLIN. All right. Now let me briefly visit this issue of privacy. You have testified that you find in the word "liberty" of the 14th amendment a right of privacy, and you indicated that this right of privacy extended to the marital relationship. And then to Senator Biden, you testified that you thought an individual had a right of privacy.

Now, I don't want to misquote you or anything. Would you clarify your exact status as to the right of privacy and how it applies particularly to individuals?

Judge THOMAS. The point, I think the exchange that we had was along this line: That there was a right of privacy as established in *Griswold,* and that that applied to the marital relationship. The question then became was there a right of privacy that applied to nonmarried individuals, and the point that I was making was that that right of privacy in the intimate relationship was established using equal protection analysis under *Eisenstadt* v. *Baird.* And I think that is where we left it.

Senator HEFLIN. Now, do you come to the conclusion that the fifth amendment contains a right of privacy under the word "liberty"?

Judge THOMAS. That is a question that I have not considered, but I don't see where there would be—in the analysis I would parallel the analysis with the 14th amendment. But, again, that is an analysis that I have not—I don't know of a particular case that has based it on that.

Senator HEFLIN. What are your feelings regarding the incorporation doctrine?

Judge THOMAS. Senator, I certainly have not any occasion—and I certainly don't—to object or to criticize the incorporation doctrine. I think the only concern that I have seen that has been raised has to do with individuals who might think that the incorporation doctrine limits—I think along the lines perhaps of Justice Black, would be the limit of rights that individuals have.

Senator HEFLIN. Would you have any concerns with the selectivity of Justice Black's incorporation doctrine?

Judge THOMAS. The exclusivity of it.

Senator HEFLIN. Now, under the Constitution, I don't think there is any question that there is a right to life in the 14th and 5th amendments. It may well be that one of the purposes of government is to protect life.

I think we have found that the right to life is not absolute and that there are questions as to whether or not the right of privacy would be absolute. Regarding the right to life, you have the death penalty, for example, which is a limit. You have to go through the due process of law and other aspects that might be controlling.

In the event that there is a conflict between two principles of constitutional right, do you have a methodology by which you would give a priority to one right over another when there is such a conflict?

Judge THOMAS. Senator, I think that the occasions on which there has been conflicts or the ones usually in which there is a right asserted have to do with the Government in some way becoming involved or regulating a particular right. And what the courts have attempted to do, of course, is to determine how to value that

right—is it a fundamental right? And if it is a fundamental right, then, of course, the state would have to show that it has a compelling interest in some way regulating this particular activity.

I think that that is important. It is one thing to state what the constitutional analysis is, but I think what it says to us all is that we place a very high value on certain rights that we have that we consider core fundamental rights in our society. And the state must show a reason that is extraordinary, compelling, overwhelming as to when it decides that it is going to do something that interferes with these rights that we value very highly. So I think that—and that, of course, can be stated with different degrees of precision, but in the equal protection analysis, that is precisely what we are attempting to do, is to value those rights and to require more of the States—we are not going to defer to what the state is doing simply because it is the Government, but rather you must have a reason for doing it.

Senator HEFLIN. You have testified several times during this hearing that when you were Director of the EEOC you felt that the EEOC laws pertaining to discrimination in employment didn't have enough teeth in them. What teeth would you advocate being added to the discrimination in employment rights statutes that give remedies?

Judge THOMAS. Well, I am not going to—let me answer it in this way, Senator, without being evasive. I know that there is pending legislation before this body in that area, and I don't think I should get involved in that debate.

But during my tenure at EEOC—and I think it is a matter of written record that I abhor discrimination, and I think that title VII undervalues the damage done by discrimination in the employment context. I have advocated damages. I have advocated contempt proceedings. I have advocated penalties. Something that would do more than say to an employer, All you have to do is hire the person that you discriminated against or pay that person what you would have paid that person.

That was my approach to saying I think—or the country saying we are serious about the damage done by employment discrimination, at least as serious as we are about other kinds of noncompliance with our civil laws.

Senator HEFLIN. Well, you have stated a number of times that you didn't think there were sufficient teeth in those laws. Did you ever make a recommendation, in writing or orally, as to additional teeth that should be added by the administration—that they ought to look at it from a legislative viewpoint?

Judge THOMAS. I certainly did.

Senator HEFLIN. You did?

Judge THOMAS. I did. I can't remember whether I ever reduced it to writing, but it was something—I guess at some point I probably began to sound like a broken record.

I advocated it in this context, Senator: I felt that we should have had a positive civil rights agenda, a very aggressive civil rights agenda, even if we disagreed as to specific policies. And I felt that adding to and enhancing the sanctions of title VII could be a significant part of that.

Senator HEFLIN. Do you remember any of the specifics that you advocated?

Judge THOMAS. I think they were generally as I indicated to you, that there should be increased damages, perhaps penalties, and even treble damages, and certainly a use of contempt proceedings where there were violations of court orders.

Senator HEFLIN. Treble damages would be punitive damages, then, wouldn't they?

Judge THOMAS. Well, I think discrimination—my view was that discrimination was abhorrent enough to make that appropriate.

Senator HEFLIN. All right. From your life and history, you are somewhat of an enigma. You have gone through many changes in your life, and American society in the last three decades has gone through many changes. The thinking of individuals evolves, and individuals change with time.

You have told us about your background in your opening statement and through testimony here. It is interesting to note that you decided at one time in your life that you wanted to study to be a priest, and you went to a seminary and then to another seminary in Missouri.

Articles that I have read by Juan Williams of Atlantic Monthly and by Karen Tumultree of the Los Angeles Times, among others, have described your experiences—that you suffered the pains of racial slurs in the seminary when at night people in the dormitory would say, "Clarence, smile, so we can see you."

Then I believe instances have been recited on the death of Martin Luther King and the callous statements of hatred that were made by your fellow students relative to that. Would you tell us what happened?

Judge THOMAS. Well, Senator, with respect to going to the seminary, of course, that is always a very, very deeply personal choice, it is a deeply personal religious choice. When you make that decision at 15, there is always opportunity for change and growth and development.

The point that I was in my first year of college, though, and beginning to grow and to develop as an adult, I can still remember that afternoon—actually, it was in the evening that one of the students who was walking up the stairs in front of me, whose name I have never revealed and won't, didn't know I was behind him, and someone yelled from the basement, "Martin Luther King has been shot," and he said, without looking behind him to see that I was there, "That's good, I hope the s.o.b. dies." That was the moment, the precise moment that I decided to leave the seminary and the moment when I began to be involved personally in much of the marches and participating in changing our society, and left the seminary.

The seminary, at Conception, was in a very, very remote area. If you are in the area, it is Conception Junction, MO. That is near Savannah, MO, near St. Josephs, MO. It is in the northwest corner of Missouri. One would have to really be there or lost, to know where you are. You either know where you are or you are definitely lost.

We went down immediately after that to Kansas City to participate in a number of the marches, and there were other events

which I won't get into that occurred that summer that were equally as difficult and touching, and it was at that point that I transferred to and went to Holy Cross College.

Senator HEFLIN. Also, I believe you told me in my private conversations with you that this was an influencing factor which caused you to decide not to become a priest, is that correct?

Judge THOMAS. It was as deeply influencing factor in that decision and many, many aspects of my life.

Senator HEFLIN. Of course, I think part of this shows you do have a sensitivity to the factors that have occurred relative to the movement or progress of race relations, and I think that ought to be brought out, in fairness to all parties concerned.

Now, you went to Holy Cross. What did you major in at Holy Cross?

Judge THOMAS. Well, I transferred to Holy Cross for my sophomore year and I majored in English literature. People would ask me why I majored in English literature, and my response has been, and it is accurate, I majored in English literature as a second language. I simply did not have the capacity to speak and use English at a level that I thought necessary to function in this society, so I decided to major in English. I had been fortunate enough in the seminary to have had Latin, to have had German, and to have had French, which all were helpful in teaching grammar, but I needed English, I needed to be immersed in something that I found painfully difficult, and that was the basis of my major.

Senator HEFLIN. What did you minor in?

Judge THOMAS. I think protest. [Laughter.]

Senator HEFLIN. Protest?

Judge THOMAS. I didn't have a minor, Senator. We had a core requirement, those were the last years of core requirements, and you were required to take specific courses, metaphysics, philosophy, those sorts of things.

Senator HEFLIN. At Holy Cross, of course, you were proud of that time that you had been involved in demonstrations. In Karen Tumultree's Los Angeles Times article, it says,

> In combat boots and army fatigues and sometimes a leather tam of the Black Panthers, Clarence looked the part of the angry radical, as he strolled down the campus of Holy Cross College. He opposed the Vietnam War, but helped found the College Black Student Union. Thomas' most notable act of defiance came after a 1969 protest against the parents of a recruiter from General Electric Company, a company that had been heavily involved in the Vietnam War. Thomas was one of a group of black students who believed that blacks had been unfairly singled out and disciplined by campus officials. They walked off, effectively resigned from the college in protest. The protestors didn't wear T-shirts and jeans, but suits and ties. Later, they were granted amnesty and allowed to return.

Other articles would indicate that you led a protest against the South African investments of Holy Cross trustees. Is that a description that is fairly accurate of your attitude and your participation in various protests and affairs of that time?

Judge THOMAS. Senator, I think as I have attempted to indicate over the past few days, that I have always been—not always, but throughout my adult life and perhaps since the age of 16 or 17, very much involved and interested in all of these issues.

When I went to Holy Cross, there was as tremendous amount going on, and one of the areas that was of great concern to me was

what I perceived at that age as injustices in our society, and what I attempted to do was to be involved and to protest and be active in protesting what I thought were injustices in a way that is permitted in our society.

One of the activities was what we designated in later years, in 1969, the walkout, that is that we felt that some students, minority students, were being unfairly treated, and as I remember it, we did not walk out with the intention of coming back. The walkout was, to my way of thinking, a walkout, it was leaving, in fact returning home. The only thing I hadn't figured out was how I was going to face my grandfather.

But the other activities that we were involved in included free breakfast programs, tutoring programs, and I think that interest has been true throughout, the same interests that I have had throughout my life, that has not changed, although I have eschewed the combat boots and the fatigues for suits that I think are overpriced. [Laughter.]

Senator HEFLIN. In this Los Angeles Times article, it says, "Today, he seems embarrassed about those days."

Judge THOMAS. No.

Senator HEFLIN. Do you want to respond to that?

Judge THOMAS. No, I am no more embarrassed about feeling strongly and passionately about injustice than I am about doing anything else in my life. I think that I would rather have those days of wanting to participate in our political process, even though I have grown and matured, than saying that I spent all of my college days drinking beer and having a good time.

Senator HEFLIN. In this article, it goes on and says,

> In a November 1987 interview with Reason Magazine, he lamented, the thing that bothered me when I was in college was that I saw myself rejecting the way of life that got me to where I was. We rejected a very stable and disciplined environment, an environment with very strict rules, an environment that did not preach any kind of reliance on government.

Do you want to comment on that?

Judge THOMAS. Well, as I have indicated in these hearings, the environment in which I grew up was a disciplined environment, it was one in which you were expected to be up early. I can still remember my grandfather on Saturday mornings, when he thought we were going to sleep until 7 or 7:30, he would come to the open windows of our bedrooms and just simply say, "Y'all think y'all rich," and that had a way of inspiring me to get up. [Laughter.]

But it was as disciplined environment and it was one that required a lot of effort. My concern wasn't so much or juxtaposing that environment with the protests that we were engaged in. I thought that was appropriate. But if you remember that time, it was as protest or challenging of all authority and all rules that we grew up by, and it was that. The question was raised, why should we take metaphysics, why should we study until 11 or 12 at night, all those questions were raised.

I thought that the efforts or among the factors that had permitted me, in addition to Holy Cross being so good as to accept me, the things that had permitted me to survive and to do well there was to take advantage, to work and to take advantage of those opportunities, again, as I said earlier, to burn the midnight oil, and that

was a part of the past that I saw us beginning to challenge or question.

Senator HEFLIN. Why did you decide to go to law school and become a lawyer?

Judge THOMAS. There were a couple of reasons, Senator, that I thought at the time were of major proportion. You know, we all wanted to change the world at that time. I guess at that age you think you actually can go out and change the world. I wanted to right some wrongs that I saw in Savannah, some specific wrongs with respect to my grandfather and what he was able to do with his life, as well as to the overall wrongs that I saw as a child there.

During law school, I did go back in the one summer that I worked for a law firm to Savannah, in an effort to do that. I did not decide to return to Savannah and, instead, went to Missouri, but it was my goal during the entirety, it was my reason for going to law school and it was my goal until my third year to return to Savannah and practice law.

Senator HEFLIN. I started talking about your background. You were in an enigma or experiencing a good deal of uncertainty or changing ideas. During these hearings I think you have maybe surprised some people with your position, for example, on the fact you don't think natural law ought to be used as a method of constitutional adjudication, that you support, in effect, public housing, that you believe multiple languages ought to be used and we ought not to have an English-only approach in governmental activities and schools. You found a right of privacy. You seem to have an adherence to the present methodology in deciding cases on separation of church and state. You have expressed some ideas that would indicate you believe that the Constitution evolves and develops, as issues change, and certainly in your own office, it is subject to the idea that you did follow some affirmative action, which brings us to the question of what is the real Clarence Thomas like or what will the real Clarence Thomas do on the Supreme Court, if he is confirmed.

Some believe you are a closet liberal, and some, on the other hand, believe you are part of the right-wing extreme group. Can you give us any answer as to what the real Clarence Thomas is like today?

Judge THOMAS. Senator, I think that during the past 10 weeks, people have written and formed conclusions about me, and that has gotten to be a part of this process. I think they are free to do that. But it reminds me of the story that I heard about Judge Haynsworth during his ill-fated nomination and confirmation process in which he was reading about himself in the morning paper, and having read the story, he looks up and says to his wife, "You know, I don't like this Haynsworth guy either." [Laughter.]

Senator HEFLIN. I thought it was otherwise; that his wife said that. [Laughter.]

Judge THOMAS. Well, either way, it works.

The point is, though, Senator, that people form conclusions. The one aspect of a lot of the publicity that I did like was that my friends from as far back as my college years—and I mean my friends, not people who have claimed to be friends—have pointed out the continuity and consistency, the growth and development.

That has been one of the most touching aspects and rewarding aspects of the past 10 weeks in reading and hearing.

But those conclusions that people form about you were not—about me were not the real Clarence Thomas. I am the real Clarence Thomas, and I have attempted to bring that person here and to show you who he was, not just snippets from speeches or snippets from articles. The person you see is Clarence Thomas. I don't know that I would call myself an enigma. I am just Clarence Thomas. And I have tried to be fair and tried to be what I said in my opening statement. And I try to do what my grandfather said, stand up for what I believe in. There has been that measure of independence.

But, by and large, the point is I am just simply different from what people painted me to be. And the person you have before you today is the person who was in those army fatigues, combat boots, who has grown older, wiser, but no less concerned about the same problems.

Senator HEFLIN. I believe my time is up.

The CHAIRMAN. Thank you. I think we will continue to go, and we will move to Senator Brown, and then we will break for lunch after Senator Brown finishes.

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, I must confess this morning's testimony has helped me understand you a great deal better, particularly your comment about why you chose English. If I heard it correctly, you said it was because it was painfully difficult for you. It does help me to understand why you would want to undergo a fifth confirmation hearing, if nothing else.

I am sure you appreciate the reason for this extended confirmation hearing and the multitude of questions. Some have alleged that the Senate is made up of 100 Secretaries of State, but I have long thought it was more like 100 Justices of the Supreme Court than Secretaries of State. And it is obvious that we have a fascination and a continued interest in the work that you may well take on.

Over the course of our hearings, you have declined to indicate how you would rule on specific cases, and clearly that is in line with what both Democrats and Republicans on this committee have indicated is the practice and, in effect, the canons of ethics for judges, to not rule on a case without hearing the facts and listening to it.

The media advise us that you had a meeting with the President, however, up at Kennebunkport, and I am wondering if in your discussions with the President you took a similar position. Did you decline to discuss with the President or indicate to the President how you would rule on specific cases?

Judge THOMAS. Senator, after I arrived in Kennebunkport, somewhat bewildered and not knowing exactly what was going to happen—in fact, not knowing what was going to happen—the President asked me to chat privately with him, and he said that he had two issues that he wanted to discuss. The first was: If you are nominated, will your family be able to sustain or to survive this process, because it will be a difficult process? Not knowing really what would come, my answer was yes. In retrospect, I might adjust

that a little bit and certainly would have conversed with him more at length about it.

The second question that he asked me was—and I think this is almost verbatim: Can you call them as you see them? And then he went on to indicate that if he did not agree with me, were I to be confirmed and sit on the Supreme Court, that I would never see him criticizing me in public, even if I disagreed with him or he disagreed with me. And I assured him that I could call them as I saw them and that I would as honestly as I could and to the best of my abilities. And he indicated that he was going to nominate me at 2 o'clock and suggested that we have lunch.

Senator BROWN. Since that meeting, have you had any discussions with the President where you have committed how you would vote on a particular case or a particular legal doctrine?

Judge THOMAS. No, Senator.

Senator BROWN. In other words, you have given the President the same ethical treatment you have given us?

Judge THOMAS. Well, I have tried to be consistent across the board, Senator.

Senator BROWN. Earlier, Senator Heflin had mentioned property rights, and we discussed a great deal about various theories of protecting property and individual rights. If I understand the cases correctly, our courts protect personal rights like abortion and others with a standard called "strict scrutiny"—that is, the Government has to have a compelling Government interest for any restrictions on those rights—but that a different standard applies for the protection of property rights, called the "rational basis test," "rational relationship test," protected by requiring some rational relationship between the legitimate, not necessarily compelling, purpose and means chosen to achieve that purpose.

At least in my mind, I think there are a number of reasons why this distinction between personal rights and property rights simply doesn't hold water, is artificial.

First, it strikes me that the property rights are of obvious concern to the Framers of our Constitution. They are named specifically in the Constitution with explicit references both to contracts and property.

Second, I believe that property is simply an extension of personal rights and vice-versa, that to separate them, to assume that they are different somehow, really reflects, I think, a distorted view of how our society works.

Third, the political and moral values that we all hold dear strike me as dependent upon private property and the freedom to contract.

When I first decided to run for the State legislature, I was very dependent on a job. My boss was a very liberal Democrat who was active in the Democratic Party. If I had lost my income to support my family, if I had lost my job, I think it would have had a major effect on my freedom of speech and my political rights. And for the courts or this country to pretend that somehow your right to property is inferior or isn't integrated with your personal rights, I think is ignoring the reality of our society.

I must say I am troubled by the artificial distinction that has been discussed. To provide a lower level of protection for property

rights I think endangers personal rights, and perhaps the opposite is true.

I raise this because I think that artificial distinction, that different treatment, the second-class protection that some have advocated strikes me as a real problem. We have talked a lot about a zoning case, the *Moore* case, calls it to mind. It strikes me that that was as much a violation of the right to use property as it was a violation of the personal rights of the individuals involved. And it seems to me it is an insult to the American people to somehow think that you can protect one without protecting the other or that there is a second class of rights even though they are specifically mentioned in the Constitution.

Well, I mention that because I want to ask you about that again. Professor Tribe is one who has great credibility, I think, with many members of this committee, and many members have quoted the professor. I thought it would be worthwhile to quote him in this case on this subject.

Here is a quote of what he wrote:

> The attempt to distinguish between economic rights and personal rights must fail.

He later wrote:

> It will not do to draw a bright line between economic and civil liberties or between property and personal rights. As Justice Stewart observed, the dichotomy is a false one. Property does not have rights. People have rights. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. That rights in property are basic civil rights has long been recognized.

The question, Judge, is this: Do you find laid out in our Constitution language that calls for a second-class level of protection for property rights?

Judge THOMAS. Senator, I think that we have certainly—as we have discussed in these hearings, I have said in my own writings that there should be a recognition of property rights—economic rights, and I was talking in that case more about my grandfather and his ability to, as you say, earn his living, not be denied that.

But I think what the courts have done in the regulation of the social and economic affairs of our country has been—and I think appropriately so. As I have noted, I have no quarrel with the equal protection analysis that the Court uses. The Court has tried to defer to the decision of the legislature. In other words, the balances should be struck by this body or by the political branches and not second-guessed by the courts.

I have no reason to quarrel with that approach. It recognizes that the considerations are very complex and involve any number of factors that are best left to the legislative branch.

Senator BROWN. In relation to the comments by Professor Tribe—by phrasing it this way, I am not suggesting that I want you to become an adherent of the good professor. But on this subject, thinking about the comments of Professor Tribe and Justice Stewart, when they conclude that the dichotomy between personal rights and property rights is a false one, would you agree with that? Do you find yourself in agreement with that? Do you have any observations about that?

Judge THOMAS. Senator, I think certainly I have not re-examined that or looked at that as a judge. It would require me to sit here

and attempt to formulate an opinion on that. Of course, I think we all at bottom feel strongly that we should have the freedom to work and to support our families or to provide a part of the support for our families and for ourselves. And we certainly don't feel that—that is one of the reasons why this body passed title VII of the Civil Rights Act of 1964 and made those difficult choices. But it is also reasons why you protect individuals in the work force so that they are not harmed in a variety of ways by the conduct of their employer or the environment itself.

I think that those are complicated decisions. We value our ability to own property and to engage in work. But there is a balancing that must take place, and I think that the courts have appropriately chosen to defer to the Congress or to the legislature, the political branches, in making those balances.

Senator BROWN. Well, I appreciate that comment. I must say from my own point of view, at least my judgment in society, those that are extremely wealthy don't have to worry about this very much. They have got theirs. But a right to work and save and have an opportunity to keep a fair share of what you produce in this world is darn important to somebody who starts off in life without much, because it is one of the ways they go from the bottom to the top. And I would hate to think in this country that we would assign second-class treatment to someone's ability to go from the bottom to the top, to acquire property, to save, to reinvest, to have a chance to protect the things that they produce for themselves.

I for one think a distinction, an artificial distinction between those rights misses the whole point and perhaps jeopardizes that fundamental ability to be a mobile society, to move up.

A couple other areas that I want to invite you to comment on. I appreciate that these are areas that the Court may take up, but if you have observations you would care to make, I would like to have them on the record.

The interstate commerce clause is one that has critical impact in terms of Congress and its ability to direct the States and others in this society. Over the years we have had a wide variety of decisions regarding the extent of the interstate commerce clause. One of the landmark cases in the early 1940's basically indicated almost anything we do in any way can affect interstate commerce.

I would be interested in your view of the interstate commerce clause and how philosophically you would approach the questions that deal with it.

Judge THOMAS. I think that you are right in the sense that the Court has read those provisions rather broadly. But I make this point, and I underscore that by saying I don't have any objection or basis to object or at this point any quarrel with the way that the Court has interpreted the interstate commerce clause.

But I make this point—and I have heard some academic objections from time to time. But I can remember reading, I believe the *Heart of Atlanta Motel* case which challenged, I believe, the accommodations provisions in the Civil Rights Act of 1964, which is based on the interstate commerce powers. And one of the factors that was used there was that blacks who traveled across the country were impeded from traveling because of the lack of accommodations.

What that brought to mind was that when I was a kid and we would travel occasionally—I think two or three times during my childhood—by highway from Savannah to New York, my grandfather would go through this long exercise of making sure that the car was working perfectly, that you had new tires, that we had a trunk full of food, et cetera, because there were no accommodations. And should you break down, you would be met with hostilities. That was the reality. So there was indeed some, I would consider significant, impediment on the ability of us to travel and certainly, by extension, on the flow of commerce or travel in our society.

I have no quarrel, Senator, with the approach that the Court has taken and certainly have had no opportunity to review all of the cases.

Senator BROWN. Thank you.

The ninth amendment has come up a great deal in the hearing, and I think continues to be an evolving area of the law. Some have viewed the ninth amendment as providing a limitation on the powers of the Federal Government over the individual. Others have viewed the ninth amendment as a provision that, in effect, mandates governmental activity of a certain nature.

Would you share with us your thoughts on that particular amendment?

Judge THOMAS. Senator, as I have indicated earlier, I think that whatever we do with open-ended provisions such as the ninth amendment, that we make sure as judges that those decisions are fettered to analysis or something other than our own predilections or our own views. That would be the concern, the generic concern, as I have said before, with any of the open-ended or more open-ended provisions.

The Court, to my knowledge, has not used the ninth amendment, a majority of the Court, to decide a particular case. And there has been debate about what the purpose of the ninth amendment is.

There could be a time when there could be an asserted right under the ninth amendment that would come before the Court in which there could be found to be a basis for that right in the ninth amendment. I don't know. But as scholars do more work and certainly as individuals begin to assert rights and the Court begins to consider those, I wouldn't foreclose that from occurring.

Senator BROWN. One last question—and I think I still have time. There has been a great deal of discussion about antitrust policy in the last several decades. I end up viewing antitrust policy as essential for helping guarantee a competitive economy. It is one of the features about America that is somewhat unique. While many other countries have sanctioned monopolies, sanctioned conglomerate control over the markets, the United States has really been a pace-setter in demanding that we have competition within our marketplace.

There have been many challenges to those concepts of antitrust statutes in recent years. I can appreciate that you do not want to deal with specific cases, but I would be interested in your view of the antitrust concepts and any remarks you would like to make about their merit.

Judge THOMAS. Senator, my grandfather was a small businessperson, one oil truck, an ice truck, and a vacuum cleaner to clean stoves, and two little kids to run with him and also to help answer phones.

I think that competition in the private sector is healthy in our society. It is healthy not only from the standpoint of the businesses themselves, particularly the smaller businesses, but it is also healthy from the standpoint of products, quality of products that are brought to consumers, as well as prices.

I think that our economy and our country expands and provides opportunities to absorb individuals who otherwise would not have a chance. It is one that is very interesting. After growing up in a household where there is a small business, literally not a separate office, it is the house, you get the feeling of how important it is to have this opportunity to be a part of this competition and to not be foreclosed by certain individuals monopolizing an entire area. So, just reacting as a person, I think that it is important that we have healthy competition in the economic arena.

Senator BROWN. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you very much.

It is 20 minutes to 1 now. Do you want to keep going? Actually, I think that we should break for lunch, and come back at quarter to 2. We will recess until quarter to 2.

[Whereupon, at 12:45 p.m., the committee recessed, to reconvene at 1:45 p.m., the same day.]

The CHAIRMAN. The hearing will come to order, please.

We will attempt to finish tonight, but I want to emphasize that if Senators continue to have questions, we will not. I still think that it is possible to finish. All of the Senators were told at the beginning of thse hearings that we would not go late today, and I want to be able to accommodate those Senators who made plans in their home States. Since deregulation, I know you can't catch a lot of planes to a lot of places other than at specific times.

Our good friend from Wyoming has such a commitment based on the assertion the Chair made that we would not go late on Friday. My two colleagues from Illinois and Wisconsin, who have not yet had a second round, have been gracious enough to yield to him for a third round or part of a third round so that we can try to meet the twin obligations.

Just as the Court always has to balance things, Judge, we are having to balance needs here, and we are going to apply a strict scrutiny test after Senator Simpson asks his questions to determine whether he met it.

But, at any rate, all kidding aside, the Chair recognizes Senator Simpson, and then we will go in order, Illinois and Wisconsin.

Senator SIMPSON. Mr. Chairman, I do very much appreciate that. I do have to catch a plane. There are others, and you have accommodated us all on both sides of the aisle, but particularly I want to thank my friends, Paul Simon and Herb Kohl, I appreciate that very much. And I really intend to just do 2 minutes, and then that will conclude my activities. Thank you for your courtesies on that.

My remarks I wanted to share, I think the committee would be interested. I became so intrigued as to the EEOC issue that I went down to the EEOC. I had seen our colleague from Missouri go

there. I don't know how many of my colleagues on the committee have paid a visit to the EEOC, but I made it a point to do that about 6 weeks ago.

I spent a couple of hours there at the agency's offices on 18th Street speaking with their employees about the effects and the results of Clarence Thomas' tenure at that organization. I visited with employees who were black, white, Hispanic. I spoke with persons who were handicapped, old, and young. I spoke with employees holding jobs from that of manager to maintenance man. Some had worked for both Eleanor Holmes Norton and Clarence Thomas. Some had been there for many years while others had come during his tenure.

And I was stunned, as I looked in my notes, from what those people said that day about Clarence Thomas; from just plain, you know, "He did a hell of a good job," to things like, "We are a lot better agency than we were when he came"; "We came further in his 8 years than we did in the previous 18." I am quoting now. "We feel proud now. Many of us didn't used to."

"He may have opposed affirmative action goals and timetables but told us that was his personal philosophy, and that we were to follow the letter of the law." And then they did, and they cleaned up the backlog.

"From the time I got here until he left, I never saw Clarence Thomas try to influence the way a case was being handled." "His honest and integrity are what inspired me." "Clarence Thomas' way was you follow the law."

Another lady in this instance, "Clarence Thomas believed in rewarding good work." And Hilda Rodriguez said, "Clarence Thomas told us that we were the EEOC and that he was not, that he was just a short-timer."

One other person said, "We feared for our jobs when he came, but I felt very proud about working for him after he came. Before Clarence Thomas came here, you could just not move forward. On his last day, one of the employees followed him out crying."

Another person: "Over the last decade, this agency has gone from mediocre to one of the Government's premier agencies. We have earned that reputation, but Clarence led us there. The problem now is that other agencies hire away our good employees."

One attorney said to me, "When I told Clarence Thomas about the lapses in the age discrimination cases, he said, 'That is nearly as bad as a lawyer dropping his client's case,' and he personally told Senator Melcher about the laspses." However, the attorney pointed out that "Less than 1 percent of all cases had lapsed."

A handyman who went to work there in 1984 told me about a problem he had with his daughter and how he could walk right into Clarence Thomas' office and talk to him about that. That is what he said.

Another employee told me that, "He is the kind of person I would like to have decide my case if I ever go before a judge. He listens, keeps an open mind, and makes a decision based on reason."

I was told that, "When he left, on his last day he went down from his upper floor office to the ground floor to leave. Every foyer on every floor was filled with people." No one was out drumming

that up. The employees were doing this. These employees made an effort to have the building named after him, but they found they couldn't do that because the Government didn't own the building. However, the employees purchased, with their own funds, and put up a plaque in the lobby. I have never seen that in any building because it is really quite—it is almost corny in Washington, DC, that that could happen. That is something out of one of those old black-and-white movies.

The plaque says:

Clarence Thomas, Chairman of the U.S. Equal Employment Opportunity Commission, May 17, 1982, through March 8, 1990, is honored here by the Commission and its employees with this expression of our respect and profound appreciation for his dedicated leadership exemplified by his personal integrity and unwavering commitments to freedom, justice, and equality of opportunity, and to the highest standards of government.

Well, those are the folks from all walks of life who worked with Clarence Thomas during his 8 years at the EEOC, and I think it is very important that we hear those who know Clarence Thomas best and what they have to say about him.

And it came to me when Senator Leahy this morning noted that we shouldn't ask or expect answers to questions about how you might rule in specific cases. I do greatly concur obviously with that. But Senator Leahy also noted that we need to know "how you think, your background, your integrity, and impartiality, what kind of a judge you will be." And I agree with that ever more.

So I just wanted to share with the committee as to how the people that worked with you felt about you. I think to a politician it is like the moment of truth, and that is how many votes do you get in your home precinct. I always like to look at that when I see people here in this place. I always go back and go into their State record and see how many votes they got in their home precinct. It gives you a better idea of how they do and how they operate. So among those that know you best, those are the things that I wanted to share—integrity, impartiality.

And my question—and I am going to conclude here. You were interviewed for an article by Sarah J. Davidson. Do you recall that article titled "Clarence Thomas, The Pragmatic Chairman of EEOC"?

Judge THOMAS. Senator, I don't recall specifically the interview, but I know the name.

Senator SIMPSON. You were asked a question by that lady in her journalistic pursuit. Her question was: "How do you think that history will record your achievements?" Do you recall that question?

Judge THOMAS. I don't recall the question, Senator.

Senator SIMPSON. Oh, you should because you gave quite a glowing answer to her. You don't remember the answer to it either?

Judge THOMAS. It is probably still the same answer.

Senator SIMPSON. Well, let me give it to you, and then I am going to leave, get on the plane and skip out of here.

You were asked the question, How do you think that history will record your achievements? "Well," you say,

I just hope that whatever is said, whether someone agrees with me or disagrees with me, they don't waste a whole lot of time on nonsensical things like where I went to school and where I have worked and what I did before I came here. Simply

bottom line, after everything is said, to hope that at least they say, "This was somebody who tried to do what was right." That is all. They don't have to say anything else. Just that, "In his lifetime, when he came to this agency, he tried to do what was right and did not try to play politics and did not succumb to pressure from various interest groups or politicians; he just took a mandate, took a job, and tried to do what was right."

That was your response to that lady's question. So it was. And I wanted to report that very moving trip to the EEOC, and I really have no questions.

I thank you for your courtesies and thank especially my colleagues, Paul and Herb, Senator Simon and Senator Kohl, for their courtesies. And thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. Have you answered the question?

Senator SIMPSON. He did answer the question. [Laughter.]

The CHAIRMAN. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

One of the questions that we face is: What really makes Judge Thomas tick? That is really what Senator Heflin's questions were approaching.

When you told the story about Judge Haynsworth saying to his wife, "I don't like this Judge Haynsworth guy," if we were to vote in this committee on whether we like this Clarence Thomas guy, it would be unanimous that we like Clarence Thomas. That is not the question that we have to face. It is where you are going.

When you told about being a student at Holy Cross, I would feel comfortable voting for that student for the Supreme Court. And then in describing yourself, you said, "Then we thought we really could change the world"—making it past tense.

Some of us still think we can change the world. Maybe not in huge giant steps, but in little steps. And you are going to a place where you are going to change the world for a lot of people.

The people on the Supreme Court who voted for *Dred Scott* changed the world. The people who voted for *Plessy* v. *Ferguson* changed the world for a lot of people. The people who voted in the *Brown* decision and *Roe* v. *Wade*, changed the world.

Members of the Supreme Court who voted on the *Crowson* decision that Senator Specter referred to, the set-aside, the *Richmond* decision, have denied the right, the opportunity for a great many people. They have changed the world for a lot of people.

The *Ward's Cove* decision changed the world for a lot of people, people like—again, quoting Senator Specter, "that 10th-grade dropout." And that is, I guess, the person that I am concerned about.

Frankly, a person with Clarence Thomas' ability is going to make out all right. Whether you get confirmed or not confirmed, you are going to do very well. That 10th-grade dropout may not do well.

We all bring something of a philosophy to our jobs, and Senator Simpson perhaps partially answered this question with his quotation from that interview, the bottom line. But what is the political philosophy, what is the judicial philosophy you bring to the U.S. Supreme Court?

Judge THOMAS. Senator, when I spoke earlier about changing the world, I think I would distinguish between the way that as a youth

you feel that you can go out and take on everything tomorrow morning and get it all accomplished tomorrow morning. At some point I think you realize that you have to take a step back and begin to approach it more—not so much in a rush or impatiently, but persistently. And if there was one lesson that I learned during that period, it was the difference between impatience and persistence, the difference between being upset and being committed to something.

So today I didn't suggest or mean to suggest by using the past tense that we felt that we could make a difference, or that we could change the world, that we can't do that today or have an impact today. I indicated earlier that I felt that if I were confirmed by this body and were fortunate to be on the Supreme Court that I could make a difference. And I also indicated that the same person that was at Holy Cross with the same feelings, a little older and a little wiser, is sitting before you.

There was a time when in law school—and I was asked why I went to law school. But there was a time actually before I went to law school that I didn't think there was any reason to go to law school. There was no further reason to prepare, to be ready to make some of the changes in society. There was a time when many of us didn't feel that working through the system, as we called it, was worthwhile.

So at some point we had to make the decision that if we prepared ourselves—and as Abraham Lincoln said, I paraphrase it, I will prepare myself and when the time comes I will be ready. What will you be ready for? I don't know exactly, or didn't know. With respect to my own approach, though, I tried to be persistent about preparing to make a difference.

As far as overall philosophy, Senator, as a judge I think that the approach that I have taken has been one of starting with the legislation or the document before me. It has been one to arrive at the intent of this body in statutory construction and certainly in broader analysis to not certainly impose my own point of view, but to be honest, intellectually honest and honest as a person in doing my job. I have done that.

But there is something that you point to also that goes beyond that, and I think this is either the third or the fourth time I have appeared before you for confirmation. And the something that you have been interested in is this, and I took it to heart—perhaps you don't remember it, but in my job, my current position on the court of appeals, one of the things that I always attempt to do is to make sure that in that isolation that I don't lose contact with the real world and the real people—the people who work in the building, the people who are around the building, the people who have to be involved with that building, the people who are the neighborhood, the real people outside. Because our world as an appellate judge is a cloistered world, and that has been an important part of my life, to not lose contact.

Senator SIMON. I think that is important, incidentally, and it is—if you are confirmed—I assume that is not a message for me to stop here, Judge.

The CHAIRMAN. A vote.

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Senator SIMON. I think it is important, if you are confirmed, to go out of your way to do that. It becomes very easy, whether you are a Senator or a Supreme Court Justice, to become isolated.

How do I reconcile what I sense are two Clarence Thomases? One is the Clarence Thomas who is testifying here, that Holy Cross student, and the other is the Clarence Thomas that says government cannot be compassionate. Though here you have said, "I favor public housing," if I can use another illustration, you were in the magazine, Reason. You were interviewed. And they say, "So would you describe yourself as a libertarian?" And you say, part of the answer, "I certainly have some very strong libertarian leanings, yes." And then you say, "I tend to really be partial to Ayn Rand, the author. When she died, the New York Times had this comment about her. It said, "Her morality constituted"—and I am quoting now—"a reversal of the traditional Judeo–Christian ethic because it viewed rational selfishness as a virtue and altruism as a vice." She was opposed to Medicare. She was opposed to a lot of things that a lot of us would say are part of having a responsibility to those less fortunate in our society.

Anyway, I see these two Clarence Thomases: One who has written some extremely conservative and I would even say insensitive things—maybe you wouldn't agree with that description—and then I hear the Clarence Thomas with a heart. And Senator Heflin says you are in part an enigma, and that is part of the enigma here.

How do I put those two Clarence Thomases together, and which is the real Clarence Thomas?

Judge THOMAS. Senator, that is all a part of me. You know, I used to ask myself how could my grandfather care about us when he was such a hard man sometimes. But, you know, in the final analysis, I found that he is the one who cared the most because he told the truth, and he tried to help us to help ourselves. And he was honest and straightforward with us, as opposed to pampering us, and prepared us for difficult problems that would confront us.

With respect to the statement about government, I think I attempted—the government being compassionate, and I don't have that full quote. But I think the rest of that statement was something to the effect that people are compassionate. Government in my view has an obligation to solve those problems and to address those problems. We may disagree as to what the best solution is as policymakers, but the fact of the matter is that from my standpoint, 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. And I think I have said that, and it is important.

But as individuals, I think that we have the capacity to be compassionate to others without that obligation, beyond that obligation.

Senator SIMON. Well, as individuals, no one will argue with that. But collectively we also have responsibilities.

Judge THOMAS. Exactly.

Senator SIMON. Your statement, "I don't see how Government can be compassionate. Only people can be compassionate, and then only with their own money, not that of others."

We have to make decisions here where we are going to say we are going to take some money from taxpayers for public housing, for food stamps, for things that are important.

Anyway, this is one of the dilemmas that we face. And in this quote here you are siding with the privileged on a lot of things, and that is the reason for my question about South Africa yesterday. One of the reporters said, "Why do you ask him about South Africa? He is not a nominee for Secretary of State."

I want to know what makes Clarence Thomas tick, and in that connection, I mentioned the article where you were quoted as objecting to the tactics of the protestors at the South African Embassy. Does anyone remember any more of the details of that?

Judge THOMAS. Senator, you asked me a question, as I remember it—and correct me if my recollection is inaccurate. You asked me whether or not that was coordinated in any way.

Senator SIMON. Yes.

Judge THOMAS. And my response and recollection remains the same; that to the extent there was any—to the extent that those comments coincided, I think it was as a result of a reporter calling around.

Senator SIMON. I also asked about Jay Parker, and yesterday's Newsday, New York newspaper, has this article by Timothy M. Phelps:

> Clarence Thomas asserted in Senate testimony yesterday that he did not know that his good friend, James J. Parker, represented South Africa although former aides say he did. A former assistant of Thomas, who asked not to be identified, said recently that Thomas brought up the subject of Parker's representation of South Africa in 1986. At that time Parker and a partner, William Keyes, were being paid more than $360,000 a year to lobby for South Africa's foreign agents, according to Justice Department records.

Then I will skip a few paragraphs, but I don't think I am taking anything out of context here.

> Thomas was asked yesterday by Senator Paul Simon about a New York Newsday story outlining his relationship with Parker. The 43-year-old Federal appeals court judge said he knew that Parker had represented some South African homelands but not South Africa itself. "I was not aware, again, of the representation of South Africa itself," Thomas said. "I was aware of Mr. Keyes' relationship with South Africa. I was not aware of Mr. Parker's." But the former aide of Thomas at the Equal Employment Opportunity Commission said in an interview that Thomas talked about Parker's representation of South Africa for 45 minutes at a staff meeting in 1986. He said that somebody had to represent the South Africans, and that if sanctions were passed, it would affect the black people more harshly than supporters of apartheid. "—well, I will not comment on that, though I think you would find most blacks in South Africa differing—" the former aide said. She said that when staff members entered the room for the meeting, Thomas had with him a newspaper article outlining Parker's relationship with South Africa. She said he asked the staff members what they thought of the article and became very angry when one said it was hypocritical of Parker to take money from South Africans.

Do you recall that at all?

Judge THOMAS. No, Senator. As I indicated to you, I understood or I knew about Mr. Keyes' representation. That is the best of my recollection. I did not recollect nor was I aware until recently of Mr. Parker's representation. I was aware, as I indicated, about his involvement with the homelands. And I don't know who that aide is or what article she is talking about.

Senator SIMON. And you do not recall that meeting?

Judge THOMAS. I do not recall that exchange at all. I was aware, however, of his representations and his trips to South Africa and his representation of the homelands, but not the paid representation of South Africa itself.

I do remember reading an article at some point indicating the involvement of Mr. Keyes and the significant amount of money that he was paid. I do recollect that.

Senator SIMON. In the exchange, you mentioned your position on divestiture at Holy Cross, and I commend you for that position. You say, "I took a strong position on the board of trustees of Holy Cross that we divest of stocks in South Africa. That was important to me then, and, of course, that is contrary to a position that they might take. But it was one that I felt strongly about."

I have to say I find a little bit of conflict in that and your opposition to sanctions for South Africa. But a publication that has just come out says—and I ask you whether this is accurate or not: "The Reverend John Brooks, the school's president, says there was no significant board opposition to Brooks' recommendation for divestment and that he does not recall Thomas or anyone else taking or needing to take a strong stand."

Judge THOMAS. As I indicated yesterday, there was significant discussion, and it is as I recall it at the board meeting.

Senator SIMON. OK. So that there was division——

Judge THOMAS. There was no opposition. Whether or not we would act now or later was the nature of the discussion, as I remember it.

Senator SIMON. One of the people you quote from in the course of some of the speeches—and in fairness, if somebody went over all of my speeches as carefully as I have gone over yours, I am sure they could find a lot of things that I wouldn't be too proud of today. But one of the things you say—Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it and, by extension, all of Congress." That was a speech before the Cato Institute in 1987. And then in a speech a few months later, you say, "Congress' aggressive oversight of Federal agencies"—in commenting on it, I am quoting, it says, "As Ollie North made perfectly clear last summer, it is Congress that is out of control."

I am concerned about quoting Oliver North, who I assume you, along with all Americans, knew shredded papers, destroyed evidence. This was done, in fairness, before he was convicted of a felony. But how does Oliver North end up getting quoted, someone who is, at least in my mind, not a hero, not for what he did as a member of the Armed Forces, where he apparently was outstanding. But when he shredded paper, when he destroyed evidence, he is not the kind of person I would want to quote and I would think Clarence Thomas would not want to quote.

Judge THOMAS. Senator, I do not think I condoned—in fact, I think I remember us having discussions about whether he had done something improper, and my saying very distinctly that I felt that if he had done something improper or wrong, that should be addressed.

The point that I was making there, and you note it in the context—and I do not have that speech before me, but it was in the

context of oversight hearings, and I think during a time when I was having my own difficulty in that oversight process, and sometimes those hearings, though they serve the very, very important function of ferreting out facts and responding to those, they can often become highly charged, politicized public events.

I think myself, like many others, that in that highly charged political environment that Colonel North took the advantage to himself and used that environment to his advantage, as opposed to succumbing to it.

Senator SIMON. Since you are talking about the process, you have spent 4 days now before this committee and you have had to go through this grueling process, and it is that. What is your feeling, as you reflect upon this process that you are going through? Does it serve the Nation well, or does it not serve the Nation well?

Judge THOMAS. Senator, even before I was nominated, I was asked that question, because when I was nominated to the court of appeals, that was not exactly a joy ride and it had its difficulties. I would——

Senator SIMON. I helped create those difficulties, as I recall.

Judge THOMAS. Pardon me.

Senator SIMON. I helped to create those difficulties, even though I ended up voting you for the court of appeals.

Judge THOMAS. That is OK, Senator. You know, we each have to do what we think is best.

Senator SIMON. Right.

Judge THOMAS. I was asked that question then, and my response to people who felt I should have returned to the kind of acerbic comments about the process, was simply this, that we are, as judges, in the least democratic branch of government. We have lifetime appointments. We make very, very important decisions, and we do not stand for reelection. This process has to work.

People can disagree as to the nature of the process, we can say that it is flawed in one way or the other. Even in the speeches where I talk about oversight, I may talk about the flaws, but I also point out the importance of the legislative and oversight process.

This process is necessary and it has to me become more clearly necessary since I became a judge, and I have no reason to change that view and, in fact, would feel very strongly about it, even through this process, even if the process is difficult for me.

Senator SIMON. Earlier, Senator Heflin asked you about the fifth amendment and privacy implications. I mentioned yesterday, I guess, or the day before, we were talking about the ninth amendment, and there are in the Constitution some specific privacy things about quartering militia and searching your home. When you combine those specifics with the history of the ninth amendment, is there a privacy implication also, in your opinion, in the ninth amendment?

Judge THOMAS. Senator, I think I have made two points with respect to that and with respect to the finding of the right of privacy. I indicated that I felt that it was the analysis that I tended to agree with or agreed with, was the finding of that interest or that right in the liberty component of the due process clause.

The approach that you are talking about, of course, and I think we discussed, was the approach that Justice Douglas took, and similar to that was Justice Goldberg's approach.

I think that no one really knows the extent to which the ninth amendment can be used. There is a considerable amount of scholarly working being done, as I said before, and there may be a point where the Court has a case before it in which an asserted privacy right or privacy interest is or could be found in the ninth amendment. To date, though, a majority of the Supreme Court has not done that.

I would not foreclose it, Senator, but with respect to the privacy interest, I would continue to say that the liberty component of the due process clause is the repository of that interest.

Senator SIMON. Let me just lobby you here now, if I may. This is the only chance we get to lobby future Supreme Court Justices. I think the ninth amendment is a very fundamental protection of basic liberty and I would hope—there is an article written I believe by a person named Rappaport at the University of—maybe it is William and Mary, I am not sure where it is, but I will send you the article, that gives some additional background on the ninth amendment. I think that is important.

I just received today, and I assume my colleagues have received, a letter from 12 subcommittee and committee Chairs from the House who worked with you in the EEOC, asking that—well, let me just read the final line, and we can put the full letter in the record:

"We conclude Judge Thomas should not be confirmed as an Associate Justice of the United States Supreme Court. His conformation would be harmful to that Court and to the Nation."

I do not know if you have seen the letter at all. There was a somewhat similar letter when you were up for nomination for the appellate court. Do you care to comment on that?

Judge THOMAS. As you indicated, Senator, there was a similar letter when I was nominated to the court of appeals, and I think as I may have indicated, either privately to you or maybe even in the hearings, I can't remember which, that, of course, I would want individuals with whom I have had dealings in the past to be supportive of me, certainly to be as supportive of me as the people who worked with me every day.

But during my tenure at EEOC, we did have some differences of opinion and some disagreements in a political and policymaking context. I certainly do not agree with them and do not think——

Senator SIMON. I did not expect you to agree with their letter.

Judge THOMAS. I think it is unfortunate, but, Senator, we had our disagreements and I did not think that they rose to the level to require a letter of that nature, but I can understand that they have to take positions that they feel comfortable with.

Senator SIMON. Thank you. I see that my time is up. I also see we have a vote over on the floor.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge, Senator Kohl, to accommodate your schedule and everyone else's schedule, went over to vote and should be back here by the time we all are up and leaving. The committee will recess until

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 supracompetitive 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 statuary 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 to argue 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

at this time to my colleague Senator Grassley. It will not affect who gets to ask questions next, except Senator Thurmond indirectly. You are next in line after me.

Senator THURMOND. Oh, you are through?

The CHAIRMAN. No.

Senator THURMOND. Well, go ahead.

The CHAIRMAN. I was just trying to——

Senator THURMOND. Mr. Chairman, you go next.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. It is seldom that it is recognized that I am the chairman by the chairman, but I am delighted that I am the chairman. [Laughter.]

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Thomas, if I could go back to an area that we discussed yesterday, the privacy area, and set a little background by reminding you, in response to the chairman's question, you agreed that "single people have the same right of privacy as married people on the issue of procreation." And you agreed with the chairman that "the privacy right of an individual is fundamental."

Yesterday I tried to find out parameters on the constitutional right to privacy, and let me make very clear I don't expect you to prejudge any case. But if I could, I would like to get an idea of the framework of the test to be applied in analyzing privacy rights. You have endorsed the rationale and the holding of *Eisenstadt*. Yesterday Senator Simpson and I raised the *Bowers* decision.

Now, the dissenters in *Bowers* found that *Eisenstadt* compelled the opposite results from the outcome that the majority reached. So the four people who were on the dissent did so on the basis of *Eisenstadt* to recognize a broad and sweeping constitutionally protected privacy right. So I hope that this puts in context my concerns and why I am bringing this up again.

I wonder if your endorsement of *Eisenstadt* could lead you to the same conclusions that the *Bowers* dissenters reached.

Judge THOMAS. Senator, I don't think that the majority in *Bowers* in any way felt compelled to undercut *Eisenstadt* in order to reach the conclusion that they did. Again, I have not gone back and re-read the majority opinion in that case, but I believe what the majority did is simply say that in looking at our history and tradition, the fundamental right of privacy did not include homosexual sodomy. I believe that was Justice White. But the point is that it left intact the holding in *Eisenstadt* that the right of privacy attached to the individual.

Senator GRASSLEY. Well, that helps me a little and makes me feel better than the answer that you gave yesterday.

You agree that the right of privacy is not absolute; indeed, protection is derived from the liberty clause of the 14th amendment as part of the Constitution. And so then in conclusion—and this is the only question I have of you in this round—I would like to read for you a portion of the majority opinion in the *Bowers* decision, and it is a few sentences long so I hope I read it carefully for you.

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

That this is so was painfully demonstrated by the face-off between executive and the Court in the 1930's which resulted in a repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

"Otherwise"—and this is the last sentence.

Otherwise, the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

While you have probably stated this already, but as a sort of summary, can you agree that this expression of judicial restraint is an important consideration in determining the parameters of the right of privacy?

Judge THOMAS. Senator, I think that in areas in which a court or a judge is adjudicating or interpreting the more openended provision of the Constitution that judges should restrain themselves from imposing their personal views in the Constitution; that their adjudication must be rooted in something other than their personal opinion. And as I have indicated and the Court has attempted to do, attempted to root the interpretation or analysis in those areas in history and tradition of this country, the liberty component of the due process clause, and I think that that is an appropriate restraint on judges.

Senator GRASSLEY. Is what you just said, your way of telling me that you agree with those statements?

Judge THOMAS. Yes.

Senator GRASSLEY. Thank you, Mr. Chairman, and also thanks to my colleagues for the courtesy of going out of order.

The CHAIRMAN. This may be an appropriate time to take a break. We will break until 3:30.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Let me say that, after consultation with Senator Thurmond and with Judge Thomas, it looks like our best efforts to get finished today—finished in the sense that Judge Thomas' testimony is finished—are not going to work. We would be here well into the night for that to happen. But it also appears after consultation with Judge Thomas and with Senator Thurmond, that we can get still a good hour-and-a-half more, maybe even more than that, in today, and can then resume at 9:30 on Monday morning. And I believe that we can finish by lunch on Monday. That will be the Chair's express intention, and it looks like that is very reasonable that that could be done.

So, Judge, instead of being finished today at 5, you will in all probability be finished at lunchtime on Monday. With that, why don't we just get under way and see how much more we can get finished tonight, if everyone is agreeable.

Now, unless I have miscounted, I believe it is my turn to ask some questions, Judge. I would like to go back and ask one very straightforward question because it has been mentioned 87 different ways by 6 or 8 different people. And I don't think you in any way have confused it. I think maybe we have confused it—we, the members of this committee, Republican and Democrat, and as I read some of the press accounts, the press even seems mildly con-

fused on it. Again, not you. I think you are perfectly clear on it, but let me make sure my recollection is right.

I want to ask you a very precise question, similar to what I indicated I would ask you. And if it requires more than a yes or no answer, obviously elaborate. But if you could answer it yes or no, it sure will save a lot of time and be on point.

Judge very simply, if you can, yes or no: Do you believe that the liberty clause of the 14th amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. Senator, I think I answered earlier yes, based upon the precedent of *Eisenstadt* v. *Baird*.

The CHAIRMAN. Well, you know, what folks are going to say is that *Eisenstadt* v. *Baird* was an equal protection case. All right? That is not the question I am asking you. Let me make sure and say it one more time. Do you believe the liberty clause of the 14th amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. I think I have answered that, Senator.

The CHAIRMAN. Yes or no?

Judge THOMAS. Yes, and——

The CHAIRMAN. I like it. I mean, not I like it. I think we can end confusion. If it yes, the answer is yes——

Senator THURMOND. Well, if he wants to explain it——

The CHAIRMAN. If you want to go on, go on. But, I mean, I think that is what you mean.

Judge THOMAS. I have expressed on what I base that, and I would leave it at that.

The CHAIRMAN. OK. Let's switch to what I thought was a very, very interesting and informative exchange you had with Senator Brown earlier. Now, we don't have the actual record because it is not able to be transcribed as we move, although they do a phenomenal job of transcribing it quickly, and we don't have it yet. But here is what I understood that exchange to say.

In your exchange with Senator Brown, Senator Brown in my view accurately stated the law and Supreme Court decisions. He accurately stated the law and the stated decisions in the Court as to where the law now stands with regard to the standard of review that judges use in determining whether an action taken by the Government against an individual is constitutional, against their individual rights of privacy or against their individual right relating to their property. And he pointed out that when the Court looks at whether an action by a State to limit an individual's fundamental right to privacy, like in *Griswold* or *Moore*, the State has an overwhelming burden. He pointed out the Court says the State in those kinds of cases has to apply a standard of strict scrutiny. They have to have an overwhelming reason to justify their action impacting upon that person's right.

But, he went on to say, if a State impacts on a person's use of their property, they now apply a rational basis test, he said. Now, he went on to explain that the Court looks at the State and determines whether or not it had a rational reason for impacting on

that person's property right, not an overwhelming reason, a lower standard.

Senator Brown said that he thought this was wrong. He said that property rights should not be separated out in that way, and he went on to point out—if my notes are correct—that property is the basis of all our moral rights. And he further pointed out that—he said—I believe this is the quote, "The courts ignore this reality now."

Senator Brown then cited *Moore* v. *East Cleveland* as an example of the failure of the Supreme Court to recognize what he calls the reality of their mistake. He said that *Moore* was a violation—the way the Supreme Court ruled, *Moore* was a violation of the right of someone to use their property.

He then quoted as authority for that Professor Tribe. He probably knows it, but he didn't have an opportunity to say it. He quoted Tribe's comments on *Lynch* v. *Household Finance*. The Tribe quote he read was about *Lynch* v. *Household Finance*, although he didn't state that, not about *Moore*.

Now, he then looked at you and he said, Do you agree? Do you agree that these two different standards—the Court has a strict scrutiny standard for matters with regard to privacy and matters with regard to other things other than property—race, suspect categories, classifications. They have this standard, and with property they have this standard. And he said, That is wrong; do you agree?

And the answer you gave, as I understood it, was exactly the opposite of the position he staked out—if I understood it correctly. You said you have no quarrel with what the Court does, how the Court deals now with regard to regulations of property. You said that this is where the Court should defer to the legislative branch. As you and I know, there is a venerable theory in constitutional law that says the reason why there should be a strict scrutiny standard on matters like privacy and suspect categories is because that is where democratic institutions have erred the most. That is when the legislative bodies have made the most mistakes, like saying people can be slaves. So, historically, we have applied a stricter standard.

But, as you pointed out, in areas where it related to property, the legislature didn't err that much. That is the basis of the thesis underlying the argument—the point, I should say. They don't err that much, so the courts have been more ready to rely on what the legislature says. A different standard.

And you went on to say, "I don't quarrel with this approach." That was the quote I do remember writing precisely.

Now, Judge, either you completely fundamentally disagree with everything that Senator Brown said and he thought you agreed with him, or the following: You said you had no quarrel with the equal protection analysis in this area, which is, of course, the area where terms like rational basis and strict scrutiny are most often used. But, of course, Judge, technically we are not dealing with the equal protection analysis when we are talking about the taking of property, as you well know. We are dealing with the fifth amendment and the due process analysis.

Now, there are always two questions in analyzing whether a regulation is valid, whether the regulation by the Government to reg-

ulate somebody's property, take their property, is valid. I can see the press and others are bored by this, but this is the single most important question you can be asked in this entire hearing.

One of the tests they apply is whether the object that is being served by the law, taking the property, is an object that falls within the scope of police power. And the other, as you well know, is whether the means chosen to legislate accomplishes an objective that is reasonably related to the reason they say they are doing this thing.

Now, Judge, the Court's current approach is to give the legislature a broad latitude in both these areas—the area of determining whether or not the means is an appropriate means and whether or not the objective being served is an objective that falls within the police power. That is the state of the law now, and they essentially use a rational basis test for a much lower standard.

So my question is this: Do you agree with the state of the law as it is now with regard to property, as I understood you to say it? Or do you agree with Senator Brown who said it is wrong the way we are doing it now; property and the test applied to the taking of property should be elevated to the same level as other constitutional rights—that is, the case he cited, the right to privacy in *Moore*?

What is your position?

Judge THOMAS. Senator, I think that I indicated to Senator Brown as well as, I believe, to the question from Senator DeConcini on equal protection analysis, that the current manner of equal protection analysis I have no quarrel with.

The CHAIRMAN. But do you have a quarrel—I am sorry. Go ahead.

Judge THOMAS. With respect to the area of the current law, in the area of taking, I have no basis to quarrel with that either.

The CHAIRMAN. That is what Senator Brown was talking about.

Judge THOMAS. Well, I thought that he recognized that we disagreed.

The CHAIRMAN. OK. Good. That is all I want to make sure because——

Judge THOMAS. I thought that was recognized.

The CHAIRMAN. Because I thought Senator Brown—Senator Brown, please correct me if I am wrong. I thought Senator Brown said, well, I understand, we agree, and, you know, property should have a higher scrutiny and should be treated with more respect in the law, et cetera. I thought he thought you agreed.

Senator BROWN. I was doing my best to get him to agree.

The CHAIRMAN. But you are aware that on the record under oath he does not agree with that.

Senator BROWN. And was very disappointed that he disagreed with Professor Tribe. [Laughter.]

The CHAIRMAN. Well, if you have an opportunity to read the case that Tribe was talking about, you will know that it is not related to the issue that we are talking about.

Anyway, now—in that I don't mean to defend Professor Tribe. I don't care one way or another whether Professor Tribe is right or wrong. It is just that it doesn't relate directly to this issue.

Now, Judge, the reason I bothered to take you through all of this I think you know well, and that is that it is a big deal at least to

me, and a big deal, in fact, to this country, that if the theory and thesis promoted by Senator Brown, espoused in great detail with significant annotation and with great articulation, and is a first-rate book by Professor Epstein, if you agree with this view, it means that, as the Brown-Epstein view, it means very simply that, to use his phrase, that—let me get it straight here—"if what follows, I shall advocate a level of judicial intervention far greater than we now have and, indeed, far greater than we have ever had"—that is what is being advocated by a very brilliant, informed, respected school of thought.

Now, I will not go into all the nuances of it. You understand them well. I might add that a couple newspaper articles that have written about this thesis said it has nothing to do with natural law. Let me quote from the book, so they are informed, quote from Mr. Epstein: "Thus, the political tradition in which I operate and to which the Takings Clause itself is bound rests upon a theory of natural rights."

I read from a very informed newspaper that natural rights had nothing to do with this theory. It is the thing upon which this theory is based. So, I am happy to hear your answer. If you would like to elaborate or speak on anything at all about this subject matter, I would be delighted to hear it. If you do not, that is OK, too. It is up to you. I do not want to cut you off.

All right. Now, let me move to another area, if I may, and that is to the area we have touched on very briefly, religion, if I may, not your religion or mine, how the court deals with religion.

Judge this is one area where the level of protection accorded fundamental rights is changing, and I do not think most of us even know it. You know it, and that is the right of free speech and the free exercise of religion. These rights, which, perhaps more than any other, are central to what most of us believe to be what it means to be an American.

In my view, these rights deserve the highest level of protection by the court, and I would like to start first with the Free Exercise Clause of the First Amendment, which provides, as you well know, "Congress shall make no law prohibiting the free exercise of religion."

Now, until last year, the Supreme Court applied the standard known as strict scrutiny, when reviewing legislation that restricted religious practice. Under the strict scrutiny standard we have discussed a number of times, but it bears repeating, the State first needed a compelling reason for restricting the religious practice, and, second, the State had to show that no other alternatives were available for it the State to achieve its goal. It has been a test now for about 40 years, 35 years, a two-prong test.

Under this doctrine, the Supreme Court held, for example, that the compulsory education law could not be used, for example, to require Amish children to attend school, when their parents believe that they have a religious duty to be educated at home, the *Yoder* case, *Wisconsin* v. *Yoder*.

The Court reasoned that, even though the State was not acting out of any hostility, and even though the State had a compelling reason for making children attend school, in general, in *Yoder* they held the State law could not constitutionally be applied to the

Amish, because there was "no compelling reason for abridging the religious freedom to educate their children."

Then, last year, the Supreme Court decided the case of the *Employment Division of Oregon* v. *Smith*. In the *Smith* case, the Court held that the Free Exercise Clause permits the State to prohibit sacramental use of peyote. I think that is how it is pronounced, is that correct? Never having used it, I am not sure of the pronunciation. Peyote, it is a drug used in an Indian ceremony and it has been used historically by them. Thus, a State could deny unemployment benefits to those who were discharged from employment for such use.

Now, I do not want to discuss the specific case of the case nor the specific outcome. Instead, I want to ask you about your understanding of the reasoning the Court used in this case. Justice Scalia, writing for a 5-to-4 majority, concluded that, as long as the Government is not specifically trying to restrict religion or as long as it is not trying to discriminate against religion, it can apply a general law against a religious activity, and it doesn't matter what effect the law has on that religion, in a sense striking down what historically—not historically, what the last several decades has been the second test needed to be passed, in order for the State to be able to take such action.

In other words, even if the law passed by the Government has a devastating impact upon a religious practice, the law is still constitutional, according to the majority, Scalia writing for them, is still constitutional, so long as the Government acted with a legitimate purpose when it passed the law.

Now, Justice O'Connor, on the other hand, said she would have upheld the ban on peyote, without changing the legal test that has historically been applied, without abandoning the strict scrutiny test. Now, Judge, which approach do you agree with, not whether or not it should be outlawed or not outlawed—that is not the issue as far as I am concerned. Do you agree with Scalia's approach, or do you agree with O'Connor's approach?

Judge THOMAS. Senator, I think as I indicated in prior testimony here, when the *Sherbet* test was abandoned or moved away from in the *Smith* case, I think that any of us who were concerned about this area, because, as we indicate, I think we all value our religious freedoms, I think that there was an appropriate reason for concern, and I did note then that Justice O'Connor, in applying the traditional test, reached the same result.

The CHAIRMAN. Correct.

Judge THOMAS. I cannot express as preference. I have not thought through those particular approaches, but I myself would be concerned that we did move away from an approach that has been used for the past I guess several decades.

The CHAIRMAN. Judge, I asked the same question of our most recent Justice and Justice Souter had no problem telling me that he agreed with the O'Connor approach. I do not care which approach. You obviously know the area well. You obviously know the facts of the cases. You obviously have an intense and deep commitment to religion and your faith in God. Do you mean to tell me you have not thought, when this came out, which approach you thought was appropriate.

Judge THOMAS. Let me restate my answer. My concern would be that, without being absolutist in my answer, my concern would be that the Scalia approach could lessen religious protections.

The CHAIRMAN. Judge, as a matter of fact, it does. I mean it is not whether it could or should. I mean it does, it limits the protection, for example, in the case—I guess it was in New Mexico, where they passed a law saying minors cannot drink wine under any circumstances. As you know, in our church and in many churches, there is a sacramental taking of wine at communion, and in most churches that occurs in most Christian religions—I cannot speak for others—and it occurs when kids are 7 years old or 8 years old, and it impacts significantly.

You know, it was struck down, that restriction in New Mexico, it never got up to the Supreme Court, to the best of my knowledge. But clearly, under the test applied by Scalia, such a law could be passed and it would be held constitutional. It has a big impact, it is a big deal, not a minor thing.

Judge THOMAS. And I guess my point is our concerns are the same, that any test which lessens the protection I think is a matter of concern. The point that I am making, though, in not being absolutist is that I think it is best for me, as a sitting Federal judge, to take more time and to think that through, but my concern about the approach taken by Justice Scalia is that it may have the potential and could have the potential of lessening protection, and I think the approach that we should take certainly is one that maximizes those protections.

The CHAIRMAN. Judge, you know, when your confirmation is over and if you are on the bench, you are on the bench and the next nominee comes up, we now talk about the Souter standard and how Souter did not answer questions that some suggest he should or shouldn't have, I am not making a judgment on that. We are going to have a new standard, the Thomas standard, which is you are answering even less than Souter.

Senator HATCH. First of all, Mr. Chairman, I do not think that is true. I think he has answered forthrightly and very straightforwardly all the way through this thing. He may not give the answers you and I want——

The CHAIRMAN. No, I am not looking for an answer that I want, let me make it clear, Senator. I am just making a statement of fact. I asked the precise same question of Judge Souter. Just Souter, sitting not as a Federal judge, sitting as a State court judge, said "I agree with O'Connor," no ifs, ands, buts about it, just click, bang, I agree with O'Connor. That is the only point I am making.

Senator HATCH. But he has answered things that Justice Souter had not answered, so I am saying——

The CHAIRMAN. I cannot think of any, but maybe yes.

Senator HATCH. I can.

Senator BROWN. Mr. Chairman, if I could have 30 seconds, I would like to comment on the previous business you were kind enough to bring up.

The CHAIRMAN. Surely.

Senator BROWN. Thank you.

I thought perhaps it was worthwhile, while the transcript is not out, as you noted, to note a couple of things that had been dis-

cussed. First, my concern about having property rights treated as second-class rights, I did not mean to indicate that property rights are the basis for moral rights. I do believe they are integral, that they are interdependent, but I do not believe that is the basis for it.

Second, the tribe citation was meant to indicate their interdependence, not necessarily as a support for more.

Third, at least my view of it is the tribe showed the interrelationship between personal and property rights, not necessarily having a different implication than that, so I cited it for its interdependence of those rights and not for another purpose.

Thank you for allowing me to interject, Mr. Chairman.

The CHAIRMAN. I did misunderstand, though, you do think *Moore* was wrongly decided, you did say that, did you not?

Senator BROWN. I cited *Moore* as an example of a case where it is very difficult to separate personal rights and property rights, where the problems that were exemplified by *Moore* clearly affect both.

The CHAIRMAN. Right. I thank my colleague and I think that is a perfect case, because where two rights come in conflict, the right of the government to tell someone that they cannot live in an area, unless they live in that area with what is defined as a traditional family, and that a woman moves in and lives there, grandparents live there and they have two grandchildren who are cousins, not brothers and sisters, and the State, in the form of the county or city, East Cleveland, says you must leave, you are violating our laws, our zoning laws which affect property, and the Supreme Court says wrong, is a basic fundamental right to privacy for grandmom to have her grandchildren, even though they are cousins and not brothers who live together.

The reason I raised this is a perfect example of this. That is why I raised the White House Working Group report. I do not want to go into whether or not you signed it or did not. I am not talking about you now. There are a number of very intelligent, very well-intended, and maybe even right, but people have a very different view than I do, and I believe you are one in this score, Senator, who argue that, hey—not you, I am not talking about you, Judge, I am talking about my colleague—but there is a whole group of people in this town, in this country who say wrong, we ought to let States, counties, cities make those judgments, and if they do they should be upheld by the Supreme Court.

From my perspective as to how I read the Constitution, I think that is absolutely, categorically wrong to say that the State should be able to tell a grandmother she cannot have two grandsons living in her house, fine kids, no problems, cannot have them living in the house because they are cousins and not brothers. I think that is bizarre, but there are a lot of people who do not think it is bizarre, and that is why I asked you questions about that, because if you thought that way, Judge—which you said you did not—but if you did, I would do everything in my power to keep you off the Court, but you do not, so you said and I believe you.

My time is up, but that is what the debate is about and that is why I am asking the questions. I can think of no way to frame it better than it was just framed in terms of your discussion with me, Senator.

My time is up, and I yield now to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I have no questions of my own, but I will reserve my time in case something comes up I have not anticipated.

I do have one question to clear up something that was asked this morning by Senator Leahy.

Judge Thomas, this morning when you answered Senator Leahy's question about important Supreme Court cases, did you understand him to be referring to important cases decided when you were in law school?

Judge THOMAS. My understanding was that he was asking me for cases decided during the period that I was in law school, from 1971 to 1974, and I think I answered him in response to that *Griggs* and *Roe* v. *Wade*.

Senator THURMOND. I just wanted to clarify that if there is any question about it.

Now, Mr. Chairman, I believe the distinguished Senator from Illinois brought out that 12 Members of the House have opposed you. Is that correct?

Judge THOMAS. That is right.

Senator THURMOND. Well, Mr. Chairman, I wish to offer for the record a letter signed by 128 Members of the House endorsing Judge Thomas, several of whom are Democrats, and ask that that be made a part of the record.

The CHAIRMAN. Without objection, it will be made a part of the record.

[The letter follows:]

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(FROM CITY OF DENTON)

Congress of the United States
House of Representatives
Washington, DC 20515

July 3, 1991

The Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden,

We are writing to express our strong support for the nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court.

In our view, Judge Thomas is a man of impeccable character. Judge Thomas, a grandson of a sharecropper, was born in the segregated South and faced seemingly insurmountable obstacles. But through hard work and discipline he was able to overcome his impoverished condition achieving success in every task he undertook.

In Washington, Clarence Thomas has served in an exemplary manner as a judge on the U.S. Court of Appeals for the District of Columbia, and he was an outstanding Chairman of the Equal Employment Opportunity Commission which he chaired from 1982 to 1989.

Judge Thomas has worked with the United States' civil rights laws for more than a decade and his commitment to equal opportunity for all is second to none. Under the chairmanship of Judge Thomas, the EEOC effectively streamlined operations and clarified the rules and regulations of the Commission while enhancing its ability to fairly respond to claims of discrimination. Consistent with the purpose of the EEOC, Judge Thomas played a vital role in ensuring that older Americans and minorities have access to a fair and equitable means of redress.

Together with his tenure at the U.S. Court of Appeals, Clarence Thomas' record--both past and present--reveals that he has the qualifications and character to uphold the high standards the American people demand. We strongly support the nomination of Judge Clarence Thomas to the United States Supreme Court.

Respectfully yours,

DICK ARMEY

GARY A. FRANKS

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DOUG BEREUTER

CLIFF STEARNS

STEVE GUNDERSON

BEN GRADISON

Senator THURMOND. I will reserve the rest of my time.

The CHAIRMAN. Senator Kennedy——

Senator THURMOND. And, Judge Thomas, let me just say this, since I think I am through, unless something comes up I don't anticipate. I want to compliment you on the way you have conducted yourself during this hearing. I think you have shown that you are fair, you are open-minded; and you have answered all the questions you could without violating the oath that you will have to take as a judge on cases that might be coming up in the future. We are very pleased with the way the hearings went.

I want to compliment the chairman, Senator Biden, and the other members on this hearing and the way it has been conducted throughout. In my opinion, you deserve to be confirmed on the Supreme Court, and I anticipate you will be.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you. Mr. Chairman, if it is agreeable with the other members of the committee, even though I am entitled to the half-hour, Senator DeConcini will be at the Gates hearing on Monday. What I would like to do is just—there were three areas I would like to get into. I would like to divide the half-hour with Senator DeConcini and take 15 minutes, or try even to take less time and give the remaining time to Senator DeConcini and then go back over to the other side. But I would like to be able, at a reasonable hour on Monday, to be able just to finish up those additional areas, if that is agreeable.

The CHAIRMAN. Without objection, you will be.

Senator KENNEDY. Judge, the right to vote is at the very core of our democracy, and the Voting Rights Act has been extremely important in assuring that all Americans can exercise that fundamental right.

In a speech at the Tocqueville Forum in April 1988, you criticized Supreme Court decisions applying the Voting Rights Act. You said, and I quote, "Unfortunately, many of the Court's decisions in the area of voting rights presuppose that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual racial or ethnic group has sufficient clout."

Do you remember what the Supreme Court decisions on the Voting Rights Act were that you were referring to?

Judge THOMAS. I can't remember precisely, Senator, but I was perhaps referring to the effects test. Again, that has been quite some time.

I do know that I also was critical of the administration for not supporting the Voting Rights Act, and I do treasure it, of course, coming from a background or an area where that right was considered enormously important and difficult to secure.

Senator KENNEDY. Well, prior to the meeting, I think we made available to the Justice Department that we would be talking about the voting rights cases. I gave, I believe, some notice that I would be getting into these because I read through your speeches where you talked about the administration's position on the exten-

sion of the Voting Rights Act. But also in the speeches it has the criticism of the Voting Rights Act, and I think in the speeches, as I mentioned here, you were talking about the ethnic group having sufficient clout, and you were critically generally, as I understand, of many of the Court's decisions. There are only really three important decisions by the Court. You mentioned one. The other two were the *White* decision and the *Thornburgh* decision.

Judge THOMAS. Senator, my only concern would have been that in that context whether or not we were assuming that—for example, if you had an all-black district or an all-white district, whether that would necessarily always be good for black Americans. And I think some of the concerns would be that even now, as I have followed in the newspapers or in other journals, that perhaps some of the black individuals feel that the district, the white district that is left becomes more conservative and offsets the newly created minority district. That would have been the only concern.

I certainly have absolutely nothing but the greatest support for legislation that secures the right to vote.

Senator KENNEDY. Well, of course, the point that you make here is explicitly prohibited by the Voting Rights Act, which says that—the Voting Right Act explicitly says, "No group is entitled to legislative seats in numbers equal to their proportion in the population. The Act simply bans States from taking actions which result in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."

In these two cases, they basically struck down the at-large districts, both in North Carolina and also in Texas, specifically in Dallas, Texas, and San Antonio. And I was wondering if—otherwise, what we can do is come back on Monday to give you a chance to review these, if you would like. That is fine. I thought I had mentioned to the Justice Department that we would get into it.

Judge THOMAS. You did, Senator, and the underlying concern that you have is the same as the one that I have; that minorities have the ability to vote and to have an effective participation in our political processes.

My concerns were not intended to suggest that I was in any way opposed to voting rights or concerned that we have them. I think that they are critical, and I certainly have been most supportive and felt that we should have been more aggressive in stating that position during the Reagan years.

Senator KENNEDY. Well, I understand from reading your speeches that you were in support of the Voting Rights Act. Also in your speeches you talked about the criticisms of the Supreme Court on the voting rights.

Judge THOMAS. Yes.

Senator KENNEDY. And what I was interested in is finding out, you know, what the nature of the criticisms really were. You had said many Supreme Court decisions in voting rights are unfortunate, and I am just trying to find out what aspect of the Voting Rights Act that was decided by the Supreme Court and the major Supreme Court decisions affecting the Voting Rights Act dealt with at-large districts in the areas which I have just outlined.

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I was just trying to understand what in particular the Supreme Court decided on voting rights that you found objectionable. That was basically my question.

Judge THOMAS. I think my only concern, Senator, was with the effects test. But it was not—I did not go into detail into the voting rights cases, and that certainly was not my area. But what I am trying to, I guess, communicate to you is that my view is that voting rights should be aggressively protected, and I felt that we should have done that during the Reagan years.

Senator KENNEDY. Well, we all agree.

What was your trouble with the effects test, the holding?

Judge THOMAS. Well, I guess the only point that I was making, Senator, was whether or not it was on—again, this is general—whether or not we could really judge from the number of individuals who held office, for example, how effective a person's voting rights were being implemented or how effective the statute was implemented or how effective the minorities were in participating in the political process. I think it is one measure, and I felt that it was one measure.

But I underscore that by saying this, Senator: I did not study that area in detail. That was simply a concern. And I think that other individuals now are concerned because of the creation of what is perceived as more conservative districts, political districts.

Senator KENNEDY. Well, do I understand you correctly that in two of the major decisions by the Supreme Court that struck down the at-large districts, both in San Antonio and Dallas, also in North Carolina, at-large districts which historically had been in effect for years by individuals that wanted to deny effective rights to vote by minorities, blacks and Hispanics—that in one case, the *White* case decided unanimously by the Supreme Court, that there had been significant diminution of the effectiveness of the right to vote in Dallas as well as in San Antonio. I understand that their requirements that they go to single-member districts is not offensive to you.

Judge THOMAS. Senator, I again would go back and look at those cases, consistent with what you are saying, but I underscore that by saying that that was my general concern. It was not an objection to the aggressive enforcement of the Voting Rights Act.

Senator KENNEDY. Perhaps over the weekend, if you can sort of refresh——

Judge THOMAS. I will try.

Senator KENNEDY [continuing]. Your recollection about what were the particular aspects in the voting rights cases, because this was something that many of us were very much involved in here at the time of the extension.

I have just 5 minutes left of the 15.

In your article in 1989, "The Higher Law Background of the Privileges and Immunities Clause, the Fourteenth Amendment," one of the arguments you made for using the natural law to interpret the Constitution was that it is, and I quote, "The only alternative to the willfulness of both run-amuck majorities and run-amuck judges." I think those words have been used at other times in the hearing.

Are you willing to name any judge whom you considered to be a run-amuck judge? [Laughter.]

Judge THOMAS. Senator, I thought about it when I looked at that language again, and I couldn't name any particular judge.

Senator KENNEDY. Well, was Oliver Wendell Holmes a run-amuck judge?

Judge THOMAS. He was a great judge. Of course, we all, when you have opportunities to study them, we might disagree here and there. But I had occasion to read a recent biography of him, and obviously now he is a giant in our judicial system.

Senator KENNEDY. Because in your speech on how to talk about civil rights, you called Justice Holmes a nihilist who, and I quote, "sought to destroy the notion that justice, natural rights, and natural law were objective." And you went on to say about Holmes, and I quote, "No man who has ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach."

Judge THOMAS. I think that was a quote from someone else, Senator.

Senator KENNEDY. Well, I will——

Judge THOMAS. I may be wrong on that, but I think it was a quote from someone else.

Senator KENNEDY. I will provide that for you over the weekend. Maybe you can get a look at it.

Whatever time is left I will yield to Senator DeConcini.

Senator DECONCINI. Senator Kennedy, thank you very much. I am sorry to impose on you and the committee, but I do intend to be at the Gates hearing.

I only have a few follow-up questions. I may not even take 15 minutes, Judge Thomas. Yesterday, when I was asking you some questions on judicial activism, I made reference to *Missouri* v. *Jenkins,* which is a current case of 1990, and, as you may recall, it was a case where the Court imposed an increase in taxes.

The only question that I did not quite get an answer from you, although perhaps it is because of my own inadequacies, is do you believe that taxation is within the Federal power of the Federal bench, or is taxation power exclusively that of the legislative branch of government?

Judge THOMAS. Senator, I think that is explicit in the Constitution that the legislative branch imposes taxes.

Senator DECONCINI. So, without talking specifically about this case, which, who knows, might come up again, although I rather doubt it, do you feel that it would be judicial activism, if the court does impose taxes?

Judge THOMAS. I think, just in the abstract, I think it would be, and I do not know that it would be tolerated.

Senator DECONCINI. Thank you, judge.

Let me just touch on another area, a little bit of concern of mine, and you may have answered this and I might have missed it, and that deals with the Equal Protection Clause. You have taken a very strong position on the case of *Brown* v. *Board of Education.* Its companion case is the *Bolling* v. *Sharpe* case. Are you familiar with that case?

Judge THOMAS. Yes, sir.

Senator DECONCINI. As you know, the Court recognized that the 14th amendment's equal protection clause does not apply to the Federal Government, as a result, the Court held that the Federal law segregating the District's schools violated the due process clause of the fifth amendment, and the *Bolling* court ruled that the fifth amendment embodied the quality principles of the 14th amendment. Do you agree with the *Bolling* decision? Do you have any problems with that?

Judge THOMAS. I have no quarrels with *Bolling* v. *Sharpe,* Senator.

Senator DECONCINI. Thank you.

Last, in the area of literacy, I just want to go back to that case. When Judge Bork was here, and just so people understand that I make a great distinction so far, Judge Thomas, between you and Judge Bork. Bork was very critical of the *Bolling* decision and he said it was a clear rewriting of the Constitution by the Warren court. He labeled it "social engineering from the bench." I do not bring this up to open up wounds or anything else, but I do bring it up to point out that I think you are very different in your philosophy and in your approach to the Constitution than Judge Bork was, and, as far as I am concerned, that is important for your confirmation process.

In section 5 of the 14th amendment, it gives Congress the power to enforce, by appropriate legislation, the provisions of that particular amendment. Invoking its authority under section 5, the Congress, in 1965 and in 1970, adopted provisions of the Voting Rights Act banning literacy tests in certain instances, and those provisions were upheld in the *Katzenbach* case and in the *Oregon* v. *Mitchell* case. The Court held in those cases that Congress had the power to determine that requiring literacy tests in specific instances deprives voters the equal protection of the law.

Again, just for the record, Judge Bork told the Senate Judiciary Committee during his confirmation hearing that *Katzenbach* was bad constitutional law. How do you feel about that case? Maybe you have already answered that, but I missed it, if you did. Have you had a chance to review that voting rights case, and do you believe that they were correct in their interpretation?

Judge THOMAS. Senator, I did read that case. Again, I do not remember all the details of it and I cannot and did not have a basis or any quarrel with the case or the result in the case.

Senator DECONCINI. So, you feel that is, in your philosophy, a proper interpretation of the Constitution of this particular section 5?

Judge THOMAS. I just have no quarrel with it, Senator. I do not object to it.

Senator DECONCINI. When you say you have no quarrel, you mean that you agree with it, is that fair to say?

Judge THOMAS. I mean I do not disagree with it. I do not have a basis to disagree with it and I have not raised any objections about it.

Senator DECONCINI. Fine. I do not mean to quarrel with you, Judge. It is just a lot easier to yes, I agree with it, than to say I do not have any quarrel with it. It immediately raises a flag in some

people's mind as saying, gee, he won't take a position. I think you have taken a position.

Judge THOMAS. Yes.

Senator DECONCINI. I was just trying to get you to say yes, I agree with it, that is all.

Judge THOMAS. Well, I guess the difficulty that I have, I was more apt to say that when I was in the executive branch and be more categorical in answers. You asked me yesterday about my comments at the hearing, the contempt hearing, and my answer was categorical.

Senator DECONCINI. Yes, it was.

Judge THOMAS. And you asked me what I learned from that and the response was not to be categorical. Certainly, as a judge, I think that it is important that when I do not know where I stand on something or I have not reviewed it in detail, that it is best for me to take a step back and say I have no reason to disagree with it, rather than saying I adopt it as mine.

Senator DECONCINI. I guess that is a fair idea. But when we are talking about a literacy test on the right to vote and if you have read the *Katzenbach* case or the *Oregon* case, it does not seem unreasonable to say yes, I agree with those cases. Now, if a different set of circumstances came up and it was a different kind of literacy test, it seems to me it gives you every ample right, once you are on the bench, if you are confirmed, to say, well, this is different than the *Katzenbach* case. My only concern is I think these cases, and I have read them and I'm sure you have too—seem to make sense to me, and my question is does it eminent sense to you?

Judge THOMAS. It makes eminent sense to me to find unlawful literacy tests that are used to deprive people of the right to vote.

Senator DECONCINI. That is all I wanted.

Judge THOMAS. And let me just give you——

Senator DECONCINI. That is all I am looking for.

Judge THOMAS. I want to give you a quick anecdote as to why it is so important.

Senator DECONCINI. Yes.

Judge THOMAS. I can remember my grandfather poring over the Bible, in order, as he said, to go and get his right to vote and it was a painful experience watching that, so I understand what you are saying.

The only point that I was making in the reservation is that the way you approach it and the way you reached that result, but the underlying concern I think we both share.

Senator DECONCINI. Oh, I do not think there is any question, we share that underlying concern. It is just that we have certain cases that are beacons in a particular area, and these two cases are. And without having you comment on what you are going to do if another voting rights case comes, it just seems appropriate for you to take a position and answer it. And I think now that you have answered it, that, yes, you believe these cases are correct, and that is really all I want to know. I only say that because I think some people get disturbed up here when they cannot get you to say yes or no. And after maybe what I asked you yesterday, you are a little bit leery of saying yes or no. But when there is as a case as clear as this, I appreciate the affirmative answer, clearly.

Those are all the questions I have, Judge.

I want to thank my friend from Massachusetts for permitting me to intervene here. I think there still is some time, Senator Kennedy, on your time, because I do not think I have taken the full 15 minutes.

Senator KENNEDY. Well, I understand from the previous agreement that would conclude this portion of the hearings for today and, as the chairman has pointed out, we will resume the hearings at 9:30 on Monday morning.

The committee stands in recess.

[Whereupon, at 4:30 p.m., the committee recessed, to reconvene on Monday, September 16, 1991, at 9:30 a.m.]

NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, SEPTEMBER 16, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room 325, Senate caucus room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge. It is a pleasure to have you back. As I said, I expect this will be our last day to hang out in this room together. And I know things are moving along, and you have begun to take this process seriously because I have now met your eighth-grade nun. She is here today, which means that we had better end it. I assume that is why you have her here, just in the event that somehow if we couldn't finish, she would remind me of the fact that I said on Friday we were going to finish. So I assure you we have an added incentive to finish today.

With that, why don't we get right to the order of questioning, Judge. Again, anytime that you would think it is appropriate to take a break, we will do so. I think what we should do is sort of play it by ear as to when we have lunch, because I would like to finish before lunch. Lunch may mean 12 or it may mean 1. But let's make that judgment as we go, if that is all right with you.

All right. Where we are now is the next questioner will be the most senior Republican who has any questions, and I yield to Senator Thurmond if he has any.

Senator THURMOND. Mr. Chairman, I have no more questions, and none on our side have any except the distinguished Senator from Pennsylvania. I believe he cares for a third round.

Senator Grassley, did you have any questions on the third round?

Senator GRASSLEY. I have used 6 or 7 minutes of the third round and don't anticipate using any more unless something happens.

Senator THURMOND. So you have no more at this time. Well, then, the distinguished Senator from Pennsylvania.

The CHAIRMAN. We yield to the Senator from Pennsylvania.

Senator SPECTER. I thank the Chair.

Judge Thomas, if you are confirmed and if you join the current revisionist Supreme Court—and I call it a revisionist Supreme Court as opposed to a conservative court because the current court has gone beyond the conservative judgments illustrative of the unanimous opinion of Chief Justice Burger in the Griggs court. I think—I would ask if you would be philosophically attuned more to the Justice O'Connor line or the Justice Scalia line. And I will deal with two cases for illustrative purposes.

When I had finished my questioning, when my time ran out on the second round, I had been asking you about *Rust* v. *Sullivan*. And in *Rust* v. *Sullivan*, Justice O'Connor dissented. That was the case where you had a regulation by the Department of Health and Human Services which had stood from 1971 to 1988 and then it was changed, and the Supreme Court upheld its change on a variety of grounds which I had specified in my last round. But the one which struck me the most peculiarly was the ground that it is appropriate to change a regulation when it is in accord with a shift in attitude. That has related, in part, to your compliment of Justice Scalia in your Creighton speech where he had referred to political considerations on changes in regulations.

Justice O'Connor on the other hand voted to uphold the original regulation and to strike down the new regulation because, as she put it, "It would raise serious constitutional problems and would constitute a serious first amendment concern." But I would ask whether you would side with the O'Connor branch or the Scalia branch of the revisionist court.

Judge THOMAS. Senator, without reference to *Rust*, I think as I attempted to explain when we addressed this last week, *Chevron* v. *U.S.A.* involved an instance in which EPA changed its regulation, an existing regulation concerning the bubble concept. That was a concept that was hotly contested, and EPA had adopted a regulation rejecting the bubble concept, as I remember it.

Subsequent to that, EPA revisited the concept and adopted it, and the question was whether or not this new regulation was a reasonable interpretation of EPA's underlying statute, or the statute in that case. And the Court held that it was, indeed, and upheld the regulation.

That is generally the existing law with respect to deference to agencies' reasonable interpretations in the administrative law area. Whether or not that is easily transported to the difficult case that you have just mentioned or is easily reducible to an instance in which there seems to be just a change and, as you say, shifts in political—shifts of attitudes and whether shifts of attitudes would constitute a reasonable basis for making such a change or that shift in attitude comports with a reasonable interpretation of the underlying statute is, I think, a totally different question.

But the point that I am making is simply that the Supreme Court has permitted—in the leading case in the administrative law area has permitted there to be a change of regulations by the agency, even when the existing regulation had been in place for some time.

Senator SPECTER. Judge Thomas, in *Rust* v. *Sullivan*, the Court concluded that the regulation was acceptable, saying that:

The regulations simply ensure that appropriate funds are not used for activities, including speech, that are outside the Federal program scope.

That ruling gives me enormous concern. It has given many, many people in this country enormous concern in light of the very extensive Federal rule on funding. So that if you have a Federal program which is funding a given activity and you say that no one can speak in opposition to that program, there is an enormous latitude for restricting freedom of speech. And my question to you is: Do you think that it is appropriate when there is Federal funding involved to limit speech when that speech is outside the Federal program scope?

Judge THOMAS. Senator, I think that in this case, with respect to the question, the underlying question in *Rust* v. *Sullivan*, I think it would be, from my standpoint, moving too far to comment on the underlying issues.

Senator SIMON. Why?

Judge THOMAS. As I have indicated in other instances, Senator, in these difficult cases, it is important to me that I not compromise my impartiality should cases of this nature, similar cases be considered by the Supreme Court in the future, if I am, of course, fortunate to be confirmed.

Senator SPECTER. But, Judge Thomas, I am not asking you about any specific issue, let alone any specific case. I am asking you about a very broad—a broad, broad philosophical question. It is as broad as the areas of Federal funding, which are gigantic, and it is as broad as the first amendment freedom of speech, which we hope even exceeds the breadth of Federal funding. And the issue is, just because the Federal Government gets into funding and establishes a scope of a program—and I am not talking about any specific issue—doesn't that give you at least some concern about limitations on speech, if you could curtail speech where Federal funding is involved?

Judge THOMAS. I think as I suggested last week, Senator, I was very concerned in instances in which it appears or in instances in which regulations by the Government curtail our fundamental freedoms, and in this case freedom of speech. I share that concern.

What I am attempting to avoid is offering a judgment on an agreement with a point of view on a very hotly contested and difficult case that could certainly come before the Court again.

Senator SPECTER. Well, Judge, I am really beyond the case, but I will not press it further. Let me move on with my question to you about the revisionist court and, if you join, whether you will be on the Scalia branch or the O'Connor branch, and go back to *Johnson* v. *Santa Clara*. Justice O'Connor takes Justice Scalia to task for his dissent which he says is an academic discussion, and then I think in a very important doctrinal view says that:

Justice Scalia's dissent rejects the Court's precedents and addresses the question of how title VII should be interpreted as if the Court were writing on a clean slate.

You have already stated that you believe the constitutional interpretation is a moving body, depending on the tradition and customs of our society, without being rigidly controlled by original intent. And here you have Justice Scalia taking title VII, as Justice O'Connor says, writing on a clean slate. And Justice O'Connor rejects

that and says that we have to take into account the Court's precedents.

My question to you: Would you choose a preference between the approaches between Justice O'Connor and Justice Scalia on that issue?

Judge THOMAS. Senator, I think it is important for any judge to take into account, even when he or she disagrees with a particular case, to recognize that there is the additional burden and additional question of whether or not this case should be overruled; that is, a question about the doctrine of stare decisis.

I do not think that judges should assume, simply because they disagree with a particular case, that we are operating as though there was no prior case law or there are no precedents and feel free to act as though they are not in any way controlled or restrained or constrained by prior case law.

My sentiments, without expressing a particular judgment on that case, my sentiments would be toward a preference for recognizing that there is significant weight to be given to existing case law and that the burden is on the judge who wants to change that precedent, to not only show why it is wrong, but why stare decisis should not apply.

Senator SPECTER. Thank you. I am going to score that one for Justice O'Connor, which may make it one to one.

Let me move on to the war powers issue, Judge Thomas, a question which has not yet been broached and one that I think is enormously important and one which you and I had discussed in the informal session which we had before the hearings started.

We have just seen a historic event in the course of the past year with the gulf war and the vote by the Congress authorizing the President to use force in the gulf war. In your writings, you have been concerned about congressional activity in many areas; and in your speech at Brandeis University on April 8, 1988, you said:

> In many areas of public policy, including foreign policymaking, Members of Congress can thwart or substitute their will for that of the Executive.

And you focus on foreign policy.

You have been very critical of the Congress, as I had commented earlier, noting that there is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business. And in your speech on September 3, 1987, at the American Political Science association, you quoted with approval a statement by Gary Jacobson that in Congress there is great individual responsiveness, equally great collective irresponsibility.

There are many issues where there is a confrontation between the President and the Congress, which we all know, and I would like your views as to the authority of the Congress under its constitutional, exclusive responsibility to declare war, as opposed to the President's authority as Commander in Chief, which is a very central issue, was a central issue earlier this year.

Let me start with the question that I told you I was going to ask you, and that is whether the Korean conflict was, in fact, a war.

Judge THOMAS. Senator, I, in response to our informal discussions, did attempt to resolve an issue that scholars and political scientists, lawyers, seem to have been debating for the last 40 years

and I recognized, I believe as I indicated to you, the hostilities in Korea and the President's response. Of course, I don't think that there was a suggestion that the President could not respond, but your question at the time went to whether or not there should have been a declaration of war.

Senator SPECTER. Correct.

Judge THOMAS. And the short answer to that is, from my standpoint, I don't know. I have attempted to look at that question, but, again, it is one that scholars haven't resolved and that legal minds haven't been able to resolve. And I think that I would be imprudent to attempt to resolve it in this environment.

Senator SPECTER. Well, Judge Thomas, when I asked you the question at our informal session as to whether the Korean conflict was a war, you said, "You asked that question of Judge Souter." And I said, "That is right." And he ducked, and then I said, "Well, let me give you the weekend." He came back and he said, "I don't know."

Now, I thought that was OK under those circumstances where it was from Friday to Monday, but you and I talked about this on August 1 and now it is September 16. And I don't think that the Korean incident is going to be repeated. It is not asking you to comment on a pending case, and it is well established historically as to what happened. And this is a crucial issue as to whether American troops are going to be committed to combat on the President's word alone as Commander in Chief or whether it is going to require a congressional declaration of war.

So, to the extent that I can push it just a little bit, let me repeat the question. Was it a war?

Judge THOMAS. Senator, this isn't one of the instances in which I am saying that the issue of whether or not the Korean—the hostilities in Korea was a war would be coming before the Court. This is an instance when, as I have indicated to you, I simply don't know.

Senator SPECTER. Well, let me try again. Instead of moving to an easier question, I will move to a harder one.

In early January of this year, there was a lot of debate as to whether the President had the authority to commit troops in the gulf war without a resolution. President Bush asserted he did. And this Judiciary Committee held hearings in early January, and some even suggested, I think ridiculously, that the President would be impeached if he moved ahead without waiting for a congressional resolution. I thought it was ridiculous because Congress had sat on its hands for months and had allowed the United Nations to set a date for the use of force January 15, and finally—finally—Congress acted, started some discussions on January 10 and moved on it on January 12.

I am not going to ask you whether you think the Constitution required congressional action or the President had the sole authority to act as Commander in Chief, because if you won't answer the Korea question, you are not going to answer that one. So let me ask you instead: What would the considerations be that you would work through in approaching that kind of a legal issue?

Judge THOMAS. It is a very difficult issue, Senator. I have addressed whether or not—in the War Power Act, resolution, of course, is very complex and has a variety of reporting provisions,

as well as the more difficult provision involving the withdrawal of troops.

I think that, as I may have alluded to in our conversation earlier in private, the whole issue of what the President's authority is, as opposed to the authority of Congress, seems to be one that is more amenable to the kind of process that this body and the Executive went through or engaged in the Persian Gulf conflict; that is, one in which the conflict is resolved in the political context.

I don't think there is certainly not very much in the way of judicial precedent or judicial consideration of this particular issue. And as I have noted before, there is an ongoing debate among scholars on both sides of the issue. I for one, just as I have viewed the issue, as I have looked at it, it seems to be one of those instances in which the differences, particularly when there is an existing conflict, are better worked out in cooperation between the executive and the legislative branches.

Senator SPECTER. Well, Judge Thomas, I agree with you totally that it is better to work them out, but that issue could come before the Court. And a concern which I have expressed is your statements suggesting a lack of wisdom in the Congress, and I know you have already said that you will be fair and impartial and that what you had said in the past was as an advocate as opposed to where you stand as a judge. So I don't think there is any use in pursuing that one any further.

Let me turn to a specific case which you have decided, Judge. Although you did not write the opinion, it is a case of some significance involving the *United States* v. *Jose Lopez*. It is a case which involves the interpretation of socioeconomic status under the Uniform Sentencing Guidelines which have been enacted to try to bring uniformity on sentences in criminal cases. Those guidelines say that socioeconomic status should not be considered on the sentencing issue.

The facts in this case were very compelling about Mr. Lopez in terms of his own background, where, as the opinion of the court said, the tragic circumstances involved the death of his mother by his stepfather murdering her, his own threats that he had to leave town to avoid problems, his growing up in the slums of New York and Puerto Rico, and of not fitting in because of his dual background.

The U.S. attorney prosecuting the case on behalf of the Government in asking for a tough sentence argued that—and this is also from the opinion:

> The Government urges that a focus on particular life experiences would permit every defendant to distinguish himself from all others, and this would undermine the purpose of the uniformity of sentencing procedures.

You were on the panel which upheld an expansion of the sentencing guidelines which prohibited considering socioeconomic circumstances. And my question to you is: How far do you think it is appropriate to go in that line? And was the U.S. attorney prosecuting the case, in asking for a tough sentence, really totally wrong in the concern expressed that it would permit every defendant to distinguish himself from all others and thus undermine the purposes of uniformity in the guidelines?

Judge THOMAS. The concern—as you indicated, Senator, I didn't write the opinion, and——

Senator SPECTER. But you joined in the opinion.

Judge THOMAS. I joined in the opinion. After awhile, you learn that when you don't—after about 150 or 200 of these cases, they are a little hard to recall. But this case was a difficult case. It is one that took into account the notion or the concern that this body had that sentences be uniform, that there not be wide disparities in sentences.

At the same time, the question was when there is an individual, such as Mr. Lopez, who has had very difficult and traumatic circumstances in his or her life, is this a factor that is not socioeconomic. Even though it may have resulted from socioeconomic status—that is, where he lived—are these factors that should be considered?

I think what the court did in that case—and I haven't had an opportunity to review that opinion—is to wrestle with that difficult issue, but also to recognize that there was in the uniform guidelines a prohibition against considering socioeconomic status and I think ultimately feeling compelled to comply with that requirement.

Senator SPECTER. Judge Thomas, the issue of the death penalty has not arisen in these proceedings except for one reference earlier to Federal court habeas corpus, but that is a very important subject. There are deep-seated differences of opinion on the matter. I was a district attorney in Philadelphia for many years and believe the death penalty is a deterrent. Philosophically, is there anything about the application of the death penalty which would bother you from upholding it, if confirmed for the Supreme Court?

Judge THOMAS. Philosophically, Senator, there is nothing that would bother me personally about upholding it in appropriate cases. My concern, of course, would always be that we provide all of the available protections and accord all of the protections available to a criminal defendant who is exposed to or sentenced to the death penalty.

Senator SPECTER. Well, since *Furman* v. *Georgia*, there have been elaborate circumstances set up for consideration of all the mitigating circumstances. But there has been a concern beyond the imposition of the death penalty in terms of its not violating the eighth amendment to cruel and unusual punishment. And I frankly am pleased to hear your answer that you would support it in the appropriate case.

There has been another concern about the tremendous delay, in some cases as long as 17 years, an average of 8½ years. And there are proposals pending which I have authored which would set time limits within the Federal system to give an opportunity in the Federal court for a full hearing, but to make it a priority case because it is really watched by so many people as to whether law enforcement is really serious in carrying out penalties.

One of the legislative provisions calls for a time limit in the Supreme Court to decide these matters within 90 days, unless the case is so unusual that it requires an extension of time, in which event the Court could take longer on a stated reason.

But I have two questions for you. One is—and people said this was too much for Congress to do because the Court didn't sit in the summertime, and the response to that was, well, the Court could sit in the summertime like other courts do. And my question to you is: Do you think that Congress has the authority to establish a timetable—as we have under the Speedy Trial Act, for example—and, second, to try to abbreviate it, whether 90 days is a reasonable time? Or if not, what time limit would be?

Judge THOMAS. Of course, there is precedent, as you have alluded to, Senator, for establishing timeframes. Whether or not Congress has the authority to do it in this particular case I have not had an opportunity to think about. But Congress certainly has established timeframes in a procedural way that governs the way Federal courts at the district court level, certainly in our Rules of Civil Procedure that govern the way that we do business. The Speedy Trial Act I think is the best example, the one best example.

The question as to whether or not 90 days is the appropriate time, I don't know. My concern would be this: I know that there is the attitude that we must move on, that you must clear these cases from the docket. We feel that way. We certainly feel that pressure as judges. But I think that there can be instances in which 90 days is not enough. There can be instances in which it may take more time to assure oneself that a particular defendant has been accorded all of his or her rights.

I would be reluctant to say that I endorse a particular cookie-cutter approach, but at the same time, I have no alternative to offer as to what is an appropriate length of time. But my concern would always be that we do not put ourselves in the position of adopting an approach that would ultimately in some way curtail the rights of the criminal defendant.

Senator SPECTER. Moving, Judge Thomas, to the Voting Rights Act, you have criticized Supreme Court decisions there and have, as noted in your Wake Forest speech back on April 18, 1988, referred to the individual right to vote as opposed to protecting some ethnic group with sufficient clout. But the Voting Rights Act has been very carefully tailored to try to provide that there is organization of voting districts so that a specific group does have some clout, as opposed to a large representation or a configuration which deny a group of some meaningful participation in the electoral process.

My question to you is: Don't you think, aside from the generalization of individualism, that there is some very important objective to be reached through the Voting Act to have a group with an adequate meaningful participation in the political process?

Judge THOMAS. Yes, I agree with that, Senator. My concern—I think when I wrote that, these speeches on individual rights versus group rights, I believe, and that was a one-paragraph example. I was using this general example, and it is the general concern that I have had throughout my speeches, and that is in according group rights that you don't overlook individual rights. I was not—I loosely, I think, referred to the voting rights cases, but the debate that I was referring to was the school of thought when—I remember in the early 1980's there was some suggestion and some feeling that the Supreme Court cases prior to the amendments of the Voting

Rights Act required proportional representation. And, of course, there were denials to that, but there was that school of thought.

My attitude was that if, indeed, there is proportional representation that that presupposes—I think that is the word I used in that speech—that presupposes that all minorities would vote alike or all minorities thought alike. And that is something that I have—those kinds of stereotypes are matters that I have felt in the past were and continue to feel are objectionable.

Senator SPECTER. Thank you, Judge Thomas.

I know my time is up, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you very much, Senator.

Our next questioner would be Senator Kennedy, but I understand he is prepared to yield to Senator Metzenbaum because Senator Metzenbaum is also required to be at the Gates hearing and to question there.

Senator METZENBAUM. Thank you, Mr. Chairman, and thank you, Senator Kennedy.

Good morning, Judge Thomas. It is nice to see you again.

Judge Thomas, your testimony before this committee has touched upon the subject of economic rights several times. This is an area of concern because over 50 years ago, the Supreme Court used economic rights arguments to strike down laws that were designed to protect workers' rights and establish a minimum wage.

In a 1987 speech to the Business Law Section of the American Bar Association, you stated that, "The entire Constitution is a Bill of Rights and economic rights are protected as much as any other rights."

You also stated that, "Legislative initiatives such as the minimum wage in Davis-Bacon provided barriers against black Americans entering the labor force." You went on to say, "It is amazing just how little attention has been paid to these outright denials of economic liberties."

Frankly, Judge Thomas, I am amazed to hear you say that legislative initiatives such as the minimum wage provided a barrier against black Americans. I would say percentage-wise in my opinion—I don't have the statistical data, but I would guess that percentage-wise no group of Americans benefited more from the fact that employers could not pay them less than $3.35 an hour. And, of course, it has gone up since that time.

But, Judge Thomas, in this 1987 speech you characterized the minimum wage as "an outright denial of economic liberty," and you stated that, "Economic rights are as protected as any other rights in the Constitution."

My question to you is: In 1987 did you believe that the minimum wage law violated economic rights which you thought were protected by the Constitution?

Judge THOMAS. No, Senator. And I think I have made myself clear here, and I have discussed it here. I don't have a copy of the speech in front of me.

The point that I was making with respect to minimum wage was a policy point, not a constitutional point. But let me address the constitutional point first.

I have indicated that I believe that the Court's post-*Lochner* decisions are the correct decisions; that those cases were appropriately

decided; that the Court is not a super-legislature to second-guess the very complicated social and economic decisionmaking of the legislative and executive branches.

With respect to the minimum wage, there was an ongoing policy debate concerning what the impact of the minimum wage was on certain minorities, particularly minority teenagers, and there is data to suggest that each time the minimum wage rises, minority teenagers, the unemployment rate increases.

Now, that is not to suggest that the minimum wage itself is not beneficial; indeed, it is. I think we all want everyone to make a decent wage. I certainly believe in that. But I think that there was a legitimate debate as to what are some of the impacts or unintended consequences of it, and that was the basis of that comment.

Senator METZENBAUM. Well, Judge Thomas, as Chairman Biden pointed out on Wednesday, economic rights currently are not entitled to the same degree of protection as other rights, such as due process, equal protection, and free speech. If they did receive that degree of protection, it would be much harder for Congress to pass laws protecting the environment, workers' rights, and the safety of workers in the workplace.

The speech in which you made that statement regarding economic rights was not a speech on political philosophy that you were giving to the Cato Institute. You were talking about the Constitution and economic rights, and you were talking to the Business Law Section of the American Bar Association. These were corporate lawyers. I am sure many of them were delighted to hear what you had to say about economic rights being protected by the Constitution as much as any other rights.

But on Wednesday, in response to a question from Chairman Biden, you stated that in constitutional adjudication, it would not necessarily be the case that the protection of economic rights "would be at the same level that we protect other rights."

Now, based on what you said in 1987 and what you told this committee, it would appear to me that today, as well as in your response to the chairman, that you have changed your views regarding this subject. You didn't make a distinction in your speech between young blacks and older blacks. You were talking about all blacks.

What has prompted you to change your views on this matter of economic rights?

Judge THOMAS. Senator, I have not changed my views. The point that I was making is that we do have rights, property rights, economic rights, within our Constitution. Now, we have other rights in our Constitution. The question becomes in constitutional adjudication at what level of scrutiny can those—or at what level of scrutiny does the Court look at regulation of those rights? They do exist. They are in the Constitution. I don't think there is any disagreement about that. The level of scrutiny for socioeconomic—in this case, the relevant factor for economic rights is rational basis. I have not quibbled with that, and I have made that clear.

In fact, in that very same speech or in one closely related to that, I made the point that the individuals who wanted to revisit the level of scrutiny for economic rights, I disagreed with them—individuals, as Chairman Biden mentioned, such as Macedo. But the

mere fact that you don't review those rights in the same way doesn't mean they don't exist, and it does not mean that they are not important.

However, I think what we do recognize in this society is that there are some rights that we value that are so deeply embedded in our society, at the core of our society, such as our first amendment rights, that we will review with a different standard. But to review it as a different standard in no way says these rights are unimportant. It recognizes our political process.

The CHAIRMAN. Will the Senator yield on my time?

Senator METZENBAUM. Of course.

The CHAIRMAN. Professor Macedo has come up several times. I have raised him. And I would like for the record to read a letter I received from Professor Macedo on Friday afternoon. I am sure he wouldn't mind. And this is his book. He said I kept holding up Epstein's book. I might as well hold up his book. [Laughter.]

It says, "Dear Senator Biden: Many thanks for giving me 15 minutes of fame, as Andy Warhol promised. Quite apart from this, though, it might be hard to profess objectivity now"—that is not relevant.

He said, "I could not agree more that the natural law issue is worth pursuing and have been a bit disappointed by Judge Thomas' vagueness." I might note parenthetically I have been very happy with that.

As a token of my appreciation, I wanted to offer a few pieces of work to you and your staff. The article, "The Right of Privacy: A Constitutional Moral Defense" is pretty clear and straightforward, I think, on the question of why something like natural law is inescapable in constitutional adjudication, as you have said at the hearings. I send along the book.

Then I want to read from just one paragraph of the article he sent along to make sure everything is clear in the record as to why both Senator Metzenbaum and I are pursuing this about Dr. Macedo. This is Steve Macedo's article, "Economic Liberty and the Future of Constitutional Self-government," sent to me Friday by Professor Macedo, and it is Macedo, M-a-c-e-d-o. He says:

The future economic liberty under the Constitution depends on the viability of the double standard—

his words, the double standard—

that has for nearly half a century characterized judicial interpretations of our fundamental law. The modern court applied a searching level of scrutiny to challenge laws that interfere with a list of preferred freedoms, including liberties associated with speech, religion, and privacy, or that involve discrimination against discrete and insular minorities. At the same time, and despite the Constitution's several explicit supports for economic freedom, laws interfering with economic liberties and property rights are typically subjected to a lax test designed to establish only the merest rational basis exists for the law in question. In applying this double standard, as I shall explain at greater length below, the modern court ignores the Constitution's support for economic liberty, disparages close connections between economic and other forms of freedoms, and invests legislators with unwarranted measures of trust, trampling at the core ideal of our constitutional regime the aspiration of reasonable self-government.

Now, the judge knew and I knew and everyone else knew why I asked that question, because Professor Macedo believes that the standard—which I understand you have no quarrel with and

accept, that has been around for half a decade, as he points out, is one that we should continue.

Judge THOMAS. That is right.

The CHAIRMAN. He believes it is one we should jettison. That was the reason for the questions and the reason why I appreciate—whether I agree with it or not—your answer distinguishing the fact that you do not agree with Macedo that we should jettison this double standard, as he called it. Am I correct?

Judge THOMAS. Right.

The CHAIRMAN. I thank the Chair, and I ask unanimous consent that the letter to me be introduced in the record as if read.

[The letter follows:]

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September 12, 1991

Senator Joseph Biden
Chairman, Judiciary Committee
SD-224, Dirksen Senate Office Building
United States Capitol
Washington, DC 20511

Dear Senator Biden:

Many thanks for giving me 15 minutes of fame - as Andy Warhol promised.

Quite apart from this - though it might be hard to profess objectivity now - I have been very impressed with your questioning. I could not agree more that the "natural law" issue is worth pursuing, and have been a bit disappointed by Judge Thomas's vagueness.

As a token of my appreciation, I wanted to offer a few pieces of work to you and your staff. The article on "The Right to Privacy: A Constitutional and Moral Defense" is pretty clear and straightforward, I think, on the question of why something like natural law is inescapable in constitutional adjudication, as you have said in the hearings.

I ~~send along the book, in part~~, in case you need another prop. It was a good ~~visual effect~~ when you waived the Epstein and Fried books - but I wouldn't want you to wear them out!

May I make one humble request? I believe that Warhol's promise hae a proviso to the effect that when you get your 15 minutes they've got to spell your name right. Mine seems to have entered the transcript as "Masito," according to the New York Times at least. Since I am not Japanese but Portuguese (like many of your constituents in New Jersey) I wonder if someone could correct the transcript?

Again, many thanks. You are doing an honorable job, and doing it well. Keep up the good work!

~~Sincerely,~~

Stephen Macedo
Associate Professor

The CHAIRMAN. I thank the Chair for allowing me—not the Chair.

Senator METZENBAUM. You are the Chair.

The CHAIRMAN. Well, I thank you very much. Sitting next to Senator Thurmond I am never sure what I am. He is always the Chair. But thank you very much for the interruption, but I thought it important to put that in the record. Anyone who wants to look at the book, this is it, "Liberal Virtues."

Senator METZENBAUM. One last question on this matter of the minimum wage. You gave me a rather lengthy answer, but I think this just takes a simple yes or no.

Do you still believe that the minimum wage law is an outright denial of economic liberty for employers?

Judge THOMAS. Senator, I think that I characterized it in the way that I think that I meant it, and that is that it does have unintended consequences of eliminating certain individuals or precluding them from entering the job market. There is data on that. I have——

Senator METZENBAUM. You haven't answered the question, Judge Thomas, I beg to point out to you. You are talking about the impact. I am not asking about the impact. You are saying it does preclude certain individuals from obtaining jobs. My question is: Do you still believe that the minimum wage law is an outright denial of economic liberty? Which is what you had stated, I think it was in 1987?

Judge THOMAS. And I explained, Senator, I think, what I meant by that. It does not allow certain individuals to enter the work force. And I did not intend to suggest, as I have also indicated to you, that this was some sort of constitutional judgment.

If we are talking about constitutional law, liberty in that sense, then the answer is no. That is not what I am saying.

Senator METZENBAUM. One of the most puzzling parts of your testimony to the committee last week is your suggestion that we should discount most of your past statements on legal and policy issues because those were made in your role as a policymaker rather than as a judge. The interesting thing is that your supporters assert that your childhood experience of growing up poor in the segregated South is a very important part of our consideration, and I agree with that. Your supporters argue that your personal history demonstrates that you will bring sensitivity to the bench when considering issues of race and poverty. I am not sure whether I agree with that.

You have basically said the same thing to us. In other words, your argument seems to be that your childhood background is more relevant to assessing your qualifications for the High Court than are a decade of speeches and writings and an 8-year record while head of the EEOC. Frankly, Judge Thomas, I have difficulty with that. Your tenure at EEOC is the major portion of your record. That is what qualified you for the court of appeals. Quite frankly, your tenure on the appellate court has been so brief that it gives us little indication of what kind of Justice you would be on the High Court. By your own admission, you spoke out on a number of issues during your chairmanship at the EEOC.

Judge I start from the assumption that public officials mean what they say. I do not think you were going around the country articulating views and advocating policy positions that you did not believe in. And if you were articulating views or advocating positions that you did not believe in, I think it is incumbent upon you to tell this committee when and why you were doing that.

I have to assume that when you expressed views on legal and policy issues as EEOC Chairman, those were your views. I can accept the idea that your views on certain matters may have changed between now and the time which you expressed yourself on a particular issue. But it is difficult to accept the notion that the moment you put on that judge's robe, all the views and positions which you held prior to going on the bench just magically disappeared. That is not my experience of the way it is in the real world.

If that was the case, then there would be no point in looking at anything beyond the past 16 months of your life. The pre-judicial record and positions of a nominee are usually a good indicator of what kind of judge that nominee will be. That is why we have these hearings—to explore that record and those positions.

You have spoken out a great deal on contemporary social and political issues. I want to ask you about some statements you have made on these issues because so often today's political or social issue becomes tomorrow's legal issue for the Court.

I think it is important for the Senate to have a sense of how you think about these matters. I have copies of speeches I want to ask you about. If you need to refer to those speeches or believe that a quote has been taken out of context, you should say so. I am trying to get a sense of how you think about political and social issues, and it is important that we be accurate.

For example, in an April 1987 speech at the Cato Institute, which has been referred to quite often, you stated that you "agree wholeheartedly" with former Treasury Secretary William Simon's statement that:

> We are careening with frightening speed toward collectivism and away from free individual sovereignty, toward coercive, centralized planning and away from free individual choices, toward a statist, dictatorial system and away from a nation in which individual liberty is sacred.

Now, Judge, this statement frankly does not comport with the reality of American political life in 1987. Why is it that in the seventh year of one of the most conservative administrations in this century you believe that this country was "careening with frightening speed toward a statist, dictatorial system"?

Judge THOMAS. Senator, I think that I have not an opportunity to go back and review that speech in detail. I have looked at it and don't know exactly where that quote appears in it. But the point I think throughout these speeches is a notion that we should be careful about the relationship between the Government and the individual and should be careful that the Government itself does not at some point displace or infringe on the rights of the individual. That is a concern, as I have noted here, that runs throughout my speeches.

In quoting former Secretary of the Treasury Simon, I think I was just underscoring that point.

Senator METZENBAUM. Well, Judge Thomas, if you have the speech in front of you—if you don't, I will send it to you—let me point out to you where it appears because I think that is very significant, and I think you have made a significant point. It is in your windup. "I find myself agreeing wholeheartedly with former Treasury Secretary William F. Simon when he asserts that"—and then I read the whole quote. And then you go on to say, "I can't think of a more appropriate time for truth than the Bicentennial of our Constitution"—thank you. Was there some material in between?

I am informed by my staff that——

Judge THOMAS. Which speech——

Senator METZENBAUM. That was the very end of the speech.

Judge THOMAS. Which speech was that, now, Senator?

Senator METZENBAUM. This was the speech to the Cato Institute on April 23, 1987. My question to you, so we don't lose sight of it, is that this was the seventh year of the Reagan administration, and I am trying to find out from you how you concluded that the country at that time was "careening with frightening speed toward a statist, dictatorial system."

Judge THOMAS. Senator, as I indicated to you and I think as I indicated throughout this speech, the point that I was making is that we were losing sight of the—it was my feeling that we were losing sight of the relationship, the appropriate relationship between the individual and the Government. And in quoting former Treasury Secretary Simon's speech, I think it was simply to underscore that point.

Senator METZENBAUM. And you thought this was happening during the Reagan administration?

Judge THOMAS. I think the relationship—my point was, again, as I indicated, that the concerns seemed to be diminished about the rights of the individual, and I was underscoring that point with that quote.

Senator METZENBAUM. I will go on. In an April 1988 speech at Cal State University, you declared that:

> Those who have been excluded from the American dream increasingly are being used by demagogues who hope to harness the anger of the so-called under class for the purpose of advancing a political agenda that resembles the crude totalitarianism of contemporary socialist states much more than it does the democratic constitutionalism of the Founding Fathers.

Now, Judge Thomas, I think most Americans believe that any laws that resemble "the crude totalitarianism of contemporary socialist states"—your quote—would be inconsistent with our Constitution. I think most Americans believe that, if you are confirmed, you would have a duty to strike down any such laws. That is why we need to know what you meant when you used such terms.

In 1988 when you made that statement, what programs and policies did you have in mind when you spoke of "a political agenda that resembles the crude totalitarianism of contemporary socialist states"?

Judge THOMAS. The point that I was making in that particular portion of the speech, again, was this: That there seemed to be some efforts to disenchant or to encourage or to take advantage of disenchantment of certain individuals in order to, I think—and this

was, again, a policy point of view—to enlarge the role of Government. That was a concern of mine, and I think it is consistent with the concern that I expressed to you or that I expressed in the Cato speech.

I think that that was an appropriate concern. Of course, once again there is quite a bit of rhetoric there, but the point is quite simply that the relationship that I felt was getting lost in the shuffle and in the confusion was the relationship of the individual to the Government.

Senator METZENBAUM. That speech was in 1988, and in your speeches in 1987 and 1988, you seem to be talking about running toward this totalitarianism, toward a socialist state. And yet it is in a very conservative President's administration.

I sort of wonder, were you just using words to make a good speech, or did you really believe the things you were saying? Because the facts belie your assertions.

Judge THOMAS. I think, Senator, I also made it a point to bring the same concerns with respect to particularly minority individuals whom I have noted in this speech in its relationship even with the administration, that the administration was not addressing those concerns and certainly were not at that time addressing minorities as individuals. I think that that was one of the reasons and one of the bases of the Heritage speech.

Senator METZENBAUM. Yes, but the concern for the minorities was not being expressed by that administration. It was the reverse, and it wasn't that totalitarian socialist state about which you speak. That wasn't the problem. The problem was to try to prevail upon a conservative Republican administration to be concerned about minorities' problems. It wasn't this other concern about which you speak that was affecting minorities, as I see it.

Let me go on.

You wrote a chapter of a 1988 book entitled "Assessing the Reagan Years," in which you dismissed as an invention the argument that the ninth amendment undergirds the right to privacy. In the article, you expressed concern that the ninth amendment provides judges with a blank check to strike down legislation deemed by the Court to violate certain unenumerated rights. You also state that, "The ninth amendment will likely become an additional weapon for the enemies of freedom."

In 1988, Judge Thomas, who are these enemies of freedom that you were referring to?

Judge THOMAS. Senator, the point, again, that I was making, I have noted what my approach and concern about the ninth amendment itself was. It was the concern that judges would use the ninth amendment without reference to anything more than his or her own predilections, and that the adjudication of the ninth amendment had to be rooted in something other than that, had to be rooted in tradition and history.

With respect to my concern, the larger concern, it was that the efforts would be to enlarge the Government at the expense of the individual, not so much a commentary on the ninth amendment, but it is the overall point that I have made throughout these speeches, the relationship of the Government to the individual.

Senator METZENBAUM. But you didn't answer. Who were these enemies of freedom?

Judge THOMAS. Well, I don't think I named any. I think it was just a general—those who——

Senator METZENBAUM. Did you have anybody in mind?

Judge THOMAS. Not in particular, Senator.

Senator METZENBAUM. In an October 1987 speech at the Cato Institute, you expressed concern that:

> Maximization of rights is perfectly compatible with total Government and regulation. Unbound by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state.

It sounds like you had serious misgivings about protecting rights. In 1987, how did you think the protection of rights could lead to a total state?

Judge THOMAS. Senator, I think the point that I made earlier in the hearings is that I wasn't talking about the rights that we consider fundamental, but that one could just simply say that he or she has a particular program and that program then becomes a right, and that it would actually be nothing more than one's preferences, as opposed to the rights protected in the Constitution, and that a proliferation of these rights or policies would actually undermine the value of the rights that we hold near and dear or the rights that are currently protected by our Constitution.

Senator METZENBAUM. But in a 1988 speech at the Pacific Research Institute, you said, "Too great an emphasis on rights can be harmful for democracy." I needn't tell you that if you are confirmed, your job on the Supreme Court will be to protect the rights of Americans.

What made you believe that emphasizing rights can harm democracy?

Judge THOMAS. Senator, as I indicated, the rights that I was talking about there were not constitutional rights but rights that could proliferate simply by name, and these rights are nothing more than programs or policies as opposed to our constitutional rights or our fundamental rights.

Senator METZENBAUM. Let me go to a different subject. During the past 15 years, a number of American companies adopted policies which barred women from certain jobs unless they could prove that they were not capable of bearing children. These so-called fetal protection policies left the working women in the unconscionable position of having to undergo irreversible sterilization if they wanted to keep their jobs. Tragically, that is just what happened to a number of women at companies such as American Cyanamid and Johnson Controls. Six months ago, the Supreme Court completely banned these policies as illegal sex discrimination.

Judge Thomas, as head of the EEOC from 1982 to 1990, you had responsibility for protecting the millions of working women in this country against sex discrimination. Shortly before you took over, the EEOC decided not to resolve allegations of sex discrimination involving these fetal protection policies until it developed a formal position on the issue. In the interim, the sex discrimination charges were investigated in the field and then simply sent to the Commis-

sion's headquarters in Washington where they were held, pending the development of an EEOC position.

But under your leadership, under your command, the EEOC failed to address this intolerable situation, not for 1 week, not for 1 month, not for 1 year, but for over 6 years. During this entire period, dozens of charges of women involving fetal protection policies sat at your headquarters without resolution. The women who filed those charges had rights, but their right became meaningless in the absence of enforcement. And they didn't just lose their rights, Judge Thomas. These working women lost their jobs, their careers, their dignity, and in some cases even their ability to bear children.

Under increasing pressure from a House Education and Labor Committee investigation, the EEOC finally took a position in 1988 and began to resolve these charges in 1989. By that point, over 100 charges had piled up. Your agency couldn't even find many of the women who had filed the charges, so their cases were thrown out. For these women, justice delayed was justice denied.

I am very troubled by the EEOC's complete abdication of its entire enforcement responsibilities in this area. I am particularly disturbed because it appears that you were personally—personally—involved in the Commission's decision not to protect women from these policies. First, a memorandum prepared by the EEOC's Office of Legal Counsel described your personal preference that the EEOC refrain from deciding whether these fetal protection policies could be illegal under any circumstances:

> On Chairman Thomas' suggestion, the EEOC staff manual now emphasizes that the Commission has not decided whether an exclusionary policy or practice is or can lead to a violation of Title VII.

In a second memorandum written to you in 1983, one of your own staff aides emphasized the need for the EEOC to decide whether these policies were illegal. "Since the charges, once investigated, will have to"—this is the quote in a memo—"Since the charges, once investigated, will have to be dealt with in some fashion, I recommend that the staff now begin preparing options for handling them. Otherwise, the Commission could end up with an inventory of unresolved and unresolvable charges." That was in 1983.

You responded by writing at the top of the memorandum, "Let's discuss. I have serious problems with this area."

You must, indeed, have had serious problems because you ignored that staffer's warning and left women unprotected for a total of 6 years.

Judge Thomas, why did it take you 6 years to help the women or to take any action to help the women who had filed these charges?

Judge THOMAS. Senator, as you noted, this was as very difficult area. The question for us was if an employer has a policy that says that women will not be allowed in a certain job, because the job itself, the radiation or, I believe in *Johnson Control*, battery acid could lead to harm to the ovaries or to the woman's ability to bear a healthy child or the next generation could have problems such as cancer, et cetera.

Initially, the concern was how do we make a judgment as to these health risks. I think we had extensive coordination or worked

with OSHA. I believe we worked with the EPA, et cetera, to try to make this determination, what standard do we apply and what role do we play. Again, I am basing this on my recollection of the early 1980's.

We subsequently decided to—our normal procedure in that instance is to bring the cases into headquarters until we develop a policy. This was one of the more difficult areas, as we were developing other policies. This was not the only policy.

Ultimately, I think we moved to giving guidance that indicated that the decision would have to be made based on business necessity, which was a strict standard. Finally, the position which we adopted was that if an employer were going to exclude women, it had to be based upon a bona fide occupational qualification, and that is ultimately the standards that the Supreme Court adopted.

Senator METZENBAUM. Mr. Chairman, I have about 10 or 15 minutes more on this one subject, and then I would be concluded. I am perfectly willing to wait my turn and come back for the next round. I just wanted to know if the Chairman desires me to conclude.

The CHAIRMAN. Well, I would think that we should take a break now, in any event, to give the Judge an opportunity to stretch his legs, and we can just huddle here for a second.

I might say right now, Judge, I am trying to figure out the time, because we are going to finish with you today and early, as I said on Friday, even if we have to declare 2 o'clock the lunch hour. It looks as though we have somewhere between 20 minutes or half an hour more on the Republican side, maybe. I am not positive of that. I think that is right. Senator Hatch has a few questions and I do not know whether anybody else has any more questions.

On the Democratic side, my questions, depending on how quickly we go through them, could take anywhere from 20 to 45 minutes, I do not know. It depends on the discussion we get into, if we do get into one. It is mainly recapitulation. I can tell you now I am going to talk to you a little bit about expressive conduct in speech and separation of powers.

Senator Kennedy has around 20 or 30 minutes. The Senator from Ohio has 15 minutes or so. The Senator from Vermont has——

Senator LEAHY. Mr. Chairman, I think I will take my full time. I understand Senator Thurmond stated that the witness misunderstood my question when I asked about cases during the past 20 years. I may want to go back into that, too, now that the question is fully understood. But I also have some other areas of questioning, so I would expect to take my full time.

The CHAIRMAN. The Senator from Alabama has roughly one round, half an hour, is that correct?

Senator HEFLIN. Yes.

The CHAIRMAN. And the Senator from Illinois is about 10 minutes.

Senator SIMON. Less than that.

The CHAIRMAN. Less than that. So, we are down to the wire now. What I would do is ask you, as we break these 10 minutes, to make a judgment as to how we are going to do that, but let us——

Senator THURMOND. Mr. Chairman, in view of Senator Metzenbaum's question, Senator Hatch desires some time to answer it.

The CHAIRMAN. OK. Well, let us not get upset about it. We are close and let us just keep plugging along.

Let us take a 10-minute break now, Judge, and then maybe Mr. Duberstein and I can speak a minute here.

[Recess.]

The CHAIRMAN. The committee will come to order.

Before I yield to Senator Hatch, what we have been doing, I say to the public, in the interim is trying to figure out how we best order bringing the testimony of Judge Thomas to an end, without cutting off legitimate questions that are left, and there are some. I think if we just let the string run here, we are going to do just fine.

I received an admonition, though, Judge, I want to tell you this. Your mom may be angry. She said she wants to go home. She told me she has one of her patients who is 104 years old, has been watching this on television, saying when is she coming home, and she told her patient, "Clarence won't let me," and I am sure you are going to tell her, "Biden won't let Clarence. [Laughter.]

Let us see if we can move this along now. Again, I do not mean in any way to disparage you. There are some very important questions that are left, but I think if we can just move with dispatch here, whether or not we get it done by lunch, we will get it done. We are not going to be long beyond that. I think we may still be able to do that, but let us just move along.

Senator Hatch.

Senator HATCH. Thank you, Chairman Biden.

I do not want you to go home, either, just yet. I think you have really added a lot to these proceedings, so we are proud to have you here.

Judge, I think you fully understand that it is awful tough when you make a lot of speeches in the past, and I am sure that some of those speeches were written by an ardent and well-intention staff, as they are for us in many cases, and I think we all understand that.

You are being criticized on one side for not being liberal enough, and then I notice in the press this morning there are other articles that are criticizing you for not being conservative enough, so I think it just goes to show that you cannot please everybody.

I do just want to take a few minutes, because Senator Metzenbaum did go into your EEOC record, and I think the Washington Post sums it up pretty well, because on May 17, 1987, the Washington Post said this—and you had been in there for, what, 5 years at that time?

Judge THOMAS. That is right.

Senator HATCH. OK. Here is what the Washington Post said:

> Things are markedly different at the Equal Employment Opportunity Commission. Here the caseload is expanding and budget requests are increasing under the quiet, but persistent leadership of Chairman Clarence Thomas.

Now, that is pretty darn good, after 5 years, being in this very tough maelstrom of a position, to have the Washington Post praise your leadership, knowing that you were in the Reagan administration, which they did not very often praise, and some people think with just cause, but I think it is important to point that out.

Second, let me point out some more. When you became Chairman of the EEOC, I was chairman of the Labor Committee at that time. Senator Kennedy was my ranking member, and now it is reversed. He is chairman and I am ranking. But we overviewed the EEOC. When you became Chairman of the EEOC, the General Accounting Office right at that time issued a report on the state of the EEOC, and that report listed the numerous financial and managerial problems at the Commission. In fact, it was entitled, "Continuing Financial Management Problems at the Equal Employment Opportunity Commission," and it was issued May 17, 1982, right at the time you came into office.

Now, if you would just look at some of the—well, first of all, the 1982 GAO report, talking about the predecessors who operated the EEOC, they found that the agency up to that time couldn't even control its funds or its accounting practices. They said:

> The Commission has failed to properly maintain and operate the system. Records and reports produced were unreliable, receivables were not properly collected, and bills were not paid on time. Also, in failing to follow some established procedures, the Commission's employees have created violations of law that now must be dealt with.

These problems predated you coming into the Commission. In the 1981 interim report, GAO stated that, "Some of EEOC's actions"—now this is even before you were put in—"Some of EEOC's actions may be thwarting its efforts to eliminate employment discrimination."

Then the Office of Personnel Management released another report on the EEOC in May 1982. It was entitled, "A Report on Personnel and Administrative Management in the Equal Employment Opportunity Commission." They had audited some 60 jobs at the EEOC's Office of Administration before you became Chairman or went to that Commission. They audited the 60 jobs to determine the relative accuracy at the EEOC's pay scale, and they found that 53 positions were overgraded, 42 percent of the positions were overgraded by 3 or more grades, 26 percent were over 2 grades, and 32 percent were by 1 grade.

Just look at the headings of the summary of findings. I think they indicate the disarray the EEOC was in when you came, No. 1, "Substantial overgrading exists within the Office of Administration and likely exists in other parts of the agency." This is before you came in. This is the predecessor agency.

No. 2, "The supervisory structure is excessive and expensive." No. 3, "The Personnel Office's two core programs, staffing and classification, are not in compliance with OPM requirements." No. 4, "Administrative operations are deficient in closing out contracts, accounting for physical property, cataloging in the library and mail room operations." No. 5, "The agency's management accountability plan may be failing to account for quality of its achievements." No. 6, "Management appears to have tolerated and contributed to a work environment beset by acrimony, improperly employee conduct, poor performance, and favoritism." Those are the titles or the headings of the sections in that OPM or Office of Personnel Management report.

Let me ask you a question: Did you work on those problems?

Judge THOMAS. Senator, during my confirmation hearings in 1982, one bit of advice that you gave me, indeed you told me you would hold me accountable for, was within a short period, to correct particularly the financial problems within a short period of time, and we were able to do that. In fact, we were able to correct the financial accounting problems and have a GAO certified system, I believe within 2 years.

Senator HATCH. In fact, the EEOC had $1 million they could not even account for, is that not so, at that time?

Judge THOMAS. That was one of the items that you told me specifically to account for in the travel area.

Senator HATCH. And you cleared that up and resolved it?

Judge THOMAS. We cleared that up and put in place a variety of procedures and a variety of checkpoints, so that would not reoccur. I think it would not be overstating the case to say that EEOC today has one of the finest financial accounting systems in Government.

Senator HATCH. Is it not true that each one of those problems listed in that OPM report and listed in the GAO report, you either improved or resolved?

Judge THOMAS. We resolved those, I believe, shortly after you instructed us to do so, as chairman of the Labor and Human Resources Committee. We attempted to address some of the long-term problems, but the recommendations that were made in the GAO report became the basis for our short-term plan, the immediate actions that we had to take upon arriving at EEOC, but most of those problems were corrected, I believe, within the first year or two.

Senator HATCH. In fact, you cleared up monitoring consent decrees and settlements, you insured not only that the judgments were won, but that they were enforced. I think most would say, having watched your tenure, would say you were creative when changed circumstances necessitated an alteration in ongoing consent decrees, some would cite the Ford Motor Co. situation as one of the highlights. You certainly aggressively corrected and improved management of the systemic litigation system, which was in disarray at the time.

I could go into all of that, but I do not want to take the time. I just want to make the point that some of these criticisms that are being brought up about the EEOC are not only wrong and misinformed, but they are distorting what really happened, because you inherited an agency that was in disarray, the people were fighting with each other, they were not bringing the litigation as they could. Even the age discrimination cases were in disarray. You did not have a central management system that was working well, you did not have a good accounting system or a good financial system, you had a lot of back-biting among employees, because they were upset with each other because there was not a management team that was necessary. All of that, as far as I could see, during your tenure was improved upon or resolved. Is that a fair statement?

Judge THOMAS. We did our best, Senator, and we think that we not only addressed those problems, but we were able to engage in some practices and to engage in some programs and develop programs that took EEOC far beyond where it was in 1982.

Senator HATCH. Well, I have to say that I think most who really know the situation, and I happen to know it, can find something to

criticize, no matter what, because it is a big agency with a lot of problems, and they are tough problems, they are among the toughest problems in our society today, they involved equal employment opportunities and all kinds of other civil rights issues. It is a very complex area, so they can find fault, but the fact is that you cleared up all of these tremendously difficult problems that existed down there.

Some would say that you really—in fact, most who know would say, in fact, I think all would say who know that you put forth an aggressive effort to stamp out workplace discrimination at the time that you ran the EEOC. In fact, some would say that is unquestioned.

Litigation recommendations received from district offices increased dramatically. The changes went up as high as 400 or 500 percent increase in better approaches of the EEOC.

I do not want to take the time of the committee, because I know we are trying to get through this and do our very best to finish today, and I do not want to take anybody's time. But let me just go into this one problem on fetal and reproductive hazards that Senator Metzenbaum brought up.

If I understood his charge, it was basically that, at the EEOC at the time you were Chairman, women who were barred from certain jobs because of fetal protection concerns did not have their rights enforced, but let me just respond to that.

During your tenure there at the EEOC—and you correct me if I say anything wrong here—there was a legitimate difference of opinion among lawyers and others over whether title VII forbids employers from excluding women from jobs that might endanger any unborn children that they might be carrying or that they might carry in the future.

Now, that is a very, very complicated area of employment law and title VII law. It involves scientific and medical considerations, as well as legal considerations. And because of the complexity of the issue and because other Government agencies such as OSHA, the Occupational Safety and Health Administration, and the EPA, the Environmental Protection Agency, had to weigh it in their views or weigh in with their views on this issue, it naturally took some time for the EEOC to formulate a position on this issue, and as it did, fetal protection discrimination charges that were filed with the EEOC were naturally held in abeyance, because a judgment had to be reached, a fair judgment, taking into consideration all of the matters, including medical and legal and other matters.

But because the charges were filed that were held in abeyance, they were not prejudiced because they actually had been filed, is that correct?

Judge THOMAS. That is right.

Senator HATCH. So, you had protected the rights of these people during the time that the medical, legal, scientific, and other considerations were taking place, and the filing of the charges tolled the statute of limitations and stopped it from running.

Moreover, the plaintiffs whose charges were held in abeyance, they were free, as I understood it—and correct me if I am wrong—they were free to sue privately in Federal court, is that correct?

Judge THOMAS. They could have perhaps received the right to sue later and gone into Federal court, Senator.

Senator HATCH. If they had wanted to.

Judge THOMAS. That is right.

Senator HATCH. So, nothing was interfering with their rights to do that, which was a very important right.

Judge THOMAS. That is right. The difficulty, Senator, as you pointed out, was that it was as very complex area and an area that involved a tremendous amount of work safety-related problems, as well as health and medical problems and concerns, and we attempted to work them out or to wrestle with them, but EEOC does not have the scientific and medical capability on its own to make or did not have the capability to make all of those determinations.

We attempted to coordinate, as I said to Senator Metzenbaum, with the other agencies and that took some time. However, even during that process, we gave significant detailed guidance, I believe in 1983 or 1984, to the field on how to handle and how to investigate these charges, and then ultimately to forward those to our headquarters.

Senator HATCH. After study of the issue in 1988, the EEOC, as I understand it, issued regulations reflecting case law as it had developed up to that time in the Federal courts of appeals.

Now, the regulations permitted fetal protection restrictions on female employees only when the employer demonstrated that there was a substantial risk of harm to the fetus and that there were no other reasonably available less discriminatory alternatives that would effectively protect female employees' offspring, is that correct?

Judge THOMAS. That sounds accurate, Senator.

Senator HATCH. Further, the EEOC regulations required that if there was a similar danger to male offspring, that fertile men be excluded from the positions, as well, so you handled it that way. When I say you, I mean the EEOC, because you just do not do these things by yourself.

After the seventh circuit ruled in 1989 that plaintiffs had to bear the burden of disproving that an employer's sex-based fetal protection policy is justified by business necessity, the EEOC announced that it rejected that decision and that its regulations, the burden of proof remained on the employer to show that a fetal protection exclusion was a bona fide occupational qualification under the criteria of the 1988 regulations.

This year, the Supreme Court, in *International Union* v. *Johnson Controls, Inc.*, agree with the EEOC, that the burden of proof is not on plaintiffs in fetal protection exclusion cases, so they came down to the same point of law that you had come up with. In addition, however, the Court went further and held that a fetal protection exclusion policy can never be justified as a bona fide occupational qualification.

But the bottom line is that no one was prejudiced by the EEOC's consideration of this extremely complex set of cases or issues, should I say, and that the position taken by the EEOC was reasonable, in light of the fact that it was based on the developing case law in the courts of appeals.

I just wanted to bring that out, because I think that if that is not brought out, you are not being treated very fairly, because you did everything you knew how to do under the circumstances, and finally the Supreme Court resolved it, and it resolved it going a little further than EEOC went, but, nevertheless, adopting basically your ideas up to that point.

Now, one last thing: When the Justice Department was considering amicus participation in the *Meritor Savings Bank* v. *Vincent* case, concerning whether sexual harassment on the job constituted a title VII violation, would you be kind enough to tell us what role you played in formulating the Government's position?

Judge THOMAS. Senator, that case, of course, involved the instance of whether or not there could be sexual harassment outside of the context in which a woman does not receive her promotion as a result of not agreeing to engage in the prohibited conduct; that is, if a woman does not concede to the wishes of the supervisor. It was whether or not there could be a hostile working environment.

Our agency, as was the practice, communicated with the Justice Department that we felt that the Government should be actively involved in this case. There was some resistance. Some individuals argued that hostile environment was not a violation of title VII as sexual harassment.

My direct role was not only at EEOC in developing the arguments that were transmitted to the Justice Department, but to personally meet with the Solicitor, his staff, individuals who disagreed throughout the Justice Department, and to argue for the Government's involvement in that case in the Supreme Court. And ultimately EEOC itself played a very extensive role in the development of the legal arguments in that case in the Supreme Court.

Senator HATCH. Well, that is great, because that issue of whether sexual harassment on the job constituted a title VII violation, then Solicitor General Charles Fried of the Harvard Law School said that that was an open question the Court had not resolved. So he then sought the views of the EEOC.

Judge THOMAS. That is right.

Senator HATCH. He came to you and said, We would like to have your ideas on this tough question, we would like to know where you stand. And he personally said that you, Judge Thomas, then Chairman Thomas, Chairman of the EEOC, forcefully argued that the Federal Government should side with the woman plaintiff that sexual harassment is clearly discriminatory and cognizable under title VII, this issue that was not decided, had never been decided by the Court.

As you know, the Government did side with the woman plaintiff in the *Meritor Bank* v. *Vincent* case, and the Court finally held that sexual harassment creating an offensive, hostile, or abusive work environment constitutes sex discrimination under title VII.

I think it needs to be pointed out, for a number of reasons, but the principal reason is that when the chips were down, when that case could have gone either way, as either not within the confines of title VII—in other words, outside of title VII and therefore not enforceable, or within, Chairman Thomas argued forcefully with the Solicitor General's office and with the administration that sexual harassment of women should be included within title VII,

and the Supreme Court upheld your position. Now, I just wanted to bring that out.

I think it is also important just to conclude with this comment. These are very difficult areas of law. Reasonable people can disagree and without any prejudice on the part of anyone. And I contend that, Chairman Thomas, once you get on that Court, you are going to be watching out for the people, the little people out there that many are worried about, who need help and who need their rights resolved and watched over. And you will do it in a fair and reasonable, responsive way, as you did at the EEOC.

I have to say the EEOC still has plenty of room for improvement, as does every agency of Government. But compared to what it was in 1982 when you took over, it is worlds apart. And you are the person who helped bring about the effective and good changes. That needs to be said by somebody like me who has watched it for all these years and takes a special interest in it and who wants that agency to work right and well.

So I just wanted to say that and correct the record and commend you for the service you have given, and I have absolutely no doubt that you will give equal service, if not better service, on the Supreme Court in the interest of everybody in America.

Thank you, Mr. Chairman. I think I took about 15 minutes. I didn't intend to take more than 10, but I apologize.

The CHAIRMAN. Thank you very much, Senator.

The Senator from Massachusetts, Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I wanted just to return very briefly to a couple of areas that we talked about last Friday, Judge Thomas. Welcome back.

Judge Thomas, I want to come back briefly to the subject that we talked about on Friday, your view of Justice Oliver Wendell Holmes. On Friday, when I asked you for your view about Justice Holmes, you said that—and I quote—

> He was a great judge. Of course, when you have opportunities to study him, we might disagree here and there. But I had occasion to read a recent biography of him, and obviously now he is a giant in our judicial system.

I then read your quotation from a speech you gave at the Pacific Research Institute in 1988, including a portion in which you quote a statement by Walter Burns on Holmes. And you correctly stated that I was quoting your reference to Walter Burns' view of Holmes. But I just want to read the entire passage into the record so that your view of Justice Holmes in 1988 is not misunderstood.

You stated, and I quote:

> We cannot expect our views of civil rights to triumph by acceding the moral high ground to those who confuse rights with willfulness. The homage to natural rights inscribed on the Justice Department building should be treated with more reverence than many busts and paintings of Justice Oliver Wendell Holmes in the Department of Justice. You will recall Holmes as one who scoffed at natural law, that brooding omnipresence in the sky. If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes. As Walter Burns puts it in his essay on Holmes, most recently reprinted in William Buckley and Charles Kessler's "Keeping the Tablets"—

and here you quoted Mr. Burns—

> "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 in order to govern itself."

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End of quote of Burns.

And then you continued, "Or as constitutional scholar Robert Falkner put it"—and here you quoted Mr. Falkner—"What John Marshall had raised, Holmes had sought to destroy" That's the end of the quote of Falkner.

And you continued:

And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they exist at all apart from willfulness, whether of individuals or officials.

So I think it is quite clear from the full quotation, Judge Thomas, that you were harshly critical of Justice Holmes for what you described as his nihilism in his effort to destroy your view of natural law. It doesn't sound to me like you thought he was a great judge in 1988.

Judge THOMAS. I guess, Senator, much of that perhaps resulted from the concern about some statements in cases like *Buck* v. *Bell* of Justice Holmes'.

Senator KENNEDY. Well, which is Judge Thomas' opinion of Justice Holmes: the one you gave on last Friday or the one you gave in 1988?

Judge THOMAS. Well, as I indicated, Senator, I have concerns about statements like "three generations of imbeciles is enough or sufficient." I think that we certainly would find problems with that. What I indicated to you was that I did take the time to go back and re-read about him. Even though I may have had disagreements, that was not the end of the inquiry. I spent a considerable amount of time going back and trying to understand him more during my tenure on the bench.

Senator KENNEDY. Well, that was then and last Friday is now?

Judge THOMAS. No. Last Friday, as I indicated, I had gone back recently and read a biography of him subsequent to the speech. That was the point.

Senator KENNEDY. Well, as I understand—and we will leave it at this—your view last Friday is your current view, and your statements that you said in 1988 was your view of Justice Holmes in 1988.

Judge THOMAS. Well, my point that I was making, notwithstanding criticisms, the point that I made last Friday is that he was a great Justice, whether we agree or whether I agree with him or not or whether others agree or disagree with him. The point that I am making now is that even though I might have had a point of view in 1988 that was critical, that did not stop me from going back and reading and learning more about him. I think that the important point that I am trying to make is merely having a point of view is not the end of the process for me. It is, indeed, the beginning of the process of learning and growing and attempting to change if there is evidence there.

Senator KENNEDY. Let me go on to the voting rights. We talked briefly about it last Friday. You made some comments earlier in the course of the hearing this morning. In 1988 you stated:

Unfortunately, many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court

has regarded the right as protected when the individual's race or ethnic group has sufficient clout.

In reviewing the Supreme Court decisions, the principal decisions decided on the voting rights case, *White* v. *Register* and the *Thornburgh* case—there is the *Allen* case as well, but that deals with preclearance provisions. But on basically that very issue, these, as I understand it, are the principal cases, and both on their very face rejected the bloc voting:

In *White* v. *Register*, we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion with voting. The plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and elections were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political process and elect legislators of their choice.

We are talking here about how State legislatures in Texas and North Carolina had at-large elections, allegedly, and I think supported by the evidence considered in both of these cases decided by the Supreme Court, that the at-large elections rather than the single-member district elections were being used to diminish and undermine the effectiveness of the rights to vote of individuals, the blacks in Dallas, Hispanics in San Antonio, blacks in the *Thornburgh* case, similar statements in the *Thornburgh* case, I think even stronger.

Those and the *Allen* case were the three, as I understand it, the major guiding beacons in terms of the Supreme Court's upholding the importance of the right to vote, certainly in judging the actions of legislatures, which in many instances, particularly in the Texas Legislature, had a history of supporting segregation activities at that time.

And we have seen subsequent to those decisions the changes in the membership in those particular districts rather dramatically, I might mention.

Well, what were you so critical of in terms of those cases, the principal cases?

Judge THOMAS. The comment wasn't about the *Thornburgh* case, Senator. The concern that I raised, I think the word I used was "presupposed" bloc voting, and that had to do with—and as I noted, I think, on Friday, I was not engaging in an exegesis of the voting rights cases. The comments were made in a speech that was about individual rights and the concern for individual rights and what would happen to individuals versus—when you considered groups versus individuals. And I simply used as an example and referred to, I think in one paragraph, maybe two, the Voting Rights Act as one of the examples, and then I moved on.

The point that I was trying to make was that—and it was my—there was a school of thought. There was thinking, I remember, involving—being involved or reading about the debates in the early 1980's about the Voting Rights Act that felt that the early cases that presupposed or would lead to proportional representation. It was that kind of mentality that I felt presupposed that blacks would vote a particular way, that there was the stereotypes. And throughout all my speeches, I argued against the use of stereo-

types. I think there was even some debate up to and immediately prior to the amendments to the Voting Rights Act in 1982 concerning proportional representation. But I was not, as I indicated, going through any cases and specifically saying here is the precise language in that case, but rather to that general school of thought that interpreted those cases to require proportional representation.

I think that was also a concern, as I remember—and, again, I was not directly involved in the debates over the Voting Rights Act. But I think that there was some concern even then with the legislation that came from the House of Representatives that it might lead to—the results test might lead to proportional representation. The language, of course, in the Voting Rights Act, in the amendments, preclude that. And, of course, the *Thornburgh* case makes it clear that you don't presuppose now that there is bloc voting, but rather it has to be proven.

So what I was talking about was this general assumption about had to do with the school of thought with respect to proportional representation and the presupposition that minorities all voted the same way or thought the same way or acted the same way.

Senator KENNEDY. Well, I am interested in your view of the legislative history because Senator Mathias and I were the principal sponsors of the extension of the Voting Rights Act, very much involved in the debate, and the legislation specifically includes in title II, explicitly says that no group is entitled to legislative seats in numbers equal to their proportion of the population. At least among those that were very much involved in the legislative history as well as the Supreme Court——

Judge THOMAS. That is where——

Senator KENNEDY. The only point I raise is when you mention here many of the Court's decisions, I was just trying in my own mind—and recognizing the importance of voting rights, to find in my own mind what were the areas of the Supreme Court decisions in voting rights that you are most critical of. But I understand now—and I would like to move on—that with regards to *White* and *Thornburgh* that you support certainly their——

Judge THOMAS. I absolutely support the aggressive enforcement of voting rights laws and certainly support the results in those cases. I think I said that or attempted to say that last Friday.

Senator KENNEDY. Let me move on to another area that was touched on during the course of the hearings but which I would like to just clarify. Judge Thomas, in your exchange with Senator DeConcini yesterday, you talked about your role in *Adams* v. *Bell*. The Secretary of Education, Terrel Bell, was the defendant in that lawsuit. Back in 1977 the Court had ordered the Office of Civil Rights in the Department to process discrimination complaints more properly and conduct compliance reviews within specific timeframes. And you arrived as the head of the Office of Civil Rights in May of 1981. So we have the Court going back to 1977, you arrive in 1981. You were the official responsible for compliances with the court order. Your agency was accused of ignoring the court-ordered timeframes to act on race discrimination complaints, sex discrimination complaints, and other discrimination complaints in a timely manner.

The plaintiffs in the case petitioned the Court to hold you in contempt for violating the court order, and the Court held a hearing on the petition in March 1982, which is 9 months after you had taken office. You told Senator DeConcini the judge did not hold you in contempt or take any other steps. You said, and I quote, "I think ultimately what the judge realized was that we were doing all that we could, that it was impossible for us to comply with it"—meaning the order, and that is the end of the quote.

That, as I understand it, is not quite right. I would like to quote from the contempt hearing on March 15, 1982. The judge concluded that instead of enforcing the civil rights laws, you were dragging your heels, carrying them out in your own way and according to your own schedule, instead of complying with the timetable ordered by the Court. Here is what the judge said, and I quote:

> I would like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly are going to make a good-faith effort to comply.

It is true that the judge did not take the extreme step of actually holding you in contempt of court, but this is what the judge went on to say, and I quote the judge:

> We do find, though, that the court order has been violated in many important respects and that we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court.

So the judge said very clearly that you violated the court order in many important respects, used the word "violated." He was concerned that you were still not making the good-faith efforts to comply. He was clearly threatening you with contempt. He was obviously pretty upset with you.

What do you think he meant when he said he might have to use the coercive power of the court to get you to comply with the court order?

Judge THOMAS. Senator, when I responded to Senator DeConcini, I think I also noted—and I did not go back and review the transcript—that I had not had an opportunity to review the entirety of the record or any orders by the court. It has been, again, now about 10 years.

With respect to what the court was doing, the petition that was filed with the court was filed prior to my going to the Office of Civil Rights. I went to the Office of Civil Rights, I believe, in May of 1981. That was filed sometime, I believe, in February or March. I can't remember exactly when.

The office had never been able to comply with those timeframes under the consent decree, and, indeed, we improved—in the brief time that I was there, I actually became Assistant Secretary in July. Even though I was there before, I was actually sworn in in July of 1981. During that brief period, we were able to improve the performance and to comply with the timeframes, certainly did better than the individuals prior to us, but still were not able to comply. And we devoted 95 percent of our resources in an attempt to comply.

What I suggested to Senator DeConcini is perhaps that I did not—I should have gone back and perhaps looked at some additional steps in communications with the court in order to prevent the

matter from reaching the point where it could be suggested that I was in any way not acting in good faith or in defiance of the court order.

Senator KENNEDY. Well, didn't the judge draw some conclusion in terms of your performance and the previous official's performance?

Judge THOMAS. Again, I have not reviewed the record, Senator. It has been quite some time ago.

Senator KENNEDY. I believe it did, but you can correct the record and take a look at it and comment on it.

The judge may not have taken the harsh step of holding you in contempt, but he did take other steps. Contrary to what you told Senator DeConcini, he set a deadline for the completion of a study that you had told the court you needed prior to taking any action. He set a deadline for both parties to consider the results of the study to agree on the revisions of the court-ordered timeframes, if any were necessary.

Also, you had told the court—you told the committee this week that you had expedited the study when you arrived at the Office of Civil Rights. In both instances, you cited this as an example that you were making your best effort to comply with the court order. I would not say the judge thought you were making the best effort. In a March 1982 hearing your lawyer commented that you had told the court you expected the study to be completed within the next month or two, the judge responded, "I think he kind of hedged on that prediction. I think if we were going to leave it up to Mr. Thomas, you might not get it this year." That is what the judge said. He sounds pretty skeptical that you were going to comply with the order.

Judge THOMAS. As I indicated, Senator, the study that we were referring to was begun prior to my arriving at the Office for Civil Rights. And as I remember—again, it has been quite some time—it had been scheduled for completion at one point, and I expedited the schedule so that we could have that study in place so that we could make the appropriate changes consistent with that study.

Senator KENNEDY. This is what the judge stated in reference to your predecessor, Mr. Tattle:

> I contrasted Mr. Tattle on the one hand, who was sitting in the same position Mr. Thomas was 4½ years ago. Mr. Thomas and I contrasted Ms. Chong and Mr. Rigau. It seems the difference between these two people is the difference between day and night. Now, Rigau admitted that they were behind in their work as far as the Office of Federal Contract Compliance was concerned, but he manifested an active interest in improving the machinery. Things weren't getting any worse. I think they were probably better. And while things weren't completely in accordance with the time frames, Mr. Tattle went out of office in the fall of 1978 or 1979.

This was the fall of 1979.

> Things were on their way to being improved; whereas, at the time he took over, things were in bad shape. That is my basic problem. I don't like to hold people in contempt. On the other hand, I like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly are going to make a good-faith effort to comply.

Judge THOMAS. He was not——

Senator KENNEDY. You can put in the record, whenever you get a chance to examine the transcript——

Judge THOMAS. But he was not my immediate predecessor. My immediate predecessor was Cindy Brown.

The difficulty that we faced, Senator, that I did not allude to—and it is one that the office continued to labor under, and I think it was an important difficulty—is that when the Department of Education was created out of HEW, to my knowledge the Department of Education Office for Civil Rights had about 80 percent of the work and 60 percent of the staff and was inundated. I think it was in a much different position from the HEW staff. But that is something that is a part of what you inherit when you move into a department, and it was a very difficult problem.

The assurance that I made and that I make here—and it is a very firm one—is that we attempted to do all we could to dig ourselves out from under the workload. That is quite a bit different in terms of accomplishing than it was, say, at EEOC where I was not a part of a larger department that controlled decisions over the deployment of personnel and budgets.

Senator KENNEDY. Well, did you complain about the staff and the resources?

Judge THOMAS. Absolutely. In fact, internally I complained, as my successors complained, but there were competing interests. As you remember, at that time the Department of Education itself, the full Department, was undergoing a RIF. And though the OCR did not have the same budgetary constraints, it was held to the same standards and not permitted, for example, to hire staff.

Senator KENNEDY. Let me move on to another area. During your opening statement, you praised civil rights leaders for having changed society, and you stated, "I have benefited greatly from your efforts. But for them there would have been no road to travel." But in the past you have condemned those same civil rights leaders in five different speeches. In 1985, for example, you denounced, and I quote, "a civil rights community wallowing in self-delusion and pulling the public with it." You omitted that phrase from only two speeches during this period, the two speeches you gave to predominantly black audiences.

What did you mean when you said that the civil rights community was wallowing in self-delusion and pulling the public with it?

Judge THOMAS. Well, let me make two points there, Senator. I have many other speeches in which I extensively praised the civil rights community and its efforts, and speeches on Martin Luther King's speeches with respect to the NAACP and many organizations, and I have always given credit concerning the efforts and the major, major contributions of the civil rights movement and the civil rights groups in our society.

The difficulties that we had during the 1980's was an important difficulty, and that was this, that there was, to my way of thinking, a need to begin to debate anew some old problems and to begin to look at them with fresh ideas.

What you see in those speeches are my frustration or is my frustration that that debate never took place. Instead, you see a similar frustration expressed to the conservatives in the Heritage Foundation speech. Rather than ultimately sitting down and beginning to try to work out the problems, we were spending our time yelling across the table at each other.

I had hoped that would not have been the case during the 1980's. As we all know, much to our chagrin, and I think to the chagrin of anyone who is involved, that that did not occur.

Senator KENNEDY. Then, in a 1987 interview with Reason magazine, you were asked whether there were any areas where the NAACP and the civil rights establishment were doing good, and you interrupted the question to respond no. When the interviewer asked, "None?" you said, "None that I can think of."

In at least three speeches, you said, "Members of the civil rights movement had given in to the cult mentality and childish obedience"—this is your quote—"which hypnotizes blacks into a mindless political trance."

Again in 1988, here is a quote, "We must now not merely be critical of the many blunders and follies that have occurred in the practice of civil rights, we must show how our reliance on American principle produces better results than those of our enemies." That is pretty powerful stuff, calling leaders in the civil rights movement "the results of those of our enemies," and then in 1987, you publicly castigated civil rights leaders who, "bitch, bitch, bitch, moan and moan and whine."

Judge THOMAS. I think that was made before, Senator.

Senator KENNEDY. The point that appears of the kind of debate you were trying to begin, I remember the time also as most of those leaders very much involved with working with Congress on the extension of the Voting Rights Act of 1982, when we had initial opposition. William French Smith, right before this committee, expressed his opposition, and he was going to recommend that President Reagan veto it.

I can remember the work that was done by the civil rights groups in 1984, 1985, and 1986, when we were trying to overrule the *Grove City* case, which affected all Federal funding, whether they could be used in terms of discriminatory purposes.

I remember the work that many have done in terms of the sanctions against South Africa. I know you have a different opinion from many of the civil rights leaders, although that opinion was different evidently from what you had at Holy Cross, where you supported disengagement and the economic sanctions. They were very much involved in overriding a Presidential veto.

And I remember the civil rights leadership in 1987 and 1988, when for the first time we worked out fair housing legislation, which had been basically stalemated in the Congress. These are major kinds of proposals that they are very, very much involved in, and what we find is a series of extremely critical comments about all.

Then the time is moving on and you had in the 1987 interview, you stated, "That I find exasperating and incomprehensible the assault on the Bicentennial, the founding of the Constitution itself by Justice Thurgood Marshall, his indictment of the Framers alienates all Americans, not just black Americans." That is a strong attack on Justice Marshall. He was criticizing the original Constitution for accepting slavery.

I will give you——

Judge THOMAS. Thank you, Senator.

Let me go back and I will try to cast this generally. I will not attempt to go through each one of those seriatim, unless you would want me to.

I think in the interview, my point was that I was the wrong person to ask with respect to comments about the existing civil rights community, because of the manner in which the civil rights community had treated me and that I am no more or less human than anyone else, that there was serious disagreement, and I do not think that the disagreements were at the level that they should have been, and I suggested that.

I attempted to conduct myself in a way that we could have a constructive debate, and I reiterate the point that I have major speeches throughout my tenure that are very, very supportive and very strongly indicate my allegiance to the civil rights community and to the civil rights movement, but I do not think that allegiance and that support should undermine the ability to disagree.

And the comment that I made with respect to the unanimity, the homogeneity of our points of views I think are important. I think that there is a need for debate. I have said from my early speeches in 1981 that it is important, these issues are so difficult, and the problems are so bad, that we need all of the talent, that we needed all of the ideas possible, not just one point of view.

I did not feel that that opportunity ever occurred or that we had the chance or I had the chance personally to engage in that debate, and I thought it was a lost opportunity, and I said it on both sides of the aisle with respect to the civil rights community, as well as with respect to the Reagan administration.

Senator KENNEDY. Well, it would appear, and the record will show, whether these are expressions of disagreement or strong negative statements.

Judge THOMAS. Yes.

Senator KENNEDY. Judge Thomas, I continue to have serious concerns about your nomination. In your speeches and articles, you have taken many strong positions, but again and again you have asked this committee to ignore the record you have compiled over a decade.

On natural law, despite your previous clear advocacy of using natural law in construing the Constitution, you now tell us that you do not see a role for the use of natural law in constitutional adjudication.

On the right to privacy, you have walked away from your record and statements. You now say that you support a right to privacy, but you refuse to comment on its controversial applications.

On abortion, you have explained away your strong praise for Lewis Lehrman's extreme article supporting the right-to-life position, and said you just mentioned the article in the hope that the rightwing audience would be more inclined to support enforcement of civil rights.

You ask us to believe that an intelligent and outspoken person like yourself has never discussed *Roe* v. *Wade* with another human being.

You ask us to be confident that you will enforce a woman's right to be free from gender discrimination, despite your prior stereotype statements about women and work.

You have abandoned your previous statements that business rights are as important as individual rights or any other right. You now claim you are satisfied with the Supreme Court decisions that give less importance to business rights and greater importance to individual rights.

You have criticized Supreme Court decisions protecting voting rights and sustaining the power of Congress to appoint independent prosecutors, to investigate wrong-doing in the executive branch, now you seem to be supporting those positions.

You have trashed the leaders of the civil rights movement in many speeches, but now you emphasize your debt to them. You have trashed Oliver Wendell Holmes in one of your speeches, but last Friday you called him a giant in the law.

You have harshly criticized Congress, and, as an executive branch official in the Department of Education, you were on the verge of being held in contempt of a Federal court for failing to enforce civil rights laws.

You urge lower courts to follow a Supreme Court dissenting opinion restricting job opportunities for women, instead of the Court's majority opinion expanding those opportunities.

The vanishing views of Judge Thomas have become a major issue in these hearings. If nominees can blithely disavow controversial positions taken in the past, nominees can say those positions are merely philosophical musings or policy views or advocacy. If we permit them to dismiss views full of sound and fury as signifying nothing, we are abdicating our constitutional role in the advise-and-consent process.

Some say that the Senate should consider only the nominee's qualifications and not his ideological views, but the Constitution gives the Senate a shared role with the President in the appointment of Justices to the Federal courts, and for very good reason.

The Supreme Court thrives on the diversity of views of nine Justices who comprise it. It is our system of checks and balances. The role of the Senate is one of the most important checks on the power of the President to pack the Court with appointees who share a single one-dimensional view of the Constitution.

When ideology is the paramount consideration of the President selecting a nominee, the Senate is entitled to take ideology into account in the confirmation process and reject any nominee whose views are too extreme or outside the mainstream.

As we move to the next stage of these hearings, I continue to have major concerns about your nomination and about your commitment to the fundamental rights and liberties at the heart of the Constitution and our democracy. This is no time to turn back.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Now, where we are at this moment is that all Republican Senators have had a third round and we should be just going down the row here, but Senator Grassley, who did not complete a third round last week, apparently has a couple of minutes he would like to use now, is that correct?

Senator GRASSLEY. Yes, at least not more than 5.

The CHAIRMAN. OK. Well, if it is all right with the Senator from Vermont, if we yield to the Senator from Iowa. Everybody will

have more time if they want it on the Republican side. Senator Brown is entitled to any time he wants and we will do that. I just wanted to make sure that people who have had a chance to ask three times already yield to those who have only asked twice. Senator Brown has only asked twice, so he will get another chance.

At any rate, after all of that, why don't I just yield to the Senator from Iowa for whatever questions he has, and then we will go to the Senator from Vermont.

Senator SIMON. Are we going to be breaking for lunch?

Senator GRASSLEY. Mr. Chairman, my point——

The CHAIRMAN. Excuse me, Senator. I have been asked a question, are we going to be breaking for lunch. I think that is going to be inescapable. The question is whether we break immediately after the Senator from Vermont, and I think that depends on how long the Senator from Iowa goes, and he has as right to go long if he wants, or whether we break after the Senator from Alabama. That being the case, we would be down to very few minutes after that, but we are probably going to have to break for lunch, and we will do a very short break, meaning an hour, not an hour and a half, when that time comes. But let us see how far we get right now.

Senator GRASSLEY. Mr. Chairman, I take some time now just for further clarification, more than anything else. I had previously discussed for the committee's benefit, more so than to question the Judge, about the *Adams* v. *Bell* matter, and I thought maybe it would be closed, but it is apparent that it is not closed.

Last week, I had asked that the transcript of the proceedings be printed in the record, and you said it would be made available, and at the time I thought that would be sufficient, but now I think it is only fair that the transcript on the Judge's order in which Judge Thomas was not held in contempt be printed in the public record, and I think that it should be clear that Judge Thomas, as I said previously and as I laid out in a factual record, only inherited a very difficult situation and in no way intentionally violated the law, so I would like to have that printed in the record, if I could, Mr. Chairman.

The CHAIRMAN. Without objection, it will be printed in the record.

[The information referred to follows:]

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: Well, as Mr. Tatel in his letter of yesterday -- counsel have copies -- correctly surmised, we are reluctant to find the defendants in contempt for a variety of reasons, not the least of which is that they arrived on the scene relatively late and the motion to hold them in contempt was filed within a matter of just a few months after they came aboard.

We do find, though, 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. We are not going to discharge the rule to show cause; we are not going to hold them in contempt at this time.

We shall give the Government until June 1, which is roughly 45 days -- a little longer than that -- or 75 days, two months and a half, within which to complete the study to which Mr. Clarence Thomas referred and to supply copies to all of the parties.

By the 15th of August, which is five months from now, we shall expect the parties on the basis of the completed study to arrive at a consent order which will either (1) reimpose the present guidelines, or (2) make modification of these guidelines in view of the changed circumstances to which Mr. Levie made reference, which guidelines would presumably

take into account the change in the mix of cases, any increases in the complexity and difficulty of cases, and any related considerations. But it is my intention that the order that the parties will submit will cover all of these contingencies so far as they are able to anticipate. On the other hand, if they are not able to enter into an order by consent, I shall expect that on, or before, the 15th of August, each of the parties will present his own order and at that time, we will again get into the question of what coercion will be necessary to insure the compliance with this order, absent the consent of the parties.

Let me say further that all of us have noted the game of "Musical Chairs" that the Department of HEW and now, apparently, the Department of Education is going through. I read in the papers that we may not have a Department of Education too much longer. I do not know what department of the Government will take over those functions. But I would think that any consent order should bear on its face the signatures, not only of the lawyers who are negotiating the settlement, but also the cabinet secretaries and department heads who are going to bear the burden of compliance.

Now having siad this, I want to say that this subject, I think, has been very fully aired and I think all sides have been very competently represented. I am sorry that we have to delay further this matter of seeing what happens to the order

1 we entered in December of 1977.

2 Is there anything further, gentlemen?

3 MR. LICHTMAN: No, Your Honor.

4 THE COURT: Mr. Levie?

5 MR. LEVIE: No, Your Honor.

6 THE COURT: Stand recessed until further call.

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8 (Whereupon, the Court's Findings and

9 Conclusions were concluded at 3:11 p.m.)

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17 CERTIFICATE OF REPORTER

18 The above and foregoing typewritten record is hereby

19 certified by the undersigned as the official transcript of

20 the proceedings in the above-captioned matter.

21

22 VERNELL A. MARSHALL

23 Official Court Reporter

24

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Senator GRASSLEY. I would also like to correct what seems to be a wrong impression here regarding Judge Thomas' relationship with civil rights groups and leaders.

In an October 23, 1982, speech before the Maryland Conference of the NAACP, as the then newly installed Chairman of the EEOC, here is something that I thought Judge Thomas said well that expresses his working relationship:

I would like to talk with you about why I believe that you are the group that can truly make a difference for blacks in this country, what I think of the challenges will be in the future, and what we are doing at the Federal level to address the problems of discrimination. The pervasive problem of racial discrimination and prejudice has defied short-term solution. The struggle against discrimination is more a marathon that short sprint.

Political parties have come and gone, leaving behind them the failures of their quick fixes. Promises have been made and broken, but one group, the NAACP, has remained steadfast in the fight against this awful social cancer called racial discrimination. The NAACP has a history of which we can all be proud. From its inception in 1809 until today, the work this organization has done in the area of civil rights is unmatched by any other such group. At each turn in the development of blacks in this country, the NAACP has been there to meet the challenges.

Judge Thomas has often acknowledged the significant role of civil rights movements and how he personally has benefited from it. In volume 21 of the "Integrated Education" publication in 1983, Judge Thomas wrote, "Many of us have walked through doors opened by civil rights leaders, and now you must see that others do the same.

In a January 18, 1983, speech at the Wharton School of Business, in Philadelphia, Judge Thomas said, "As a child growing up in the rural South during the 1950's, I felt the pain of racial discrimination. I will never forget that pain. Coming of age in the 1960's, I also experienced the progress brought about as a result of the civil rights movement. Without that movement and the laws it inspired, I am certain that I would not be here tonight."

An October 21, 1982, speech to the Third Annual Metropolitan Washington Board of Trade, EEO Conference, Judge Thomas described himself as "a beneficiary of the civil rights movement."

An April 7, 1984, speech at the Yale Law School, Black Law Students Association Conference, Judge Thomas noted the freedom movement of black Americans was not a sudden development, but "had been like a flame smoldering in the brush, igniting here, catching there, burning for a long, long time before someone had finally shouted fire."

He asked, in effect, who was responsible for this. Then Judge Thomas went through a litany of people and events that helped fan the flames of black freedom. He asked in part whether it was—

* * * the founders of the NAACP or the surge of pride which black folks felt, as they huddled around their ghetto radios to hear Joe Louis preaching equality with his fists, or hear Jesse Owens humbling Hitler with his feet, was it A. Philip Randolph mobilizing 100,000 blacks ready to march on Washington in 1941, and FDR hurriedly signing Executive Order 8802, banning discrimination in war industries and apprenticeship programs, or the 99th Pursuit Squad, trained in segregated units at Tuskegee, flying like demons in the death struggle high over Italy, was it Rosa Parks, who said no, she wouldn't move, and Daisy Banks, who said yes, black children would go to Central High School, of the three men who had been the black man's embodiment of Blitzkreig, the most phenomenal legal brains ever combined in one century for the onslaught against injustice, Charles Houston, William Hasty, Thurgood Marshall, or a group of students who said we have had enough, I mean

what is so sacred about a sandwich, Jack, or men named Warren, Frankfurter, Black, Douglas, who read the Bill of Rights and believed.

I realize, Judge Thomas and for members of this committee, it may seem more newsworthy to report the judge's remarks only when they have been critical of traditional civil rights leadership, and I realize some of his critics who object to his expressed views against reverse discrimination and preference wish to make him look ungrateful, but it is a false portrait of character being drawn.

So, Judge Thomas, I think you have a lot to be proud of in not only your statements, but your actions in support of efforts of others in the civil rights community who carry the ball and run with it, and I think you have adequately recognized their contribution, and I thank you for it.

That is the end of the time that I will use now, Mr. Chairman.

The CHAIRMAN. Well, I want to thank you, Senator.

After conferring with Judge Thomas' spokespersons in the break here, it seems appropriate we will take a break for lunch now.

Now, let me just give everyone a heads up on where we are going to go from here. We will go to Senator Leahy next, unless Senator Metzenbaum comes back and claims his 15 minutes. Then what we will do I hope, as I count the time, we should be able to finish everything by 4 o'clock today with Judge Thomas.

We will then move to the ABA today, and they will probably move to the first panel of witnesses. We will move at least to one other panel, maybe two, and tonight we will go with the public witnesses until sometime close to 6:30, to try to move this along, because we are going to end early tomorrow night and we will not be in session on Wednesday, so we will see how much we can move along and catch up with the other end here.

Now, we will break for lunch until 1:30, at which time, in all probability, we will resume with, if it is convenient for Senator Leahy, with Senator Leahy——

Senator LEAHY. I will be prepared to start my questioning right at 1:30, if that is what the Chair wants.

The CHAIRMAN. Yes, we will start at 1:30. We will recess until 1:30.

[Whereupon, at 12:17 p.m., the committee was recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order, please.

The Chair recognizes the Senator from Ohio, Senator Metzenbaum.

Senator METZENBAUM. Thank you very much, Mr. Chairman.

Judge Thomas, before the break this morning, I was inquiring about the EEOC's failure for 6 years to process sex discrimination charges involving fetal protection policies. I am frank to say that I regret that I missed your ensuing discussion of this issue with Senator Hatch and, as has been publicly stated, I missed it only because I am also sitting on the Gates nomination hearings which are going on at the same time.

But as I am informed by my staff, you agreed with Senator Hatch's statement that "women were not prejudiced by the EEOC's

failure to act on this issue for over 6 years while you were Chairman."

Judge Thomas, I simply cannot accept the idea that women were not harmed by the agency's default on this issue. The women who lost their jobs due to sex discrimination were certainly harmed. Some of them didn't get their jobs back for 10 years, and some of them never got their jobs back at all.

Had you acted in a timely manner to resolve their charges, they surely would have been spared much of this harm. And had the EEOC declared fetal protection policies to be illegal in 1982, as it did in 1991 after your departure, the women who were forced to undergo sterilization in order to keep their jobs might have been spared that terrible outcome.

Judge Thomas, you pointed out that women were free to file their own lawsuits challenging fetal protection policies. The women who lost their jobs, that were sterilized as a result of fetal protection policies, were blue collar women working at an hourly wage. These women came to the EEOC, because they could not afford to file their own cases or they needed assistance with the complex issues involved.

These women sought the help of the EEOC in fighting for their rights. That is why the agency is there. But under your direction, it didn't hear the cases, it turned its back on these women.

My question is do you really believe that these women did not have their rights prejudiced at all, simply because they retain their right to bring a private lawsuit?

Judge THOMAS. Senator, the point that I thought Senator Hatch was making was that the right to bring a lawsuit or to engage in litigation continued to exist and did not expire. I do not think either one of us intended to suggest that individuals who have to wait for long periods of time to resolve these issues aren't in some way and to some extent prejudiced to that degree.

The point with respect to what we did during my tenure I think has to be refocused in this way: In thinking about this issue, where we eventually arrived in developing a policy, I believe the BFOQ approach was originally rejected prior to my going to EEOC, and there was significant debate about that.

We attempted to resolve the issue in what I think was an appropriate way. It didn't happen as fast as most of us would like it, but it was a very, very difficult issue and it was one the rulemaking and the final resolution that you are talking about or that you commented on was one that was developed during my tenure, although finalized after my tenure.

It again was something that in these difficult areas you would hope to have been able to done a lot quicker or done in a more expeditious way, but this was one of the most difficult issues we wrestled with.

Senator METZENBAUM. Well, before the break this morning, you stated in response to my question that it took 6 years for the EEOC to take action on charges involving fetal protection policies, because you were faced with difficult issues outside its area of expertise. However, Judge Thomas, even if these charges did present difficult issues, that would hardly justify taking no action on them for so many years.

In addition, although some of the charges may have turned on complex scientific issues, many others represented clear violations of title VII. For example, in one case, a female job applicant was denied a job requiring exposure to lead due to fetal health risks which might arise if she became pregnant. The employer's personnel manager told her that she wouldn't like plant work, anyway, that plant work would be too dirty for her and that he could use a pretty face in his office.

The applicant, understandably, filed a discrimination charge in 1981. The Commission investigated the charge, but took no action to resolve it for 8 years. In 1989, the commission closed the case, because it was unable to locate the charging party.

Now, some charges filed with the Commission languished, even though the employer had offered no evidence at all to back up its discriminatory assumptions regarding the health risks posed by the hazard in question. In other cases involving x-ray technicians, the commission had already issued their decision prior to your tenure, finding violation based on parallel facts. I do not dispute that some of these issues may have raised difficult issues, but do you really believe that that justifies the EEOC's total inaction for 6 years? One has to say why did it take so long for any action at all to occur.

Judge THOMAS. Senator, as I have indicated, I think that the agency during my tenure could not be said not to have been taking any action. The results may not have occurred in a way that we would have liked it to have occurred, as expeditious as possible, but to say that we took no action is incorrect, I believe.

The agency, the Commissioners, including myself, attempted to review this particular policy in a professional way and a way that would protect the rights of women. We recognized—and there was disagreement among staff, as well as Commissioners, and I think even within the Government—we recognized that this was a difficult issue that involved scientific, as well as health problems or health concerns, and we attempted to resolve it in a way that took those factors into consideration.

Senator METZENBAUM. Judge Thomas, I must also take issue with Senator Hatch's suggestion that, in the *Johnson Controls* decision, the Supreme Court "adopted basically your ideas on fetal protection and carried them a little further." As Senator Hatch pointed out, your position in the EEOC's 1988 policy guidance was that, where a substantial risk to a fetus or potential fetus existed, employers could use fetal protection policies which applied only to women.

What Senator Hatch did not mention is that your 1988 policy allowed women to be excluded from jobs, even if those women were fully able to perform their jobs, but the Supreme Court expressly rejected that position in *Johnson Controls*, holding that these policies could never be justified by reference to the well-being of a fetus or potential fetus. In short, it took the EEOC 6 years under your tenure to develop a position that the Supreme Court rejected out of hand.

Judge THOMAS. I could be—if my recollection serves me right, Senator, I think Senator Hatch must have been referring to I think the 1990 policy. Again, I do not have that in front of me, but I

think the 1990 policy was consistent with the Supreme Court decision. I would have to go back and look at that. Again, I am operating just off memory.

Senator METZENBAUM. Judge Thomas, the facts actually speak for themselves. This was an issue of great significance to women in the workplace. According to the Bureau of National Affairs, as many as 15 to 20 million jobs may involved reproductive hazards, and thus could have been affected by exclusionary fetal protection policies.

Given the fact, it is not surprising that one Federal judge said that the *Johnson Controls* case was "likely to be the most important sex discrimination case since the enactment of title VII."

You were sworn to protect the rights of the millions of working women in this country against employment practices that completely barred them from high-paying industrial jobs. Frankly, Judge Thomas, based upon the facts, not on opinion, but based upon the facts, it would appear that, instead of protecting these women, you abandoned them. For most of the 1980's, you refused to resolve over 100 discrimination charges that had accumulated at Commission headquarters.

In addition, when you finally began to act, you sold women short by allowing employers to adopt facially discriminatory policies that excluded women who were fully capable of performing their jobs.

In this year's *Johnson Controls* decision, the Rehnquist Supreme Court concluded that employers have no business depriving women of their jobs in the name of protecting non-existent future fetuses. The Court expressly held that "decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them, rather than to the employers who hire those parents." That is the Court's language.

Three months ago, the EEOC finally took the position that "policies that exclude members of one sex from a workplace for the purpose of protecting fetuses cannot be justified under title VII." The EEOC conceivably, probably should have reached that conclusion 10 years ago. You had an opportunity to make it occur. You didn't.

The EEOC's failure to protect women apparently at your direction gives me and millions of American women and men cause for concern, because it appears on the basis of the facts that you didn't protect their rights, when it was your sworn responsibility to do so, and I am very worried that you won't protect their rights as a member of the Supreme Court.

Judge Thomas, as I reflected on our last 4 days of hearings and as I reflect back on your answers to my questions this morning, I feel compelled to repeat a point I have made to you. I am struck and can't figure out a reason, I can't comprehend the number of times in which you suggest that this committee should discount past statements which you have made.

For example, you gave speeches to lawyers and wrote articles in law journals advocating the use of natural law, a subject to which the chairman has addressed himself quite extensively, but now you say that you never meant to suggest that natural law should be used in deciding cases.

You have condemned aggressive legislative oversight, characterized Congress as unprincipled and out of control, and commended

Justice Scalia's narrow vision of congressional power under the separation of powers clause, but now you say that those remarks were just part of the normal tension and give-and-take between Congress and the executive branch.

And other issues such as economic rights, the minimum wage, and affirmative action, there is a conflict between your testimony to the committee and statements which you have made in the past.

But in the area of abortion, one of the most important issues facing this Nation, one that has been discussed and about which you have been asked at great length, it is in that area that you have most seriously sought to distance yourself from your past record.

To the millions of American women who are wondering where you stand on that critical issue, your answer is "trust me, my mind is open, I don't have a position or even an opinion on the issue of abortion." Judge Thomas, that is just incredulous. It is difficult for millions of Americans, whether they are pro-choice or pro-right-to-life, to accept.

You have a record in this area. You simply don't want us to take account of it. You are asking us to believe that you didn't really mean it, when you said Lehrman's antichoice polemic was splendid. You are asking us to believe that you didn't really mean it, when you signed onto a report that criticized *Roe* and other pro-choice decisions.

You are asking us not to worry that you criticized the key constitutional argument supporting a woman's right to choose. You are asking us not to worry that you were on the editorial board of a journal that has only published articles on the abortion issue which vehemently attacked a woman's right to choose. You are asking us to ignore the fact that your nomination is championed by antiabortion groups and that you were selected by a President who has pledged to appoint Justices who will overturn *Roe*. And you are asking us not to be concerned that you, like other nominees have gone onto the Court and undermined the right to choose, have singled out this particular subject for silence.

Judge, I cannot ignore your past statements on the abortion issue and on other critical legal issues and policy issues. I cannot accept the idea that we should give little weight to what you said or did before going on the bench. I reject the notion that what you said or did about certain issues becoming a judge bears no relation whatsoever to what you will do with respect to those issues once you are on the bench.

And I cannot accept your suggestion that we should discount some of your most controversial statements, such as your praise of the Lehrman article or your condemnation of the *Morrison* case, on the grounds that you didn't endorse or agree with what you were saying. That explanation only raises more questions than it answers.

The bottom line is this, Judge: You have a record and I believe this committee and the Senate must evaluate your nomination based upon that record and based upon the way in which you have discussed that record with this committee.

Thank you, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Brown would be next, if he were here, but I yield to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Judge Thomas, I am told that, at least for your testimony, the end is near—a matter that I was going to say you probably see with mixed emotions, but I doubt that would be a fair statement. You are probably happy to have it end. I hope you and your family had a pleasant weekend.

I must admit, while I was up in Vermont this weekend with my family, I heard more discussion about you than I have heard—well, ever since your nomination. Many people came up to me in grocery stores and at gas stations and on the street, virtually every place I was—in fact. And I believe that all but one person I talked with during the weekend mentioned you, and their views either for or against your confirmation.

I told them what I have told others here; that I have been here for virtually all of your testimony. I have done this so that I might know you better. I am one who spends the time here with you. For many of those who will speak either for or against you, I will read their statements, but they are not the ones about to be voted on one way or the other. You are. And so I have been here to get to know you better.

I want to know how you think, what you consider most important in the law or cases, what kind of Justice you would be if confirmed, how qualified you are. In many ways I don't really have those answers. I probably never will, even at the time you finish testifying today. Apparently the judgment has been made, either by you or your advisers or in conjunction with each other—I don't know—not to answer many questions, for whatever reason. And you have stated in a number of instances—when people suggested you weren't answering the questions—you have stated your reasons why. So I will re-read the transcript to see if a better view of you develops.

One of your advisers, Senator Danforth, feels he knows you very well. I am sure he does. He has had years and years of getting to know you, and all of us on both sides of the aisle have the greatest respect for Senator Danforth. But we haven't had that experience with you, so every Senator has had to make up his or her mind based on what you said or have not said here.

I said to somebody this noon that I wanted to look into the window of your soul, if I could, although I find the shade down quite a ways. And that may be me. That may be ineptitude on my part. That may be design on yours. That may be the ships in the night. I don't know.

Let me ask you a few more questions. While I could ask dozens and dozens more beyond the ones I will ask, I suspect that I might not know any more than I do now if I were to ask them. So let me just take a few.

Even though you have been asked a number of questions on natural law, I find that I still get asked a lot of questions about that. Again, when I was home in Vermont, people would ask just exactly what is meant by natural law, or what you mean by it. You have testified here that natural law plays no role in constitutional adju-

dication. You told Senator Hatch on Tuesday, I believe it was, that a constitutional amendment was required to outlaw slavery. Does that mean that you believe that the *Dred Scott* case, which was decided before the 13th and 14th and 15th amendments were enacted, was correctly decided?

Judge THOMAS. I don't think I——

Senator LEAHY. At the time it was decided.

Judge THOMAS. No, I don't think I have suggested that and didn't analyze it in that way. But I believe the question there was whether or not—since he was not an escaped slave, the question was whether or not he enjoyed the privileges and immunities of a citizen, and I think it would have been analyzed a bit differently. But my own reaction to that is that it was not correctly decided, and I have not gone back and redecided it.

Senator LEAHY. Have you not argued that Justice Taney failed to take into consideration the natural law principles in the Declaration of Independence, particularly those that all men are created equal?

Judge THOMAS. I don't have that before me, and I don't have the analysis before me, Senator. But I think that I could be wrong on this. I think that was a privileges and immunities case.

Senator LEAHY. But did you argue that Justice Taney failed to take into account natural law principles in the Declaration of Independence?

Judge THOMAS. No, I think I—and, again, I don't have that before me, but I think the reference was to the Founders' understanding of natural law and what they were including in the Constitution.

Senator LEAHY. Did you tell Senator Hatch that a constitutional amendment was required to outlaw slavery?

Judge THOMAS. I did. But the issue there was a different issue. I think the issue was a black individual who had been taken to a nonslave territory rather than having escaped to that territory. That would have been the similar arguments that were made by individuals who were free blacks and what their rights were.

Senator LEAHY. Should Justice Taney have used natural law in the *Dred Scott* case?

Judge THOMAS. I think he should have, again, read the Constitution and attempted to discern what the Founders meant in drafting the Constitution.

Senator LEAHY. But if he did that before the 13th, 14th and 15th amendments, would he not have had to uphold slavery? I mean, slavery was allowed at the time the Constitution was drafted.

Judge THOMAS. I think the separate issue is, the individual and complicating issue is if you are in a State that does not have slavery or in which slavery is outlawed.

Senator LEAHY. Judge, let me quote from a couple of your speeches. At Wake Forest in April 1988, you said, "I thought that Ollie North did a most effective job of exposing congressional irresponsibility. It forced their hand, revealed the extent to which their public persona is fake." You said then a year later, "Lieutenant Colonel Oliver North made perfectly clear last summer that it is Congress that is out of control."

Now, I don't want to debate the issue of how you felt and what you said at those times, but I take those particular statements because last year, as a judge on the court of appeals, you ruled in favor of Colonel North in his criminal case. You voted, in effect, to sustain the opinion of the panel which had overturned his conviction on the ground that it was tainted by the use of congressionally immunized testimony.

Now, the reason I mention your vote in that case in which you were with a substantial 8–2 majority, as well as your earlier statements, is because I have heard you say over and over again, during your testimony, that you were concerned that in giving us an answer you might affect your judicial impartiality. You said, in effect, that you did not want to recuse yourself from cases that might come before the Supreme Court because of what you said here.

Did you ever consider disqualifying yourself from sitting in judgment on Colonel North's case on the grounds of either the strong support that you expressed for him in 1988 or your criticism of the Iran-Contra congressional hearings?

Judge THOMAS. Senator, first of all, let me address the statement itself. As I have indicated, my statement was in reference to something that happens sometimes with respect to oversight hearings, or I guess in the political environment, and that is that hearings, substantive hearings become overly publicized or over politicized. And in this instance, I indicated—and this is the way I felt in giving that speech. Colonel North exploited that to his own advantage. I at no time expressed—and, in fact, in reflecting on my feelings toward him during that time, my own view was that if he lied to Congress or if he had engaged in any kind of unlawful conduct, then he should suffer the consequences. At no time did I condone that.

On the court of appeals, the issue was a rehearing petition, whether or not that case should be reheard en banc. And I didn't feel that I was in any way less—in any way or anything other than impartial in considering that.

Senator LEAHY. So the answer to my question is "no."

Judge THOMAS. I did not. I felt that I had not expressed any opinion on his culpability or on his criminal conduct.

Senator LEAHY. I want to make sure I understand the answer. The answer to my question is "no"?

Judge THOMAS. That is right.

Senator LEAHY. Do you think that there is a core of political speech that is entitled to greater constitutional protection than other forms of speech?

Judge THOMAS. I think that, Senator, the value that we place on speech, whether it is freedom of the press or whether it is freedom to engage in discussions about politics or whether it expressive conduct, we see those as—and the Court has treated those as—fundamental rights and has protected those accordingly.

Senator LEAHY. Is all speech the same, though? Is all speech given exactly the same constitutional protection?

Judge THOMAS. Well, I think that the Court, of course, has not accorded the same protection of speech to commercial speech, for example. But the issues that have faced the Court have usually in-

volved whether or not—the difficult issues have involved expressive conduct as opposed to pure speech. And——

Senator LEAHY. What about—I am sorry.

Judge THOMAS. And the exercise that the Court has gone through has, in essence, been whether or not the Government or the State can in any way regulate that expressive conduct and under what circumstances, in cases, for example, like *O'Brien* or the cases such as *Texas* v. *Johnson*, the flag-burning case.

Senator LEAHY. You are not saying, then, by any stretch, that only political speech is protected? I mean, there is a lot of other speech beyond political speech that is protected by the first amendment.

I realize what you said about the expressive forms of speech.

Judge THOMAS. Senator, I have not analyzed every single speech case, but my own value would be to protect the entire amendment in all of its fullness and not to find ways to creatively read out that protection. I think it is important that we protect all of the amendment.

Senator LEAHY. Now, for example, if you had non-political speech, like say a scientific debate, that would be protected by the first amendment? I am not trying to get you to a specific case. You understand, Judge. I just want to make sure we differentiate between the types of speech. But a scientific debate, first amendment protections?

Judge THOMAS. Well, I think that speech, we value all of our speech. What I am trying to say is I don't limit and see no reason and haven't seen the Court limit our freedom of speech to whether or not we are talking about science or whether we are talking about politics. Certainly the Court has attempted to accord protection to speech such as, for example, the most recent case being *Texas* v. *Johnson*, the flag-burning case.

Senator LEAHY. Now, in that case, that was a 5–4 decision, as I recall. The Court refused to uphold a conviction on the basis that flag burning was a political statement. Is that a fair shorthand——

Judge THOMAS. No. It was expressive conduct.

Senator LEAHY. Expressive conduct?

Judge THOMAS. Expressive conduct, that the individual was making a statement, a political statement in burning the flag, and that was protected by the first amendment. And the analysis normally is whether or not the Government can in some way control the conduct or regulate the conduct; whether the Government, if it is expressive conduct, has a compelling interest in regulating that conduct.

Senator LEAHY. Do you agree with the *Johnson* case?

Judge THOMAS. Again, Senator, I have not—I think it is inappropriate for me to express agreement or disagreement, but I agree that we certainly should—that expressive conduct should be protected by the first amendment. And I think that the difficulty for the Court has been to what extent can it be regulated, not whether or not it should be protected.

Senator LEAHY. Would it be safe to say you would draw the line at certain kinds of expressive conduct? Suppose somebody says, "I am going to make a political statement by driving 95 miles an hour

down Constitution Avenue." Might you say that that might stretch the first amendment guarantees a tad far?

Judge THOMAS. I think the analysis would be along the lines of whether or not the Government has an interest, a compelling interest in regulating this conduct. And I think that we would probably both—and that is an extreme example. We would both have some difficulty with the Government not regulating someone speeding down Pennsylvania Avenue at 95 miles an hour, although at times you feel in some cabs that you are going 95 miles an hour along Pennsylvania Avenue.

Senator LEAHY. In *New York Times* v. *Sullivan*, which I think we would all agree is the benchmark libel case, the Court held that a public official could not recover damages unless he could prove that the defamatory information was made with actual malice. Does that standard provide sufficient protection for public figures in your mind?

Judge THOMAS. I guess I haven't looked at it from that standpoint. You know, I think all of us who have found our names occasionally in the newspaper would like to feel that we have——

Senator LEAHY. Never happened to you, has it, Judge?

Judge THOMAS. Well—but as I was telling my wife during this process, no matter how badly it turned out as far as the publicity, I think that the freedom of the press is essential to a free society. And she sort of looked at me, because we were going through the midst of it, sort of, Are you out of your mind? But I believe that, and I believe that even as I was going through it and even as I am going through it.

But I think what the Court was attempting to do there was, of course, to balance the first amendment rights, the freedom of the press as we know it, and to not have that in a way impeded by one's abilities to sue the media or to intimidate the media, and applied a standard of actual malice and struck a balance by protecting the rights of the individual with the standard of actual malice.

That is something, of course, that one could debate, but I think it is demonstration, a clear demonstration on the Court's part that the freedom of the press is important in our society, is critical in our society, even though individuals may at times be hurt by the use of that right.

Senator LEAHY. Do you see any need to change that standard?

Judge THOMAS. I at this moment certainly have not thought about changing that standard and have no agenda to change that standard. I think the Court is—my view, as I have attempted to express here, is that we should protect our first amendment freedoms as much as possible.

Senator LEAHY. When you were at the EEOC, you spoke often about preparing our young people for the high-technology jobs of the future. You mentioned especially minorities. I totally agree with you, and I would hope that more and more Government officials would continue to say the same thing and that more and more people in the private sector would say it, because I don't believe we are doing anywhere near enough.

I also know that as new technologies come along, we need to look at some of the civil liberties questions they bring up. One scholar even suggested a 27th amendment to explicitly extend civil liber-

ties, including freedom of speech, privacy, and protection against unreasonable search and seizure, and apply it to these new technologies. I am not endorsing that proposal, but it raises the questions that come up all the time about how we interpret the Constitution in light of technologies that were totally inconceivable at the time the Constitution was written, and some that were inconceivable even 50 years ago.

Do you have any comment on the adequacy of constitutional protection for computer and new telecommunications technologies?

Judge THOMAS. Senator, I think perhaps some of the same questions were raised with respect to search and seizure and certainly addressed by the Court when telephonic communication became an important part of our way of life, and I am certain many of the cases or many issues will arise as to tapping in the computer data bases, as well as issues involving such things as caller ID.

I have not explored all of those issues. I certainly have seen our laws, particularly our constitutional laws, moving and developing, as those technologies move and develop. It certainly has done that in the past, and I would have no reason to believe it won't have that capacity in the future.

Senator LEAHY. We have talked to you about specific issues here, on civil rights, on relations between the Federal Government and States, *Roe* v. *Wade*, and a number of others. On some of those specific issues, you have said that you did not want to discuss them or you had certain parameters beyond which you would not discuss them, because they might come up again.

Let me ask you, then, in the abstract, about your basic sense of stare decisis. Say a case comes before you, you have to make a judgment in deciding whether you should overrule a decision. You feel that the case law that might otherwise control was wrongly decided. The new case you have now is perhaps on all fours, and you have to decide whether to overrule the earlier decision.

Tell me the kind of weight that you would give to these various points. How much weight would you give to the Supreme Court's acceptance of the basic principles of the case—subsequent acceptance—after the Court had decided the earlier case, which you happen to think was wrongly decided?

Judge THOMAS. Senator, it is hard to say exactly and precisely how much weight you would, in judging a case, I give to a particular component. I think, though, that when you have a precedent that has been relied on in the development of subsequent Supreme Court law, it is not one that was simply there and has never been relied on by the Court, but I think that you would give significant weight to repeated use of that precedent and repeated reliance on that precedent. I think that is very important.

Senator LEAHY. Do you give weight also to changed circumstances? Suppose we have changed substantially, as a country even, since the earlier case was decided. Is that something that can at least be considered or should be considered?

Judge THOMAS. I think what the Court does, and it depends on a particular case, Senator, is if a precedent or a rule becomes unworkable, the circumstances change to a point that it is no longer a useful precedent and it is one that is not applicable—I can't think

of one off the top of my head right now, but I think the Court could revisit a precedent when it becomes unworkable.

Senator LEAHY. What about the importance of stability, and adverse consequences that might result from overturning a case that people had relied on up to that point?

Judge THOMAS. I think what is critical there, Senator, is this, that one of the reasons in our case-by-case system of adjudication for having stare decisis is to provide for that continuity, and I think that continuity is a basis for the stability of our system. It is certainly a basis around which institutions can develop, it is a basis around which people can develop some sense of predictability in our system, it is a basis upon which I think people can react in a positive way to our system. I think that the continuity and the stability is important.

Again, let me just add and underscore the factors that you are isolating here, by saying that I think the burden is on those who would change a precedent to show more than simply that they disagree with the underlying opinion. I think there is that additional burden, which would include an analysis or would certainly include the factors that you set out here.

Senator LEAHY. Absent changed circumstances, does the lapse of a significant amount of time weigh heavily in such thinking, or should it?

Judge THOMAS. I think that to this extent and perhaps in this way, I think that in two ways, at least, that the passing of time will certainly have some relationship to the manner, maybe not directly, but the way that the Supreme Court has used that precedent, whether it has cited that precedent over a long period, whether it has built a body of case law around that precedent.

The other point is that, over time, an important precedent could be a basis upon which or around which institutions develop and grow, expectations develop and grow, and I think that those would certainly be taken into consideration, so in that sense I think time is important. But I add this, though, that there have been precedents in our time, for example, *Plessy*, which was overruled, which had been around for quite some time, and certainly I don't think there is any argument that that should not have been revisited, notwithstanding the significant time that it had been around, but I only use that as a caveat.

Senator LEAHY. But in *Plessy* v. *Ferguson*, there were, of course, at least to some extent in our society, changed circumstances, or were there?

Judge THOMAS. Well, society had changed somewhat, not totally. I think that sometimes we think that it changed more than it actually had and we hope that——

Senator LEAHY. Some might ask if it has changed all that much since then.

Judge THOMAS. Well, some do ask rhetorically.

Senator LEAHY. How do you feel?

Judge THOMAS. Senator, the fact that I am sitting here engaged in a discussion with you at a confirmation hearing for the Supreme Court of the United States indicates that there is some change, but throughout there has been much discussion about my speeches and interviews, but you would find a common theme running through-

out them, and that is this, that there may have been changes, but there is still so much yet to change.

There are so many individuals who are left out of our society who deserve and should have a central role or full participation in our society and all that it has to offer, and that is something that I believe in, it is heartfelt, it is something that I have reiterated over the years, and, notwithstanding the changes, there needs to be more.

Senator LEAHY. Let's go through all the different things we have talked about: Changed circumstances and what you said about that; the length of time the case has been on the books, weight to be given to what a change or overruling a case might do to practice that may or may not have become accepted practice.

What if, after you have gone through all of that analysis, in your heart you look at that decision and you say "I don't like it. I read that decision, I disagree with it." Preceding from all the questions of changed circumstances, the affect of time on society, acceptance, et cetera, you Judge Thomas sit there—if you have been confirmed as a Supreme Court Justice, you sit there as Justice Thomas—and you say "I don't like that case, I disagree with that case in my heart, morally, politically, emotionally, legally, whatever the reason is, I disagree with it." What weight does that carry, as compared to all the other things we have talked about?

Judge THOMAS. Senator, there is Justice Marshall's dissent in *Payne* v. *Tennessee*, I think is a very important admonition, and that is that you cannot simply, because you have the votes, begin to change rules, to change precedent. That is not a basis for doing it. I think it is a very stern and necessary admonition to everyone, all of us who are judges.

On a personal level, as a judge, I at the end of the day, if I made a decision in a case that way, that willfully, I could not say to myself in the mirror that I have acted consistent with my oath and the way that I see my obligations as a judge. I do not think that it is appropriate to just simply say, as a judge, this is the way I feel and that overrides everything else. I don't see where we have order to our system, and I certainly don't see where that is consistent with the discharge of my obligations under my oath as a judge.

Senator LEAHY. Thank you.

Mr. Chairman, I thank you. I have many, many more questions, that I do not anticipate going through.

Judge I commend you for being here and I hope you won't think it inappropriate if I also commend your wife and the rest of your family who have been here. I mentioned to your son last week that I admire his aplomb and his ability to stay there, and you would be pleased in his response of why he was willing to do that for you. Thank you, Judge.

Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you.

We will break for 10 minutes.

[Recess.]

The CHAIRMAN. The Chair recognizes the Senator from Alabama, Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge Thomas, your explanation of the——

The CHAIRMAN. Excuse me, Senator. I am sorry. I apologize for interrupting. I was told by staff that Senator Brown, in fact, had no questions. I misunderstood. I guess you wish to make a statement. Is that correct, Senator Brown?

Senator BROWN. Thank you, Mr. Chairman. I think I can complete this within——

The CHAIRMAN. Take your time. I am sorry. I just was told you had no questions or nothing to say. Senator Brown. I apologize to my friend from Alabama.

Senator BROWN. I thank the chairman. I simply wanted to make an observation that I think is important to appear in the record.

There is a lot riding on this consideration, and I don't think any of our members have made statements that they intentionally meant to be misleading. But as I review the record, one thing, at least in my mind, is quite clear. Judge Thomas' remarks with regard to how he would use natural law in my view are very clear and very consistent. He stated before this committee that he would not use natural law in the interpretation of the Constitution if he sat as a Justice of the Supreme Court.

In viewing the consistency of that, I have looked back at the 1½ years of his tenure on the circuit court of appeals, and also at a very similar question that was asked of him when he came before this committee for confirmation to the circuit.

The transcript of what he said at that time is virtually identical to what he said before us. And the suggestion by some that there is some sort of a change in his commitment to not use natural law to interpret the Constitution I think simply is not borne out by the facts. I wanted that observation as part of the record.

I will yield back, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Alabama.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge Thomas, your explanation of the apparent inconsistency in your evaluation of Justice Oliver Wendell Holmes, from a speech in 1988 to the explanation that you give today, troubles me. Let me read this again, the speech at the Pacific Research Institute civil rights task force, which I will read shortly. But as I understand your explanation, it is that when you made this speech you were not as familiar with the work and the opinions and the writings of Oliver Wendell Holmes as you are today; and that when you made this speech, you didn't realize as much as you do today about Holmes; and that since making this speech, you have read books on Holmes and you have changed your opinion.

Now, is that a correct statement of your explanation?

Judge THOMAS. No, I don't think so, Senator, and it is probably because I didn't make myself clear. What I was attempting to say was that I did make the statement, and the concerns that I did have were expressed there. But I said that I did not stop there in my development; that he was someone that I continued to look at, and after going on the bench I decided to go back and to read more about him and to look at him as a person. There was a recent biography of him, "The Honorable Justice," which I read. And it didn't necessarily mean that I didn't—that what I said there is what I believed at that time, but rather that I didn't stop with just that

point of view. I wanted to know more about him and that clearly he is a great Justice, but that doesn't mean that we can't disagree with him.

Senator HEFLIN. Well, basically you are saying, as I understand you, that you read a biography, you studied his writings, his opinions, his life, and you came to a conclusion he was a great Justice.

Judge THOMAS. With the—no. I came to the conclusion that I had differences of opinion with him, but, you know, I think it is one thing to read about a judge or a Justice, I think, when you are on the outside. It is another thing to read about him when you are sitting on the bench also. And I think know more about him now, but I still have that disagreement, as I said, with him that I expressed in that speech.

Senator HEFLIN. Well, in that speech, you basically are expressing a disagreement with Justice Holmes about natural law. Are you not?

Judge THOMAS. Well, no. The disagreement, I think the overall disagreement was one in which I felt that he did not look back to the Declaration that is the backdrop of our regime, not to use it to interpret the Constitution, but rather to not think that there is anything back there at all. As I indicated, our Founding Fathers believed in natural law, and not to recognize that——

Senator HEFLIN. I don't see anything in here about Founding Fathers and looking back—let me read to you the statement that has caused this criticism.

The homage to natural right inscribed on the Justice Department building should be treated with more reverence than the many busts or paintings of Justice Oliver Wendell Holmes in the Department of Justice. You will recall Holmes as one who scoffed at natural law, that "brooding omnipresence in the sky." If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes. As Walter Burns put it in his essay on Holmes, most recently reprinted in William F. Buckley and Charles Kessler's "Keeping the Tablets," "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 in order to govern itself well."

As constitutional scholar Robert Falkner put it, "What Marshall—

Meaning John Marshall—

had raised, Holmes sought to destroy." And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they existed at all apart from willfulness, whether of individuals or officials.

Now, that is the quote.

Now, from reading this, it would appear that in your scholarship prior to this speech that you had read Walter Burns' essay on Holmes and you agreed what constitutional scholar Robert Falkner said about him. But for you to attack with words like this in a speech a Justice of the Supreme Court, as well as one who is generally regarded as one of the giants of the Supreme Court, raises some question in my mind.

First, what was your scholarship in determining at that time before making those statements about Holmes? How much had you read about him at that time?

Judge THOMAS. I think I had read what I cited there, and, Senator, as I noted earlier, one of the points that I had felt that, you know, his statement in *Buck* v. *Bell* was troublesome to me. My point was not so much that he did not use natural law or anything; it was a matter of my attempting to understand natural law at

that time as a backdrop to our Constitution, not as a method of adjudication.

What I was saying recently to Senator Kennedy here with respect to Holmes is that, as a judge, I decided that—I knew I had read Mr. Kessler and some of the others. As a judge, I decided that, look, I want to go back, and I want to learn more about Oliver Wendell Holmes. I want to know more about Warren Burger. I want to know more about all of our judges and Justices. And as a judge, as I indicated, in my readings my point was that even though I may have had in that context, in pulling together my own political theory and trying to develop my own way of looking at our country, my own philosophy, I wanted to look at him from the posture of a judge. And that was a comment that I was trying to make to Senator Kennedy earlier this morning.

I think that it is totally different, at least it has been for me. I have heard comments here that it doesn't make any difference. You don't change when you become a judge. And, of course, you have been a judge. But for me, becoming a judge, as opposed to being in the executive branch, was a dramatic change. And it is one that certainly required me to take a step back and to look at the responsibilities of the job and to look at the difficulty of deciding cases. It also gave me a different appreciation of the role of a judge, one that I could not have had when I was on the outside talking about how we govern our country as opposed to how we adjudicate our cases.

And I think that any of us who became judges or who have become judges look to someone like an Oliver Wendell Holmes, whether we would agree with him from a political theory standpoint or not. My job, my effort has been as a judge to learn from everyone. That is what I was attempting to do, and that is why I indicated to Senator Kennedy—I was trying to suggest a sense of humility that one learns when one sees the daunting task of being a judge.

Senator HEFLIN. Well, now, reading this from your speech, it appears to me—well, it is certainly subject to an interpretation, but it is a very strong interpretation that you are criticizing Holmes because Holmes takes the position that natural law should not be used in constitutional adjudication.

Judge THOMAS. That was not my intention there, Senator. My intention was solely to indicate that I didn't believe that he had an understanding of what it meant to our regime, as a teacher or as a political theorist. I think it would have been easy enough to say that he should have used it in constitutional adjudication. I have not said that.

My effort was solely to look in that speech and the speeches that I have given, to solely look at how our Constitution and how our form of government relates to the Declaration and our Founding Fathers, et cetera. I think I have tried to say that throughout these hearings.

I in no sense considered myself a jurist or considered myself someone who felt that the role of natural law was to be a part of constitutional adjudication. I did not feel that. And I have indicated—attempted to indicate that.

Senator HEFLIN. Well, I read this part of that toward the end of your speech. These are your words: "And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they existed at all apart from the willfulness, whether of individuals or officials."

Earlier in the speech, you say, "You will recall Holmes as one who scoffed at natural law, that brooding omnipresence in the sky."

Now, this language isn't talking about Holmes the political theorist, but it is speaking about Holmes the jurist.

Now, explain—this leaves me that you at this particular time are criticizing Holmes because he said and believed that natural law is not to be used as a means of constitutional adjudication.

Judge THOMAS. Well, I think my criticism perhaps was a bit broader than that, Senator. Certainly—I know I am repeating myself. I did not then nor do I now see a role for natural law in constitutional adjudication except to the extent that I have noted, and that is as the Founding Fathers saw it.

What I was attempting, the point that I was attempting to make in my speeches, in this speech, was that you couldn't just simply ignore it and say it doesn't exist at all, it didn't exist, it had no role in our regime, it had no role with the Founding Fathers.

The Founding Fathers did believe in that. It did have a role in our Declaration, and it did in some significant ways influence the kind of government that was established in our country. But at no point—at no point—did I suggest that it had a role in constitutional adjudication.

Senator HEFLIN. All right, sir. Now, let me ask you about the *Sears & Roebuck* case. This was a case that EEOC was the plaintiff and brought against Sears & Roebuck, largely based on a reliance upon—almost entirely I would say, a reliance upon statistics to prove disparate impact. And I think that you were not the head when this suit was filed.

Judge THOMAS. That is right.

Senator HEFLIN. But as the suit went along, you personally authorized the increase of money for statistical studies in that case. On March 30, 1983, you authorized an increase of $135,000. In May 1983, you again authorized the increase of another $534,000. On August 10, 1984, you authorized another payment of $315,896. Now, close to $1 million was authorized to you, as I understand it, for statistical studies as the case went along.

Then in the case, as the case was proceeding and had not come to any judgment, you made the speech in which you criticized, relying on statistics, and basically said that the agency had relied too heavily on statistics and investigations initiated by the Commission itself and in its review of complaints filed by individuals. And in that statement, you said, "For example, he said a case filed by the Commission in 1979 against Sears & Roebuck Company, still pending in the Federal court, relies almost exclusively on statistics to show discrimination against women."

I am not arguing statistics or whether it is proper or not, but with the investment that had been made in that case, isn't it unusual for a head of an agency to, in effect, cut the feet out from

under the agency's lawyers by making such a statement pending the litigation?

Judge THOMAS. Senator, I believe that that statement occurred once in an interview in 1984. The circumstances of the interview I will not get into. It was not in a speech, and it wasn't in prepared remarks. Not that that excuses it.

There had been an ongoing debate about the use of statistics, not statistics alone but the use of statistics. And I felt that in specific cases in the agency that we had used broad statistical comparisons or broad statistical disparities. I think we discussed it a little earlier in my testimony before this committee. We used those broad disparities as a basis for deciding whether or not discrimination occurred, and it didn't necessarily always show that. I have expressed that concern, and we made changes in the way that we operated at EEOC to address that concern and to solve that problem.

With respect to this case, I indicated immediately after I made that statement—it was an inadvertent statement and it was an unfortunate statement, and I said precisely that. And I think I said that in my last confirmation hearing or in the interview that I had—I can't remember—that it was an unfortunate statement. I do not believe that it either undermined the case or impeded the prosecution of the case. It was, again, an unfortunate statement, nor did it in any way undermine my commitment to pushing that case and financing that case.

We pushed to the point of having to choose between furloughing employees and financing that case. Although it didn't come to that, we had chosen or decided—I decided that we would furlough employees rather than underfinance that particular case.

Senator HEFLIN. Now, the age discrimination problem and the fact that Congress had to come in twice to pass laws to give people who had lapsed claims the right to pursue them causes some concern that has been gone into, basically because there was a charge against you, and it was made at your court of appeals hearing, too, at that time. First there were some 78 cases that had lapsed; later, continuing to grow, one figure was 900 and then 1,608 and then finally somebody came up with the idea of 13,000 of the cases. Your explanation, as I recall, was that you didn't know how the 13,000 came along and that you, as head of the agency, after Congress gave them the right to continue to sue, passed laws in effect eliminating the hurdle of the statute of limitations. You all sent out letters to those—over 2,000 letters went out pertaining to it.

In your explanation in the court of appeals—I don't believe I have heard it here—you raised the issue that there were two statutes of limitations and that there was confusion as to which one would apply; that there was a 2-year statute and there was a 3-year statute. And then came along the case of *TWA* v. *Thurston* that, in effect, strictly construed the 3-year statute. The 3-year statute was based on willfulness.

Now, there was some misunderstanding and confusion, not only in your office but in the district offices, the State and the local offices, pertaining to this. The statutes of limitations are always in the minds of a practicing lawyer. He gets a lawsuit, and he investigates, and he has got real fears that if the statute of limitations ran against him. His client couldn't pursue in court because of the

statute of limitations, and he would be subject to malpractice suits as well as losing for his client outright. And it is a thing that practicing lawyers sometimes wake up in the middle of the night in horror and dream of something like that. All practicing attorneys develop a methodology in order to prevent the statute of limitations from running on any case that is in their office. You try to develop it where you will be sure that it doesn't happen.

Now, in this case, let me ask you, was the issue of the statute of limitation an issue that was involved in the interpretation of this as to why these claims lapsed?

Judge THOMAS. It was early on. When I arrived at the EEOC, Senator, it was commonly felt that the agency had basically conflated the two statutes and considered the statute that really limited it to be the 3-year statute.

After *TWA* v. *Thurston*, there was certainly concern that you could no longer do this. The agency had interpreted willfulness to mean basically that if a company knew that it was covered by the Age Act, then any violation during that period was a willful violation. That is a generalization. That was basically the agency's view. So the agency simply responded to the 3-year statute. After *TWA* v. *Thurston*, the agency had to take a look at and be concerned about the 2-year statute.

Your view of the response to statutes of limitation is my view. I think I noted earlier in the hearings that I have made that midnight run to the office of the attorney general, to the attorney general's office. I wasn't in private practice, but you wake up in a cold sweat and you throw something over your pajamas and you run down to the office to make sure that you haven't missed the date for filing a notice of appeal or responding to interrogatories or what have you.

I felt that everyone responded when you heard "statute of limitations." You responded with fear or apprehension, et cetera.

That was not the case, however. The response wasn't always that way. It depended on the individuals in the particular offices, and that is not a criticism of all the individuals. But some individuals responded the way you and I responded. Some individuals did not respond. Indeed, some individuals said that the statutes were missed because it was a management decision, which horrified me that anyone could feel that way.

But we did eventually put in—some managers had their manual tickler system to show when the statute was running. What we had to do in headquarters was to help to develop an automated tickler system in the computer so that there was absolutely no reason why anyone could say that he or she didn't know that the statute of limitations was approaching.

But I would not pass off the change in the *TWA* v. *Thurston* ruling in the way that we viewed the statute of limitations as a reason for missing those statutes. It was a complicating factor. It was one of the many factors. But I don't think that there is any excuse for missing a statute of limitations. Indeed, when this whole matter came up, I offered none.

Senator HEFLIN. Well, in order to clarify a distinction between two statutes of limitation, isn't it from an administrative viewpoint, since this involved primarily an issue of whether or not you

or somebody can proceed to sue, whether you sue on behalf of them, whether the EEOC sues on behalf of, or whether they allow them to sue?

Now, it seems to me that any uncertainty would have called for a managerial approach to try to at least take the thinking don't take a chance on the third-year statute, you had better work on the 2-year statute if there is any question at all about it. Was there any activity on the part of you or your lawyers in the EEOC to so advise all people that were handling such claims on behalf of the EEOC?

Judge THOMAS. That was certainly my response, Senator. I didn't think that it made sense to rely on the 3-year statute of limitations. That may have been a secondary approach, but it certainly should not have been our primary approach.

We did, as I have indicated, I think in discussions with Senator Metzenbaum, that when I arrived at the agency, the agency didn't attempt to investigate most of the age charges. I don't know what the percentage is, but it was a small fraction of the charges that were actually investigated. Unlike title VII, the Age Discrimination in Employment Act does not require that there be an investigation. There were normally some attempts made at conciliating or reaching the employer, and the case was closed out by the agency in about 60 days, and the charging party was told to find a lawyer and pursue your case in court.

When I arrived at the agency, what we attempted to do as Commissioners was to recognize that we should put the age cases from an administrative standpoint on parity with our other cases; that is, we had an obligation to investigate them. Actually investigating them, however, took more time.

We realized that, and we attempted to inform our managers and to instruct them, cajole them, put it in their performance agreements, to get them to realize that the inventory had to be managed with this consideration in mind that there is a 2-year statute of limitations that must be taken into consideration, not just the first-in, first-out approach that had been used in the past.

That worked in many instances. In a number of instances, however, it did not work. We followed that up, again through performance agreements with management directives, as well as with requirements that they take into account age cases that are approaching the statute of limitations, that they move those to the head of the line. We did all those things.

The problem, however, was that in some offices there simply wasn't a response, an appropriate response. Hence, we missed the statute of limitations in a number of cases.

Senator HEFLIN. I believe my time is up.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge let me just add, your family deserves some kind of a special medal for patience, sitting through all of this, and we appreciate their doing that.

If I may get back to a question that you declined to answer, for reasons I understand, and that is the *Rust* v. *Sullivan* decision. But

what is involved there is something very basic, and that is whether the Federal Government can restrict speech if we fund something.

Let me take some hypothetical cases that you will not be faced with. The Federal Government funds libraries through the Library Services and Construction Act; just a small amount, but we provide some funding.

Would it be constitutional for the Federal Government to decide there are certain books—let's just say back when we viewed communism as an immediate threat, if the Federal Government decided you can't have any books by Karl Marx in the library because we provide funding. Would that be constitutional?

Judge THOMAS. Senator, I think that we could take an example like that, and I could offer an opinion on it and say that that would not be—that was a problem, a violation of the first amendment. But I think that the difficulty would be in offering an opinion on those kinds of examples would lead me back to *Rust* v. *Sullivan*. But let me make this point: I would be concerned by any effort—and I think that we all should be concerned that when the Government can, especially with the Government being involved in more and more parts of our lives every day, we should be concerned that if the Government funds or attaches strings that limits fundamental rights merely because of the receipt of those funds. I would be concerned about it, and I think as I noted earlier, I certainly would be concerned in this case that there would be some condition on the exercise of first amendment rights.

Senator SIMON. And I am not suggesting that—obviously you have not had a chance to look at anything in depth here. But to get a feel for where you stand, a little more of a feel than the generality that you just gave us, your off-the-top-of-your-head instinct, would the Government have the right to restrict what books they can have in a library?

Judge THOMAS. Without committing myself, Senator, could I——

Senator SIMON. Without committing yourself——

Judge THOMAS. I might——

Senator SIMON. I don't want you to commit yourself to doing certain things: I don't want you to be on the bench and think, well, I told the Senate committee this or that. But I am interested in knowing what your feeling is on the first amendment.

Judge THOMAS. Well, I would hope that the Government can't do that. I would have grave concerns if the Government can, through simply providing funding, undermine fundamental rights. It would be my hope that that could not happen.

Senator SIMON. All right. I have some other examples, but let me get to a more specific example that you were involved in at the EEOC. There was a man named Frank Quinn who was in charge of the San Francisco district. He was the district director. In 9 months he was going to retire. He had high ratings. He was asked by Newsweek magazine to comment, and he gave a comment that was not complimentary to the Washington office of the EEOC. And then he was transferred to the Birmingham office—meaning no disrespect to Birmingham here now. I may get in trouble with my colleague. He was transferred to the Birmingham office where they had had a vacancy for a full year.

He went into court, and a judge appointed by President Nixon, Judge Schnackey, in upholding Frank Quinn's right not to be transferred, said,

> We have, I think, an overly outraged reaction to the initial publication demonstrating at the very least deep anger at the temerity of anyone in Mr. Quinn's position to make the statement that he did. On the evidence before me, I can find absolutely no rational basis for the agency's conduct. All of the evidence tends to support Mr. Quinn's view that this was a deliberate, arbitrary, and capricious desire to punish him. I haven't the slightest doubt Quinn was transferred as punishment for the exercise of his First Amendment right.

Now, you may want to comment on the case. But the more fundamental question is: How do you view first amendment rights for Government employees?

Judge THOMAS. Senator, I fundamentally disagree with that statement. And I did then and I do now. When I arrived at EEOC, I established a policy and made it clear to all district directors, who are members of the Senior Executive Service, that they would be rotated. I had rotated some into headquarters from the field offices—in fact, one from Birmingham—and intended to rotate the others across the field.

The indication that this was in response to an article, I do not believe I have seen the statement in the article, and certainly it had no bearing whatsoever on my decision to move Mr. Quinn. I have stated that and would continue to state that. And if I did, I think it is inappropriate.

My own view is that individuals—I would hope that individuals who worked for me wouldn't feel the need to criticize me publicly, but I think they have the right to do so.

Senator SIMON. And they have the right to do that without being transferred or anything like that?

Judge THOMAS. I think so. But this case was not that point. Others have criticized me, and there certainly were no efforts against them. I think that this was confused in this case with a policy that I thought was important to the development of EEOC as an agency. When I arrived at the agency, the agency was stagnant. The agency needed some stimulation, and I believe that the agency needed to have the managers moved around, sort of stir up the waters somewhat. And I made that clear, and we did rotate managers and continue to rotate managers.

Senator SIMON. You can understand the judge's assumption, because it happened only a few days after the Newsweek article appeared, that he was transferred because of that.

Judge THOMAS. That has been quite some time, but I think that that had been in the works prior to the Newsweek article. I had made a number of decisions early on in my tenure and simply began to implement them. That had, from my standpoint, no relationship whatsoever. And I don't think—I don't remember that what he said was particularly offensive anyway.

Senator SIMON. You gave a talk to the Kansas City Bar Association in which you refer to the Newsweek article. You were unhappy with the Newsweek article, obviously. Do you happen to remember——

Judge THOMAS. But not the Quinn—I don't think I referred to Mr. Quinn. I thought that the article was off base, but I didn't refer to him, I don't think.

Senator SIMON. I don't have that here. I don't know. But in terms of basic freedom of speech, if an employee of any Federal agency speaks—and obviously some things are confidential, some things are classified. There are some limitations. But just because something would be embarrassing to an agency is not cause for restricting freedom of speech for a Government employee?

Judge THOMAS. It certainly wasn't from my standpoint, and I would be concerned if as an employee my speech was in some way impeded.

Senator SIMON. In an area where you have expressed your opinion here to the committee, on the death penalty—where I happen to be in the minority on this committee—two realities are a part of the imposition of the death penalty in our country. One is it is a penalty we reserve for people of limited means. If you have enough money, you hire the best attorneys; you never get the death penalty. The second reality is that it is much more likely to be applied to minorities. If you are black, Hispanic or Asian, you are more likely to get the death penalty.

We have executed in this country literally hundreds of blacks for killing whites. So far as I have been able to determine, my staff has been able to determine, only two whites have ever in the history of the country been executed for killing blacks.

If you were on the Court and the circumstances were such that you felt that economic circumstances dictated a lack of qualified counsel for someone who received the death penalty, or you were persuaded that the fact that a person was a minority was a factor in receiving the death penalty, what would your attitude be?

Judge THOMAS. Senator, it would be similar to the attitude I have now and that I expressed here. I don't know of any judge who could look out the back window of our courthouse and see busload after busload of young black males and not be worried and not be concerned and not be troubled. I think it is only exacerbated by the fact that it is the death penalty.

As I have noted earlier in these hearings, one of the reasons that it is so troubling is that it is a very fine line between my sitting here and being on that bus. And I think that any judge who has that obligation and that responsibility of adjudicating those cases and has that responsibility of reviewing those cases should be concerned if the death penalty is imposed based on socioeconomic status and certainly imposed on the basis or at least to a large extent disproportionately on the basis of race. It is certainly something that I am concerned about at this point and would continue to be concerned about as a judge.

Senator SIMON. And it would be something that you would have to weigh as a member of the Supreme Court. Am I reading you correctly?

Judge THOMAS. It is something that I certainly go there with in my mind and in my calculus when I think about these issues.

Senator SIMON. But it is not just that you go there with that in your mind. If you were convinced someone received the death penalty because he or she did not have adequate counsel, for example,

because of economic circumstances, would that be a factor that you would weigh, among others?

Judge THOMAS. I think it would be important for me to take that into account, Senator.

Senator SIMON. OK. Let me shift to a couple of loose strings. The Jay Parker/South Africa issue we have talked about. We have received one additional phone call from someone who verified that there was a staff meeting. We talked about it; you did not recall. Do you recall this any further upon reflection, or has anyone reminded you or anything at all?

Judge THOMAS. Senator, I have attempted to reflect on it. My recollection is as I have told you. I have attempted to try to understand where the confusion could come from. And I knew that Jay Parker, for example, represented one of the homelands. That could be a source of confusion as to whether or not he represented South Africa. I also knew that a colleague and friend of mine who worked with me here in the Senate and went on to other endeavors, as well as worked with me during the Reagan administration, represented South Africa. That was a matter of public knowledge.

I don't think—I do not remember or recall Jay Parker's involvement being a matter of public knowledge prior to my nomination. I certainly was not aware of it until the last few months.

The only confusion that I could think of, based on my own recollection, would be that he has had significant dealings in South Africa, and someone may have felt—or I may have imprecisely stated that, and they may have felt that he was representing South Africa. But I simply didn't know. I don't recall knowing, and I don't recall such a meeting.

Senator SIMON. Do you now or have you ever had any financial dealings with Jay Parker?

Judge THOMAS. No. We had no financial dealings. He is a friend of mine.

Senator SIMON. And, again, on recollection, you were not aware prior to your nomination and the publicity that came with it of any involvement on his part with the Government of South Africa other than the homelands?

Judge THOMAS. No, I was not. My recollection was that, again, a mutual friend of ours, a Bill Keyes, was representing—and that was public knowledge. He represented South Africa.

I was not aware of Mr. Parker's involvement, and I do not recall the meeting that you indicated. Again, there may have been confusion, as I have indicated, but I did not—I was in no way aware of that.

Senator SIMON. Thank you very much, Judge.

I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman.

I would like to commend you on your patience and open-mindedness during this hearing, particularly under circumstances which were at times trying.

Judge Thomas, I would like to give you one more opportunity to talk about what many of us are concerned about, and that is the

possibility that you have a philosophy that tends to change with your audience.

I would like to quote for you a part of a column that appeared this morning in the New York Times and then ask you if you wouldn't think about it for a moment and then comment on it, hopefully to enlighten us.

The most striking aspect of Judge Thomas' testimony was his disavowal of just about everything that he said in speeches made while he was Chairman of the EEOC. The strident right-wing message was appropriate to his role in a right-wing administration, he suggested, but he donned a new skin of impartiality when he became a judge. Indeed, Judge Thomas went further in his disavowal. He implied that he had made some of his conservative comments partly to please conservative audiences. That was his explanation for his praise for the extreme anti-abortion position of Lewis Lehrman. But if he tailored his philosophy to please his audiences in the past, might he not be doing so at this time in the Senate Caucus Room?

Judge THOMAS. Senator, there is much that has been said, but I don't think that I said that I tailored my message to please an audience. In fact, the Heritage speech was precisely the opposite of that, it was to make the audience uncomfortable. My explanation with respect to the Lew Lehrman reference was simply to convince the audience to re-look and revisit the issue of civil rights. The bulk of that speech, the first part of that speech is a criticism of conservatives as well as the Republican administration.

The second point I would like to make, Senator, is that I do think it is important to have be a member of the judiciary, as opposed to being a member of the executive branch. There is a significant difference, and I have not through my history at EEOC or on the bench or any place else attempted merely to please individuals. That has not been a suggestion of mine.

I was a member of the executive branch and I think I conducted myself as a member of the executive branch. I am a judge now, and I think I conduct myself as a judge.

Senator KOHL. But you said that there was a difference—and you said that consistently—between being a member of the executive branch and being a member of the judiciary. And certainly there is a difference, it is a simple fact. But you are being considered here to become a member of the Supreme Court, because of whatever your philosophy is—and we are attempting to get at that.

Now, are you saying that that philosophy has changed, as you moved from the executive branch to the judicial branch, or are you saying that you had a philosophy in the executive branch, but you come now to judiciary with no philosophy?

Judge THOMAS. I said that, I think I have indicated I engaged in ideological and political debates and discussions. I participated in debates and policymaking, I participated in debates between the two political branches. As a member of the judiciary, I do not think that ideology is important and I do not engage in those political or policymaking battles or discussions.

Senator KOHL. Just one more question and then we move on. I don't differentiate perhaps as much as you might between ideology and philosophy. I think that what we are saying here is we are asking ourselves and asking you whether the philosophy that you expressed when you were in the executive branch is the same philosophy that you have today.

Judge THOMAS. I am the same person, my outlook, I believe in our country, I believe in trying to look at a problem and solve that specific problem, to look at a statute or a case and be true to my obligations with respect to that statute or that case.

I do not believe, however, that there is a role in judging for the expressions of the kinds of personal views or the policymaking or the personal opinions that you have in the executive branch.

Senator KOHL. That is all right, but would you say that I can assume that, in general, the kinds of philosophies that you had expressed, however we interpret those, when you were in the executive branch, are not that dissimilar from the kinds of philosophies that you carry today?

Judge THOMAS. I am the same person. I think the role, again, the judicial philosophy versus being a policymaker is different. I think that there is an indication of the kind of person I am when I was in the executive branch and my outlook on life.

The only point that I am making is that, to the extent that those are political statements or policymaking statements, I don't think they are relevant in my role as a judge.

Senator KOHL. Thank you very much, Judge Thomas. I don't suppose I will be speaking to you again, at least not in this capacity. I found you to be an intelligent, bright, and humorous person.

With respect to the process itself, Mr. Chairman, I think that one of the things that has come out of this confirmation hearing is that we need to do as much as we can to ensure that the hearings in the future leave us all, at least most of us, with a little more definite feeling about what kind of a person, in terms of philosophy, we are voting on.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I have questions. It is my turn to come around. What I will do is I will ask a few of them and then I will yield to the Senator from Pennsylvania who has questions on his last round, and then I will conclude.

Judge I would like to go right back to methodology, if I may, without any preamble. I would like to talk to you about the *Michael H.* case, and famous footnote 6, if I may. I don't want to bore the listening public with the esoteric underpinnings of that debate, but let me just simply ask you: Do you concur with the rationale offered by Justice Scalia as to how one is to determine whether or not an interest asserted by a person before the court, an interest asserted that there is a fundamental right that that person has, whether or not you must go back and look at the most specific level of that interest as asserted, like he suggests, or as has historically or traditionally been viewed, a broader look back at the more general interest asserted, as Justice Kennedy and Justice O'Connor indicated, notwithstanding the fact they concurred in the opinion with Justice Scalia in the *Michael H.* case? Would you speak with me a little bit about that?

Judge THOMAS. Senator, again, that is a very recent case and I am in the position of not wanting to comment on that specifically, but I am very skeptical——

The CHAIRMAN. I am not asking you to comment on the case. I am asking you to comment on the footnote.

Judge THOMAS. I am skeptical, when one looks at tradition and history, to narrow the focus to the most specific tradition. I think that the effort should be to determine the appropriate tradition or the tradition that is most relevant to our inquiry, and to not take a cramped approach or narrow approach that could actually limit fundamental rights.

I think that Justice Kennedy's reference to *Loving* v. *Virginia* was a very catching reference in his reference and one——

The CHAIRMAN. Excuse me, Justice Kennedy's reference to *Loving* v. *Virginia?*

Judge THOMAS [continuing]. Was a very telling reference and one that certainly caught my attention. But I think that I would be skeptical of that kind of an approach, Senator, very skeptical of——

The CHAIRMAN. The Kennedy kind of approach?

Judge THOMAS. The Scalia approach.

The CHAIRMAN. I hope so. Justice Kennedy's references to *Loving* I think are—and there are other cases we could point to and not just *Loving*—as to whether or not we go back and look in history as to determine whether or not there is a protected fundamental right. In the case of *Michael H.*, the issue there, as you know as well or better than I do, was whether or not a father who, in fact, was the father by blood of the young person in question, whether or not he had any rights to visitation, notwithstanding the fact that the child was born at the time when the mother was married to another man. Justice Kennedy asserts that—Justice Scalia asserts that when you go back to determine whether or not there is a personal right to privacy of a father to be able to visit his child, that you go back and not look at whether or not fathers have those rights, but whether illegitimate fathers have those rights, and he concludes, as you well know, that nowhere in our English jurisprudential tradition are illegitimate fathers treated the way that "fathers are treated."

When you narrow the scope to look that way, you can come out with the ability to suggest that there is no historical background or tradition that protects illegitimate fathers, ergo, in *Loving* v. *Virginia,* as you know better than I, it was a case that ended miscegenation in this country, at least in Virginia and the country, and if you apply the Scalia method, you would go back and say is the right of marriage, one that we always look to, and Scalia says no, no, you don't look at marriage, you look at whether or not the miscegenation laws were legitimate, they have always been viewed as that in our unfortunate background, therefore. So, that is why it is so important, as you well know, and, as I understand it, you are not taken with the Scalia approach.

Judge THOMAS. Skeptical.

The CHAIRMAN. I hope you are more than skeptical, Judge.

Judge THOMAS. Well——

The CHAIRMAN. At any rate, let me move on, if I may, for a moment now to the issue of separation of powers, if I may, and go back to *Morrison* v. *Olson,* if I may. I won't bother you with the quotation. We have talked about it before, which is the quotation about *Morrison* being the most important case since the *Brown* v. *Board of Education.* We have talked about this passage several

times, and you talked about it with Senator Leahy, and I want to ask you why you thought the independent counsel case was the most important since *Brown*.

Your answer, if I understood it when we spoke about it the last time, was that you were addressing an audience for whom the topic of separation of powers would seem, to quote you, "obscure" or a topic that "doesn't excite people in the audience." Now, is that correct?

Judge THOMAS. And also it dealt with any case that dealt with the structure of our Government. For example, *INS* v. *Chadha* deals with the structure of our Government and the congressional veto. I think those are important cases, because I think the Supreme Court has very few cases directly addressing the structure of our Government.

The CHAIRMAN. I can understand the need, we all do in each of our businesses, you when you were in the executive branch and us in the legislative branch, trying to get the attention of an audience that may not want to pay attention to an esoteric subject. It never happens in these hearings, but it occasionally happens in other places, so I understand the technique, and I don't say that critically, I mean that sincerely.

I never did get around to asking you whether you actually do consider *Morrison* v. *Olson* the most important case since *Brown* v. *Board of Education*.

Judge THOMAS. I think it is one of the most important cases. I think it is among the important cases. Of course, I say that because I think the cases that deal with the structure of our Government are important cases.

The CHAIRMAN. Well, I am sure you know why I was drawn to this quote and comment, and it wasn't so much because it had a darn thing to do with *Brown* v. *Board of Education* and looking whether you thought something else was as important or the most important since then.

As you know, there is a group of people beyond yourself who consider the independent counsel case very important and maybe even the most important case since *Brown*, and I am thinking of the libertarians who are devotees of Mr. Epstein and others, those people who have two major items on their agenda and they state them very forthrightly. One is to use the takings clause of the fifth amendment to limit the power of society to regulate. You and I have talked about that. And the other is to limit the power of society to regulate by revitalizing the doctrine of separation of powers.

Now, when you gave that speech at the Pacific Research Institute, did you realize the significance of the independent counsel cases for the people with what I will characterize as with these views?

Judge THOMAS. This is the first I have heard of that. I have heard of the takings argument, but I haven't heard of the separation of powers argument.

The CHAIRMAN. Well, the reason why again it was brought to my attention, I am reading Solicitor General Fried's book, as we mentioned in another context, and Solicitor General Fried and I have had our little disagreements before this committee and he has

never been accused, at least in the circles I travel in, of being a liberal.

In the book he wrote about his years as Solicitor General in the Reagan administration, he refers to a group of executive branch employees, primarily in the Justice Department, whom he refers to as "Reagan revolutionaries." Professor Fried writes of the so-called revolutionaries and what they thought about the Independent Counsel case and why they thought it was such an outrage, such a horrible decision, that is, upholding the Independent Counsel.

But they also thought something else, he said. They thought that if they could get the Court to strike down the Independent Counsel statute, they would have a basis for striking down all independent agencies, because the rationale that allows the Independent Counsel case to be struck down would allow the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission, the Federal Reserve Board—which is one of their primary targets—to be struck down.

According to General Fried, this group wanted all of these agencies placed under the thumb of the President, rather than continuing to operate with a modicum of independence from the day-to-day political influence, and I quote from his book, on page 154, "Order and Law."

He says, "To the revolutionaries of the Reagan administration, the independence of the independent regulatory commissions, for instance, the ICC, the FTC, the FCC, the SEC, and, most importantly, the Federal Reserve Board, was on a fence against the principle of the unitary Executive and of the separation of powers."

"So," he goes on to say, "that is why *Morrison* was such a big deal to so many people, and still is to so many people, bright, attractive and energetic people who would like very much, nothing wrong about it, but would like very much to change the regulatory process in agencies of this country."

If Justice Scalia's opinion, the lone dissent that you found so remarkable—and that is your word, remarkable—in the *Morrison* case, had been the majority opinion, all of these agencies would be unconstitutional, if Scalia's dissent were the majority opinion, including the Federal Reserve Board, an independent agency that has served this country extraordinarily well in recent years, most might suggest, because the rationale of Scalia's opinion does not stop at the Independent Counsel statute, it would outlaw all independent agencies.

Now, Judge, do you believe that the separation of powers requires the abolition of independent agencies in the Federal Government?

Judge THOMAS. Senator, I have not thought that. In fact, I was on the other side of that debate, but let me just walk through it a second.

The CHAIRMAN. Please.

Judge THOMAS. EEOC was one of the rare independent regulatory agencies in the executive branch.

The CHAIRMAN. If I could stop you there, as you know, there was a debate at the outset as to whether or not EEOC was, in fact, truly an independent agency and designed to be one, unlike the FCC and others which clearly unequivocally were meant to have

independence in that the President could not dismiss without cause.

Judge THOMAS. Well, that debate about EEOC was, for all practical purposes, conceded in the Reorganization Act of 1978. My argument, as the Chairman of EEOC, was that EEOC needed to be independent, that it was enormously difficult, as one of my Commissioners put it, we had the worst of both worlds. We were one of the few independent agencies or commissions that had to have its regulations cleared through the Office of Management and Budget and engage in a process that the other executive branch agencies had to engage in, and there were problems with that, so I advocated just the opposite, that it be truly independent.

I was aware of the academic debate years ago, particularly after the New Deal era, concerning administrative agencies. I did not participate in that debate during my chairmanship of EEOC, and I really just thought it was nothing more than the debate that you would place next to the gold standard debate.

The CHAIRMAN. It is alive and well, I must tell you. [Laughter.]

Judge THOMAS. There are some limits to the things that I can spend my time on, but I was not involved in that debate and was not aware that there was a relationship or there was a second agenda to *Morrison* v. *Olson*. This is news to me, as you explain it today.

The CHAIRMAN. Well, Judge, in light of what you know now, you do understand why this is such an important issue to question you on, don't you? If you look again at the dissent in Justice Scalia's dissent—and he has been consistent, by the way, this is not a new notion for Justice Scalia—he takes separation literally and, as you well know, he is in a position where he suggests that articles I, II, and III set out the parameters for each of the branches and they do it very precisely, and that any branch that in any way, voluntarily or involuntarily, treads on the prerogative of another, in this case if there is any executive capacity or judicial capacity that any of these agencies possess, then, in fact, they have gone beyond what is legitimately authorized in the Constitution under the separation of powers doctrine, doctrine, I might add, that is not anywhere mentioned explicitly in the Constitution.

So, this is a big deal, and if there were five Justice Scalias on the bench, we would find ourselves with a radically different means by which we would be able to have this Government function. I am not being pejorative, when I say that. For argument purposes, he may be right, but it would radically change it.

The FCC has judicial functions as well as legislative functions, it has rulemaking capacity. He argues, no, no, rulemaking capacity, that's legislative, it can't be done. In *Morrison,* he argues, wait a minute, you still have the—you put, in effect, the executive branch in the position where it has to assign a special counsel, so notwithstanding the fact you allegedly give independence, whether or not to determine whether or not such counsel exists, you have already stepped over the line, therefore, it is unconstitutional, because the legislature is taking on some executive function.

I am not being facetious when I say this, but do you understand why his dissent is so significant, if it were to be the majority view of the Court, or do you disagree with my assessment of his dissent?

Judge THOMAS. Well, in the context that you explain, I can understand your concern. My quote and my reference in the speech was that with respect to the individual rights that were affected in this particular case, but——

The CHAIRMAN. I will accept that on its face, because I believe you mean that and, believe it or not, I am delighted to hear that is the case, and not the larger case, because it is a—when I say agenda, I don't mean it again to sound so pejorative, when I talk about an agenda out there unrelated to you, but I think we should understand that there is a good deal of intellectual ferment.

I must admit, one of the reasons why the right has been so successful is there is much more intellectual ferment on the right than there is on the left today. I think the left has fallen back on its laurels in many ways. It finds there is no need to come up with new methods and means by which to promote its objectives, but that is not lacking on the right and there is an explicit desire, not at all denied by any of the young intellectuals who wish to see a change, that the way to deal with too much Government bureaucracy and regulation is to eliminate the regulatory bodies that exist, thereby giving the Executive total control over those elements of regulation, as opposed to the legislative bodies.

I won't bore you with that. I accept your answer for what it is to be the truth, and I will at this moment, unless you would like to add anything, I will yield to my colleague in a moment.

Judge THOMAS. No.

The CHAIRMAN. I suggest we break and give you a break, unless you have a comment to make on what I said, and then I will yield to my colleague when we come back, Senator Specter, and we will have you question then, Senator.

We will recess, to give the witness time to stretch his legs a little bit, about 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Thomas, in my last round of questions, I was discussing with you the topic of the revisionist court, which is a name that I affix to our current Court because it is not a conservative court; it is a revisionist court, as I see it. And I want to discuss with you two cases which are illustrative of its being a revisionist court because they are two 1971 opinions by a unanimous Supreme Court, with the opinions being written by Chief Justice Burger in a very conservative thrust.

One of the cases is *Swann* versus the school districts, and I ask you about this case because you had written on the subject in the Boaz edition of "Assessing the Reagan Years." And you complained about "*Brown* not only ended segregation but required school integration."

My first question to you is: If you end segregation, doesn't it necessarily mean that you are requiring school integration?

Judge THOMAS. Well, I guess semantically the reference, my own reference to those different terms would have been that desegregation would be the ability to simply not be barred from certain ac-

tivity and integration would be more positive; that is, you are required to have a certain percentage or certain number.

Senator SPECTER. Judge Thomas, does your criticism of the *Swann* case signify another one of the illustrations of your advocacy from the executive branch, or is this something you really think should be changed and something you would try to change if confirmed for the Supreme Court?

Judge THOMAS. Senator, the answer to the second portion of your question is the same as I have said in other areas. I have no agenda to change existing case law. That is not my predisposition, and it is not the way that I approach my job.

The concern that a number of us raise with respect to just as individuals in this society, as individuals who have watched the changes in our country, was simply that if we could demonstrate that the educational opportunities were improving for minorities, then whether it is busing or any other technique, then use it, but make sure that we are helping these young kids. That was totally out of the legal context. That just simply would have been a preference that I expressed as a citizen.

I have not reviewed, gone back and looked at *Swann* or the other cases and made any determination that would undermine my ability to look at those cases impartially. And I certainly don't have a predisposition that precludes me in any way from looking at those cases in an objective manner.

Senator SPECTER. Judge Thomas, let me pick up the second unanimous opinion, again written by Chief Justice Burger in 1971, which I know you have reviewed, and that is *Griggs*, which has been an enormous source of controversy. It has occupied a tremendous amount of time by the Members of Congress, by the President. It has occupied almost as much time for Senator Danforth as your confirmation hearings have occupied.

This is a case which I have commented on when we have considered legislation to change the *Ward's Cove* decision because I think it is a very serious matter when you have a statute enacted, as the Civil Rights Act was in 1964, and you have a 1971 unanimous Supreme Court decision written by the Chief Justice, handling many issues, two of which are the definition of business necessity and the second of which is the burden of proof. And then 18 years later, by a 5-to-4 decision, as I read *Ward's Cove*, that law has changed. Not interpreted but changed. And four of the five Justices who voted in *Ward's Cove* to change the law put their hands on their Bible in the confirmation hearings in the course of the past decade and swore not to change the law but to interpret the law. And I think if there is any principle which is rock-bed we all agree to among the 14 of us here and the 100 in the Senate, it is that the Supreme Court ought to interpret the law and not make law.

The Court in *Griggs* said that the touchstone is business necessity, and in *Ward's Cove*, the Court said that there is "no requirement that the challenged practice be 'essential' or 'indispensible.' "

Now, this is shortcutting a very extensive amount of complicated discussion, but the essence of a defense was business necessity in *Griggs* and in *Ward's Cover* they say it need not be essential, which is about as direct as you can have on a change in language.

When you testified before the Judiciary Committee on your confirmation for the District of Columbia, I had asked you about a series of cases, and you had said, in part, "There is a definite change in the burdens under *Ward's Cove*."

Is there any doubt, Judge Thomas, that *Ward's Cove* overruled the *Griggs* case?

Judge THOMAS. Senator, I think that if the Court had intended to overrule it, I would hope that it would have done so explicitly. When I was Chairman of EEOC and, as you indicate, when I appeared before this committee the last time, you asked me about this case. Our response at EEOC, when we were initially involved in this, was that we should have simply—the Supreme Court case should only have involved whether or not there was a prima facie case. That was EEOC's official response.

Our reaction to the ruling—and I was at EEOC only a short time after the ruling—was that there was a change in the business necessity test. That was our reaction. I was not there long enough to determine precisely the extent to which there was this change, but that was our reaction at the time. And I have not since I have been a judge, of course, revisited those questions.

Senator SPECTER. Well, that is one of the two questions that I told you in our brief meeting on August 1, that I would ask you, only two, the questions about Korea and the question about *Ward's Cove* reversing the *Griggs* case. And I would agree with you that it would be preferable in the sense if it is explicit, but I think the way this case has come down, it is a very plain conclusion.

My question to you is: Do you think that it is appropriate for the Supreme Court, given the underlying premise that the Court is to interpret law rather than make law, where the Congress has passed a law like the Civil Rights Act in 1964, and a unanimous Supreme Court interprets it in *Griggs*, and Congress leaves that law unchanged, and in *Ward's Cove* the law is changed? Is that appropriate?

Judge THOMAS. Well, as I indicated, Senator, my concern would be that in those instances in which there is an interpretation on the books or in case law and Congress has not seen fit to readdress that in a statutory change or statutory amendment, then it seems as though that there should be less of an inclination to want to revisit those issues, as compared, of course, or contrasted with constitutional issues.

I can't say—and I don't think it is appropriate for me to place a normative judgment on whether or not it is appropriate or not. I would be, as a judge, concerned about changing, as I have said in my discussions of stare decisis, existing interpretation that has been long standing, that has been——

Senator SPECTER. What do you mean by "normative," Judge Thomas?

Judge THOMAS. Appropriate or putting a value judgment of some sort on it.

My concern would be that in making those kinds of changes that we are not paying sufficient heed to the principle of stare decisis.

Senator SPECTER. Well, I think that this is one of the central issues which has been raised in your confirmation hearings. I accept your statement about your previous comments as to the lack

of wisdom in the Congress, but your commitment to interpret the law and not make new law. And it seems to me that this is a classical illustration of the Court changing the law and making law, as opposed to its function to interpret the law.

I was pleased to hear your comment about the dissenting opinion by Justice Marshall in the *Payne* case, which involved the decision last term which overturned two very recent U.S. Supreme Court decisions when, as I heard you say, Justice Marshall's decision was a "stern admonishment." Were those the words you used?

Judge THOMAS. I think "stern admonition."

Senator SPECTER. "Stern admonition." Do you agree with Justice Marshall's dissent?

Judge THOMAS. I would like to—I think it would be inappropriate for me, Senator, to agree or disagree with it.

Senator SPECTER. Why?

Judge THOMAS. I was certainly affected by it. I agree with his statements concerning stare decisis to the extent that I suggested here. I think that judges should be very concerned that their personal opinions are not the basis or their clout is not the basis for making decisions.

Senator SPECTER. Well, do you agree with Justice Marshall's assertion that "Power, not reason, is the new currency of this Court's decisionmaking," his opening statement in *Payne*?

Judge THOMAS. I would, Senator, refrain from agreeing or disagreeing with that. I agree that we should be concerned and be aware of the principle of stare decisis and that we should guard against making decisions as judges based on the number of votes we have.

Senator SPECTER. Well, I won't press you further on it then. But let me ask you if you agree that property and contract rights have no higher status than personal liberties because the majority opinion put property rights, contract rights on a higher level, saying that stare decisis should be followed—that is, a precedent should be followed, and more attention should be changed to not make the modification if there were property rights or contract rights contrasted with personal liberties. Would you at least put personal liberties on the same level with property and contract rights in following precedents?

Judge THOMAS. The answer to your question, Senator, is yes. I don't understand the quote. It makes no—the statement in, I think, Justice Rehnquist's opinion? It makes no sense to me. But I would—my answer to your question would be yes.

Senator SPECTER. Thank you.

Let me move, and very briefly because there is not a great deal of time, to a very complicated subject and just ask one question about it. That is the subject of federalism, and it is this: Does our modern Constitution, as it has been interpreted, place any restriction on Federal power vis-a-vis the States? Or is the political answer by Congress now the measure of the constitutional power issue?

Judge THOMAS. Senator, I don't know whether we know what the limits are. I think we realize that there is much more involvement on the part of the National Government in our day-to-day affairs,

certainly through the 14th amendment and through the commerce clause.

I think that that issue and similar issues come into focus in cases such as the *Garcia* case, and I think that that is something that will continue to be explored and debated in the judicial arena, as well as, I am sure, in this body and at State government level.

Senator SPECTER. So, you think the commerce clause might not have the full sweep of enabling the Congress to do what it chooses in the field of commerce and regulatory and legislative power?

Judge THOMAS. I don't question the current development of the commerce clause, Senator. As I have noted earlier, my point is that I don't think that any of us know precisely what the limits are now, with the advances in communications, with the increased role of the Federal Government, with the increased involvement of the Federal Government in our day-to-day lives. I think that is something that certainly was at least to some extent a concern in the *Garcia* case.

Senator SPECTER. Judge Thomas, there were two major cases decided relatively recently on the equal protection clause, *Metro* v. *Federal Communications Commission*, which was congressional action, and *Richmond* v. *Crawson* which was a city council action. My question to you is, in applying the equal protection clause, does it make any difference whether the legislative enactment comes from the Congress, as opposed to a city council?

Judge THOMAS. Senator, I think that *Metro Broadcasting*, of course, used the equal protection analysis, but it was a fifth amendment case. The Court has made a distinction in *Crawson*, as well as in *Metro*, that when the race- or gender-based policy, I think race-based policy in these cases, were as a result of Congress' effort, the level of scrutiny is lower than it is if it is on a policy that is developed by a State or local government.

Senator SPECTER. Well, the fifth amendment due process clause, of course, picks up the equal protection clause of the 14th amendment——

Judge THOMAS. That's right.

Senator SPECTER [continuing]. So the analysis would be the same as the equal protection.

Judge THOMAS. That's right.

Senator SPECTER. So, you would accord greater strength or latitude to a congressional enactment, as opposed to a city council enactment?

Judge THOMAS. That's right, that is under existing case law, that's the approach.

Senator SPECTER. Let me cut through quite a lot of discussion with, again, a very direct question, without getting into the undergirdings of the opinion in *Metro Broadcasting*, would you agree with this succinct statement from Justice Stevens' concurring opinion, at the very start, in *Metro*: "Today, the Court squarely rejects the proposition that a government decision that rests on a racial classification is never permissible, except as a remedy for a past wrong."

Judge THOMAS. That's the state of the law.

Senator SPECTER. You agree with that state of the law?

Judge THOMAS. I have no reason to disagree with it.

Senator SPECTER. All right. That is a very important point and I am glad to hear you say that, because this really goes right to a core of a good bit of your writing.

Judge THOMAS. Well, it doesn't, as I mean that as a judge, Senator. I have had no basis as a judge to disagree with it.

Senator SPECTER. No, no, I am referring to the writings prior to the time you became a judge.

Judge THOMAS. Well, that is a policymaking function, and I——

Senator SPECTER. So, that was a different lifetime than all of this——

Judge THOMAS. Well, I have to adjudicate these as a judge and I know that is a distinction that some seem to think is troublesome, but it is a very, very important distinction for me.

The CHAIRMAN. Will the Senator yield on that point?

Senator SPECTER. Yes.

The CHAIRMAN. Not the case law, but the point about a judge. Judge, you are going to be the judge, you are going to be a judge who is not bound by stare decisis, has nothing at all that would bind you other than your conscience. And so I am a little bit edgy when you give an answer and you say, well, that's the policy, as if you are still going to be a circuit court of appeals judge, which means you have to follow that policy.

You are going to take a philosophy to the Court with you, as well, and you are not limited, as I understand it, in any way, including the methodology you have indicated you would apply to great questions of the day, from reaching a conclusion different than that which the Court has reached thus far. So I don't know why you can't tell us with a little more certainty in the case the Senator just laid out as the state of the law, because it is a big deal, whether you agree with it or not.

Judge THOMAS. Well, I understand that, Mr. Chairman, but what I have attempted to do is to not agree or disagree with existing cases.

The CHAIRMAN. You are doing very well at that.

Judge THOMAS. The point that I am making or I have tried to make is that I do not approach these cases with any desire to change them, and I have tried to indicate that, to the extent that individuals feel, well, I am foreclosed from a——

The CHAIRMAN. If you had a desire to change it, would you tell us?

Judge THOMAS. I don't think so. That would be—— [Laughter.]

The CHAIRMAN. That is what worries me, Judge.

Judge THOMAS. But the——

Senator SPECTER. Was that an "I don't think so"?

Judge THOMAS. I think the point that I am trying to make, Mr. Chairman and Senator Specter, is that when I say I don't have an agenda, I mean I don't have an agenda. I operate that way as a court of appeals judge and that's the way I will function if I am fortunate enough to be confirmed as a member of the Supreme Court.

The CHAIRMAN. Thank you, Senator.

Senator SPECTER. Senator Biden, let me amplify Judge Thomas' answer for you.

The CHAIRMAN. I would appreciate it.

Senator SPECTER. He is testifying that he is not going to make policy as a Supreme Court Justice, if confirmed. He has written extensively that the courts have been thrust into a policymaking position and that the courts have made policy. He has disagreed with the policy and has stated that he would change a lot of law from an advocate's position on policy, saying, for example, in *Johnson* v. *Santa Clara*, that the dissent by Justice Scalia was preferable and saying, in another context, although not totally approving it, that one quick fix is to appoint new Justices to change the approach.

He is saying in these hearings, as I understand it, that all of that policy consideration that you were commenting about in those many speeches is a thing of the past, and you talked about that solely as an advocate.

The CHAIRMAN. Senator, you understand what concerns me. If I were a judge——

Senator SPECTER. Let me finish for him, Senator.

The CHAIRMAN. I leave those usually for Senator Hatch.

Senator SPECTER. I object. [Laughter.]

The CHAIRMAN. If he were employing me as a judge, in good faith, to change the position of the law, because he felt in good faith it was in my power to do so as a judge, and then he became a judge and didn't follow his own advice as to what he in good faith was giving me that was within my power to do, I would wonder about that. But that is my confusion and I will have to resolve that, but I would be delighted to hear more of your explanation, if you would like to give it.

Senator SPECTER. Well, to finish my question for you, Judge Thomas, which is really an understanding of mine as to what you are saying here, you are saying you are going to do your level best not to make policy. You are making a commitment not to make policy, you don't think that is a judge's function, and it is an about-face from a lot of what you have written.

Senator Metzenbaum earlier made a comment that he is disturbed by the position you have taken in disavowing much of what you have spoken about in your tenure as Chairman of EEOC, contrasted with your background and your roots, and I think that is something that this committee has to consider and the Senate has to consider. I am not so sure but what your roots are not more important in trying to predict what you will do, if confirmed, than your writings. Your writings and your answers are at loggerheads, they are inconsistent with what has been said.

You had written earlier in your career that you thought flexible goals and timetables were appropriate, and you changed that. Judge Thomas, isn't it entirely possible you could change your mind again and find that timetable and goals are the preferable course?

Judge THOMAS. Senator, what I have attempted to do here is to demonstrate that, in any number of areas, certainly the transition from policymaker to judge is an important transition. In specific areas, I have attempted to demonstrate, even when I have in the policymaking area strongly held views, that I have always looked to expand and to grow and to understand the counterarguments, not to simply reinforce my own.

There is always a possibility that someone who is open to argument, who thinks about issues, who is receptive to different points of views, there is not only a possibility, but a hope that person would grow and develop, and I hope that, in a positive way, that I would continue as a person to grow and develop.

Senator SPECTER. Judge Thomas, we have seen lots of changes of positions in the course of the hearings in the 10 or 11 years that I have been here, and I don't know any way to stop the Supreme Court of the United States from functioning as a superlegislature, regardless of what is said here, so we have to make an assessment of the whole man. But I understand what your statement is, that you agree with a very critical aspect as to what Justice Stevens defines on the *Metro* case. It is a very core issue and you don't have any intent at the moment to change it. More than that, what can be said.

Let me pick up with one other aspect of what Senator Metzenbaum had questioned you about. He had referred to a speech you made in San Bernardino, on April 25, 1988, and picked out—and this is illustrative of much of what you have written, and when I say picked out, I don't mean extracted out of context—"Increasingly, they are being used by demagogues who hope to harness the anger of the so-called underclass for the purpose of utilizing it as a weapon in their political agenda."

I had made an abbreviated comment last week about your status as a role model and the fact that politics is involved at many levels of the confirmation proceeding, and at most of those levels I think it is appropriate. And one of the items which concerns me that I raise in a positive sense when I was talking about Professor Carter, is that you would be serving as a role model. You will be serving as a role model for young African-Americans who would look to the success you have achieved in terms of doing it entirely on your own, and that might not be something that many of the traditional African-American leaders want to hear.

Your speeches are full of comments about their being pro-Government and wanting the Government to have a larger role. But I think it is a very healthy thing, whether you are right or whether you are wrong, to have that other ideas put into the marketplace.

I had commented, and somebody didn't understand what I was saying when I had called you, after I read a speech you made after the 1984 election, that African-Americans were not as active in the Republican Party as they should be, entirely appropriate at that time. You weren't a judge. We sat down and talked about it, and I think it would be a very healthy thing for my State, for the city of Philadelphia, to have a two-party system, and to the extent there is a role model here and you have said that, given a chance, blacks would come to the conservative cause. That is not the element for my decision, I repeat, but that is a lurking undercurrent which I think is worthwhile to put squarely on top of the green-felt table here today.

A final roundup, Judge Thomas, as my time is almost up and I know your answers to these questions, because we have discussed them at your confirmation hearing on the court of appeals, but I think they are very important, and that is rockbed on *Marbury* v.

Madison, that the Supreme Court has the last word, no doubt in your mind about that.

Judge THOMAS. No doubt, Senator.

Senator SPECTER. You are not going to revisit that question.

The other one which I consider to be very important is the issue of court stripping. During my tenure in the U.S. Senate, there have been efforts to take away the jurisdiction of the Federal court on constitutional issues, and I just want to be sure that, if confirmed, you would not countenance that kind of a major change in our constitutional government.

Judge THOMAS. I think we discussed that the last time, and I think that my position is the same, that I would not.

Senator SPECTER. Thank you very much, Judge Thomas. I think about these hearings and the kinds of questioning, I think about the old case of *Ashcraft* v. *Tennessee*, which ruled unconstitutional relay questioning. You certainly had to do a lot of that here today, and I commend you for your stamina and I thank you for your answers.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Does anyone on this side of the aisle have any further questions at all for the judge?

[No response.]

The CHAIRMAN. I am sure the judge appreciates that.

I yield to my colleague from South Carolina, Senator Thurmond.

Senator THURMOND. Judge, I just want to ask you one question. There has been a lot of talk here about making policy. Under the Constitution, the Congress makes the law. The executive branch, headed by the President, administers the law, and executes the law. The judicial branch interprets the law. This should not be a question of courts making laws. Courts have done that, but they should not have done it. This should not be a question of making policy. A judge's job is to construe and to interpret the law. Judge Thomas, is that the way you see your responsibility?

Judge THOMAS. That is the way I see it, Senator.

Senator THURMOND. That is a good answer, and that is the correct answer. [Laughter.]

Now, Judge, we are about through here. We are going to wind up.

Mr. Chairman, yesterday the Washington Post ran an editorial which I ask unanimous consent be placed in the record. Briefly, I would like to quote from it. It states: "[Judge Thomas] will have a clearer sense of discrimination and its remedies that any other member of the Court * * * on the strength of the hearings so far, we think he should be confirmed."

The CHAIRMAN. Without objection, it will be placed in the record.

[The article follows:]

38 Sunday, September 15, 1991

The Washington Post

AN INDEPENDENT NEWSPAPER

The Thomas Hearings

ONE OF the truly unsettled questions in American politics is how a prospective justice of the Supreme Court should be interrogated and judged by those members of the U.S. Senate most responsible for his confirmation. If you doubt this, only recall the hearings held and the arguments generated when the last several nominees were up for consideration. It is still pretty widely accepted that a president has a right to choose justices who reflect his own philosophical predisposition and that if the nominee is to be rejected it should be on some other grounds, grounds of moral, mental or professional disqualification. It is also held, and we think rightly, that the nominee should not be required to tip his or her hand on specific decisions likely to be made in the future. These are the givens. The problem is that there are those who a) don't accept them but b) rarely say so, rarely assert that they just will not vote for someone whose political philosophy they disagree with; so they oppose in other ways.

They try to marginalize, caricature or morally discredit the nominee. Neither political party has a monopoly on this approach—it just depends which is making the nomination and which is called upon to approve it. What ensues are often essentially trick questions, which generate trick answers. Everyone on all sides becomes surpassingly cagey, figuring how the issue or exchange, is going to play, what the public relations traps are and so on. Also across the political spectrum, everyone has gotten pretty practiced and good at all this, which is what accounts for the very gamelike quality of the procedure. It's nobody's fault and everybody's fault, and it has been very much apparent in the Clarence Thomas hearings and the arguments they have inspired in the press and among lobbying groups in the past week, just as it was in the hearings of his recent predecessors.

We don't want to be too hard on the procedure; it is true that in the past week there were some interesting, even illuminating exchanges and that some things became clearer, not murkier as a result. But there was also much adjustment of perspective in keeping with the two sides' new imperatives. It was, for example, said by critics of Judge Thomas that he and his supporters dwelt at far too great length on his personal background, his experience of discrimination and poverty and struggle, as a qualification for the job—as distinct from the requisite legal experience. His supporters, naturally, challenged this complaint. The last time around, they were on opposite sides: the critics of New Hampshire's bookish bachelor, David Souter, had much to say about how his limited life experience would likely inhibit, even deform, his ability to understand the cases before him, never mind the extent of his judicial background—while the Souter supporters took the other line.

Did Judge Thomas modulate, trim, bob and weave during the questioning? Well of course he did. From time to time, it seemed to us he dodged excessively, even though you could construct a defense of his extreme defensiveness in light of some of the traplike questioning. We think the charge of total and instantaneous conversion is not fair, however. For example, some of the things Judge Thomas said on the agitated matter of natural law had been said to this same committee by him at his hearing in February of 1990, when he was appointed to the U.S. Court of Appeals. Specifically he had told the senators: "But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents on those matters."

Our own sense, on the strength of what we know of his record and the testimony given so far, is that Clarence Thomas is qualified to sit on the court. He is surely not the most eminent jurist who could have been selected, but neither have many of his predecessors been. His views, particularly on what are called broad remedies in civil rights cases, are conservative. An administration whose views are also conservative in this area is unlikely to produce any other kind of nominee. It is not clear to us that in every respect these views are wrong or that Judge Thomas's mind is closed, and in any case, in its episodic resistance, the Judiciary Committee has cleared with scant attention or dissent nominees, now justices, whose similar views on the subject are equally strong or stronger.

Nor do we think Judge Thomas comes to the court or this point in his life with a malign or distorted agenda. Quite the contrary. There has perhaps been too much talk about how he beat the odds and rose out of poverty and segregation in rural Georgia 40 years ago. Maybe not even he can be sure of all the effects this had on him. But one thing is sure: He will have a clearer sense of discrimination and its remedies than any other member of the court, any other nominee this administration is likely to send up—and any of the members of the Judiciary Committee now judging him. There seems also to be a streak of individualism in him, a turn of mind that will not easily accede to the prejudices and popular passions that sweep the day. On the strength of the hearings so far, we think he should be confirmed.

Senator THURMOND. Briefly I would like to just quote two sentences. Here it is speaking of Judge Thomas. It states Judge Thomas "will have a clearer sense of discrimination and its remedies than any other member of the Court." In another place in the editorial, in the last sentence, "On the strength of the hearings so far, we think he should be confirmed."

I just wanted to put that editorial in the record. That is coming from the Washington Post, Mr. Chairman. [Laughter.]

The CHAIRMAN. I say to my colleague, I am certain the Post is delighted that you are praising them.

Senator THURMOND. It isn't so often I agree with them. I want to give them credit when they deserve it.

Mr. Chairman, I ask unanimous consent that several articles here, just three of them, one is in the Washington Post of August 6, 1991, "The NAACP is Wrong on Thomas," by Margaret Bush Wilson. Another one is the Washington Post, July 16, 1991, "The Clarence Thomas I Know," by Allen Moore. Another one is from the Washington Post of July 17, 1991, "Talking with Thomas for 10 Years," by Constance Berry Newman.

I ask unanimous consent these appear in the record.

The CHAIRMAN. Without objection, they will all appear in the record.

[The three articles follow:]

7-16-91

THE WASHINGTON POST
7/16/91

Allen Moore

The Clarence Thomas I Know

I have been reading and hearing a lot about Clarence Thomas these days. Some of it makes me wonder: Can this be the same Clarence Thomas who worked for me in Jack Danforth's office 12 years ago and has been my friend ever since?

The man I read about has been called an "arch-conservative" who has "forgotten where he came from," who believes "affirmative action is like heroin," whose seven years as chairman of the Equal Employment Opportunity Commission were "the most retrograde in its history," whose first marriage ended in a "messy divorce that deserves scrutiny," whose "opposition to abortion is well-known," whose "allegiance to the pope" should be examined, whose actions are "guided by political calculation," and who is "harshly judgmental and self-righteous rather than compassionate and empathetic."

The Clarence Thomas I know is a caring, decent, honest, bright, good-humored, modest and thoughtful father, husband and public servant who has already come farther in 43 years than most of us will in a lifetime.

The president did his nominee no favor when he said race was not a factor in the nomination. Of course it was, and Thomas readily admits it, just as he acknowledges that race played a role in his selection for other jobs along the way. He has never denied his indebtedness to, or admiration for, those, such as Justice Thurgood Marshall, who helped open such doors. He does not blindly oppose the notion of taking race into consideration for hiring, promotion or admissions decisions. What he does oppose are rigid numerical goals and quotas, which he considers divisive and unfair.

When he gets a chance to fully explain his views in Senate hearings, he will challenge his listeners to think beyond platitudes and conventional orthodoxy. Clarence Thomas has always supported the idea of giving preferential treatment to the truly disadvantaged, especially minorities, rather than to those from middle- or upper middle-class backgrounds who happen to be members of a targeted minority group. To do otherwise risks stigmatizing those favored—to make it appear as if they are incapable of competing fairly. It also can put the unprepared in situations where they are destined to fail. "God helps those who help themselves," Clarence might say, encouraging self-help and self-reliance. Martin Luther King Jr., Malcolm X and Jesse Jackson have stressed such themes.

Regarding his feelings about the pope, I believe Clarence stopped being a practicing Catholic when he left the seminary almost 25 years ago. In recent years, he has attended a Methodist church, a Christian church and, most recently, an Episcopal church.

I don't know how he feels about abortion, but I would be very surprised if he didn't have an open mind on *Roe v. Wade*. Many liberals and conservatives on both sides of the abortion issue acknowledge the vulnerability of that decision on purely legal grounds, but I personally wouldn't bet the ranch on how he would come down on the issue.

I know something about Thomas's first marriage because I spent many hours talking with him as it broke apart. He was tormented both about breaking his wedding vows and about the impact of the divorce on his young son. He sought me out for advice because I was a divorced father with two well-adjusted children. His divorce was handled amicably, with Clarence given undisputed primary custody of his son. Both parents have played a major role in his upbringing, and all parties have great respect for each other.

Clarence's record as EEOC chairman deserves close scrutiny, just as it did when he was renominated and reconfirmed for a second term

as chairman, and just as it did when he was nominated and confirmed to his seat on the D.C. Circuit Court of Appeals. The record will speak for itself, but someone should also look inside the agency to find out how people feel about Thomas the man and the leader.

Evan Kemp, his successor as chairman, marvels at what Thomas did with a historically underfunded agency that saw its budget cut nine out of 10 times in the 1980s. (Usually Congress cut the president's request, then beats up the agency for its budget-related shortcomings.) Clarence Thomas inherited a poorly managed, dispirited agency whose employees were embarrassed to admit where they worked. His legacy, according to Kemp, is that employees are now proud to work at the EEOC and even named the new headquarters building after him. Nonetheless, says Kemp, "Clarence won't get the credit that is his due; I will." People throughout the agency sing Thomas's praises—his dedication, his professional standards, his extraordinary sensitivity to and support of the "little people," and his inspiration to employees at all levels.

The suggestion that his actions have been politically motivated is laughable. This is not a political animal. His passionate, behind-the-scenes battles with the White House and Justice Department conservatives during the Reagan years were hardly politic. In addition, several times through the years, I strongly advised him to approach his detractors both on and off the Hill. "They attacked me without knowing the facts," he would say, "and it would be hypocritical to approach them." This is a man who advanced in a political environment in spite of, not because of, his political skills.

Perhaps the most absurd charge leveled at Thomas is that "he forgot where he came from." Thomas's professional and personal life, not to mention his conscience, wouldn't permit him to forget his roots if he wanted to. Neither would the world around him. After lunch a few weeks ago, he and I were strolling around downtown Washington. He suddenly realized he was late for an appointment and asked me (I'm white) to hail him a cab.

"I have trouble getting a cab downtown, and it's virtually impossible in Georgetown," he said, jumping into the taxi I had flagged down as the driver mouthed an obscenity in my direction.

The writer was principal policy adviser to Sen. John C. Danforth (R-Mo.) for 11 years.

THE WASHINGTON POST 7/17/91

Constance Berry Newman

Talking With Thomas for 10 Years

In nominating Judge Clarence Thomas to serve as associate justice of the U.S. Supreme Court, President Bush has chosen an individual who has both the intellect and the intellectual honesty for the job. He nominated a person who will be fair and sensitive to the struggles of all Americans—black, brown, white, red and yellow.

Judge Thomas would not let people's religion or station in life affect the way they thought about their rights. He has a special understanding of those poor striving for political and economic empowerment.

And he is willing to listen to others with whom he is not supposed to agree. I know. I am one of those people. For almost a decade Judge Thomas and I have discussed many issues, but most often our discussions were about inequities in this nation and approaches to ensuring equal opportunity for all. We agreed, we disagreed, and we have both changed our minds some.

The discussion and the debate about Judge Thomas's qualifications are confusing, and not all who have participated have been fair. What disturbs me is that much of the discussion is not even relevant. In order to be fair and relevant we must ask, What does the Constitution require? Article II, Section 2, provides that the president by and with the advice and consent of the Senate shall appoint judges of the Supreme Court. The Constitution does not set specific requirements such as an examination or even citizenship. It is up to the advise-and-consent process to determine the qualifications.

Through the years the questions asked the nominees have changed because the issues have changed. What has not changed significantly are the basic value judgments made about the nominees. I will set out what I believe to be the most important of those values.

It is important that a justice of the U.S. Supreme Court be competent. Even though the Constitution does not require that they be lawyers, all 105 justices have had legal training, with more than half having served on the bench. The American Bar Association has had uneven influence in the process through various administrations, looking at such factors as judicial temperament, character, intelligence and trial experience.

I will not second-guess the ABA. However with regard to Judge Thomas's competence, fairness requires recognition of the following points: Judge Thomas graduated from Holy Cross College with honors and from Yale Law School. He was assistant attorney general of Missouri from 1974 to 1977. He was counsel to Monsanto Co. and legislative assistant to Sen. John Danforth. He has been confirmed by the Senate on four separate occasions. The most relevant confirmation was in 1989 as a U.S. Court of Appeals Judge for the District of Columbia. Since confirmation he has participated in more than 140 decisions.

BY RAY LUSTIG—THE WASHINGTON POST

A justice of the court must have an open, inquiring mind—a willingness to listen and be sensitive to the struggles evidenced by the issues before the court. At the time of confirmation, the Senate cannot know of the issues the justice will face. What is important is that the nominees have no preconceived notions of how they will decide specific cases. They must be prepared to review complicated briefs with an open mind and to listen to the arguments, inquiring and then deciding.

When Earl Warren was nominated to be chief justice in 1953, there should not have been and was not a way for the Senate to know how he would decide the landmark case *Brown v. Board of Education* in 1954. It was important to the Senate that Warren be competent and fair, inquiring about the struggles evidenced by the issues in the case. And he was just that. We would have that in Judge Thomas, an independent thinker who is fair and who will listen. Judge Thomas has read and quoted many people of varying points of view. That type of inquiring mind is needed on the court.

A justice of the court must have integrity, particularly intellectual honesty. We entrust a great deal to the nine on the Supreme Court. They must honestly call the cases as they see them. An independent thinker, Judge Thomas will have no problem adapting to the culture of the Supreme Court.

I trust the president's judgment in nominating Judge Thomas, but I can go further. After almost 10 years of discussions with him, I am comfortable with the idea that he will be one of the nine people deciding the issues that come before the Supreme Court during my lifetime and afterward.

The writer is director of the U.S. Office of Personnel Management.

Margaret Bush Wilson

The NAACP Is Wrong on Thomas

The young man standing at my door that summer day in 1974 looked like an African prince. "Hello, I'm Clarence Thomas," he said. "I know," I replied. "I've been expecting you." And so began a friendship with someone I think of fondly as a second son.

I first heard of young Thomas (then almost 26) from his employer-to-be, Sen. John Danforth (R-Mo.), who was attorney general of Missouri at the time. Mr. Danforth told me he had just hired a bright young law graduate from Yale and asked if I knew of a place the young man could live for the summer while studying for the Missouri bar. My own son, Robert, was then a law student with plans to work that summer in Washington. I invited young Clarence to stay in my son's empty room.

I don't recall seeing another young person as disciplined as Clarence Thomas. First thing, every day, he would exercise with my son's weights and then be off to his studies. I asked of him only one thing: I would prepare dinner, and he would show up on time. We would eat together every night, often with one or two friends or relatives and talk about any and all of the problems of the world.

We didn't always agree (Clarence was "conservative" even then), but I was impressed continually with one so young whose reasoning was so sound. I must also admit that his arguments, both legal and logical, forced me to rethink some of my own views. I know I sometimes made him see things differently, too, because Clarence Thomas knew how to listen as well as talk.

Across the years, I have kept in touch with Judge Thomas, and to this day I respect his integrity, his legal mind and his determination. Even when we disagree, I have found him to be a sensitive and compassionate person trying to do what is right, working to make the world a better place.

Back then I sensed that he would one day be in a position to have a larger impact, but I had no way of knowing that this determined young man might one day have the chance to tackle some of our country's problems on this nation's highest court.

Recently, the NAACP National Board took action opposing Judge Thomas's nomination. I wish it had withheld judgment until after the hearings, because the Clarence Thomas I have been reading about often bears little resemblance to the thoughtful and caring man I have know over these years.

Judge Thomas reflects the diversity and complexity of African-American thinking, but his views are not nearly as radical as his critics suggest. He has pushed for a new frontier in civil rights, and heaven knows we need one when one-third of African Americans are still in poverty as we approach the 21st century. He seeks a climate where African Americans and other minorities feel empowered to compete equally with their counterparts of other races, with rational support from government programs.

Some have said that despite his chairmanship of the Equal Employment Opportunity Commission for eight years, he has not been a champion of civil rights. Those people obviously don't know Judge Thomas or the real facts about his tenure with the EEOC. His record will speak for itself and will impress those willing to listen and look beyond misinformed rhetoric. On a personal level, he knows the struggle and hardship blacks and the impoverished of every race grapple with daily—not to mention the plight of most families, since in my judgment the central issue of our time is that some 82 percent of the families in these United States have no discretionary income after bills and taxes are paid.

We didn't talk much about Judge Thomas's background that summer 17 years ago, so it is only recently that I have learned about his humble beginnings. The cramped house with no plumbing in rural Georgia, his wise but not learned grandparents, the Catholic nuns and the rest have only recently come into full view for me. To rise above the dual curses of poverty and discrimination requires tremendous individual effort from a special kind of person, help from others and luck. All these have been present in Judge Thomas's career.

Throughout the history of the U.S. Supreme Court, I don't believe any other nominee can claim to have come so far. In point of fact, Judge Thomas's unique perspective belongs not only on the Supreme Court but in the legislature, in the work place, at city hall and on our campuses.

No one can deny that Judge Thomas would differ with Justice Thurgood Marshall on some issues. I don't always agree with the justice myself. I do believe that both men show a common, fundamental belief in the inherent worth and rights of the individual. At one of his four previous Senate confirmation hearings, Judge Thomas said, "The reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society, gained access. . . . I may differ with others on how best to do that, but the objective has always been to include those who have been excluded."

As young Clarence Thomas left my home at the end of the summer, he asked how much he owed for his stay. I told him that he owed me nothing, but I did want a promise from him. I asked him to promise that if he were ever in a position to reach out and help others that he would do it, just as some had done for me and as I had done for him.

He promised he would, and Judge Thomas has been keeping his word ever since, looking out for the vulnerable and victimized on the job, in the community and at the court. I know that as a Supreme Court justice Clarence Thomas will continue to defend and protect the rights of the needy. He does not permit anyone to think for him, and he is intellectually honest.

When the history of these times is written, it will be interesting to see how historians view the position of the National Board of the NAACP—an organization committed to advancing colored people, which is opposed, on ideological grounds, to this nomination of a black man to the U.S. Supreme Court.

Let the record show that the NAACP's former national board chair respectfully disagrees with its position.

The writer, an attorney in St. Louis, chaired the National Board of Directors of the National Association for the Advancement of Colored People from 1975 to 1984.

Senator THURMOND. Now, Mr. Chairman, I am not going to take time to give all these groups here a chance to just—several law enforcement organizations recently met with me to express their strong support of Judge Thomas' nomination, several groups such as the National Sheriffs Association, International Association of Chiefs of Police, Federal Investigative Association, National Law Enforcement Council, National Society of Former Agents of the FBI, National District Attorneys Association, and Citizens for Law and Order, a victims rights group. They all endorse Judge Thomas for a position on the Nation's High Court. I ask unanimous consent that certain documents of support from these organizations be placed in the record.

The CHAIRMAN. Without objection.

[The information of Senator Thurmond follows:]

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
1033 NORTH FAIRFAX STREET, SUITE 200, ALEXANDRIA, VIRGINIA 22314
(703) 549-9222

RESOLUTION

WHEREAS, President George Bush has nominated Judge Clarence Thomas to fill the United States Supreme Court vacancy created by the retirement of Justice Thurgood Marshall; and

WHEREAS, the Board of Directors of the National District Attorneys Association has reviewed the qualifications of Judge Thomas and found him exceptionally well qualified for that important Supreme Court seat; and now

THEREFORE, BE IT RESOLVED that the National District Attorneys Association urges the Senate Judiciary Committee and the United States Senate to confirm without delay President Bush's nomination of Judge Clarence Thomas to the United States Supreme Court.

Done this 14th day of July 1991 at Tucson, Arizona.

ATTEST:
JACK E. YELVERTON
Executive Director
National District Attorneys Association

GRAND LODGE
FRATERNAL ORDER OF POLICE
520 SOUTH HIGH STREET, SUITE 203 • COLUMBUS, OHIO 43215-5685 • (614) 221-0180 • FAX (614) 221-0815

DEWEY R. STOKES
NATIONAL PRESIDENT

September 6, 1991

The President
The White House
Washington, DC 20500

Dear Mr. President:

On August 14, 1991 during our recent National Fraternal Order of Police Conference, we were honored to have you address our delegates attending the conference regarding several legislative matters and other issues of concern to law enforcement. At that time, you asked for our support for Judge Clarence Thomas, your nominee to the U.S. Supreme Court. As a result of your request, our delegates passed a resolution instructing me to investigate Judge Thomas' judicial background and report my findings and recommendations to our Board of Directors.

Mr. President, I am pleased to inform you that after submitting my report, the Board of Directors of the Fraternal Order of Police (representing 226,000 member law enforcement officers in forty-one [41] states) have agreed with you and voted to support Judge Thomas' nomination to the Supreme Court of the United States.

Please be assured, that the entire board of the Fraternal Order of Police and I are available to assist you in whatever way possible to insure the approval of Judge Clarence Thomas' nomination.

Respectfully,

Dewey R. Stokes

Dewey R. Stokes
National President

DRS:cch

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Co.	Co. NATL. F.O.P.
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Fax # 202-514-2504	Fax # 614-221 0815

NATIONAL HEADQUARTERS

NATIONAL TROOPERS COALITION

112 STATE STREET, SUITE 1212, ALBANY, N.Y. 12207 518-463-7448

September 5, 1991

NATIONAL TROOPERS COALITION

RESOLUTION

Endorsing the nomination of Judge Clarence Thomas for Associate Justice of the United States Supreme Court.

Whereas, President George Bush has chosen to nominate Judge Clarence Thomas for Associate Justice of the United States Supreme Court, it is the sense of this assembled body to extend our most stringent support of that nomination, and...

Whereas, the National Troopers Coalition recognizes that the office of Associate Justice demands integrity, intellectual skills, and dedication to the principal of equal justice, and...

Whereas, the office also requires unbending dedication to principal, basic fairness, human decency, and justice under law, and...

Whereas, the record of Judge Thomas impressively demonstrated these qualities from his days as Assistant Attorney general in the State of Missouri to his term as Chairman of the Equal Employment Opportunity Commission, to his latest office as a member of the United States Court of Appeals for the District of Columbia, and...

Whereas, the National Troopers Coalition firmly believes there must be a fair and equitable balancing of protecting the right of society to enforce its laws on the one hand; and the constitutional rights of the accused on the other, and...

Whereas, be it resolved that this assembly body of Troopers, which represents over 45,000 Troopers and protects more than 200 million Americans, seize upon this great opportunity to most stringently support the nomination of Judge Clarence Thomas to Associate Justice of the United States Supreme Court.

Now be it further resolved, that a copy of this resolution be sent to the honorable members of the United States Senate.

Adopted this 5th day of September, 1991 at the National Troopers Coalition Conference, Portland, Maine.

Richard J. Darling
Chairman
National Troopers Coalition

CITIZENS FOR LAW AND ORDER, INC.
"dedicated to law and order with justice for all"

Address all inquiries to:
Jack Collins
Eastern Regional Director
Citizens for Law and Order
Phone: (703) 569-8574

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RESOLUTION SUPPORTING THE CONFIRMATION OF JUDGE CLARENCE THOMAS AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Citizens for Law and Order (CLO) is a grassroots organization of citizens committed to a reduction of violent crime and the achievement of a truly balanced and fair criminal justice system. We are proud of our two decade record of advocacy and accomplishment. As an umbrella group, we represent over forty thousand (40,000) individuals nationwide who are active in criminal law issues.

The U.S. Supreme Court plays an absolutely critical role in assuring the maintenance of a healthy, fair and balanced criminal justice system. Its decisions on criminal law issues impact both on individual litigants and on the Federal and State court systems for years to come. Given this importance of the Court and its individual justices, CLO commissioned Barbara K. Bracher, a litigation attorney for a major Washington, D.C. law firm, to prepare a report on the judicial philosophy of Judge Clarence Thomas as it is reflected in his criminal law and procedure opinions on the United States Court of Appeals for the D.C. Circuit.

Our own research and our reading of Ms. Bracher's report lead us to the conviction that Judge Thomas will bring to the Court a voice of reason, fairness, and balance in the area of criminal justice. He promises to be equally as forthright in protecting the rights and concerns of victims and the community at large as those of criminal defendants. A thoughtful jurist with both a keen intellect and a restrained judicial temperament, he will very likely bring certainty and predictability to this area of the law. He has demonstrated a common sense approach to questions of criminal law and procedure, consistently recognizing the practical problems faced by law enforcement officials on the street. And, very importantly, he sees his charter as construing and interpreting the law, and not shaping it to fit his own personal predilections or private agenda.

Considering these positive judicial attributes, and noting as well the fine qualities reflected in Judge Thomas' background, personal history, and career to date, Citizens for Law and Order (CLO) is

BOX 1-28 OAKLAND, CALIFORNIA 94661 (415) 531-4664 FAX (415) 531-1861
NON-PROFIT TAX-EXEMPT NON-PARTISAN

pleased to endorse Judge Clarence Thomas' nomination to the United States Supreme Court.

As an all volunteer, strictly non-partisan organization, we have not given this endorsement lightly. As an organization, however, with a special concern for victims, it is given in the conviction that Judge Thomas, by virtue of the attributes cited above, will effectively balance the scales of justice by insuring for victims true equality before the law.

A copy of Ms. Bracher's report is appended.

Phyllis M Calles
President

September 4, 1991

IACP NEWS

INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE / 1110 N. Glebe Road, Suite 200 / Arlington, Virginia 22201 / (703) 243-6500

For Immediate Release
Wednesday, August 28, 1991

Contact: Dan Rosenblatt
Sara Johnson
(703) 243-6500

IACP ENDORSES THOMAS NOMINATION
FOR SUPREME COURT

ARLINGTON, VA -- The International Association of Chiefs of Police today announced its endorsement of President Bush's nomination of Judge Clarence Thomas to the United States Supreme Court.

IACP's governing body made the decision after carefully reviewing the background and professional record of Judge Thomas at one of its regular meetings on August 10 in New York. It was determined that Judge Thomas is a well-qualified, tough, anti-crime judge who has recognized the problems that law enforcement officers face in combatting crime.

The U.S. Senate has already confirmed Judge Thomas four separate times: as Assistant Secretary for Civil Rights at the Department of Education in 1981, twice as Chairman of the EEOC in 1982 and 1986, and most recently as U.S. Court of Appeals Judge for the District Columbia in 1990. He graduated from Holy Cross College with honors in 1971 and Yale Law School in 1974.

Judge Thomas has resisted efforts to impose unreasonably

(MORE)

(2)

burdensome requirements on the police and prosecutors or to overturn criminal convictions on technicalities not required by the Constitution, while guarding against infringements of the fundamental rights of criminal defendants.

Among his noteworthy decisions:

-- In United States v. Long, Judge Thomas rejected arguments that a trial judge erred in admitting police testimony during a search of a defendant's apartment, which tended to show that the defendant was dealing in narcotics. Similarly, in United States v. Rogers, he upheld the admission at trial of evidence of a defendant's prior drug-dealing activity.

-- Judge Thomas ruled against a defendant who argued that, at his trial, the judge had improperly instructed the jury as to his entrapment defense. In so holding, Judge Thomas observed that "the government [had] introduced overwhelming evidence of [defendant's] eagerness to sell crack, enough, we are certain, for the government to have carried the burden of proof it needed to defeat [defendant's] entrapment defense." (United States v. Whole)

The International Association of Chiefs of Police is the world's oldest and largest non-profit organization of police executives. Established in 1893, the IACP currently has approximately 12,500 members in 65 nations around the world.

Further information is available from the IACP at 1110 N. Glebe Road, Suite 200, Arlington, Virginia 22201; 703/243-6500.

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Phone (703) 243-6500
Cable Address IACPOLICE

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Past President and
Parliamentarian
France B. Looney
Farmingdale, NY

Executive Director
Daniel N. Rosenblatt
Arlington, VA

91 SEP -5 P1:01

September 5, 1991

The Honorable Strom Thurmond
United States Senate
217 Senate Russell Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

The International Association of Chiefs of Police (IACP) wishes to go on record urging a favorable recommendation by the Senate Judiciary Committee regarding the nomination of Judge Clarence Thomas to the United States Supreme Court.

After careful review of the personal and professional background of Judge Thomas, the governing body of the IACP has determined that Judge Thomas will prove himself to be a worthy Supreme Court Justice. His judicial temperament, breadth of perspective and professional experience indicate he will serve the country well on the Supreme Court.

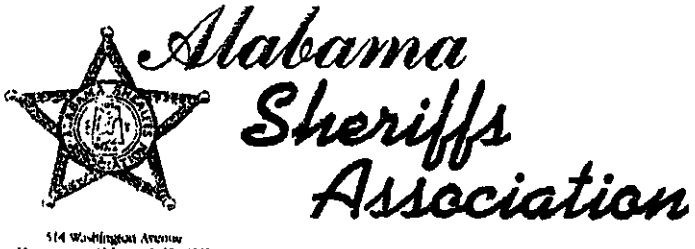
Specifically, his record as a judge leads the IACP to believe that he will serve the cause of law enforcement well. The views of Judge Thomas in United States v. Long, United States v. Rogers and United States v. Whoie are indicative of efforts on behalf of law enforcement concerns.

The IACP strongly supports quick action by the Judiciary Committee and the Senate to confirm Judge Thomas.

Sincerely,

Daniel N. Rosenblatt
Executive Director

Alabama Sheriffs Association



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1-800-622-STAR
FAX (205) 269-5588

ROBERT D. "HOBBY" TIMMONS
EXECUTIVE DIRECTOR

MIKE BLAKELY, President
SHERIFF OF LIMESTONE COUNTY

September 5, 1991

The Honorable Howell Heflin
United States Senate
728 Hart Building
Washington, D.C. 20510

Dear Senator Heflin:

On behalf of the Alabama Sheriffs Association, I would like to ask you to vote to confirm Judge Clarence Thomas to the United States Supreme Court.

At a recent meeting, the Sheriffs of Alabama voted unanimously to support Judge Thomas's nomination to the United States Supreme Court. A resolution was passed by the Alabama Sheriffs Association directing me to write a letter requesting your support of Judge Thomas's nomination.

After careful consideration of Judge Thomas's record and views in the areas of law enforcement, we feel that Judge Thomas would be an excellent candidate to serve on our Nation's highest court. We hope that you share our views and will make a strong stand to assure Judge Thomas's appointment as a United States Supreme Court Justice.

We appreciate your support in the past on matters of concern to the Sheriffs of Alabama. Thank you for considering this request.

Sincerely,

Mike

Mike Blakely
President
Alabama Sheriffs Association

"No Sheriff Shall Stand Alone"

Senator THURMOND. Mr. Chairman, I ask unanimous consent that a list of approximately 100 groups and individuals who have strongly endorsed Judge Thomas be placed in the record.

The CHAIRMAN. Without objection.

Senator THURMOND. I won't take the time. It would take an hour or two to read all this stuff. But I want the public to know about it. I want the public to know these people all endorse this man. This is coming from the people.

I ask unanimous consent that a list of approximately 100 groups and individuals who have strongly endorsed Judge Thomas be placed in the record.

[The information of Senator Thurmond follows:]

LIST OF GROUPS IN STRONG SUPPORT

1. South Carolina Greenville County Council
2. V.O.C.A.L., Victims of Crime and Leniency
3. Mississippi Harrison County Republican Executive Committee
4. Veterans in Community Service
5. U.S. Hispanic Chamber of Commerce
6. Traditional Values Coalition
7. Council of 100, an Organization of Black Republicans
8. The National Tax-Limitation Committee
9. Department of Home Missions, Brotherhood Pensions and Relief
10. Polish American Congress
11. West Virginians for Religious Freedom
12. Professional Bail Agents of the United States
13. American Road & Transportation Builders Association
14. The Associated General Contractors of America
15. Knights of Columbus
16. African American Committee
17. Family Research Council
18. National Small Business United
19. National Traditionalist Caucus
20. U.S.- Mexico Foundation
21. Association of Christian Schools International
22. National Sheriff's Association
23. International Association of Chiefs of Police
24. Federal Investigators Association
25. National Law Enforcement Council
26. National Society Former Agents of the FBI

27. National District Attorneys Association
28. Citizens for Law and Order
29. Iowa Jima Black Veterans Group
30. Agudath Israel of America
31. Asian American Voters Coalition
32. Board of Directors of Catholic Golden Age
33. Citizens for a Sound Economy
34. Congress for Racial Equality
35. The Cuban American National Foundation
36. D.C. Black Police Caucus
37. The Improved Benevolent and Protective Order of the Elks of the World
38. Indian American Forum for Political Education
39. International Mass Retail Association
40. National Black Nurses' Association
41. National Council of Young Israel
42. National Family Foundation
43. National Jewish Coalition
44. U.S. Chamber of Commerce
45. Zeta Phi Beta Sorority, State of Georgia
46. Alabama Attorneys to Confirm Clarence Thomas

INDIVIDUALS IN STRONG SUPPORT

1. James Harkins, Maryland House of Delegates
2. Timothy F. Ireland, Florida House of Representatives
3. Debby P. Sanderson, Florida House of Representatives
4. Gwendolyn T. Bronson, State of Vermont House of Representatives
5. Roger F. Wicker, Mississippi State Senate
6. William H. Harbor, Iowa House of Representatives
7. David G. Walchak, Chief of Police, City of Concord, New Hampshire
8. Jimmy Evans, Attorney General, State of Alabama
9. Michael B. Cronin, Chief Executive Officer, St. Joseph Hospital
10. Betty Southard Murphy, Baker & Hostetler
11. Henry McKoy, Deputy Secretary for Programs with the North Carolina Department of Administration
12. Father Jack Rainaldo, Marquette University
13. J. Shelby Sharpe, Sharpe Bates & Spurlock
14. Mr. Frederick Dent, Mayfair Mills, Inc.
15. Mr. James L. Denson, C.E.O., Allpoints International, Ltd
16. LeRoy C. Zignego, Zignego Company
17. Michael O'Laughlin, United States Chauffeurs Training Academy
18. Royce Fessenden, Fessenden Technologies
19. Renne Oliver, Executive Secretary, Teach Michigan
20. Stephen Strang, President, Strang Communications Co.
21. Mr. Michael O'Neil, President & C.E.O., TransTac
22. Morris J. Crump, Southern States Lumber Company
23. Pastor David T. Harvey, Covenant Fellowship of Philadelphia

24. Armstrong Williams, The Graham Williams Group

25. Van Cook, Hill County Telephone Cooperative, Inc.

26. C.E. Falkenstein, M.J. Ruddy & Son, Inc.

27. D. Joe Smith, Jenner & Block

28. Dean Rodney K. Smith, Capital University

29. Jerald Hill, The Landmark Legal Foundation

30. Norman Smith, Constable, LeFlore County, Mississippi

31. Richard A. Delgaudio, The Legal Affairs Council

32. Beverly LaHaye, Concerned Women for America

33. Clay Claiborne, National Director, Black Silent Majority Committee

34. Professor Cortus T. Koehler, California State University, Sacramento.

35. Arizona State Senator Carole Springer

36. State Representative Jim Froelker, 110th District Missouri House of Representatives

37. Mr. Camden R. Fine, President/CEO, Missouri Independent Bank

38. Ms. Carol A. Chapman, Assistant Editor, Charisma

39. Ms. Jane Dee Hull, Speaker of the Arizona House of Representatives

40. State Senator Caroi McBride Pirsch, Nebraska State Legislature

41. C.D. Coleman, Senior Bishop, Christian Methodist Episcopal Church

42. Joseph Morris, President, Lincoln Legal Foundation

43. Evelyn Bryant, President, Liberty County NAACP

44. Dewey Clover, President, National Association of Truck Stop Operators

45. Representative William B. Vernon, Massachusetts House of Representatives

46. Representative Anna Mowery, Texas House of Representatives

47. Dean Ronald F. Phillips, Pepperdine University School of Law

48. Mr. Doyle Logan, President, Alabama State Lodge Fraternal Order of Police

49. Mr. Willie Willis, President, Alabama State Troopers Association

Senator THURMOND. Mr. Chairman, a bipartisan group of approximately 35 black attorneys, business people, and community and religious leaders from South Carolina traveled to Washington in August and met with me to discuss Judge Thomas. That was in August when we were in recess. Most of you were at home, but I was here. They indicated their overwhelming support for Judge Thomas.

Mr. Larkin Campbell, an attorney from Columbia, who is a member of the NAACP, endorsed Judge Thomas' nomination and stated, "Clarence Thomas is a man who would bring integrity, wisdom, and foresight to the Supreme Court."

Mr. Fletcher Smith, a Democrat, an attorney, member of the Greenville County Council, and a member of the NAACP, presented me with a resolution passed by the Greenville, SC, County Council in support of Judge Thomas.

Several other individuals spoke to me about their strong support for Judge Thomas. To name just two or three, Ms. Jean Burkins, a very prominent woman in Columbia, an attorney, and a member of the NAACP; Rev. Norman Pearson, vice president of Fuller Enterprises, also a member of the NAACP; and Mr. James Moore, a civil rights activist and founder of the Committee for the Betterment of Poor People. All these people endorsed Judge Thomas.

I ask unanimous consent that appear in the record.

The CHAIRMAN. Without objection. I hope there wasn't a reason you weren't able to go home in August. You were welcome, I assume.

You are not paying attention. [Laughter.]

Senator THURMOND. What do you think?

[The information of Senator Thurmond follows:]

Mr. Chairman, a bi-partisan group of approximately 35 Black attorneys, business people and community and religious leaders from South Carolina traveled to Washington in August and met with me to discuss Judge Thomas. They indicated their overwhelming support for Judge Thomas.

Mr. Larkin Campbell, an attorney from Columbia who is a member of the NAACP, endorsed Judge Thomas' nomination and stated, "Clarence Thomas is a man who would bring integrity, wisdom and foresight to the Supreme Court". Mr. Fletcher Smith, a Democrat, attorney, member of the Greenville County, and a member of the NAACP, presented me with a resolution passed by the Greenville, South Carolina, County Council in support of Judge Thomas. Several other individuals spoke to me about their strong support for Judge Thomas; to name a few: Ms. Jean Burkins, an attorney in Columbia who is member of the NAACP; Reverend Norman Pearson, vice-president of Fuller Enterprises, also a member of the NAACP; and Mr. James Moore, a civil rights activist and founder of the Committee for the Betterment of Poor People.

Senator THURMOND. Judge Thomas, we are just about through. I just want to make two or three remarks to wind up here.

First, I want to commend you for the outstanding job you have done during your 5 days of testimony. There have been efforts to try to get you to express yourself about decisions and about what position you would take on the Supreme Court maybe. You have had the courage and the resolution and the good judgment not to fall for that.

You have answered many difficult questions with clear, thoughtful answers. You have shown that you have the intellectual capacity to sit on the Supreme Court. You made a good record at Holy

Cross where you graduated and also at Yale Law School, and that stood you well today.

The many difficult circumstances you have overcome in your life have given you common sense to go along with your formal education. As Chairman of the EEOC, you showed that you had the practical experience to handle a difficult position in an exemplary fashion. You did a fine job there in spite of some criticism that was unjustified. You did a good job, too, at the Civil Rights Education Department.

Your testimony has also shown that you have the appropriate judicial temperament and the sensitivity to do well on the Supreme Court. I believe you will be fair and open-minded and will understand the vast impact your judicial decisions will have on the people affected by them.

While you have discussed natural law, you have made it clear that you will exercise judicial restraint, following the Constitution and relevant statutory intent. Your record on the D.C. Circuit I think shows that you have done just that.

Regarding crime, you have made it clear that you will be sensitive to the rights of victims who must have a say in our criminal justice system, and that is important, and that you will also be fair to defendants in hearing their cases.

In my opening statement, I stated certain characteristics I look for in a Supreme Court nominee. In my 37 years in the Senate here, I have had the pleasure of acting on hundreds and hundreds of judges. And these are the qualities that I think we have to consider: Integrity, courage, compassion, competence, judicial temperament, and an understanding of the majesty of our system of government, which a lot of people don't seem to understand.

Judge Thomas, I believe you have exhibited these qualities throughout your life and during your testimony this week. I am confident that you will make an excellent member of the Supreme Court of the United States, and I commend you for the fine job that you have done for this committee. Good luck and God bless you.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Judge I have some additional questions on expressive conduct, but observing the expressive conduct of the people behind you, what I will do is I will submit those to you in writing in the interest of time and to accommodate the witnesses we have to come after. They will not take a great deal of your time. We will not be finished with the public witnesses until the end of this week, so there is plenty of time to answer the questions. There are only about three or four of them, and I do want to talk about the *Barnes* case and a few others that involve expressive conduct. I would appreciate your answering them for me.

Judge, I appreciate very much your willingness to accept the President's nomination, and I hope that as imperfect as the process is—and there is none that I know that is perfect—that you appreciate our responsibility. I thank you for the courtesy you have shown to this committee, and we will hear from public witnesses who are both for you, against you, and some who just want to come and express their concern.

It has been the history of this committee, at least of late, of the last several decades, to allow groups and individuals of standing to do just that, and we will finish this hearing, God willing and the creek not rising, sometime before this week is out. I have no intention of carrying it over into next week with the public witnesses.

Then within the next couple of weeks, we will as a committee act on your nomination, and it will then be sent to the floor of the Senate for the Senate as a whole to act on the nomination.

So I appreciate, again, your cooperation during this process. I thank Senator Danforth and I thank the White House, with whom you have been working for cooperating in the process. And I most importantly want to thank your wife, who has sat through all of this, and your sister, but even more importantly, Mom. It has been a long, long time to sit there, and this is—a lot of what we talked about, Mom, is boring, I know. But I appreciate your graciousness to the committee, and it is obvious your loyalty and devotion to your son is deep and is real. So I want to thank all of you.

Judge do you have any closing comment you wish to make to the committee or to the public or to anyone?

Judge THOMAS. Just a word or two, Mr. Chairman.

Mr. Chairman, Senator Thurmond, I would like to thank you for the courtesy and the fairness that you have shown me through this process. I am one of those who believes that this process is critical, and the longer I am a judge, the more important I think this process is.

I would like to thank my family for being so patient and so supportive, and Senator Danforth who said when I was nominated that we would spend a lot of time together and who has been so wonderful to me. And, of course, I would like to thank the President for nominating me.

I have been honored to participate in this process. It has been one of the high points—indeed, it is the high point from a lifetime of work, a lifetime of effort on behalf of so many people. This is the high point.

Whatever your determination is, I would like to reiterate that I have been treated fairly, that I have been honored, deeply honored to participate here. And I am reminded of my reaction in Kennebunkport when the President nominated me to the highest court in the land. It always gives me goose bumps to say "the highest court in the land." Only in America could this have been possible. Thank you all so much for your courtesy.

The CHAIRMAN. Judge, let me close your participation by suggesting to you, some have asked why we have not asked certain questions. Any question that I have failed to ask is only because I believed it was not relevant to whether or not you could or should sit on the Supreme Court of the United States of America. And so I have asked you all that I think is relevant. And you have answered some, you have not answered some, and you have made your judgments about what you should answer. Again, I thank you for your cooperation.

What we will do now, because I know as soon as we break we are not going to have much order in this room for a moment, so if you will sit with me so I can announce who comes next so that everyone will know, we will move from here immediately upon a little

bit of order being restored to the caucus room, when it occurs that you leave, to the American Bar Association which has been traditional under Democratic and Republican leadership in the Senate. They are the first public witnesses we hear from.

Then we will hear from a panel of legal scholars who support your nomination, and we will see how far along we are this evening. But, again, it is my intention to finish the public witnesses by Friday. So I want everyone to know that.

Again, thank you all. Thank you and your family for your cooperation. We will recess for 5 minutes.

[Recess.]

The CHAIRMAN. The hearing will resume.

Our first panel is a panel of distinguished members of the American Bar Association, and I would like to welcome them all: Mr. Ronald Olson, Mr. Best, and Mr. Watkins, all of whom are here to do as the ABA has done in the past, I don't know for how many years, give us their best judgment as to the qualification of the nominee, as they have with all nominees, to the Supreme Court.

Mr. Olson, I understand you are speaking for the committee, and I would ask you to keep your statement to 10 minutes or less, and then the panel of Senators will have questions for you all.

Again, welcome and thank you for being here.

STATEMENT OF RONALD L. OLSON, CHAIR, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY JUDAH BEST, DISTRICT OF COLUMBIA CIRCUIT REPRESENTATIVE, AND ROBERT P. WATKINS, FEDERAL CIRCUIT REPRESENTATIVE

Mr. OLSON. Thank you, Mr. Chairman, Senator Thurmond, honorable members of the Judiciary Committee; I will meet that 10 minutes.

I would first like to elaborate a little bit on our introduction. My name is Ron Olson. I am a practicing lawyer in Los Angeles, CA, and since August of this year, I have been the chairman of the ABA's standing committee on the Federal judiciary.

I am accompanied today by two of my colleagues: Mr. Judah Best on my left, and Mr. Robert Watkins on my right. Both are practicing lawyers here in Washington, DC. Because of their location, they were the primary investigators on behalf of the committee insofar as the investigation of the Honorable Clarence Thomas is concerned.

The three of us are here in a representative capacity on behalf of the American Bar Association committee, and further our committee on behalf of the legal profession as a whole. I would like to say, Senator, at the outset that it is a high honor to be here and be able to participate in this proceeding, and we would like to express our appreciation for the work of this committee, not only with regard to this very important nomination, but every nomination to every Federal court in the land.

Second, I would like to say that it has been a distinct privilege for all of us on this committee to revisit the professional credentials of the Honorable Clarence Thomas. With regard to our investigation, we were requested by the Attorney General of the United

States to commence an investigation of Judge Thomas' integrity, temperament, and professional competence. We did that, beginning July 3, and we carried it through until August 19.

That investigation consisted of over 1,000 interviews. We talked to some 400 different judges, over 300 practicing lawyers, and over 150 academics.

Our investigation included careful examination of colleagues with whom Judge Thomas associated at each stage of his career, from the attorney general's office in Missouri right up to his present position. We especially concentrated on the work that he has performed as a U.S. Court of Appeals judge for the District of Columbia. We spoke with his judicial colleagues. We spoke with lawyers who appeared before him. We spoke with academicians who reviewed his opinions.

The three reading committees that we have identified in our submission to this committee were especially helpful to us, and I want to pay particular respect to their work and express appreciation on behalf of the committee.

At all turns, Mr. Chairman, we focused on three criteria: Integrity, temperament, and professional competence. In conclusion, a substantial majority of the committee is of the view that Judge Thomas is qualified for appointment to the U.S. Supreme Court. The substantial majority concluded that Judge Thomas' integrity is above reproach, his temperament outstanding, and that he has demonstrated professional competence sufficient to meet the committee's qualified standard.

A minority of two on our committee concluded that Judge Thomas does not have the depth or the breadth of professional experience and competence necessary for appointment to the Supreme Court. There was one recusal.

Our rationale, Mr. Chairman, is set forth in a written statement that we have submitted to the committee. I would respectfully request at this time that that written statement be received by the committee as part of the written record of this proceeding.

The CHAIRMAN. It will be placed in the record without objection.

Mr. OLSON. Thank you very much.

[The prepared statement of Mr. Olson follows:]

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September 14, 1991

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D. C. 20510-6275

Re: The Honorable Clarence Thomas

Dear Mr. Chairman:

This letter is submitted in response to the invitation from the Senate Committee on the Judiciary to the Standing Committee on Federal Judiciary of the American Bar Association (the "Committee") to present its report regarding the nomination of the Honorable Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.

The Committee's evaluation of Clarence Thomas is based on its investigation of his professional qualifications, that is, of his integrity, judicial temperament and professional competence.

THE PROCESS

The Committee investigation began on July 3, 1991, and ended on August 19, 1991. On two different occasions, Judge Thomas was personally interviewed by members of the Committee.

Committee members interviewed over 1,000 persons throughout the United States, including well over

75 state and over 300 federal judges, 28 federal magistrate judges, and 29 federal bankruptcy judges. The interviews included present and former members of the Supreme Court of the United States, members of federal courts of appeals, members of the federal district courts, members of state courts, including those before whom Judge Thomas appeared as a practicing lawyer, and, in particular, Judge Thomas' colleagues from the United States Court of Appeals for the District of Columbia Circuit.

Committee members questioned approximately 300 practicing lawyers throughout the United States with special emphasis on those who had occasion to appear before Judge Thomas and those who worked with Judge Thomas during his tenure in the Office of the Attorney General of the State of Missouri, his employment in the Office of General Counsel of Monsanto and the office of United States Senator John Danforth, and his service as Assistant Secretary of Education, and later as Chair of the Equal Employment Opportunities Commission.

Committee members additionally inquired of over 150 deans and faculty members of law schools throughout the United States, including some 12 professors at the law school which Judge Thomas attended, as well as constitutional and Supreme Court scholars.

At the request of this committee, all of Judge Thomas' opinions were reviewed by:

1. A Reading Committee chaired by Rex E. Lee, former Solicitor General of the United States and presently President of Brigham Young University;

2. A Reading Committee chaired by Professor Ronald Allen of the Northwestern School of Law in Chicago; and

3. A Reading Committee composed of professors from Duke University School of Law.[1]

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1. Members of these three Reading Committees who participated are listed in Exhibit A to this letter.

The results of the reviews of the Reading Committees were independently analyzed and evaluated by each member of the Committee. In addition, each member of the Committee independently selected and read opinions of Judge Thomas. This Committee also had the benefit of a thorough and recent investigation of Judge Thomas for appointment to the United States Court of Appeals for the District of Columbia. The present Supreme Court investigation, while built on the base of the earlier work, was substantially expanded and included further review of Judge Thomas' professional qualifications, including an analysis of his performance while a sitting appellate judge.

While the same factors considered with respect to the lower Federal courts are relevant to an appointment to the Supreme Court of the United States, this Committee's Supreme Court investigations are based upon the premise that the Supreme Court requires a person with exceptional professional qualifications. The significance, range and complexity of the issues considered by the Supreme Court require a person of outstanding ability. Such exceptional ability is further demanded by the Supreme Court's extraordinarily heavy docket.

Because of the foregoing, the ratings employed by the Committee for Supreme Court nominees have higher thresholds. The evaluation of "Qualified" for one of the lower federal courts means that the prospective nominee meets very high standards with respect to integrity, judicial temperament and professional competence and that the Committee believee that the nominee will be able to perform satisfactorily. To meet the committee's "Qualified" rating for the Supreme Court is more demanding. The nominee must have outstanding legal ability and wide experience and meet the highest standards of integrity, judicial temperament and professional competence.

Finally, consistent with the Committee's long-standing policy, the Committee did not undertake any examination or consideration of Judge Thomas' political ideology or his views on any issues that might come before the Supreme Court.

EVALUATION

Integrity

Virtually all comments on Judge Thomas' integrity, character and general reputation were highly favorable. Many people who know Judge Thomas remarked, as did one United States Court of Appeals judge, that he is a "good, caring human being." Those who have observed Judge Thomas characterize his integrity in extremely positive terms: He is viewed as an "honest and straight-forward person, always putting his cards on the table". One litigator, not known for effusiveness, put it this way: "Judge Thomas has great personal integrity. He is at ease with himself and others. He has great self discipline and a strong personal value system. He is a very good person. I have implicit trust in him. He would not do anything he did not think was right." Several judges who have sat with him and have had the opportunity for close observation regard Judge Thomas "as a man of the utmost integrity" who has "moral courage." Indeed, several appellate judges, when addressing the subject of Judge Thomas' qualifications advised the Committee they could only "speak in terms of superlatives." Descriptive terms such as "honest" and "totally open-minded" appear during the interviews.

While no one questioned Judge Thomas' personal integrity, a few interviewees expressed disagreement with Judge Thomas' interpretation of equal employment laws at the EEOC and his adherence to existing court orders, suggesting that those differences raised doubts as to his professional integrity. The Committee investigated these concerns and is satisfied that the disagreement over the interpretation of the law reflects an honest and reasonable difference of opinion. Those who have worked with Judge Thomas stated emphatically to the Committee that he "wanted to do what the law required him to do" and that "[w]hen he thought goals and timetables were required by the law he stood up to those who opposed them."

The Committee, therefore, concludes that Judge Thomas possesses integrity, character and general reputation of the highest order.

Judicial Temperament

While serving the Court of Appeals, Judge Thomas has consistently been fair and open-minded in his dealings with his fellow judges and with attorneys appearing before him. He has been patient in his questioning of counsel and his questions are focused and to the point. Judge Thomas has been described as deliberate, thoughtful, "business-like, judicious and quiet." Some of his colleagues on the United States Court of Appeals note that he "listens as well as talks" and "has displayed remarkable equanimity in handling his oral arguments." He has also evidenced the capacity to reach a decision efficiently and to defend that decision politely but firmly. A Reading Committee characterized one of Judge Thomas' dissents as one of his "strongest opinions where with civility and deftness of reasoning," he took issue with the majority's position. He is described as an "excellent colleague" who is extraordinarily conscientious and works long hours. The Committee became aware of certain charges concerning Judge Thomas' management as EEOC Chair in which his conduct was characterized as being allegedly "retaliatory." The Committee's investigation revealed these allegations arose from disputed facts and perceptions and involved matters that were in the realm of management discretion. The Committee is satisfied that existing evidence of Clarence Thomas' appropriate conduct and suitable temperament as a judge is much more relevant and persuasive than these few allegations of intemperate conduct. The Committee concludes that Judge Thomas possesses a highly suitable temperament for judicial service.

Professional Competence

To make an assessment of Judge Thomas' professional competence, the Committee sought to measure his intellectual strength, the breadth and depth of his legal knowledge, his analytical skill and his ability to communicate clearly and rationally. The assessment of these considerations produced the only significant differences within the Committee.

Judge Thomas' professional experience to date has not been as extensive or as consistently challenging as that of others who might have been available for appointment to the Supreme Court. Nevertheless, the substantial majority of the Committee concluded that Judge Thomas meets the Committee's "Qualified" standard.

Particularly persuasive to the substantial majority has been Judge Thomas' performance on the Court of Appeals. There, he has demonstrated intellect, analytical ability and writing skills that are well within the zone of competence for those rated "Qualified" for the Court.

The Reading Committees support the majority of this Committee in their evaluation of Judge Thomas' legal opinions. Thus, as noted by the one of the Reading Committees:

> "His writing is direct, clear and carries the hallmarks of competent appellate craftsmanship. His opinions, as another member of the committee has noted, 'reveal that he is certainly intelligent, as well as diligent and thorough in his approach to deciding cases.' His work evidences broad analytical skill and open-mindedness. Several of Judge Thomas' opinions (discussed above) contain clear indications that he will perform competently when given further opportunities to consider cases of real complexity and import."

Another Committee stated that:

> "A consensus * * * emerged, but we were somewhat diffident in expressing it confidently because * * * [e]ighteen opinions over a little more than a year is not enough to give one * * * certain insight * * * [.] In brief, Judge

> Thomas' writings reflect a highly intelligent man, well versed in the technical skills of the law. His opinions are carefully and systematically reasoned, clearly articulated, respectful of the record (so far as we can tell), fair in consideration of opposing arguments, extensively supported by citations to authority, and demonstrate no obvious bias in decision. * * *
>
> In sum, we were collectively quite impressed with Judge Thomas' opinions. We found only one opinion to criticize, and many to praise."

The last Reading Committee's comments were equally supportive:

> "In conclusion, our review committee found that Clarence Thomas has performed capably as a judge on the U.S. Court of Appeals. He has shown no evidence of judicial bias. His opinions have been, by and large if not without exception, well reasoned and well written. We cannot speculate on the basis of the materials we have reviewed how Judge Thomas, if confirmed, would function under the different demands placed upon a Supreme Court justice. Our review of his work to date suggests that his analytic and communicative capabilities would be adequate to that job."

Additionally, during oral argument and deliberation, Judge Thomas has been well prepared, attentive, and focused on the issues necessary for decision while being sensitive to broader policy considerations, and has challenged attorneys and fellow judges with questions that were thoughtful and useful. The Committee finds his opinions to be clear, direct and thorough. The results have been fair and understandable to litigants. Further buttressing these

favorable conclusions is a wide set of life and professional experiences. These experiences suggest a special capacity for personal growth and professional wisdom.

On the other hand, Judge Thomas' background as a trial and appellate lawyer has been limited to relatively brief experience gained immediately upon his entry into the profession, and very little of his experience as a practitioner was in the federal court system. His several articles in legal journals have little analysis, are not particularly well formed, and, in part, rely upon an undefined reference to "natural law." Reading Committee representatives and others found these articles to be "disappointing" in presentation, content and scholarship. Our Committee notsd, however, that in an interview with Committee members, Judge Thomas rejected "natural law" as a basis for judicial decision making.

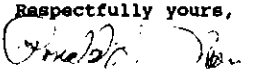
The substantial majority of the Committee believes that these limitations are overcome and outweighed by Judge Thomas' brief but highly satisfactory performance on the Court of Appeals. The Committee minority of two, on the other hand, is of the view that Judge Thomas is "Not Qualified" for the Supreme Court. They conclude that Judge Thomas does not have the depth or breadth of professional experience sufficient to place him at the top of the legal profession, as is required by the Committee's criteria for appointment to the Supreme Court of the United States. This minority believes that Judge Thomas' track record in the profession does not demonstrate exceptional or outstanding ability. They further believe that the hope or expectation that such ability will be demonstrated in the future is insufficient in the absence of a prior and extended history of exceptional work in the profession.

CONCLUSION

Based on all of the information available to it, the substantial majority of the Committee is of the view that Judge Thomas is "Qualified" for appointment to the Supreme Court of the United States. A minority of two rated Judge Thomas "Not Qualified". There was one recusal.

The Committee will review its report at the conclusion of the hearings and notify you if any circumstances have developed that require modification of these views. On behalf of our Committee, we wish to thank the members of the Judiciary Committee for their invitation to participate in the confirmation hearings on the nomination of the Honorable Clarence Thomas to the Supreme Court of the United States.

Respectfully yours,



Ronald L. Olson
Chair

EXHIBIT A

READING COMMITTEES

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Professor George Christie
Professor Tom Rowe
Professor Lawrence Baxter
Professor Tom Metzloff

NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Professor Ronald J. Allen
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Professor Sara Sun Beale, Duke University School of Law
Professor Drew S. Days, Yale University Law School
Professor John H. Garvey, University of Kentucky Law School
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Benna Ruth Solomon, Chief Assistant Corporation Counsel City of Chicago
Hon. Philip W. Tone, Jenner & Block (former Federal Court of Appeals judge)
Professor Richard G. Wilkins, Brigham Young University Law School
Professor Charles Alan Wright, University of Texas Law School at Austin

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September 17, 1991

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Re: The Honorable Clarence Thomas

Dear Mr. Chairman:

Pursuant to the request of Senator Heflin during our testimony yesterday, we enclose a list of non-judicial articles written by Judge Thomas which were considered by the ABA's Reading Committees.

Sincerely yours,

Robert P. Watkins

RPW:keu

Enclosure

BY HAND

Attachment to Sept. 17, 1991 letter to
the Hon. Joseph R. Biden, Jr., Chairman
Committee on the Judiciary

NON-JUDICIAL ARTICLES WRITTEN BY THE HON. CLARENCE THOMAS:

Thomas, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, 12 Harv. J. of L. & Pub. Pol. 63 (1989)

Thomas, Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation, 30 How. L. J. 983 (1987)

Thomas, Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!, 5 Yale L. & Pol. Rev. 402 (1987)

Thomas, The Equal Employment Opportunity Commission: Reflections on a New Philosophy, 15 Stetson L. Rev. 27 (1985)

Thomas, Pay Equity and Comparable Worth, 34 Labor L. J. 3 (1983)

Thomas, Current Litigation Trends and Goals at the EEOC, 34 Labor L. J. 208 (1983)

Why Black Americans Should Look to Conservative Policies, The Heritage Lecture, June 18, 1987

Civil Rights as a Principle Versus Civil Rights as an Interest, from ASSESSING THE REGAN YEARS (D. Boaz ed. 1988)

The CHAIRMAN. I have no questions. I yield to my colleague from South Carolina.

Senator THURMOND. Thank you very much, Mr. Chairman.

Mr. Olson, I want to congratulate you on the fine job you are doing as chairman of the standing committee on the Federal judiciary. You have a very outstanding reputation as a distinguished lawyer, and I am glad you have two of Washington's finest lawyers sitting here with you—Mr. Best and Mr. Watkins too—to help you.

Now, I had a number of questions here, but to save time I am just going to ask one question. Mr. Olson, does the ABA qualified rating mean that the nominee has the outstanding legal ability and wide experience and meets the highest standards of integrity, professional competence, and judicial temperament? Isn't that how the ABA defines a qualified rating? And isn't that exactly what you are saying about Judge Thomas and that he is an outstanding nominee?

Mr. OLSON. That is exactly right, Senator, with respect to the substantial majority of our committee.

Senator THURMOND. I have no further questions.

The CHAIRMAN. Thank you.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

This is basically a two-part question. That is, what would have been necessary for Mr. Thomas to be well qualified in terms of the American Bar Association's findings?

Mr. OLSON. The distinction between qualified and well qualified is admittedly, in our general definitions, less than clear. To reach the well-qualified standard, one has to be among the very most prominent members of our profession. Not simply at the highest grouping, but among the single most prominent members of the legal profession. And it is that very important distinction that we made. We made it on the basis of an analysis of Judge Thomas' performance to date, and I would be happy to elaborate on that if the Senator cares for it.

Senator KENNEDY. Well, anything you want to add to make the answer complete.

Mr. OLSON. I think it is important for the committee to recognize that we made the finding exactly as Senator Thurmond has summarized it on behalf of the substantial majority. But it is also important to recognize that while he has distinguished himself in each one of those three criteria that we have recognized, there were limitations in his work that precluded the committee from finding him well qualified. His opinions on the court of appeals have been very well written, very well documented, very well explained. He deals with precedent carefully, honestly, and open-mindedly. He has been without bias.

On the other hand, his opinions have been limited in number. He has not been tested in many of the fundamental issues that the U.S. Supreme Court will face. He has not had the opportunity to face questions of first impression. He has not had the opportunity to deal with important constitutional concepts such as federalism, separation of powers, first amendment—many others. He has not been faced with those experiences yet, and therefore has not had the opportunity to demonstrate them.

That does not mean that he is incapable of doing so. It simply means that he is untested. But being untested left us with a sense that he was less than our well-qualified rating would indicate.

Senator KENNEDY. Finally, what was the basis of the minority holding?

Mr. OLSON. The minority view, Senator, focused on the criteria of professional competence. The minority of two did not reach any resolution of the other two issues, but they determined that with regard to professional competence, Judge Thomas did not measure up with respect to his track record. He had not had the breadth of experience or the depth of experience to demonstrate in their mind that he is at the top of the profession.

They particularly, I believe I am fair in saying, focused on the mixed writing that we have seen from Judge Thomas. As I have noted earlier, the opinions that he has crafted on the court of appeals have been highly praised. On the other hand, the writings that he has done off the court particularly those published in legal journals, have been generally criticized by a wide range of individuals.

I think it is that unevenness which was of particular concern to the minority of two.

Senator KENNEDY. Just in clarification, the criticism, was that based upon philosophical differences of opinion or based upon some other reason?

Mr. OLSON. It was not based upon philosophy or politics. That is, as far as we are concerned, outside the parameters of our investigation, Senator. With regard to the criticisms, I think they can be summarized very simply. The criticisms of his law journal writing are simply that they were shallow. They were without—the positions he took were not well documented and supported, and he failed to confront and deal with strong arguments on the opposite side of the issue. They simply did not evidence the kind of scholarship that one would like to see on a regular basis, and they did not demonstrate the kind of scholarship that he has shown as a judge on the U.S. court of appeals.

Senator KENNEDY. Thank you very much.

No further questions, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Grassley.

Senator GRASSLEY. I will pass for this round.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. I will pass, Mr. Chairman. Thank you.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Just a question or two.

When you refer to scholarship and you talk about the issue of wide experience, how much do you look toward a familiarity with the specific work of the Court as to whether the nominee would be able to move right in, understand the kinds of issues the Supreme Court has, to be able to deal with it as an initial matter?

Mr. OLSON. Let me respond and relate my answer particularly through our examination of Judge Thomas. Judge Thomas has had, as the Senator has indicated, a very wide set of life experiences. We took note of that. We believe that it demonstrates a tremen-

dous potential for personal growth and a background for professional wisdom.

The experience that he has had on the U.S. court of appeals has demonstrated his capacity to craft good judicial opinions where he has dealt with established precedent and applied that in a careful way to the cases before him. He has been very disciplined in his approach to decisionmaking, disciplined in terms of the kinds of issues that he addresses, generally no more than necessary to answer the case before him, and disciplined in the way in which he expresses himself, focusing very carefully on the particular statute or rule at issue.

What this record that we have reviewed does not have in it is the very area that the Senator has raised. We have seen very little of his writing that grapples with the kind of issues that are typically dealt with on the Supreme Court. There have been very few cases on the court of appeals that have raised those fundamental issues. Most of them have been dictated by the precedents already established.

On the U.S. Supreme Court, as the Senator well knows, there are a lot of issues that come around for the first time. He has had very little practice dealing with cases of first impression, at least as far as the written record is concerned. He has had very little practice dealing with the fundamental constitutional principles that govern wide areas of conduct. He has had very little practice reaching out and defining over-arching principles that go across the spectrum of our Constitution.

Those are the kinds of things that I think limited our ability—let me say that differently. Those were the kinds of areas that limited the rating that was given to Judge Thomas. If he had had 10 or 12 years and 200 opinions on the U.S. court of appeals, I suspect he would have had a lot more opportunity to practice in that very basic constitutional area.

Senator SPECTER. I had some other questions in mind, but that answer was so complete that you have already covered them.

Mr. OLSON. Thank you.

Senator SPECTER. Let me turn to one other aspect of the issue, and that is on a comparison to the Court. A nominee for the Supreme Court attracts a lot of attention, obviously. I have had a question about a comparison of the current Court, say the Court with Holmes and Brandeis, are there evaluations made by the scholars in the field—there is a phase of writings I don't know—evaluating the current Court? I ask this in the context of Judge Thomas is going to join a court and his ability to perform may well turn on the balance of the Court. Has there been any distinguished writing comparing this Court to other Supreme Courts like the Holmes-Brandeis court?

Mr. OLSON. There certainly is and it is ongoing on a regular basis, and I am going to turn to my colleague Mr. Best in a moment, but I will refer briefly to one article that was published recently in the Minnesota Law Review, trying to identify the characteristics of the great Justices of the U.S. Supreme Court, trying to identify the characteristics of individuals, and then see if there were central characteristics that carried through.

The one that I remember being above all was character, the individual character of a Justice was more important than any other single factor in identifying greatness on the Court.

I should also say that I think it was Justice Frankfurter who said that the ability to define greatness for a judge is a very uncertain art, and I would agree with that.

Mr. Best I believe may have some further answer to your question.

Mr. BEST. If I may, Senator, I think the same law review article demonstrated an attempt statistically to determine what was the best background for a Supreme Court Justice, demonstrated that there are no hard and fast rules. The character was extremely important, and the only other factor that came out in the analysis and discussion was, of course, the question of background, and to the extent that would be helpful to this committee, it seems that the analysis of those candidates for the Supreme Court who had come up, as it were, the hard way, who had scratched and crawled their way and had made their career for themselves were probably the greatest of the Supreme Court Justices.

So, to the extent that that sort of meager sociological information is helpful, I offer it to you.

Senator SPECTER. Any other references on that subject besides the single Minnesota Law Review article?

Mr. OLSON. Well, I suppose we could go back to Socrates, he had a quote or two, and certainly wrote about what it——

Senator SPECTER. I mean about an evaluation of this Supreme Court.

Mr. OLSON. I don't have any specifically to suggest at this time. We would be happy to supplement the record, if the Senator would like.

I would make one other statement that I think too often tends to get overlooked with respect to our Federal judiciary, and that is the single criteria of integrity. It seems to me it is very easy to take that criteria for granted, and if you look around at this Federal judiciary that we have had for so many years and, in particular, the Supreme Court, there has been very, very few breaths of scandal. It is that integrity that I think in my mind speaks directly to the majesty of the law that Senator Thurmond referred to about half an hour ago, and I think it is something that this committee that you represent and, hopefully, our committee and our work have something to do with, and it strikes me that that has distinguished our judiciary here in the United States from virtually every other judiciary in the world, and it is one that I am very proud of, and I think when you talk about greatness on the courts and consistency, that to me is a criteria that is very, very important.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Heflin.

Senator HEFLIN. How many members are there on the committee?

Mr. OLSON. Fifteen members on our committee.

56-270 O—93——18

Senator HEFLIN. On the issue of reading his opinions, was there a committee of the 15, or did the full 15 read all of them?

Mr. OLSON. All of the members of the committee read opinions of Judge Thomas. In addition, Senator Heflin, we used the services of three separate reading committees. Two of those committees were based at distinguished law schools, one at Duke Law School and one at Northwestern Law School.

A third group was comprised of practicing lawyers around the country, and that group was headed by Rex Lee, a former Solicitor General and currently president of Brigham Young University. The membership on that committee was comprised of practitioners who have had active practices before the Supreme Court and had themselves presented I think somewhat over 100 cases to the Supreme Court. They read each one of the writings of Judge Thomas and reported to us.

Senator HEFLIN. You said writings. Was it a different group or the same group that read his articles?

Mr. OLSON. The same group.

Senator HEFLIN. The same group read his articles. Now, were they articles that were limited to articles that had been published in law journals?

Mr. OLSON. Generally speaking, yes. The ones that are found, six or eight of them, in law journals, Stetson, Howards, and so on.

Senator HEFLIN. Could you provide us a list of the—I am not talking about his opinions, because we have all of that—could you provide us a list of the articles in law journals that were read by this committee, and if any other writings or speeches or articles that were published in nonjudicial publications, if you could furnish—in other words, furnish a full list of the articles that were read. I don't want his cases, but the articles.

Mr. OLSON. I would be happy to do that, Senator.

Senator HEFLIN. That is all.

The CHAIRMAN. Any other questions before the committee?

[No response.]

There being none, thank you, gentlemen, very much for your effort. I thank the committee as a whole.

Mr. OLSON. Thank you very much for allowing us to appear.

Senator THURMOND. I thank you gentlemen for appearing.

Mr. OLSON. Thank you.

Mr. BEST. Thank you.

The CHAIRMAN. Now, I indicated that we had two more panels. I have gotten the order reversed. The next panel of witnesses is a panel of academic scholars who have expressed either concern or opposition to the judge, and then we will follow with a panel of four very distinguished witnesses who wish to testify for the judge.

The first panel we will call up is Thomas Grey, from Stanford Law School, who has written extensively about using historical sources to interpret the Constitution, and also about the fifth amendment and property rights. Professor Grey was a law clerk to Justice Marshall from 1969 to 1970, and I believe he is also the same Thomas Grey that is quoted somewhat extensively by Mr. Epstein in his book. I believe Mr. Grey is here to express concern—I am not sure, I will let him tell you what he is going to express.

Also, Sylvia Law, a professor at New York University School of Law, who specializes in constitutional law in the area of personal and family privacy rights, and I understand she is going to testify in opposition to Judge Thomas.

And Prof. Frank Michelman, a professor at Harvard University, has written extensively on methods of constitutional interpretation and, in particular, the use of the fifth amendment's takings clause.

I welcome you all. I would appreciate it if you would be willing to limit your comments to 10 minutes, as unfair as that is, in the interest of time. We will be delighted and anxious to have placed in the record as if read in full your entire statements, if they are long.

Why don't I begin, unless you have all decided on an order—you have, well, why don't you tell me what order you have decided on.

Ms. LAW. I will begin.

The CHAIRMAN. Professor Law, why don't you begin.

STATEMENT OF A PANEL CONSISTING OF SYLVIA LAW, NEW YORK UNIVERSITY LAW SCHOOL; FRANK I. MICHELMAN, HARVARD LAW SCHOOL; AND THOMAS C. GREY, STANFORD LAW SCHOOL

Ms. LAW. I am Sylvia Law. For 18 years I have been professor at NYU Law School and codirector of the Arthur Garfield Hays Civil Liberties Program. I am also the president-elect of a national organization called the Society of American Law Teachers.

Prior to his nomination to the Supreme Court, Judge Thomas expressed strong views opposing the fundamental right to choose abortion. Most dramatic was his assertion four years ago that Lewis Lehrman's analysis of "the meaning of the right to life is a splendid example of applying natural law." That endorsement of the assertion that the fetus is a human being, entitled to full constitutional protection, and that *Roe* v. *Wade* led to a "holocaust," is a more extreme position on abortion than has ever been taken by any Supreme Court Justice in our history, or by any nominee, including Robert Bork.

Judge Thomas' praise of the view that natural law requires an interpretation of the Constitution that would criminalize abortion under virtually all circumstances is not an isolated example. Two years ago, in the Harvard Journal of Law and Public Policy, he characterized *Roe* v. *Wade* as "the current case provoking most people," from conservatives, like himself. Judge Thomas then advocated the use of natural law in interpreting the Constitution, as an alternative to judicial activism and the recognition of unenumerated rights.

These comments were not made in an off-the-cuff political speech. They were published in an academic/legal journal of Harvard University. Those of us who publish in these journals can attest that the editors scrutinize each idea, word, and comma, to assure that the author has expressed ideas with precision.

Judge Thomas' prior statements on reproductive freedom, hence, distinguish him from Justices Souter and Kennedy. He staked out a position on these issues that is extremist, that is far outside the mainstream of conservative American political and judicial thought. His prior statements demand explanation.

During these hearings, many of you questioned Judge Thomas on reproductive freedom. You gave him the opportunity to assure us that he is not, in the words Senator Heflin used in rejecting Robert Bork, "an extremist who would use his position on the Court to advance a far-right, radical, judicial agenda." After a week of hearings, we do not know anything new about how Judge Thomas approaches the core question of women's right to control their bodies, free from State interference. Indeed, Judge Thomas' answers were deeply disturbing and raised new problems, including concerns about his sense of judicial responsibility and his credibility.

Judge Thomas sought to justify his refusal to answer your questions about his views on reproductive freedom, saying that "to take a position would undermine my ability to be impartial."

By contrast, however, on many issues he expressed concrete substantive views. He offered detailed analysis of the constitutional law of exclusionary rules and warrants. He endorsed the Court's current standards of establishment clause jurisprudence, even though a case challenging that standards is now pending before the Court.

He addressed the wisdom and constitutionality of mandatory sentencing guidelines. I could go on and on. You know he addressed many subjects in lots of concrete detail. Each of these positions is controversial. Each involves issues that are or will be before the Court. On each, he was nonetheless able to offer concrete detailed views.

Judge Thomas sought to distance himself from his prior extreme statements about reproductive freedom by denying knowledge of them. He said he had only skimmed the Lehrman article before pronouncing it a splendid example of natural law protecting fetal life.

Since his nomination, his endorsement of the Lehrman article has been a centerpiece of public debate and concern. But Judge Thomas testified that he did not even reread it in his 10 weeks of preparation for the confirmation hearings. He testified that he never read the 1985 report of the Working Group on the Family, calling for the overruling of *Roe* v. *Wade,* even though he had signed that report.

Perhaps most astonishingly, despite frequent criticisms of *Roe* v. *Wade,* Judge Thomas insisted that he had no personal memory of ever having discussed the case, he had no personal opinion about the Court's ruling in *Roe*. He said, "Senator, your question to me was did I debate the contents of *Roe,* the outcome of *Roe,* do I have this day an opinion, a personal opinion on the outcome of *Roe,* and my answer to you is that I do not."

These statements, if credited, reflect serious irresponsibility and insensitivity. Integrity—consistent truth-telling even when it is uncomfortable—is an essential quality in a judge. Everyone recognizes that. There is no question that integrity is an appropriate litmus test for a Supreme Court Justice.

But if we believe what Judge Thomas has told us during these hearings, then we must question whether he is sufficiently responsible to serve on the High Court. Why should we assume that he will bother to read the briefs of the parties or prior precedent, if he does not even reexamine his own words when they generate enor-

mous protest and concern? How can he criticize a landmark decision guaranteeing women their most basic rights, without having formulated an approach to the issue that it raises?

Judicial impartiality did not prevent Judge Thomas from asserting views on many important controversial issues. It did prevent him from repudiating or even discussing his recent assertions that natural law gives the fetus rights superior to any woman's right to make decisions about her own body and life.

We asked how, as a judge, he would address the question whether the fetus was entitled to full constitutional protection, he asserted that he would look to precedent, but that he knew no cases that addressed the issue. It was as though *Roe* v. *Wade* did not exist. Judge Thomas' selective responsiveness and selective memory has to be disturbing to women and has to be, I submit, disturbing to this committee.

Judge Thomas did recognize that the Constitution protects some forms of unenumerated privacies and personal liberties, particularly marital privacy in relation to contraception. In response to persistent questioning, skilled questioning by Senator Biden, Judge Thomas reluctantly approved *Eisenstadt's* holding that unmarried people have a right to access to contraception. But he repeatedly returned to characterizing *Eisenstadt* as an equal protection decision, and to the right to martial privacy. Clearly, this provides no reassurance that he would recognize a fundamental right of a woman to choose abortion. Indeed, Judge Thomas steadfastly refused to acknowledge that the constitutional protection of liberty or privacy gives any right to a woman seeking abortion. This is a position that is more radical than that of Justice Rehnquist or Justice O'Connor, who have recognized some form of liberty or privacy interest for women seeking abortions.

No one is asking Judge Thomas to indicate how he would decide particular cases. Last Thursday Senator Hatch asserted that once one recognized that a woman possessed a fundamental right, "you are on the way to deciding most of the cases" involving reproductive freedom. With respect, I don't believe that is true. The development of a standard requires an evaluation of the interest asserted by the woman, the weight to be given to countervailing interests asserted by the State, and a definition of a constitutional criteria for balancing these conflicting claims. Even people who agree on the standard often disagree on its application to particular facts. And thought about the standard evolves over time. We don't ask him to pass on particular cases. Rather, we ask whether he repudiates his prior statements, suggesting he would give no weight to women's claims of reproductive liberty and privacy, or whether he would attach an absolute value to the protection of the fetus. We ask that he answer the same types of questions concerning the fundamental right to choose as he had no difficulty in answering concerning other constitutional issues.

On the constitutional issues that matter most to women, reproductive freedom, he stonewalled you and the American people. A week ago, his prior statements and writings created a presumption that he was an extremist, an ideologue. He had a burden to overcome on reproductive freedom, and he failed to do it.

On a practical level, let me just address the argument that confirmation of Clarence Thomas would not matter to reproductive choice because we already have five Justices on the Court willing to overrule *Roe* v. *Wade*. Assuming that is true—and it may well be—many difficult issues remain. Can States ban abortions when the woman will die as a consequence? Can they ban abortion advertising or abortion counseling? Can they prohibit women from traveling to States where abortion remains legal? Will statutes enacted by this Congress be interpreted in a way that is hostile to women's reproductive freedom?

The lack of a majority opinion in *Webster* suggests that a tension exists amongst the Justices of the Court, a give and take. Adding a Justice with an extreme antichoice view will influence that balance and will move the Court even further to the extreme ideological right.

The Constitution assigns you the solemn responsibility to advise and consent. That responsibility is at the core of the Constitution's separation of powers amongst the branches of Government.

Over the years, this committee has developed an ability to question nominees. Last week some of you made comparisons amongst the nominees—Bork, Kennedy, Souter. To allow practical politics to justify approval of a nominee who does not meet your standards of integrity, responsibility, and commitment to core values of liberty and equality would disregard your constitutional duty.

Reproductive choice is a basic, fundamental right that is of singular importance to women. It is entirely appropriate for the Senate to insist that a nominee offer a reasoned framework for addressing this fundamental right and to return to confirm nominees who are not forthright in discussing this core issue.

Thank you very much.

[The prepared statement of Ms. Law follows:]

STATEMENT OF

PROFESSOR SYLVIA A. LAW

OPPOSING THE CONFIRMATION OF

JUDGE CLARENCE THOMAS AS

ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

September 16, 1991

I am Sylvia A. Law. For 18 years I have been Professor of Law at NYU and Co-Director of the Arthur Garfield Hays Civil Liberties Program. I am President Elect of the Society of American Law Teachers.

Prior to his nomination to the Supreme Court, Judge Thomas expressed strong views opposing the fundamental right to choose abortion. Most dramatic was his assertion four years ago that Lewis Lehrman's analysis of "the meaning of the right to life is a splendid example of applying natural law." That endorsement of the assertion that the fetus is a human being, entitled to full constitutional protection, and that Roe v. Wade led to a "holocaust," is a more extreme position on abortion than has ever been taken by any Supreme Court Justice in our history, or by any nominee, including Robert Bork.

Judge Thomas's praise of the view that natural law requires an interpretation of the Constitution that would criminalize abortion under virtually all circumstances is not an isolated example. Two years ago, in the Harvard Journal of Law and Public Policy, he characterized Roe v. Wade as "the current case provoking most protest," from conservatives, like himself. Judge Thomas then advocated the use of natural law in interpreting the Constitution, as an alternative to "judicial activism" and the recognition of unenumerated rights.

These comments were not made in an off-the-cuff "political" speech. They were published in an academic/legal journal of Harvard University. We who publish in these journals can attest that the editors scrutinize each idea, word and comma, to assure that the author has expressed ideas with precision.

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Court to advance a far-right, radical, judicial agenda." After a week of hearings we do not know anything new about how Judge Thomas approaches the core question of women's right to control their bodies, free from state interference. Indeed, Judge Thomas's answers were deeply disturbing and raised new problems, including concerns about his sense of judicial responsibility and his credibility.

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By contrast, on many issues he expressed concrete substantive views. He offered a detailed analysis of the constitutional law of exclusionary rules and warrants. He endorsed the Court's current standards of Establishment Clause jurisprudence, even though a case challenging that standard is currently pending before the Court. He addressed the wisdom and constitutionality of mandatory sentencing guidelines. He endorsed a three-tiered approach to equal protection analysis. I could go on. Each of these positions is controversial. Each involves issues that are or will be before the Supreme Court. On each he was prepared to provide concrete, detailed views.

Judge Thomas sought to distance himself from his prior extremist statements about reproductive freedom by denying knowledge of

them. He said he had "only skimmed" the Lehrman article before pronouncing it a "splendid" example of natural law protecting fetal life. Since his nomination, his endorsement of the Lehrman article has been a centerpiece of public debate and concern. But, Judge Thomas testified that he did not even reread it in his ten weeks of preparation for the confirmation hearings. He testified that he never read the 1986 Report of the Working Group on the Family, calling for the overruling of Roe, even though he had signed the Report. Perhaps most astonishingly, despite his frequent criticism of Roe, Judge Thomas insisted that he had no personal memory of ever having discussed the case, and had no personal opinion about the Court's ruling in Roe. He said,"Senator, your question to me was did I debate the contents of Roe v. Wade, the outcome in Roe v. Wade, do I have this day an opinion, a personal opinion on the outcome in Roe v. Wade; and my answer to you is that I do not."

These statements, if credited, reflect serious irresponsibility and insensitivity. Integrity -- consistent truth-telling even when it is uncomfortable -- is an essential quality in a judge. There can be no question that integrity is an appropriate litmus test for a Supreme Court Justice. But if we believe what Judge Thomas has said during these hearings, we must then question whether he is sufficiently responsible to serve on the High Court. Why should we assume that he will bother to read the briefs of parties, or prior precedent, if he doesn't even

reexamine his own words when they generate enormous protest and concern? How can he criticize a landmark decision guaranteeing women their most basic rights without having formulated an approach to the issue?

"Judicial impartiality" did not prevent Judge Thomas from asserting views on many important and controversial issues. But it did prevent him from repudiating, or even discussing, his recent assertions that natural law gives the fetus rights superior to any woman's right to make decisions about her own body and life. When asked how, as a judge, he would address the question whether the fetus was entitled to full constitutional protection, he asserted that he would look to precedent but that he "knew no cases addressing that specific question." It was as though Roe v. Wade, which did address that issue, did not exist. Judge Thomas's selective responsiveness and memory has to be disturbing to women and to this Committee.

Judge Thomas did recognize that the Constitution protects some forms of unenumerated privacies and personal liberties, particularly "marital privacy" in relation to contraception. In response to persistent questioning by Senator Biden, Judge Thomas reluctantly approved Eisenstadt's holding that unmarried people have a right to access to contraception. But he repeatedly returned to characterizing Eisenstadt as an equal protection decision, and to the right to "marital privacy." Clearly, this

provides no reassurance that he would recognize a fundamental right of a woman to choose abortion. Indeed, Judge Thomas steadfastly refused to acknowledge that the Constitution's protection of liberty or privacy gives <u>any</u> right to women seeking abortions. This is a position more radical than that of Chief Justice Rehnquist or Justices O'Connor, who have recognized some form of liberty or privacy interest for women seeking abortions.

No one is asking Judge Thomas to indicate how he would decide a particular case. Last Thursday Senator Hatch asserted that once one recognized that women possess a fundamental right, "you are on the way to deciding most of the cases" involving reproductive choice. With respect, this is not true. The development of a standard requires evaluation of the interest asserted by the woman, the countervailing state interests, and definition of a constitutional criteria for balancing these conflicting claims. Even people who agree upon a standard, often disagree on its application to particular facts and cases. And thought about the standard evolves over time. Rather we ask whether he repudiates prior statements suggesting that he would give <u>no</u> weight to women's claims of reproductive liberty and privacy, or would attach an <u>absolute</u> value to the protection of the fetus. We ask that he answer the same types of questions concerning the fundamental right to choose that he had no difficulty answering concerning other constitutional issues.

On the constitutional issues that matter most to women -- reproductive freedom -- he stonewalled you, and the American people. A week ago his prior statements and writings created a presumption that he was an extremist -- an ideologue. He had a burden to overcome on reproductive freedom. He failed to do so.

On a practical level let me address the argument that confirmation of Clarence Thomas would not matter to reproductive choice because there are already five Justices on the Court willing to overrule Roe v. Wade. This may be true. But many difficult issues remain. Can states ban abortions when the woman's life is in danger? Can they ban abortion advertising? Can they prohibit women from traveling to states where abortion remains legal? Will statutes enacted by Congress be interpreted in a way that is hostile to women's reproductive freedom? The lack of a majority opinion in the Webster case demonstrates tension -- give and take -- among the current Justices. Adding a Justice with an extreme anti-choice view will influence that balance and move the Court even further to the extreme ideological right.

The Constitution assigns you the solemn responsibility to "advise and consent." That responsibility is at the core of the Constitution's separation of powers among the three branches of government.

Over the years this Committee has developed a "common law" of confirmation. Last week some of you made comparisons among this nominee, Judge Bork, and Justices Kennedy and Souter. To allow practical politics to justify approval of a nominee who does not meet your developing standards of integrity, responsibility and commitment to core values of liberty and equality, would disregard your constitutional duty.

Reproductive choice is a basic, fundamental right that is of singular importance to women. It is entirely appropriate for the Senate to insist that a nominee offer a reasoned framework for addressing this fundamental right, and to refuse to confirm a nominee who is not forthright in discussing this core issue.

The CHAIRMAN. Thank you very much. Let me point out that you did exactly what I asked; you limited your comments to 10 minutes. I made a mistake, as has been pointed out by my staff and by the distinguished Senator from South Carolina, in that we had allegedly told every witness that they would be limited to 5 minutes because we have somewhere near 90 witnesses. And my physical constitution—that is one of the reasons why I would never want to be a judge.

Now, having said that, because we gave the first two panels 10 minutes, we will let the next panel as well go 10 minutes. But everyone else should be on notice from this point on that they are limited to 5 minutes. That little light will go off in 5 minutes.

Now, we will not be offended, Professor Michelman, if you get closer to 5 minutes than 10. But I will not cut you off, and I will not cut the next panel off either if they are under 10 minutes. But I would appreciate it if you would make it as short as possible.

The Senator from South Carolina keeps telling me to tell you what I have already told you, but I will tell you again. Your full statements will be placed in the record.

STATEMENT OF FRANK I. MICHELMAN

Mr. MICHELMAN. Thank you very much, Mr. Chairman. I think I get your message, and I will aspire to comply.

My name is Frank Michelman. I have been a member of the Harvard Law School faculty since 1963. That is 28 years there, and I am proud to say that I have survived.

What I would like to talk about is the one-issue issue; that is, the question that has been raised so many times about whether it is right or sensible for you to give a central place in your deliberations to the nominee's record on the question of abortion rights and your colloquies with him about that question.

Let me say first that we have to distinguish between the ideal and the actual. As an ideal matter, I would agree that there are strong reasons for striving to keep the process of nominating and confirming Justices from being used for purposes of packing the Court with friendly ideologues or with people who you think are going to decide one or another issue as you would prefer.

The independence of the judiciary may be in some ways an unachievable ideal. It is, nevertheless, a central tenet of our constitutional system. It aims at noble ends. It is an idea well worth reinforcing. And it does seem clear that this ideal may be compromised and eroded by deliberate, sustained attempts at court-packing through the process of selecting judges. And if that is true, then that concern certainly applies to your part of the process—that is, advising and consenting.

That is the ideal. What about the actual? Well, we all know that responsibility begins at home, and in this case it seems to me that home means 1600 Pennsylvania Avenue. Presidents Reagan and Bush both ran and were elected on platforms openly avowing a purpose to pack the Supreme Court with a view to overturning *Roe* v. *Wade*. Many Americans think they have good reason to believe that Presidents Reagan and Bush have had that plank in mind when choosing judicial nominees; maybe not in each and every

case, but at least as a general policy. Moreover, Clarence Thomas' particular record of speeches and publications surely gives Americans reason to think the plank had a bearing in his selection at this time, and that impression, I have to say, is not dispelled by the President's assurance that he simply chose the best qualified person.

The trouble with that assurance is that it simply doesn't seem to be true that Judge Thomas is, by the traditional standards, a truly—outstandingly a truly exceptionally well-qualified nominee. By the traditional understandings of qualifications for the Supreme Court, that would be rich and broad and tested experience as a constitutional lawyer or judge, notable accomplishment, admired mastery of the materials and methods of constitutional law, Clarence Thomas does not stand out as exceptionally well qualified for the Supreme Court. And I note that not one member of the ABA panel has said that he does through the obvious means of awarding Judge Thomas the highest rating.

Now, I want to say here that I am one who believes that it is very proper and desirable to consider in this process the Supreme Court's representativeness of the American people, and that does not change my assessment that Judge Thomas cannot reasonably be called the best qualified person for this job.

So the question for Senators doesn't arise in the abstract, but in the actual situation I have described, and I asked myself this question: Suppose a Senator comes conscientiously to the conclusion that this particular nomination really is very hard to explain or justify by the traditional standards. And the selection, therefore, seems to have been influenced by the nominee's record of prior declarations regarding a particular issue or set of issues.

Suppose that a Senator believes that for a President to nominate on such a basis is no less wrong than for the Senate to grant or withhold consent on such a basis. How does that Senator in this situation act effectively and in accordance with that judgment and that conviction? The only way I can see would be to refuse to lend his vote for the support of the nomination.

I have some additional thoughts about the one-issue question—am I close to the 5 minutes?—that I would like to offer. The question often is asked in such a way as to imply that abortion rights are just one neatly isolable issue among countless similarly isolable issues that come before the Court, important in its own right certainly, but still just one bone of contention among many others.

But that way of thinking involves a serious misunderstanding of how constitutional law works. Issues of constitutional interpretation don't come in separate packages like items on a store shelf, among which we arbitrarily, as fancy moves us, pick and choose. It is one Constitution that the Justices expound, and interpretations regarding one topic inevitably, and often unpredictably, interconnect with interpretations regarding others.

Your colloquies here make clear your understanding of how the issue of a woman's procreational freedom is inseparable from issues about contraception, about the privacy of marital intimacies, about the intimacies of unmarried persons of whatever sex, about family privacy and self-determination. *Rust* v. *Sullivan* unfortunately illustrates how issues of procreational freedom spill over into ex-

tremely momentous questions of freedom of expression and unconstitutional conditions.

What a judge thinks about *Roe* and how a judge thinks about *Roe* is inseparable from how that judge thinks about the whole tissue of constitutional law. It is inseparable from how that judge thinks about constitutional liberty, how he thinks about freedom of conscience, how he thinks about the status and place of women in our society, and what the Constitution has to say about that, how he thinks about natural law.

In our times and circumstances, we cannot fully know how a judge thinks about those matters if he refuses to engage us in earnest on the subject of constitutional protection for a woman's procreational freedom.

Finally, let us understand that apart from everything else I have said, the practical question of abortion rights is very far from being just one practically important legal issue among many. For many, many Americans, it is the issue of their lives—and I mean that literally in the sense of life and death, for the many whose lives or health would be sacrificed to their pregnancies by some of the extremely restrictive abortion laws we are seeing, and for many others whose life circumstances would force them to the back alley or to self-mutilation as the alternative to Government dictation.

For many, many more, the procreational choice is the issue of their lives in the sense in which life means running your own life, choosing responsibly for yourself who you will be and what you will do in life, rather than having the Government assign you a role.

Mindful of the Chair's request, I think I will leave it at that point and let others proceed.

[Prepared statement follows:]

STATEMENT OF FRANK I. MICHELMAN CONCERNING THE NOMINATION OF CLARENCE THOMAS AS ASSOCIATE JUSTICE OF THE SUPREME COURT*

I am Frank Michelman. I am a Professor at the Harvard Law School.

I wish to direct some remarks to the litmus-test question. I mean the question of whether it is right or sensible for Senators to give a central place in their deliberations to the question of the nominee's stance regarding a particular issue such as abortion rights.

As an ideal matter, there is a strong argument against trying to use the process of nominating and confirming Justices for purposes of packing the Court with friendly ideologues or with people you think will decide particular matters in the way you prefer. The independence of the judiciary may be in some ways an unacheivable ideal. It is nevertheless a central tenet of our constitutional system. It aims at noble ends. It is an ideal well worth reinforcing. And it does seem likely that this ideal will be compromised and eroded by deliberate, sustained attempts at court-packing through the process of selecting judges. The argument certainly applies to your part of the process in the Senate. That is the ideal. But it is necessary sometimes to distinguish between the ideal and the actual.

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* On Monday, September 16, I testified to the Senate Judiciary Committee as part of a panel on privacy rights and natural law, composed of law professors described as "opposed to" or "leaning against" the nomination. I prepared this statement for that occasion. Through the first paragraph on p. 4, this text is a close approximation of my opening remarks to the Committee. Time constraints prevented my saying the rest, although I worked some of it into responses to Senators' questions. I have submitted the full text for inclusion in the printed Hearings.

Responsibility begins at home, and in this case it seems to me that home is 1600 Pennsylvania Avenue. Presidents Reagan and Bush both ran on platforms openly avowing a purpose to pack the Supreme Court with a view to overturning Roe v. Wade. Many Americans think they have good reason to believe that Presidents Reagan and Bush have had that plank in mind when choosing judicial nominees, maybe not in each and every case, but certainly as a general policy. Clarence Thomas's public record gives Americans particular reason to think that the plank has had a bearing on his selection at this time.

That impression is not dispelled by the President's assurances that he simply chose the best qualified person. The trouble with that assurance is that it does not seem to be true that Judge Thomas is, by the customary standards, an outstandingly well qualified nominee. By the customary understanding of qualifications for this office -- one thinks of rich and broad experience as lawyer or judge, and of tested, accomplished mastery of the materials and methods of constitutional law -- Clarence Thomas does not stand out as exceptionally well qualified for the Supreme Court. Let me say here that I am one who believes that it is very proper and desirable to consider in this process the Supreme Court's representativeness of the American people, and the diversity of the Justices' experiences and outlooks. That does not change the assessment: Clarence Thomas cannot reasonably be regarded as in the running for best qualified person for the job.

I ask myself, then, this question: Suppose a Senator comes conscientiously to the conclusion that this particular nomination is very hard to explain or justify in terms of qualifications, and that the selection seems to have been influenced by the nominee's record of prior declarations regarding a given issue or set of issues. Suppose our Senator believes that for a President to nominate on such a basis is no less wrong than for the Senate to grant or withhold consent on such a

basis. How does our Senator give effect to his conscientious judgments? The only way I can see is by voting against the nomination.

The "litmus-test" question is often asked in such a way as to imply that the issue of abortion rights is just one, neatly isolable issue among countless similarly isolable issues that come before the Court; important in its own right, certainly, but still just one bone of contention among many others. That way of thinking, however, involves a serious misunderstanding of how constitutional law works. Issues of constitutional interpretation do not come in separate packages, like items on a store shelf among which we pick and choose as the spirit moves. It is one Constitution that the Justices expound, and interpretations regarding one topic inevitably and often unpredictably interconnect with interpretations regarding others. Your colloquies here make clear your understanding of how the issue of a woman's procreational freedom is inseparable from issues about contraception, about the privacy of marital intimacies, about intimacies of unmarried persons of whatever sex, about family privacy and self-determination. *Rust v. Sullivan* unfortunately illustrates how issues of procreational freedom spill over into extremely momentous questions of freedom of expression and unconstitutional conditions.

What a judge thinks about *Roe*, how a judge thinks about *Roe*, is inseparable from how that judge thinks about the whole tissue of constitutional law. It is inseparable from how he thinks about constitutional liberty, how he thinks about freedom of conscience, how he thinks about the status and place of women in our society and what the Constitution has to say about that, how he thinks about natural law. In our times and circumstances, we cannot fully know how a judge thinks about those matters if he refuses to engage us in earnest on the subject of constitutional protection for a woman's procreational freedom.

Let us understand, too, that, practically speaking, the question of abortion rights is very far from being just one important legal issue among many. For many, many Americans, it is the issue of their lives. I mean that literally, in the sense of life and death, for those whose lives or health would be sacrificed to their pregnancies by some of the more restrictive abortion laws we are seeing, and those whose life circumstances would force them to the back alley or self-mutilation as the alternative to government dictation. Moreover, that the question of abortion rights is the question of their lives is true for countless women in the sense in which life means running your own life, choosing for yourself who you will be and what you will do in life rather than having the government assign you a role.

In light of all I have said, it is entirely legitimate for Americans concerned about freedoms they hold dear to demand close examination of this nominee's views about constitutional protection for abortion rights, including frank discussion by the nominee himself. To ask this much is not to demand a commitment. There really is such a thing as open-mindedness, and many if not all of those for whom abortion rights are a chief concern would settle for that. We do not, in fact, know that Judge Thomas' mind is not fully open on this matter. The question, however, is whether, on the record before us, it is reasonable to ask concerned Americans to take it on faith that he has. I do not see how the record to date can warrant such a conclusion.

That record starts with Judge Thomas's prior declarations about abortion and natural law. It indelibly includes his robust commendation, in a prepared address to a presumably anti-*Roe* audience, of an extraordinarily vehement and

dogmatic attack on that decision as morally and legally outrageous.[1] Judge Thomas insists now that he conveyed no endorsement of that view. Yet anyone can see that he plainly did. Had Judge Thomas frankly faced up to this simple fact, you might have examined with him just how his mind has come to change since then, and conceivably a fair basis might have been laid for confidence in his ability now to judge the issues open-mindedly. However, his testimony denied you that opportunity. Certainly a man is not bound forever by a view he once embraced, but that is not the question here. The question here is what inference, if any, to draw from a man's failure to face candidly the plain fact that he once embraced a certain view, when we are trying to get a sense of how much of that view clings to his heart and fibre and mind.

Examined in light of that question, the transcript of Judge Thomas's testimony to the Judiciary Committee contains disturbing signs. The transcript shows Judge Thomas refusing to engage with the Committee on the legal issues surrounding abortion rights anything like as freely as he did on several other live and controversial matters of constitutional law. The transcript shows Judge Thomas repeatedly exercising what looks like care to preserve for himself a doctrinal path to overruling *Roe*, should it come to be his determination to do so. The transcript even shows Judge Thomas refusing to grant to *Roe v. Wade* the ordinary respect of *stare decisis*. (For example, in colloquy with Senator Leahy, Judge Thomas treated as uncontrolled by any precedent the question of

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1. This was not, as been suggested, an isolated statement having no resonance with anything else Judge Thomas has ever said or suggested. What, after all, do we make of a published article that first cites *Roe* to exemplify what "makes conservatives nervous" about "the expression of unenumerated rights today," and directly goes on to offer these conservatives a "higher law" theory designed to counter "the worst type of judicial activism" and "the wilfulness of ... run-amok judges?" (Thomas, *The Higher Law Background*, 12 Harv. J. Law & Pub. Policy 63-64 (1989).)

a fetus' "constitutional status as a person." The fact is that *Roe* squarely decided that question, in the negative, in the specific context of abortion rights.) In a vacuum of other information, these signs might not carry great significance. We do, however, have other information. Considered in its light, these signs tend to augment rather than dispel the indications already conveyed by Judge Thomas's Heritage Foundation speech, and by his perfunctory dismissal of its significance, of a predisposition against *Roe*.

The CHAIRMAN. Thank you very much, professor. I do appreciate it. I realize this is very difficult. You all have so much to offer, and you made such a trip to get here, and then we say, "5 minutes." I apologize to you and all the witnesses to come for the limitation, but I don't know quite else how to do it.

Professor Grey, welcome.

STATEMENT OF THOMAS C. GREY

Mr. GREY. Thank you, Senator.

There is statement here which the three of us have signed, along with a number of other law professors, which really expresses our views in writing, and I hope the Senators will read it.

The CHAIRMAN. It will be placed in the record.

Mr. GREY. I will be short, even shorter.

Frank Michelman said something of what I wanted to say about the role of the Senate, and so I will shorten what I had to say about that.

I just want to point out the Washington Post editorial that Senator Thurmond entered in the record, in which they basically endorsed Judge Thomas' confirmation. There is something said there that I think is wrong. The editorial says,

> It is still pretty widely accepted that a President has a right to choose Justices who reflect his own philosophical predisposition, and that if the nominee is to be rejected, it should be on some other grounds, grounds of moral, mental, or professional disqualification.

Now, I think that is not the understanding of the Constitution that most scholars who have studied the nomination and confirmation process have. It is not the one verified by our history, it is not the one backed up by the original intent, as best that can be ascertained, and it has not consistently been the practice of the Senate.

The process is a political one. It does not mean that adjudication is a political process, it means that there is a screen, a political screen placed before the judges become judges and stop being politicians, in which two kinds of politicians, the President on the one hand and the Senate on the other exercise their political judgment as to whether this person should be a Federal judge and, most dramatically, of course, a Supreme Court Justice in the case of appointments to this Court.

As people have pointed out, these judges and this Justice, if confirmed, will serve for a whole generation, the law of the United States for a whole generation is at stake. It seems to me this body has a responsibility equal to that of the President in exercising its independent judgment on whether this person is appropriate for this job.

It does not mean that the Senators necessarily should vote not to confirm any judge they would not have appointed, for that would be an unworkable system. But it does mean, it seems to me, that judges should apply the same criteria as the President applies, and I ask you to consider for yourself what criteria this President has applied in this and other cases.

Then, simply as an analogy, I would suggest that Senators might take essentially the same attitude toward the confirmation vote as they think the President might appropriately take for the question

of whether to veto or approve legislation. The President does not veto every law that he would rather not have passed. On the other hand, he considers, in deciding whether to veto, the same criteria that the Congress has consulted in deciding whether to pass the legislation in question. I believe that is historically attested and, in terms of the theory of our institutions, appropriate role for this body, the Senate, in exercising its checking function against the President in the appointment of a Supreme Court Justice.

Now, I am going to move along at that point to the question of natural law, which Senator Leahy said a lot of people were asking him in Vermont over the weekend about natural law, and a lot of people have been asking me, as a law professor, what is this natural law stuff that they are talking about in the Thomas hearings.

I do not think the concept is quite as arcane as some have tried to make it seem. In the simple sense, natural law is simply doing justice, and there is nothing wrong with the idea that judges are there to do justice while they apply law. If that is what it means, it is an idea I think most Senators would endorse, and I would certainly endorse it.

It means, in that broad sense, simply the application, the practical application of human reason to difficult questions of right and wrong, the application, I would add, in all humility, given what we know about the limitations of human reason.

But I think it has frightened some Americans, the idea that Judge Thomas will be a Justice who applies natural law in adjudicating constitutional cases, and I will come in a moment to his statement that he will not do so. But the fear that he might do so is the sense that there is another version of natural law which lurks there, not necessarily a bad thing, when applied to personal decisions of individuals about what they think is right and wrong in politics or law, but not the right attitude for a judge.

This is the attitude that we see in Judge Thomas' continued references to self-evident truths. Now, the Declaration of Independence does declare these truths to be self-evident, of course, and in some broad sense, indeed, the rights of life, liberty, and the pursuit of happiness are perhaps self-evident truths. But I think it is fair to say that no lawsuit that ever comes before the Supreme Court or perhaps any other court involves questions the answers to which are self-evident or which can be deduced simply and dogmatically from clear, simple, self-evident premises.

So, the attitude that natural law is something simple and self-evident is the attitude that I think shows up in some of Judge Thomas' prejudicial announcements, his speeches and writings. It is God's law, it is, as he puts it in a number of places, but I will quote from the Harvard Journal of Law and Public Policy, he says, at the very end of that article, "Can this Nation possibly go forward, without a science of the rights of man?"

A science of the rights of man—now, I do not know what that science is. I do not have access to that science. I believe most Americans think they do not have access to any science of the rights of man. They may believe there are rights of man, they may believe they know what they are, but I think they believe they are matters of commitment, personal belief, in that general area, not things to be proved like scientific truths.

The point about this is that belief in that kind of natural law gives great confidence to the person holding the views that he or she thinks comes under the natural law. Liberty, there is a natural right to liberty, the Declaration of Independence tells us so. Liberty means this, it is clear to me that liberty means this: Liberty means X, it is written in the sky, it is God's truth, it is the higher law, it is the brooding omnipresence in the sky.

It is this attitude brought to the judiciary that, it seems to me, is inappropriate and is frightening, when joined to the actual views on public issues, constitutional issues, no less, that Judge Thomas has already expressed in his writings before coming before this committee.

Now, Judge Thomas has said before this committee that, in fact, he will not apply natural law in constitutional adjudication, or so it is sometimes thought. But if you go back and look at what he said on the question, you will find that he does not say quite that. He does not say simply that natural law is a matter of mere philosophic musing or political theory. He has said several times that he will not directly apply natural law, that he will view natural law at the background for his decisions on questions of what is life, liberty and property.

As he put it in the same article, the Harvard article, in discussing Justice Harlan's dissent in *Plessy* v. *Ferguson,* Justice Harlan's reliance on political principles was implicit, rather than explicit, as is generally appropriate for Supreme Court opinions. This is what he said before, and I think this is a version of what he said here, when he said he does not believe in appealing directly to natural law. He means that he does not think natural law can overrule the clear meaning of the Constitution.

However, it seems clear that he does believe that his convictions about natural law will inform his views of what the broad majestic phrases of the Constitution guaranteeing liberty, equal protection, protecting the privileges and immunities of citizens and the like do mean, and among those views we know what they are, and my predecessors on this panel have spoken about them.

The Lehrman speech is the most striking example. Remember what Judge Thomas said about that speech, that the right to life, that the speech was as splendid example of applying natural law to constitutional question. The article in question said that, from a right to life sprang the fetus' right to life form the moment of conception. Translating this into constitutional adjudication, into constitutional doctrine means something more radical than any nominee for the Supreme Court has heretofore proposed, something more radical than Judge Bork proposed, and he was rejected by the Senate.

Basically, implicit, indirect or background use of natural law is all you need, if you hold the kinds of firm, simple, dogmatic convictions about the content and method of natural law reasoning that seem to be held by Judge Thomas. It is all you need, if you want to translate your most deeply-held personal convictions into the law of the land. Those personal convictions in his case include the agenda of the relatively far right portion of the American political spectrum, and I think it would be a great mistake, it would be a tragedy if the Senate confirmed someone with those views who has

implied his intention to implement those views on the Supreme Court as a Justice of the Supreme Court.

Thank you, Senator.

[The report referred to follows:]

JUDGE CLARENCE THOMAS' VIEWS ON THE FUNDAMENTAL RIGHT TO PRIVACY

A REPORT TO THE UNITED STATES SENATE JUDICIARY COMMITTEE, SENATOR JOSEPH BIDEN, CHAIRMAN,

September 5, 1991

BARBARA ALLEN BABCOCK, Ernest W. McFarland Professor, Stanford Law School
CHRISTOPHER F. EDLEY, JR., Professor, Harvard Law School
THOMAS C. GREY, Nelson Dowman Sweitzer and Marie B. Sweitzer Professor, Stanford Law School
SYLVIA A. LAW, Professor, New York University School of Law
FRANK I. MICHELMAN, Professor, Harvard Law School
ROBERT C. POST, Professor, University of California at Berkeley
NORMAN REDLICH, Dean Emeritus, New York University School of Law
JUDITH RESNIK, Orin B. Evans Professor, University of Southern California School of Law
STEVEN H. SHIFFRIN, Professor, Cornell Law School

As teachers and scholars of constitutional law committed to the protection of constitutional liberty, we submit this report to convey our grave concerns regarding the nomination of Judge Clarence Thomas to be an Associate Justice of the United States Supreme Court. Careful examination of Judge Thomas' writings and speeches strongly suggests that his views of the Constitution, and in particular his use of natural law to constrict individual liberty, depart from the mainstream of American constitutional thought and endanger Americans' most fundamental constitutional rights, including the right to privacy.

Among the most alarming aspects of his record, and the primary focus of this report, are the numerous instances in which Judge Thomas has indicated that he would deny the fundamental right to privacy, including the right of all Americans, married or single, to use contraception and the right of a woman to choose to have an abortion. Judge Thomas has criticized the Supreme Court's decisions in the landmark privacy cases protecting the fundamental right to use contraception. He has endorsed an approach to overruling Roe v. Wade[1] that is so extreme it would create a constitutional requirement that abortion be outlawed in all states throughout the Nation, regardless of the will of the people and their elected representatives. Recent Supreme Court

[1] 410 U.S. 113 (1973).

decisions in Webster v. Reproductive Health Services[2] and Rust v. Sullivan[3] have seriously diminished protection for the right to choose. Replacing Justice Thurgood Marshall with Judge Clarence Thomas would likely result in far more devastating encroachments of women's rights, perhaps providing the fifth vote to uphold statutes criminalizing virtually all abortions. Such laws have recently been adopted in Louisiana, Guam and Utah and challenges to them are now pending in the federal courts.

We submit this report prior to Judge Thomas' testimony before the Judiciary Committee in the hope that it will assist the Committee, and the Nation, in formulating questions to discern Judge Thomas' views on fundamental rights to individual privacy and liberty. We urge the Committee to question Judge Thomas on these matters and to decline to confirm his nomination unless he clearly refutes the strong evidence that he is a nominee whose special concept of the Constitution "calls for the reversal of decisions dealing with human rights and individual liberties."[4]

I. THE SENATE'S ROLE IN THE CONFIRMATION PROCESS

A basic element of our constitutional system of checks and balances is the joint responsibility the Constitution confers upon the President and the Senate for the selection of Supreme Court Justices. In the words of Senator Patrick Leahy:

> When the Framers of the Constitution met in Philadelphia two centuries ago, they decided that the appointment of the leaders of the judicial branch of government was too important to leave to the unchecked discretion of either of the other two branches. They decided that the President and the Senate must be equal partners in this decision, playing roles of equal importance. The 100 members of the United States Senate, like the Chief Executive, are elected by all the people.[5]

The Senate's equal role in selecting Supreme Court Justices is

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[2] 492 U.S 490 (1989).

[3] 111 S.Ct. 1759 (1991).

[4] Senate Committee on the Judiciary, Nomination of Robert H. Bork to be an Associate Justice of the United States Supreme Court, S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Heflin, 210 (1987).

[5] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Leahy, 193-94 (1987).

widely accepted by Senators of both parties. For example, Senator Arlen Specter has stated that the "Constitutional separation of powers is at its apex when the President nominates and the Senate consents or not for Supreme Court appointees who have the final word. The Constitution mandates that a senator's judgment be separate and independent."[6]

Although the precise wording has varied, a majority of the members of the Senate Judiciary Committee have indicated that to be confirmed a nominee must, at a minimum, demonstrate a commitment to protect individual rights that have been established as fundamental under the U.S. Constitution. For example, Senator Patrick Leahy described the standard as follows:

> The Senate should confirm [a nominee] only if we are persuaded that the nominee has both the commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years. . . . I cannot vote for [a nominee] unless I can tell the people of Vermont that I am confident that if he were to become [a Justice], he would be an effective guardian of their fundamental rights.[7]

Senators have often identified the right to privacy as among the fundamental rights that a nominee must recognize to meet the standard for confirmation. As Chairman Joseph Biden stated:

> A nominee who criticizes the notion of unenumerated rights, or the right to privacy, would be unacceptable in my view. A nominee whose view of the Fourteenth Amendment's Equal Protection Clause has led him or her to have a cramped vision of the court's role in creating a more just society would be unacceptable in my view. And a nominee whose vision of the First Amendment's guarantees of freedom of speech and religion would constrain those provisions' historic scope would be unacceptable in my view.[8]

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[6] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess. Additional Views of Senator Specter, 213 (1987).

[7] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Leahy, 193-94 (1987).

[8] Statement of Senator Joseph Biden, Chairman, Senate Judiciary Committee on Nomination of David Souter to be Associate Justice U.S. Supreme Court (Sept. 27, 1990).

Senator Herbert Kohl similarly stated:

> [A] Supreme Court Justice must, at a minimum, be dedicated to equality for all Americans, determined to preserve the right to privacy, the right to be left alone by the Government, committed to civil rights and civil liberties, devoted to ensuring the separation of Church and State, willing to defend the Bill of Rights and its applications to the States against all efforts to weaken it, and able to read the Constitution as a living, breathing document.[9]

Although Senator Howell Heflin indicated that he "would favor a conservative appointment on the Court," for him the question was "whether this nominee would be a conservative justice who would safeguard the living Constitution and prevent judicial activism or whether, on the other hand, he would be an extremist who would use his position on the Court to advance a far-right, radical, judicial agenda."[10] As Senator Heflin noted, if a nominee's "concept of the Constitution calls for the reversal of decisions dealing with human rights and individual liberties, then people's rights will be threatened."[11]

Judge Thomas' writings, speeches and professional activities do not statisfy this standard. They strongly suggest that, if confirmed, he would interpret the Constitution in a manner that would dangerously restrict constitutional protection for civil rights and civil liberties.

The threat Judge Thomas poses to our basic constitutional freedoms is well exemplified by his views regarding the fundamental right to privacy and the protection it affords reproductive rights, including the right to use contraception and the right to choose to have an abortion. The remainder of this report focuses on these alarming aspects of Judge Thomas' record.

II. THOMAS ENDORSES A NATURAL LAW "RIGHT TO LIFE" FROM CONCEPTION

At the core of Thomas' claims to constitutional authority and a dominant theme throughout his writings and speeches is a belief

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[9] Hearings of the Senate Judiciary Committee on the Nomination of Judge David Souter (Sept. 13, 1990) (Statement of Senator Kohl).

[10] S. Exec. Rep. No. 100-7, 100th Cong., 1st Sess., Additional Views of Senator Heflin, 211 (1987).

[11] Id. at 210.

that the Constitution should be interpreted in light of "natural law" or "higher law." "[N]atural rights and higher law arguments are the best defense of liberty and of limited government."[12] "Natural law" is a slippery concept. It has been invoked in noble causes, for example, in opposition to slavery, genocide and torture. But it has also been used in invidious ways, for example, to defend slavery and to deny women the right to vote or participate in public life. The key questions that must be posed to a proponent of natural law are: What principles are dictated by natural justice? How do we know that these answers are correct?

Despite the central role natural law plays in his professional writings, Judge Thomas has said surprisingly little about the specific content of his natural law philosophy. His discussions of natural law, though numerous, tend to be abstract and repetitive, often confusing, and sometimes contradictory. Thomas routinely cites the Declaration of Independence as the primary source of the natural law values that should be promoted through constitutional interpretation, and he frequently refers to a religious basis for those values.[13] Beyond these general references, he has been remarkably vague about the content of those values.

One striking exception to Judge Thomas' general failure to provide specific examples of how natural law should be applied is his frequent criticism of the right to privacy. One specific application of Thomas' view of natural law is his enthusiastic endorsement of the assertion that the fetus enjoys a constitutionally protected right to life from the moment of conception. In a 1987 speech to the Heritage Foundation, he stated:

> We must start by articulating principles of government and standards of goodness. I suggest that we begin the search for standards and principles with the self-evident truths of the Declaration of Independence. . . . Lewis Lehrman's recent essay in The American Spectator on the Declaration of Independence and the meaning of the right to life is a splendid example of

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[12] Thomas, The Higher Law Background of the Privileges and Immunities Clause, 12 Harv. J.L. Pub. Pol'y 63, 64 (1989).

[13] See, e.g., Thomas, Why Black Americans Should Look to Conservative Policies, 119 Heritage Lectures (June 18, 1987); Thomas, Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation, 30 Howard L.J. 983 (1987); Thomas, Civil Rights as a Principle Versus Civil Rights as an Interest in Assessing the Reagan Years (D. Boaz ed.), 391, 398 (1989); Thomas, Notes on Original Intent.

applying natural law.[14]

The Lehrman article that Judge Thomas invokes as exemplary of his approach to natural law argues but one point: interpreting the Constitution, in light of natural law, as derived from the Declaration of Independence, requires that the fetus be protected as a full human being from the moment of conception. Lehrman states that the privacy right protected by the Court in Roe was "a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority," and that even if such a right existed, it would be overridden by the natural, inalienable right-to-life of the fetus from the moment of conception.[15]

This view is far more extreme than that of any current Supreme Court Justice. The Declaration of Independence says nothing about abortion or the fetus. Abortion was then legal. An overturning of Roe premised on the supposed natural right of the fetus not only would strip women of constitutional protection for their reproductive autonomy, it would prohibit individual states or the Congress from allowing legal abortion as an option even in extreme cases. It would require that abortion be defined as murder. It would prohibit states from allowing abortion even where pregnancy resulted from rape or incest or posed grave risk to a woman's health. It would deny to women as responsible individuals the ability to exercise their own religious and moral beliefs concerning abortion.

The Lehrman article does little more than assert that it is a "self-evident" truth that the fetus possesses an "inalienable right to life."[16] We fear that Judge Thomas' strong praise of this application of natural law endorses this radical view on the critical issue of abortion on the basis of an approach to natural law that relies on fixed and unquestionable moral "truth" rather than reasoned debate over the application of American constitutional principles to the circumstances of our times.

Natural law protection of the right to life from the moment of conception has been cited in recent years by opponents of legal abortion, such as members of the group "Operation Rescue," in defense of their actions in violation of laws against trespass, destruction of property and assault and battery while attempting to obstruct women's access to reproductive health care

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[14] Thomas, Why Black Americans Should Look to Conservative Policies, supra note 13, at 8.

[15] Lehrman, The Declaration of Independence and the Right to Life, The American Spectator 21, 23 (April 1987).

[16] Id. at 22.

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facilities.[17] Natural law has further provided a basis for opposition not only to abortion, but to contraception by any means viewed as an interference with "natural" human reproduction.

III. THOMAS REJECTS UNENUMERATED RIGHTS AS ARTICULATED IN GRISWOLD, EISENSTADT AND ROE

The specific content of Judge Thomas' view of natural law can be seen, not only in the applications he praises, such as the "God-given" and "inalienable right to life"[18] of a fetus, but also in the rights and values he rejects. Although Thomas advocates constitutional protection for natural rights not specifically enumerated in the Constitution, he repeatedly attacks the recognition of unenumerated rights under the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment by what he dismisses as "liberal activist"[19] and "run-amok"[20] judges. Most prominent among the judicial opinions that Thomas has thus criticized are those in which the Supreme Court has protected the fundamental right to privacy.

For example, in a law review article he published in 1989, Thomas again selected decisions protecting the right to privacy to illustrate "the willfulness of both run-amok majorities and run-amok judges."[21] Thomas writes that the judicial decisions that "make conservatives nervous" are Roe v. Wade and Griswold v. Connecticut.[22] After describing Roe as "the current case provoking the most protest from conservatives," Thomas affirms

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[17] See, e.g. Senftle, The Necessity Defense in Abortion Clinic Trespass Cases, 32 St. Louis U.L.J. 523, 546 (1987); City of Kettering v. Berry, 57 Ohio App. 3d 66, 70 (1990) ("The law does not recognize political, religious, moral convictions or some higher law as justification for the commission of a crime"); Brief for Operation Rescue at 7, Roe v. Operation Rescue, No. 88-5157 (E.D. Pa., filed June 29, 1988); Brief for the Catholic Lawyers Guild of the Archdiocese of Boston, Inc., as Amicus Curiae supporting Appellants, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (arguing that Roe v. Wade should be overruled).

[18] Lehrman, supra note 15, at 23.

[19] Thomas, Notes on Original Intent, supra note 13.

[20] Thomas, Higher Law Background, supra note 12, at 64.

[21] Id.

[22] Id. at 63 n.2.

his "misgivings about activist judicial use of the Ninth Amendment."[23] But, he asserts, his proposed concept of "higher law" would restrain both legislative majorities and judges, and should hence appeal to those he calls "my conservative allies."

Thomas has described the protection afforded the right to privacy under the Ninth Amendment as an "invention" in an opinion in Griswold v. Connecticut, authored by Justice Arthur Goldberg and joined by Chief Justice Earl Warren and Justice William Brennan. Thomas further criticizes Justice Goldberg's opinion and rejects the Ninth Amendment as a source of constitutional protection for rights that are unenumerated in the Constitution, stating:

> A major question remains: Does the Ninth Amendment, as Justice Goldberg contended, give to the Supreme Court certain powers to strike down legislation? That would seem to be a blank check. . . . Unbounded by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. . . . Far from being a protection, the Ninth Amendment will likely become an additional weapon for the enemies of freedom.[24]

Judge Thomas offers no real explanation in these writings of how protecting the rights of individuals promotes a "total state" or how defining unenumerated rights by reference to "natural law" is either more determinate or less a "blank check" to judges than more traditional means of constitutional interpretation.

Elsewhere, Thomas described the views on the right to privacy of Judge Bork and other proponents of original intent as follows: "restricting birth control devices or information, and allowing, restricting, or (as Senator Kennedy put it) requiring abortions are all matters for a legislature to decide; judges should refrain from 'imposing their values' on public policy."[25] Thomas then criticized this view as leading to an "indifference toward or even contempt of 'values.' Far from being an alternative to leftist activism, it readily complements it, as long as a majority approves."[26]

Although Thomas' discussion of this point is confusing, there is reason to fear it may be another endorsement of the view set out

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[23] Id.

[24] Thomas, Civil Rights as a Principle, supra note 13, at 398-99.

[25] Thomas, Notes on Original Intent, supra, note 13.

[26] Id.

in the article by Lewis Lehrman in support of a natural right to life for the fetus. Thomas' discussion of the right to privacy in the context of arguing that the Constitution must be interpreted consistent with a particular moral view, and his expression that this moral view must be employed to constrain majorities that might otherwise engage in "leftist activism," may be a further indication that under Thomas' theory of natural law, the Constitution would not permit states to allow citizens to have access to abortion or use contraception if these activities are deemed to violate the natural order of things.

In 1986, Thomas participated as a member of a White House Working Group on the Family that produced a report on the family that severely criticized landmark constitutional decisions protecting the right to privacy. The report went so far as to excoriate a decision protecting a grandmother's freedom to open her home to her orphaned grandchildren, without government restriction.[27] It particularly targeted cases in the area of reproductive freedom, and called for them to be overruled.[28]

In addition to Roe v. Wade, the working group singled out as wrongly decided the Supreme Court's decision in Planned Parenthood v. Danforth, in which the Court struck down a Missouri law that required a woman to obtain the consent of her husband before she could obtain an abortion and a minor to obtain the consent of a parent. The report also criticized the Court's reasoning in Eisenstadt v. Baird, which protects the right of unmarried individuals to use contraception, and in particular the Court's statement that "the marital couple is not an independent entity with a mind and heart of its own."[29] The working group described these, and other cases protecting the fundamental right to privacy, as a "fatally flawed line of court decisions" and indicated that they "can be corrected, directly or indirectly, through . . . the appointment of new judges and their confirmation by the Senate . . . and . . . amendment of the Constitution itself."[30]

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[27] Moore v. City of East Cleveland, 431 U.S. 494 (1971). The Family: Preserving America's Future, A Report to the President from the White House Working Group on the Family 11 (1986).

[28] Id. at 11.

[29] Id., at 12 quoting, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[30] Id. at 12. The Republican Party platforms for 1980, 1984, and 1988 contained strikingly similar language, pledging to work for "the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity

IV. THOMAS' NATURAL LAW THEORY

As we have noted above, Thomas' approach to constitutional interpretation is highly unusual in its invocation of a body of natural law.[31] Appeals to natural law in constitutional interpretation do not necessarily portend decisions that would restrict the rights of individuals and overturn core constitutional values. Depending on how its methodology and content are specifically understood, natural law might point in various directions. But Thomas' approach to natural law is disturbing, both as a matter of methodology and as a matter of content.

As a matter of constitutional method, natural law is disturbing when invoked to allow supposedly self-evident moral "truth" to substitute for the hard work of developing principles drawn from the American constitutional text and precedent. As we have noted, Judge Thomas has not sought to explain the social and historical reasons supporting the conclusions to which "natural law" leads him. The more traditional common law and constitutional method of open-ended, case-by-case development is a core strength of the American judicial approach to justice for a diverse and ever-evolving country. Natural law norms are not necessarily antithetical to a reasoned, case-by-case approach. But Judge Thomas seems to invoke "higher law" as a substitute for explanation. His concept of natural law appears to mean strict adherence to a perceived set of fixed and undoubtable normative truths. As such, it does not accommodate the principle and precedent exemplified in the work of conservative Justices such as John Harlan and Lewis Powell.

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of innocent human life." Thomas listed the Republican Party's position on abortion as the first in a list of conservative positions that he believed should attract African Americans to the Republican Party. Thomas, "How Republican can Win Blacks," Chicago Defender, February 21, 1987.

[31] For at least the last fifty years, constitutional interpretation on the basis of natural law has been conspicuously absent from American legal philosophy and judicial opinions. Professor Laurence Tribe commented that Clarence Thomas "is the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation." Tribe, "Natural Law" and the Nominee, N.Y. Times, July 15, 1991. As Professor John Hart Ely noted, "[t]he concept of [natural law] has . . . all but disappeared in American discourse." J.H. Ely, Democracy and Distrust 52 (1980).

When natural law was last in vogue some eighty years ago, it was employed by the Supreme Court to strike down state laws providing basic health and safety protection to working people. The Court asserted a natural law right of employers to be free of minimum wage laws and health and safety regulations.[32] Natural law has been particularly disabling for women. In 1873, the Court upheld the exclusion of women from the practice of law.[33] Justice Bradley wrote that the "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[34]

The impact that the application of natural law would have on core constitutional principles thus depends on the particular proponent's personal views of the content and source of the natural law principles to be applied. It is therefore imperative that the Senate Judiciary Committee determine with specificity which fixed principles Judge Thomas has in mind when he advocates the use of natural law in constitutional interpretation and how they will affect the Court's role as guardian of American's fundamental rights. As the preceding analysis indicates, Thomas' record contains compelling evidence that the substantive content of his natural law theory is incompatible with continued protection for the fundamental right of privacy, including the right to choose.[35]

V. CONCLUSION

Particularly given the critical moment in the history of the Supreme Court at which this nomination has occurred, the Senate should reject any nominee who is not committed to protecting fundamental individual liberties. We urge the Senate to shoulder its responsibility to determine whether the nominee "has both the

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[32] See, e.g., Lochner v. New York, 198 U.S. 45 (1905).

[33] Bradwell v. Illinois, 83 U.S. 130 (1872).

[34] Id. at 141-42 (Bradley, J., concurring).

[35] In addition to Thomas' writings and speeches discussed above, Thomas has disparaged those who have used natural law arguments in support of unenumerated rights, including the fundamental right to privacy. Thomas, "How to Talk About Civil Rights: Keep it Principled and Positive," keynote address celebrating the Formation of the Pacific Research Institute's Civil Rights Task Force, August 4, 1988; Speech of Clarence Thomas at Harvard University Federalist Society Meeting, April 7, 1988. (This speech was prepared but apparently not delivered.)

commitment and the capacity to protect freedoms the American people have fought hard to win and to preserve over the last 200 years."[36] Our analysis of Judge Thomas' writings and speeches raises serious questions about whether he meets this standard. We exhort the Committee to probe these questions and to approve the nomination only if satisfied that Judge Thomas has the commitment and ability to contribute to the wise elaboration of our Constitution.

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[36] Statement of Senator Patrick Leahy, supra n. 7.

The CHAIRMAN. Thank you very much.

Let me begin, Professor Grey, with you, if I may. If Judge Thomas had not spoken about the application of natural law with reference to the Lehrman article, his views on natural law as stated would not be particularly out of the mainstream. Would they at all be out of the mainstream, assuming he had not spoken, as you characterized, in a dogmatic way?

Mr. GREY. No, I think not, Senator. I think a lot of Americans would affirm their belief——

The CHAIRMAN. Well, not just Americans. There are an awful lot of Justices who believe that natural law does inform the Constitution. And there are a lot of people, a lot of Justices who served on the Court, who share the view that I share, that, at a minimum, natural law is a basis for a limited government, that our rights spring not from a document, but spring from other sources, and that the document represents a document of limited government.

Correct me if I misstate your concern, but what has you concerned is that you believe or at least have a strong concern that Judge Thomas thinks there are natural laws writ large in the sky that are bright lines that should be applied in the area where the Constitution is not clear on the meaning of some of the majestic phrases and words like liberty and property and due process, is that correct?

Mr. GREY. That is my view quite well, Senator. I think the application of natural law has been common in the Supreme Court.

The CHAIRMAN. Now, I think the record should show, since Judge Bork's name has been mentioned, Judge Bork is the absolute antithesis of your concern of what you think Judge Thomas might be. Judge Bork's entire judicial construct for a way to deal with those phrases was to go the other route, to suggest that there is only positive law and there were, consequently, no unenumerated rights in the Constitution, because they were not positively stated and the judge could not roam.

Ironically, in fairness to Judge Bork, he was worried about the same thing you all are worried about. He was worried about Justices roaming the landscape and applying their own subjective judgments to phrases like liberty. I see Professor Michelman is shaking his head no, and I would defer to him for a whole range of reasons. I would be curious as to why that is not correct.

Mr. MICHELMAN. What my head shaking was about—Senator, you notice that my friend, Tom Grey, a moment ago paid you a great compliment.

The CHAIRMAN. He called me a judge. I paid him a bigger compliment when I called him Senator earlier. So we just exchanged compliments. [Laughter.]

Mr. MICHELMAN. He didn't call you doctor, but he called you judge.

Here is what my head shake was about. I think that a part of what we are concerned about here—and Professor Grey referred to this—isn't not just a question of judges roaming about and picking and choosing among their own values as to what they will read into the Constitution. There is a difference in style and spirit of constitutional reasoning that I might try to characterize as the difference between a dogmatic style and a more pragmatic style.

The pragmatic style is the style that sees—tends to see most constitutional cases as difficult, as involving more than one of the great values that animate the Constitution, as, for example, the question of abortion rights involves values of life, of control over one's own life and destiny and one's own physical being, of freedom of conscience, of the status of women in American society and so forth. And the pragmatist sees the task of the constitutional adjudicator as figuring out, on the basis of reasoned deliberation and argument, how best to make all those values effective in the particular context, and in the example I chose the wrenching context of abortion. And the more pragmatically inclined constitutional reasoner doesn't think you can deduce your way to a conclusion, doesn't think that you can get the conclusion for certain, just thinks that after all the arguments are in you have to make a choice and a judgment and hope that you have done it right, and keep listening.

The CHAIRMAN. Now, that is what he said to do.

Mr. MICHELMAN. Well, that certainly is what Judge Thomas' testimony here sounds like. But let me point out—let me first just say a word about the dogmatic style by contrast.

The dogmatic style, by contrast, is the style that tends to see constitutional law cases as simple, that tends to look for and find kind of one master principle whose imminent truth and whose application to the case at hand are both self-evident and all you have to do is go ahead and do it.

Now, if one was looking for a splendid example of the dogmatic style of natural law reasoning, one might go to Lewis Lehrman's article.

The CHAIRMAN. I get the point.

Mr. MICHELMAN. If one were looking for another splendid example of a dogmatic style, one might go to Justice Scalia's dissenting opinion in *Morrison* v. *Olson*. And what we know on the record is that Judge Thomas very strongly praised and commended those two splendid examples of the dogmatic style of natural law reasoning——

The CHAIRMAN. And one might look to the writings of your colleague.

Mr. MICHELMAN. I am sorry?

The CHAIRMAN. Or one might look to the writings of your colleague at Harvard, not at the law school, but—I know you don't want to mention that.

Mr. MICHELMAN. But he—the thing that we can't help noticing is that in the writings and speeches we find Judge Thomas putting forward such examples, as in my judgment unambiguously putting them forward as good models for constitutional adjudication.

The CHAIRMAN. I understand your point. I think it is a point well taken and one that I know I have to wrestle with.

Ms. LAW. Can I just follow that——

The CHAIRMAN. Let me ask you a specific question, if I may, professor, before my time is up, and then you can answer, including what you wanted to mention.

I questioned the judge extensively on *Eisenstadt*. I will get the record and make sure you have a copy of it. I don't have it in front of me at the moment. Although he started off giving me the equal

protection answer, I was dogged in my pursuit of whether or not he agreed with Brennan's reference to a liberty—a fundamental right found in the liberty clause, the fundamental right of privacy for an individual. And he said on the record under oath that he did agree with Justice Brennan's assertion as being what the Constitution would dictate and require, and that is that an individual had a fundamental right to privacy which resided in the liberty clause of the 14th amendment, in addition to giving me the equal protection answer.

How did that sit with you? Did you just not believe him or——

Ms. LAW. It was not tremendously reassuring. I mean, his testimony was exactly the same testimony that Justice Souter gave before this committee. But——

The CHAIRMAN. No, that is not true. Justice Souter did not——

Ms. LAW. Well, to begin with.

The CHAIRMAN. To begin with.

Ms. LAW. To begin with. But you, having learned your lesson with Justice Souter, pressed on and pressed on and pressed on. I think it was either on the second or third round of questioning that you finally got him to concede that there was a liberty protection for single people's rights to use contraception.

But it was a brief moment there, and then in subsequent discussions he returns again and again to the right of marital privacy as that is the characterization of the right to privacy. And even in that brief moment when he is conceding a liberty protection for *Eisenstadt,* it tells us nothing—it tells us absolutely nothing about whether women have any right in relationship to——

The CHAIRMAN. I wasn't suggesting. I was just responding specifically to your concern. There is no question about that, that it doesn't tell us when, for example, one concluded there was a competing life and being and so on. I understand that.

Ms. LAW. It tells us absolutely nothing, and——

The CHAIRMAN. I was just speaking of the specific issue of——

Ms. LAW [continuing]. Thomas is not Souter in the sense that Thomas has staked out a position on abortion and has indicated that he has thought about abortion and needs to address that issue.

The CHAIRMAN. Well, I think—well, I understand your position.

Now, let me ask one last question. The yellow light is on here, the amber light is on, and I want to go to this question of qualification, Professor Michelman. Your assertion that it is clear on its face that he is not the most qualified person out there in terms of the traditional methods by which the legal profession, legal scholars, and observers would conclude who would be the most qualified, the creme de la creme.

Now, were any of the previous Justices in that position? Would you put Justice Kennedy in that position?

Mr. MICHELMAN. No.

The CHAIRMAN. Would you have put Justice O'Connor in that position?

Mr. MICHELMAN. I can't really answer about Justice O'Connor. I am not familiar enough with——

The CHAIRMAN. Would you have put Justice Souter in that position?

Mr. MICHELMAN. Probably not.

The CHAIRMAN. I appreciate your frankness because one of the things that has—well, my time is up. I do appreciate your candor on the part of all three of you.

Let me yield to my colleague from South Carolina.

Senator THURMOND. Mr. Chairman, I was late. I will forgo any questions.

The CHAIRMAN. OK. Senator Kennedy.

Senator KENNEDY. Let me just ask the panel generally, given what—I think you probably answered in these early exchanges, but given what Mr. Thomas, Judge Thomas has stated about his position on the right to privacy prior to the time of the confirmation hearing, and then also his response to the various different questions. Do you find that there is a consistency here? How do you react to those exchanges? Are there consistencies, inconsistencies, given the wide range of both articles, writings, and his response in various degrees to the different members here on the right to privacy?

Mr. GREY. Just briefly, Senator, I had trouble with his testimony here that he had not thought about *Roe* v. *Wade* or had not spoken to other people about *Roe* v. *Wade* or expressed his opinion on that. It seemed hard to believe.

Then as far as consistency goes, you know, I think he has equivocally moved toward accepting something that he hasn't accepted before, as far as we know, which is the right of single people to have privacy, constitutional privacy rights under *Eisenstadt.* That question has been discussed already.

Ms. LAW. On abortion, this was not a confirmation conversion. There was a substantial difference between his prenomination statements, which were very critical of *Roe* v. *Wade,* and his statements here where he runs away from the issues. There is a way in which we could feel more comfortable with a confirmation conversion because you might try to evaluate whether it was sincere or not. But he did not affirm a concern with the core issues of women's capacity to control reproductive choice in the abortion context period, no matter what the circumstances. So there is that consistency, but there is a real inconsistency in terms of his willingness to go to be aggressive in attacking *Roe* v. *Wade.*

Mr. MICHELMAN. A quite obvious inconsistency is that between Judge Thomas' testimony here that he has an open mind about the abortion rights question and his prior declarations about that topic, which we all know about and are in the record and include the Heritage speech.

I don't have any problem with a man's changing his mind. I don't have any problem with a man's saying, I once thought and said because I thought it was true that Lehrman's article is a splendid example of constitutional argument with which I agree, and I have come to understand that it is not and let me explain to you what was wrong with my prior judgment.

What to me is troubling—and I want to say this committee invited, offered to Judge Thomas every opportunity to engage with it in that kind of colloquy, in serious open discussion about the issues involved in the abortion rights controversy and about how his prior views on that topic relate to his present views. And what is baffling

to me and disappointing and worrisome is that he did not take you up on it.

And what is especially baffling and troublesome to me is that he didn't do what I would have hoped he would have done, which would have been to start it off by frankly facing up to the obvious meaning and the obvious significance of the Heritage speech and other things that he had said. That he did not do.

Instead, he said that that speech and those other writings simply do not mean what to my mind they plainly and incontrovertibly do mean. That to me is a distressing and worrisome factor about these hearings.

Senator KENNEDY. Do you think everyone at the Heritage Foundation understood what he was talking about?

Mr. MICHELMAN. I certainly do.

Senator KENNEDY. This is just speculation. Given both what he has written and what he has stated in response to questions here, what would be your prediction of what he would do in a similar kind of factual situation of the *Roe* v. *Wade?*

Mr. GREY. You can never be sure, Senator, but with this judge I would say I would be more confident than usual in predicting his vote, that he would vote to overrule it and would extend that overruling very far. It is important to see that it is not simply the issue of overruling *Roe* v. *Wade* as such. It is how far you press beyond that and how you resolve the many difficult issues that would still remain if *Roe* v. *Wade* were overruled.

Mr. MICHELMAN. In all candor, there is some real uncertainty here, but if the question is that I have to stake a bet one way or the other and my life depends on it, there is no doubt that I am going to bet that he will vote to overrule *Roe* v. *Wade.*

Senator KENNEDY. Professor Law.

Ms. LAW. I would certainly concur with that, and that would be one vote. I don't think that he is going to get other Justices to join the position that he staked out prior to his nomination. But as Professor Michelman indicated earlier, it all comes up in complex packages, and it comes up in terms of your right to speak about abortion or your right to travel for purposes of getting abortions. And I suspect that in all of those contexts, we would see him as a voice for a more extremely conservative position than we have yet seen on the Supreme Court.

Senator KENNEDY. OK. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

I notice that this paper that you have submitted to us was written on September 5. I think there are some really inflammatory statements in here I would like to ask you about.

On page 4: If confirmed, he would interpret the Constitution in a manner that would dangerously restrict constitutional protections for civil rights and civil liberties. Then you say this report focuses upon these alarming aspects of Judge Thomas' record.

Well, I don't know whether you are talking about his record as a judge or whether you are talking about his record as a policymaker in Government. But either way, you know, what you say about Judge Thomas here doesn't appear to me to be the judge that I have looked at face to face for the last 5 days.

Did you have a chance—well, I shouldn't say did you have a chance. Did you review the legal opinions written by Judge Thomas and the 122 other opinions that he joined in? Did these play a part in your analysis?

Mr. GREY. No, not my analysis, Senator.

Senator GRASSLEY. How about you, Mr. Michelman.

Mr. MICHELMAN. No.

Ms. LAW. I looked at some of those, but it focused—the purpose of this document was primarily to raise questions for the committee. And I don't have the text in front of me, but when we say things were alarming, what we are saying is that his prior record contains a lot of alarming statements that—at that point we are not condemning him. We are just urging you to question him closely, which you have done. And on many issues, the answers have been explanatory, and on other issues they haven't been. On other issues, they have been more disturbing than the prior record.

Senator GRASSLEY. When a person has served 18 months on the second highest court in the land and he is going to highest Court in the land, and he has written 18 to 20 opinions and he has been involved in 120-some, I don't see how if you are going to judge his competence for being on the Supreme Court or what he might do there, if there is any fear in his being there, that you could ignore that.

Mr. GREY. First off, Senator, it wasn't about his competence. His competence in the basic sense hasn't really been called into question. I accepted the representations made from all sides, both Judge Thomas' supporters and his detractors, that the decisions he had been involved with on the court of appeals had not raised fundamental issues one way or the other, so that he did not provide a sound basis for making a judgment about how he would decide the kind of issues that come before the U.S. Supreme Court which we are particularly concerned with here.

Mr. MICHELMAN. It really is relatively rare—it is not that it never happens, but it is relatively rare for a judge serving on a court of appeal to face the kind of responsibility for constitutional interpretation that might be seriously revisory of prior interpretations or that might be operating in a field in which there really is no prior precedent, in a way such that a judge's underlying philosophies and values and outlooks could enter seriously into the decisionmaking. A judge on the court of appeals in constitutional cases in the overwhelming preponderance of cases will find what appear to be binding precedents from which a judgment can be reasoned.

That is not true of a Supreme Court Justice. The judicial offices we are talking about here are two quite different offices. And given what Professor Grey has said about the representations coming from all sides, that unsurprisingly in Judge Thomas' 18 months on the court he hasn't come across a case that really would have put him to the test in terms of the kind of concerns we raised. We felt it appropriate to say what we had to say.

Senator GRASSLEY. Well, we were concerned at his confirmation hearing for the court of appeals about his views on natural law, and he was asked an awful lot about them. We are concerned about it now. But you were concerned because that is part of—that is the basis for the paper here. And not once has he touched on or

used natural law as a part of the rationale for these decisions he has written. It seemed to me like that would be significant.

Mr. GREY. Senator, that is my point that I tried to make in my opening statement; that he has said that he thinks the appropriate role for natural law in constitutional adjudication is implicit and pointed to Justice Harlan's dissent in the *Plessy* case as his example. That I believe is what he is likely to do on the Supreme Court, not say the Constitution says this or the statute says this but natural law says this and that wins, but rather in interpreting the liberty clause or the equal protection clause or the privileges and immunities clause bring to bear his prior stated version of natural law in interpreting those clauses. And that is what alarms me, and that is what I fear we will see.

Senator GRASSLEY. Well, there hasn't been anything you have heard from him in the last 5 days that relieves some of that suspicion you have, that concern you had?

Mr. GREY. Well, in my case, no. He certainly sounds different—he sounded different here in tone. He sounded very measured, very different in tone from the speeches. His explanation for that was that he was speaking as a policymaker then and as a judge now.

The thing is that he was speaking as a policymaker then about constitutional questions, about questions of constitutional law, and to a certain degree a Supreme Court Justice, once confirmed, is more like a policymaker in terms of the lack of constraint than he is like a sitting judge who is before a Senate committee scrutinizing him. So in some ways, the statements as a policymaker or an independent political speaker are more revelatory of what someone is likely to do on the Supreme Court, where there is no recall and there is no recourse.

I am not saying I don't believe what he was saying. I am sure he believed what he was saying. But I think you all must understand how tempting it is to say what—to come to believe what one wants—what one knows is expected in a situation like this. It is a high pressure situation, and I would place more credence on the long-term record.

Senator GRASSLEY. Professor Law, you almost suggested a litmus test on the abortion issue. If he had been right on the abortion issue, would he otherwise be qualified to be on the Supreme Court, in your judgment?

Ms. LAW. That is a hard hypothetical. It is not, I don't think, a litmus test on any particular issue, certainly not that a person to be confirmed has to take a particular view in a particular factual context. But I think it is the case that there are some basic principles—like, for example, the principles articulated in *Brown* v. *Board of Education* or the principles articulated in *Griswold* v. *Connecticut*—that at this point in our history it is fair to ask Supreme Court Justice nominees if they agree with those basic principles.

I believe that *Roe* v. *Wade* should be added to that list. It is a precedent that we have had for 17 years. And I am not saying that a Justice has to take this view or that view or that view. But I do think it is essential at this point that a nominee be willing to talk about in the way Professor Grey suggested is the mainstream of our constitutional adjudication and history, talk about the values

and the principles that they would bring to that process of decision-making.

I don't, with respect, think that Judge Thomas was willing to do that on that issue in particular.

Senator GRASSLEY. Well, I am done questioning, but from a practical standpoint, if every Senator with a pet project or pet political issue or pet constitutional issue we have would expect a litmus test-type approach from everybody who came before us, we would never confirm anybody to the Supreme Court.

Ms. LAW. Senator Grassley, with respect, I don't think basic commitment to racial equality, to gender equality, to core notions of privacy and autonomy are pet projects. You know, they are—the Constitution has——

Senator GRASSLEY. Well, I think——

Ms. LAW [continuing]. Free speech would be another. The Constitution has a substantive value because it has been given content by Justices over the last 200 years. And it is legitimate to be concerned about that content.

Senator GRASSLEY. Well, with the exception of one or two of the issues you just mentioned, he has already spoken to those before this hearing, in support of his view, and would agree in the same general approach you did of those being very basic and I would too. But I am still saying—whether it is a 200-year history or something as recent as 10 years—if every Senator took that view, we would never confirm anybody.

I am done.

The CHAIRMAN. Thank you very much.

Senator Simon.

Senator SIMON. Just very briefly, and I want to thank all three witnesses. I will just comment on a point that Professor Grey made that I think is extremely important.

In connection with the Washington Post editorial, and the idea that we should not consider ideology or philosophy, whoever wrote that editorial was a major in journalism and not history. It is interesting. It is used by both sides. When you have a liberal President, the liberals say, oh, you can't look at ideology. When you have a conservative President, it goes the other way.

But historically, from George Washington's first term on his nominee for Chief Justice, from that point forward it has always been a consideration. It was assumed by the Constitutional Convention that it would be a consideration. Up until the next to the last day of the Constitutional Convention, the Senate was naming the Supreme Court, not the President of the United States. We go through this phrase "advice and consent." We have forgotten totally about the "advice" part of it. And some people want us simply to rubber stamp the nominee. That should not be what we do. I think your point is well taken, and I appreciate the testimony of all three witnesses.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Grey, you refer to the documents which have been submitted on September 5 signed by a number of professors, including

you, and I note there is a comment on page 4, the heading of section No. 2, "Judge Thomas endorses a natural law right to life from conception." My question is: Where does the reference come from that he views that from conception?

Mr. GREY. That is what is implicit in his endorsement of the Lehrman article, his picking up the Lehrman article and saying it was a splendid application of natural law.

Senator SPECTER. So it comes from what Lewis Lehrman said——

Mr. GREY. That is right.

Senator SPECTER. Is there anything more that you know about to your contention about Judge Thomas endorsing the Lehrman article besides that one line in his speech?

Mr. GREY. No, but I think that is a very significant line, Senator. I think he said—he did not say Lewis Lehrman is a great benefactor of the conservative cause. He said—Lewis Lehrman is a nice man. We all respect him. He said, "This is a splendid example of applying natural law theory," and he referred to it in his article about the right to life, his argument about the right to life. So he wasn't referring to the abstract fact that he endorsed natural law, but to the fact that he had applied natural law to the right to life.

Senator SPECTER. Well, that sentence says, "But Heritage trustee Lewis Lehrman's recent essay in The American Spectator on 'The Declaration of Independence and the Meaning of the Right to Life' is a splendid example of applying natural law."

Mr. GREY. Right.

Senator SPECTER. That is the sole basis for the contention that Judge Thomas endorses life beginning at conception?

Mr. GREY. Yes, it is. It is the only clear statement that he has made on that. He has had some other hints, but that was the only clear statement, I thought.

Senator SPECTER. You say there are other hints?

Mr. GREY. Yes. His——

Senator SPECTER. What hints?

Mr. GREY. Well, the reference in the Harvard article on the privileges and immunities clause to *Roe* v. *Wade* as the decision that conservatives are most concerned with. Now, that doesn't go nearly this far. That simply suggests——

Senator SPECTER. That doesn't say anything about——

Mr. GREY. From the moment of conception——

Senator SPECTER [continuing]. Conception or about natural law.

Mr. GREY. Oh, yes, it does, because the whole thrust of the article thereafter is to say that if we apply natural law in constitutional reasoning we can get past these problems.

Senator SPECTER. He has written quite a lot on natural law, but it has been largely in the context of the Declaration of Independence as a source for eliminating slavery or as a source for the decision in *Brown* v. *Board of Education*. There is a reference to natural law as it relates to economics. But is there any reference anywhere—Professor Law, you also in your statement refer extensively, in criticism of Judge Thomas, to the right—to the abortion issue. Is there anything else in any of his other writings which supports your conclusion that he would rely on natural law to deal with the abortion question?

Ms. LAW. I think it is basically a matter of putting together the fact that he has, in the Harvard article and in other places, criticized *Roe* v. *Wade* with the fact that he—and you are quite correct that normally when he talks about natural law, he uses the example of slavery, which is a relatively less controversial example today. But it is basically, apart from Lehrman, putting together the fact that he is critical of *Roe* v. *Wade* with the fact that he is very enthusiastic and recommends to conservative audiences that we adopt a natural law approach to judicial decisionmaking in order to develop a way of approaching problems that conservatives will find attractive.

Now, I don't know what that means. Abolishing slavery is not an issue that is going to bring conservatives—or black people into the conservative fold or that is going to be attractive to conservatives particularly. So in terms of a concrete agenda, the place where natural law has been used in recent years has been primarily in relationship to the abortion debate, a debate about which he is very conservative.

Senator SPECTER. But what you have is the reference that *Roe* v. *Wade* is the subject of criticism by conservatives, and you have that single line referring to the Lehrman article, and that is all.

Ms. LAW. Senator Specter, that is why that letter a couple weeks ago didn't conclude by urging you to reject the nominee. The whole purpose of that letter was to say ask good questions because here are things that we find alarming. And you did ask good questions, but I don't think you got answers to suit your questions.

Senator SPECTER. Well, let me ask the question of you again, Professor Law. That is all there is. The one statement about being critical of *Roe* v. *Wade*, conservatives being critical, and the single line about a reference to Lehrman's article. That is the sole basis for your contention as to Judge Thomas' stand on abortion and natural law relating to abortion.

Ms. LAW. Actually, I think the major evidence now is the response he gave to you in these hearings. The fact that he was so forthcoming on so many subjects and so concrete and so detailed and so utterly unwilling to discuss abortion in response to good questioning on this committee.

Senator SPECTER. Well, I am familiar with what he said here. I am just trying to find the basis which is a long statement by you, Professor Law, and a fairly long statement by a number of people which is focusing virtually exclusively on the privacy issue, and I am just wondering if you have anything more to base it on other than those two statements. And I think I understand your position.

Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Before I yield to Senator Leahy, I am going to explain what is about to happen in terms of a vote. Momentarily, there will be a vote. As a matter of fact, I can hear it coming now with the beepers, so there will be a vote and it is on an amendment that as the chairman of the European Affairs Subcommittee, I have jurisdiction over, and I am going to be required to spend a little time on the floor after the vote.

Senator Simon has been gracious enough to agree to chair the hearing, or Senator Leahy if he is going to stay, whomever, and we will go to the next panel after this panel is completed, so we will

have one more panel tonight. I will try to come back before that panel is completed. This will be the only time I will have absented myself from these hearings, but I must be over on the floor for a moment.

Now, with that, let me suggest that we go to Senator Leahy.

Senator LEAHY. I will take just 1 minute.

The CHAIRMAN. Please go right ahead. Senator Leahy.

Senator LEAHY. Mr. Law, I was not going to really ask any questions here at all, but I heard reference saying almost in a flippant way we would just be concerned about why you are concerned about remarks regarding the Lehrman article on the part of Judge Thomas, but that was a pretty substantial remark you made, saying wholeheartedly applauded it.

I read the Lehrman article. If one were to follow specifically the arguments made in the Lehrman article, it would make all abortion unconstitutional, am I correct in that?

Ms. LAW. Absolutely correct, it would constitutionally require that abortion be treated as murder, whatever the circumstances of the woman or the desires of the individual State.

Senator LEAHY. Whether there be rape, incest, whatever it might be?

Ms. LAW. That is absolutely correct. I think if you think about a nominee who cited an article advocating slavery and describing it as a superb example of the application of natural law to protect historic rights of property ownership, we would have no trouble in seeing that as a serious problem.

My complaint is that I feel that women's reproductive rights, however they are defined, are being treated as something less than fully serious.

Senator LEAHY. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. I might point out, Professor Law, there is probably no issue since slavery that has divided a nation as much as this issue has.

Let me yield now to my colleague from Colorado.

Senator BROWN. Thank you, Mr. Chairman.

Professor Law, I want to go back to the judge's record on the circuit court of appeals. My understanding is that he is now joined in approximately 120 opinions. Can you help us in looking at those opinions, of those 120 how many would you disagree with the conclusion he has reached?

Ms. LAW. I cannot really help you on that, because, as he indicated in his testimony here earlier this week or last week, many of the cases that he was involved in were regulatory technical opinions on which I could not form an opinion, because I am not sufficiently sophisticated in the areas in which—and as Professor Grey indicated, people studied those opinions with some care and did not seem to think they were a major source of concern, so I have not done that detailed analysis myself.

Senator BROWN. Well, are there any of them which you would cite as ones which you would be in disagreement with the conclusion?

Ms. LAW. I cannot think of one, no.

Senator BROWN. Professor Grey, my understanding is that you, along with Professor Tribe of Harvard, are two of the most preeminent scholars in America, at least in terms of the writing that you have done on natural law. For me, it is hard to imagine that Stanford would not have the claim on preeminence over Harvard, but perhaps there is disagreement in the academic community about that.

The CHAIRMAN. But not at Stanford, there is no disagreement at Stanford, is there?

Mr. GREY. I am speechless. [Laughter.]

Senator BROWN. You mentioned at least a reference to two kinds of natural law, or at least I suspect there may even be more, but at least two general approaches to natural law. You described one as a lurking kind, which I assume would be one that we might deal with alarm. Could you help us with how you would differentiate the one that is benign and the one that may be thought of as of concern?

Mr. GREY. My colleague Frank Michelman, I agree with what he said and I will paraphrase it. Basically, there is an approach which I think has been very widely followed by the great Justices of our Supreme Court, which is the attempt to develop through reasoned elaboration a structure of doctrine based on the text, based on the history and based on the fundamental values, trying to draw these together in a coherent way, and treating individual cases as tough problems to be wrestled with in the light of that set of materials, which includes fundamental values which might be called natural law.

Then there is another approach, which treats legal and political and moral problems like problems in Euclidean geometry, where there are certain axioms, fundamental truths which are self-evident, which dictate answers, and that is not—I definitely detect that tendency in Judge Thomas. It is not unique to him, though it is relatively rare among lawyers today. I think it was somewhat common in the 17th and 18th centuries for lawyers to believe or at least aspire to some kind of deductive geometric kind of legal science which could answer all tough questions.

Senator BROWN. You have a concern over someone who views it as a simplistic answer to legal problems?

Mr. GREY. That is right.

Senator BROWN. My few years of exposure to law professors taught me that nothing is simplistic. I assume, then, that you, in reviewing his statement that he would not use natural law as a means of interpretation of the Constitution, that that has not allayed your fears or concerns in this regard?

Mr. GREY. No. Actually, I found Judge Thomas more consistent than other people did on this, as I read very carefully what he said in his writings on the subject before the hearing, which did not—he said, for instance, the quote that I gave from the Harvard Journal article, Justice Harlan, who he took as a model, the first Justice Harlan, his reliance on political principles was implicit, rather than explicit, as is generally appropriate for Supreme Court opinions, and he went on to say that he would do that, too, that he would regard him as background or make indirect, rather than

direct reference or see natural law as incorporated, because the Framers believed in it in text of guarantees like the liberty clause.

My concern was just that once you get it in indirectly, if you have the kind of approach Judge Thomas displays in his prejudicial speeches, indirect is enough and implicit is enough to march very confidently to these very firm conclusions that he tends to reach about economic rights, about privacy rights, and so on, about color blindness as the proper approach to racial equality questions, march very confidently and swiftly to those conclusions, and that is what disturbs me.

Senator BROWN. In his 120 or so opinions on the circuit court of appeals, are there any of them in which you see signs of the use of this simplistic natural law?

Mr. GREY. As I said, Senator, I have not read a one of his opinions. I passed on them, relying on the fact that both his proponents and his detractors had said that there was no guidance there to be gained on his constitutional philosophy.

Senator BROWN. The Bar Association has found, I guess to quote their standard—and you appreciate that my guess is standards I suspect are not chiseled in stone, but perhaps may be more flexible than they appear from paper, but what they say is the nominee must have outstanding legal ability, wide experience, to meet the highest standards of integrity, judicial temperament, and professional competence.

They indicated, after talking with roughly 1,000 people in interviews, 150 deans and faculty members of law schools and 300 practitioners, I suspect that those are cumulative figures, that the 1,000 includes everyone and the others are breakout, in reviewing the judge's record, do you come to the same conclusion the Bar Association does? Do you conclude that he has outstanding legal ability, wide experience, and the highest standards of integrity, temperament, and professional competence?

Mr. GREY. Again, Senator, I have not read the opinions, which were a big source of their evaluation. I have read his speeches and I have read his published law review articles, and I thought the scholarship there was not particularly strong, but he does not put himself forward as a professional legal scholar, so as far as his competence goes, I have no strong views.

I certainly do not see him as a standout nominee, but as a number of Senators have pointed out, not everybody who goes on the Supreme Court is a standout nominee, and indeed some people who have had less than stellar backgrounds have turned out to be great Justices, so really that part is not something to which I can really speak.

Senator BROWN. Am I correct in assuming that the other members of the panel do not agree with the Bar Association evaluation, either?

Mr. MICHELMAN. I certainly would not try to judge Clarence Thomas' qualifications on the basis of his scholarship. He was not primarily a scholar. I think that it is fair to look in his scholarship and his speeches for indications of the bent of his mind, the tendency of his thinking, his habits of thought, but I would not look there to try to appraise that material on some standard of scholarship, to ask whether he is qualified for the Supreme Court.

I think that in order to gauge this man's abilities, you would have to look to the walks of life in which he primarily invested his energies. You have to look to the testimony of those who appraise his work at EEOC, and in the positions that he held professionally prior to EEOC.

If I were to judge on the basis of the testimony here, I would say that Judge Thomas is a man of considerable ability. I have never raised a question about that and I would not now. My testimony was that it is not reasonable to think of him as being in the class about which one might plausibly say he is the best qualified person.

Senator BROWN. Were any of you among the 150 professors that were consulted by the Bar Association?

Mr. MICHELMAN. I was not, sir.

Mr. GREY. Nor was I.

Senator BROWN. I see that we have got a vote on, and let me just conclude very quickly with one question. Professor Grey, you had referred to the standard to be used in selecting or approving or confirming a nominee for the Court. One of our distinguished members is quoted in the Thurgood Marshall confirmation of indicating that the basis should be on qualifications and not on philosophy. I take it your feeling is that philosophy should be a part of the confirmation process.

Mr. GREY. Yes, Senator.

Senator BROWN. I must say I agree. I think philosophy is an appropriate venue, but I wonder, would you think the standard for the philosophy used should be the standard of the President making the nomination?

Mr. GREY. No, Senator, I think the Senate should exercise——

Senator BROWN. I did not mean to imply that you did.

Mr. GREY. I am sorry, then I misunderstood the question.

Senator BROWN. I am saying what standards should we look to, in terms of philosophy.

Mr. GREY. It seems to me Senators have to make independent individual judgment about what they think will be good for the country, just as I believe the President does, using his political views, when he decides what nominee should go forward. So, Senator can be expected to disagree, because they have different views of what is the proper future direction for the Supreme Court.

Senator BROWN. Just a couple of quick observations, Mr. Chairman, and I will yield back the balance of my time.

It strikes me, if we have a President who has as different philosophy than the majority of the Senate, we find ourselves in an unusual circumstance that is not easily resolved, and perhaps there is some explanation here.

It also occurred to me, as I thought about the testimony we have received, that when Clarence Thomas had clearly indicated he believes in a constitutionally based right of privacy; two, that my recollection is that he indicated that he had not agreed with Mr. Lehrman's conclusions in response to questions brought by this panel; third, in his discussion of natural law, he specifically indicated that he would not use it to adjudicate the Constitution; and, fourth, we had as many questions as I can imagine on his attitude of *Roe* v. *Wade*.

I confess that the panel has made some interesting points, but I do not know how you would forecast this, except to say that the judge has said very clearly he had not made up his mind.

Thank you, Mr. Chairman.

Senator SIMON [presiding]. Senator Thurmond.

Senator THURMOND. Thank you very much.

I am going to ask a couple of questions. I think you can answer them in one word, unless you especially want to explain them. I have to go and vote in just about 3 minutes.

First, we will start with you on this end, Professor Grey. Isn't it true that the theory of natural law does not require that a judge reject the Constitution, statutory intent or relevant, law?

Mr. GREY. That is right, Senator.

Senator THURMOND. Professor Michelman?

Mr. MICHELMAN. The same question, yes, the same answer.

Senator THURMOND. Professor Law?

Ms. LAW. That sounds right.

Senator THURMOND. The second question: Isn't it true that a judge is bound by the Constitution and statutory law, even if he believes in natural law?

Mr. GREY. Right, though he may think natural law is part of that Constitution.

Mr. MICHELMAN. The same answer.

Ms. LAW. And it depends, I mean it will influence his interpretation.

Senator THURMOND. He is bound by those, regardless of what he believes in, isn't it?

Ms. LAW. Of course he is bound.

Senator THURMOND. The Constitution and statutory law?

Ms. LAW. Yes.

Senator THURMOND. You have all answered them favorably. Thank you very much, and good night.

Senator SIMON. We thank you very much for being here and for your testimony.

Senator SIMON. Our next panel has four distinguished witnesses. The first is the Honorable Roy Allen, State senator from Savannah, GA; the second is one of the most distinguished Americans, the Honorable Griffin Bell, former Attorney General of the United States, now practicing law in Atlanta; the third member of the panel is Judge Jack Tanner, senior Federal district court judge for the western district of Washington, in Seattle, Judge Tanner is one of the founders of the National Conference of Black Lawyers; and the final member of this panel is Margaret Bush Wilson, former chair of the board of the National Association for the Advancement of Colored People.

We are very happy to have all of you here. I am particularly pleased to welcome Judge Bell, who is an old friend, a long-time friend, and, as I indicated earlier, one of the most distinguished Americans. We are honored to have you here any time, Judge Bell.

Judge BELL. Thank you very much.

Senator SIMON. Senator Allen, we will be pleased to hear from you first.

STATEMENT OF A PANEL CONSISTING OF HON. ROY ALLEN, STATE SENATOR, STATE OF GEORGIA; HON. GRIFFIN BELL, FORMER ATTORNEY GENERAL OF THE UNITED STATES; HON. JACK TANNER, FEDERAL DISTRICT COURT JUDGE, WESTERN DISTRICT OF WASHINGTON; AND MARGARET B. WILSON, FORMER CHAIR OF THE BOARD, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. ALLEN. Mr. Chairman of this committee, 20 years ago, when I left Howard University and Catholic University, I always felt that I would return to this lovely city and Capitol Hill. In all candor, however, I never thought that I would be in this capacity as a witness in support of a Supreme Court nominee, and even less for a fellow school mate and altar boy.

As I sit here in this hallowed room named for one of your former monumental leaders and my fellow Georgian, I feel the spirit and presence of such luminaries as the late President Kennedy and President Johnson, Carl Vinson and Javits and Dirksen and Long and Bayh and so many others too numerous to mention.

As I look around this room and see the faces of Senators I have seen throughout these hearings of men that I have met on the campaign trail who have come to south Georgia, and many of those faces who belong to legendary families, I must say that at this moment I must push aside this awe and put in unequivocal thoughts and words of my support for my friend Judge Clarence Thomas.

Since July 1 of this year, many of us who consider ourselves as friends and associates and/or acquaintances of Clarence, I have had to read many descriptions of "boy" or Cousy, as we know him, and I have had to stop and wonder whether the many adjectives and characterizations of the man we know, we knew, and we still know are one and the same, and the answer is a resounding no.

I come here today as the great-grandson of slaves, as a guy who comes from the soil of south Georgia, a product of the 1950's and 1960's of the segregated South, a lad who watched his daddy teach school by the day and swept floors and cleaned bathrooms by night. I could not understand why I had to drink from a colored fountain, nor could I understand why my dad, with a near A average, could not go to medical school in Georgia and become a doctor. I could not understand why mom and dad had to pull over on the side of the road to relieve themselves, when we passed so many rest rooms.

I was bewildered as to why mom and dad referred to some people as Mr. or Mrs., and those same people called them Roy or Maggie, but the words of a song still ring true in my ears, and "God moves in mysterious ways, as one is to perform, He plants his foot out on the sea and he rides every storm; God is his own interpreter, and He will make it plain."

In hearing those who do not know Clarence to try and describe him, I am reminded of a verse in the New Testament. In Matthew, when he asked the disciples whom do men say that I am the son of man am? In response to this inquiry or dialog, they have called him Elias, Jeremiah, and John the Baptist. But only upon further

inquisition, did Simon Peter give the correct answer of who he really is.

The boy Clarence Thomas was an intense and serious student, a voracious reader, a faster than average runner, a basketball player with such moves that, on the playground of St. Benedict the Moore Catholic Church, that he was nicknamed Cousy, after the famous Celtic star.

Further descriptions of this fiercely competitive guy would reveal a student and an athlete who just plain hated to lose. Be it at a basketball game or a spelling bee, Clarence Thomas was a winner then, and certainly is a winner now, and I am firmly convinced that the words of Winston Churchill still ring incessantly in his ears, never give up, never give up, never, never, never give up.

A notion or a thought that Clarence has forgotten from whence he has come is ludicrous at worse and speechless at best. How does one forget drinking from a colored fountain or going to a colored beach? How does one forget walking by and being unable to use a first-class park, only because of the hue of one's skin? I can only imagine that my friend the judge feels the anguish and exasperation that another great Georgian felt, Dr. King, on April 16, 1965, when Christian and Jewish clergymen criticized his nonviolent activities, while he sat in a Birmingham jail. The very famous letter that he penned is still a literary work of art.

Nowhere am I recommending throughout this history or these proceedings that Judge Thomas should be canonized or recommended for sainthood. Sister Mary Catherine, may God bless her, would still be surprised to learn that not all of our trips were to the bathroom in the basement, but jumping the fence to go to Miss Nora's to buy snowballs and candy.

The many sisters, Sister Mary Catherine, Sister Mary Chrisustum, Sister Mary Aquinas and so many other Franciscan Sisters of Newton, MA, were happy that he was faithful as an altar boy in serving mass, he was faithful in his homework, and he was faithful as a patrol boy, and he was faithful as a model student.

Yes, our lives had similar paths and seemingly different results. Clarence a Republican, me a Democrat, Clarence a Supreme Court nominee, myself a Georgia State senator.

Mr. Chairman and other members, his character, his integrity and his honesty, his intellectual ability and sense of purpose are unquestioned. The foundations of his childhood place him in the unique position to one day rank along side such names as John Jay of the Original Court of 1790, to rank along side Oliver Wendell Holmes, who brought a deep and abiding faith in America at the turn of the century, to social reformer Louis Brandeis in 1916, to Benjamin Cardozo, to William Douglas and tc the man he hopes to replace, Thurgood Marshall.

Yes, Mr. Chairman, many of us know this man and his potential for true greatness on this Court, and we will not sit back and let his good name be criticized. We will never forget the words in the conversation of Orthello in act III, scene 3, "Who seals my purse steals trash to something, 'tis nothing, 'tis mine, 'tis his, and has been slave to thousands, but he who filters from me my good name, robs me of that which does not enrich him, but makes me poor indeed."

Second, Mr. Chairman, I focus on Clarence Thomas as an anomaly, or is he a representative voice? I like to focus on those critics, particularly in the black community who contends that Clarence Thomas is out of step with mainstream black thought. A number of these groups came out early on, even before they had a chance to know this nominee personally.

Since July 1, the terms "affirmative action, conservative and liberal" have been bandied about, with no true definition of terms. The Congressional Black Caucus and other so-called black leadership groups have operated like true kneejeck reactionaries, because they have not come to box in Judge Thomas or to fit him in a particular mold. Had some of these groups or persons had an opportunity to know some basic historical research, they might have learned that their seemingly strange views were espoused by such notable black figures as Frederick Douglas, Marcus Garvey, and Booker T. Washington.

They may have been pleasantly surprised that the famed Malcolm X was as true disciple of self-help and political and economic independence. The fact of the matter is, Mr. Chairman, that many of these standard bearers are still heavily dependent on corporate largess and they have no true solutions for the plight of these people and are slow to ingenious and creative thought, regardless of the political party.

Many of the leaders conveniently overlook the first major poll by USA Today, showing that the majority of black Americans are supporting Judge Thomas, not to mention the most recent poll conducted by our own Atlanta Constitution, where black southerners are supporting this man 2-to-1.

To you members, I doubt seriously if our Forefathers were whipped, chained, or murdered, so that all blacks could think alike, walk alike, talk alike, and act alike. No single individual or organization has an exclusive lock or insight into the black experience.

While Judge Thomas has left no clear definitive trail on the issue of choice or pro-life issues, just a few years ago, many so-called black leaders were arguing that those who were favorable to the issue of choice were promoting black genocide. Again, I raise the question, did the masses change, or just the leaders?

In the final analysis, a true historical perspective will reveal that there has never been a monolith of thought of leadership in the black community. There was Garvey and DuBois, there was King and Malcolm X, and a newly emerging dichotomy between Gov. Douglas Wilder and Jesse Jackson. But a lack of monolithic leadership is as healthy now as it has been throughout history. Black people, like any other ethnic group, can see through shams, spurious and insincere leaders and programs or the lack thereof.

In closing, Mr. Chairman, I submit that Clarence Thomas represents the true American spirit, the true American ethic and ethos, and should be judged accordingly. The standards by which he is judged should be no different than the standards used for Justice Scalia, Kennedy, Souter, and the many others who have preceded him.

Mr. Chairman, I thank you for this opportunity to come before you and to speak of one, not that I heard of, not one that I heard about, but one that I know, and in no way would I try to denigrate

the work of many organizations who have criticized him, but neither could we sit back and acquiesce to their false definition of this man.

Mr. Chairman and members of the committee, I thank you for this opportunity.

Senator SIMON. Thank you, Senator.

Judge Bell, good to have you back here with us again.

STATEMENT OF HON. GRIFFIN BELL

Mr. BELL. Thank you, Senator. I want to thank Chairman Biden for accommodating my schedule. He is very nice to do it.

I want to thank you for the opportunity to appear here today in support of my fellow Georgian, the Honorable Clarence Thomas. I came to Judge Thomas before he became a judge, when it came about as a result of his long-time friendship with one of my law partners, Larry Thompson, who was formerly the U.S. attorney for the northern district of Georgia. Larry will himself be here as a witness during these proceedings. Judge Thomas and Larry Thompson practiced law together at Monsanto in St. Louis. That is how they became acquainted.

As one who served on the Federal court of appeals for 14½ years, I was interested in seeing the evidence of the stewardship and scholarship of Judge Thomas as a member of the District of Columbia Court of Appeals. I have now read a number of his opinions. I found these balanced, moderate, scholarly, well written, reasoned, and careful. In sum, his opinions evidence the highest standards of judicial excellence.

I have also heard a substantial portion of the testimony in this hearing. In my judgment, Judge Thomas has done remarkably well. Only one who has been interrogated endlessly in such a hearing by a large group of Senators—I speak of myself—some of whom were even hostile, can fully appreciate the tremendous pressure and wear that one undergoes in such an ordeal. Surviving such a ritual with one's character, reputation, good humor, and dignity intact is a victory within itself.

Judge Thomas has clearly survived. His character, reputation, and particularly his dignity is intact.

I have heard no reason not to vote to confirm President Bush's choice of Judge Thomas as his nominee to the Supreme Court. He appears to be a man of balance, unquestioned integrity and independence, and generally good character, intelligence, compassion, and patriotism. I believe that he will uphold our Constitution. I would trust him with my fundamental rights.

No one can really know what the sum total of the experiences of Judge Thomas have been during his lifetime. His experiences have surely been different from those of us who were fortunate enough to be born into a favored group. It has occurred to me that his early life in a segregated, often hostile society has perhaps given him the patience and courtesy and dignity to withstand the withering and almost brutal cross-examination to which he has been subjected on occasion in this hearing. I do not see how any objective viewer or listener could conclude that such a long-suffering and

sensitive person would lack compassion toward others similarly situated or would not favor and advance civil rights.

I heard Judge Thomas testify in response to a question of why he wanted to serve on the Supreme Court. He said that he wanted to give something back for all that has been given to him. He plainly has all of the objective qualifications and the appropriate personal qualities. His motive for service is in the highest tradition of our country.

I hope that you will vote to confirm Judge Clarence Thomas.

Thank you, Mr. Chairman.

Senator SIMON. Thank you, Judge Bell.

Judge Tanner.

STATEMENT OF JUDGE JACK TANNER

Judge TANNER. Thank you, Mr. Chairman.

I can recall in February 1978 that I appeared before this committee. Senator Thurmond is familiar to me. I was very unfortunate before that hearing. As I appeared, Senator DeConcini informed me that they had just filed disbarment proceedings against me in the State of Washington. So I am here because of the most intense, unprecedented, and harsh opposition in the history of this country to a nominee to the Supreme Court of the United States. The attacks have now also shifted to Members of the Senate. There is no logic or reason for the attacks, whether it is on the right or the left. They are emotional attacks based solely upon passion and prejudice, neither of which has any relevance to the qualification of fitness of the nominee.

I am most concerned with the concept of fairness and justice which are the very foundation of our system of jurisprudence. These remarks that I am making are my own and do not purport to represent the view of any other person or organization.

I am also concerned because I too appeared before this committee under somewhat similar circumstances. I was the first black person west of Chicago and north of San Francisco ever nominated an article 3 judge. I was nominated by Senator Warren G. Magnuson, then the chairman of the Senate Appropriations Committee. He formerly was, as several of you will recall, chairman of the Commerce Committee, the committee where the civil rights legislation in the 1960's originated.

My nomination was immediately opposed by certain factions in the State of Washington. The opposition was led by a local newspaper. Senator Henry Jackson, concerned about the nature of the attack against my nomination, appeared at a news conference in Seattle and denounced the attack. Senator Jackson said that the attacks against me "was only because he is black, that if Tanner was white there would be no opposition to his nomination."

I think that I should say here and now that not one Member of the Senate of the United States voted against my nomination at that time.

The opponents of Judge Thomas' nomination are concerned that he might do this or he might do that or that his confirmation will lead to some ideological shift in the Supreme Court, or that he is somehow outside the mainstream of legal thinking, yes, and politi-

cal thinking in this country, just because they do not agree with his sense of values of judicial philosophy, whatever it is that might be. Judge Thomas has sat as a member of the U.S. Court of Appeals for the District of Columbia for some 19 months now, and his judicial philosophy is still uncertain and unknown. Yet about 96 percent of the cases decided by that court are final decisions.

What is certain and known about Judge Thomas is that he is independent and can't be put into a category. He is just where he should be. Speculation and hysteria as to what the nominee might do should not disqualify him from the Supreme Court. After all, no other nominee has ever been disqualified for such reasons. Judge Thomas understands very well the rule of law.

I realize, of course, that there is one obvious difference between Judge Thomas and the previous nominees to the Supreme Court of the United States other than Thurgood Marshall. In my opinion, these groups are saying—and I include all of those groups opposing Thomas' nomination—that we just do not trust Judge Thomas because he is a black man. Support for this position comes from the prevalent view in America, and it is caused by the ravages and comes from the vestiges of slavery and the infamous black codes which followed that coloreds or Negroes, blacks or African-Americans, if you will, could not be trusted with responsibilities and obligations that affected the Armed Forces, the judicial, political, social, and educational institutions of America. They could not be trusted to fight in the many wars of this country, although they did so and with courage and valor. And so it stood to reason they could not be trusted with the life, liberty, and property of white Americans.

In 1949, President Harry Truman appointed for the first time in the history of the United States the first article 3 black judge. He appointed William Hastings to the Third Circuit Court of Appeals. In 1955, the Supreme Court of the United States handed down the opinion of *Brown* v. *Board of Education*, perhaps the greatest decision ever handed down by the Supreme Court of the United States at any time in our history. Thurgood Marshall was rewarded for his great victory in that case when President Lyndon Johnson nominated him to the Supreme Court of the United States. Once again it had been recognized by the country that the black man could be trusted.

In 1991, the United States went to war in the Middle East. The Chairman of the Joint Chiefs of Staff of the Armed Forces of the United States was one Colin Powell, then a four-star general and a black man as well. President Bush, as Commander in Chief of the Armed Forces, trusted the integrity, loyalty, training, and experience of General Powell. He was, in fact, entrusting the security of the United States to a black man. History will show that trust was well placed. It is my judgment that history will repeat itself and one day show that President Bush, the first Republican President to ever do so, was right in entrusting to a black man the job of safeguarding the life, liberty, and property of all Americans by nominating Judge Clarence Thomas to the Supreme Court of the United States.

Judge Thomas is just as well qualified to become an Associate Justice of the Supreme Court as were the 103 white males, 1 black

male, and 1 white woman who have heretofore come before this body for advise and consent. In fact, because he had the black experience in his life, he is perhaps the better qualified than all but two members of the Supreme Court.

This committee can believe the President of the United States when he says that Judge Thomas is the best man for the job. Just because he happens to be a black man does not disqualify him, nor should it by any test or criteria. It has only happened twice in our history that a black man has been nominated. It is highly doubtful that any of us in this room will see it happen again.

It is my judgment that there are a great number of Americans out there, and, yes, there are people throughout the world, who are watching this great drama unfold. It is also my judgment that the great majority of those Americans, white, black, brown, yellow, and red and of all religions and faith, want to see Judge Thomas sitting as an Associate Justice on the Supreme Court of the United States. They want to see fair play and justice done to this man. They want to be able to point to this man and say to their children that they too can aspire to the highest Court in the land, that they too can expect fairness and justice, and they too can put their hopes and dreams in America where the rule of law and not of man reigns supreme.

In conclusion, let me say to the members of the committee, no President of the United States, whether he is Republican or Democrat, has ever or will ever appoint a black man or a black woman to the highest Court of the United States unless that person is well, well qualified. Despite the vicious, unwarranted, and unprecedented attacks upon the nominee, he still stands tall. He has exhibited more than just plain character while under fire. This black man has exhibited sheer guts and will power above and beyond the call of duty to his country. He has displayed courage and valor in the face of the bitter criticism and abuse heaped upon him. Such valor and courage in the time of war is rewarded in the armed services of the United States by award of the Congressional Medal of Honor. What could be a greater test of character than that displayed by the nominee before this committee?

Thank you, Mr. Chairman.

Senator SIMON. Thank you, Judge Tanner.

Margaret Bush Wilson, whom I have known back from the days when she was considered a radical. Happy to have you here, Mrs. Wilson.

STATEMENT OF MARGARET BUSH WILSON

Ms. WILSON. Thank you, Senator. I have to apologize for this voice. I have had some thyroid surgery, and it has affected my vocal cords. Some of my colleagues say it is a good idea that I can't talk. [Laughter.]

I have prepared a written statement which I trust that all members of the committee will receive, if they have not already. I propose not to——

Senator SIMON. We will put the statement in the record, and I assume someone has it. I do not have a copy of it right here.

Ms. WILSON. I would hope that it would be in the record and therefore I can just speak briefly from it.

I think it is most appropriate that your questions probe, as many of you have done, the fundamental character of the man, Clarence Thomas, and how he thinks about and analyzes issues. It seems to me that that, more than anything else, is the critical thing that this committee must address, rather than his specific views on specific issues, because how he thinks about and analyzes issues will determine what kind of Justice he will be in the first third of the 20th century, what kind of Justice he will be as he deals with the problems, the like of which none of us in this room can even imagine, much less frame questions about.

With that in mind, maybe I can help the committee in a small way to understand who Clarence Thomas is. I make this offer in part because, at least to some degree, the Judge Thomas I have been reading and hearing about is not the Judge Thomas I know.

I would like you to go back with me to the spring of 1974. One afternoon I was seated next to the then attorney general of the State of Missouri, who is now my distinguished senior Senator from Missouri, John Danforth. We were at a luncheon at some public event, and he said to me during the table conversation, "I have a bright young man whom I would like you to get to know. I am inviting him out to be on my staff. He is a graduate of Yale, and he will be coming out to the State to be on my staff."

I said, "Well, that is fine." And then he added, "And he is black." And I said, "Well, that is great." Then he said to me, "Do you happen to know a place where he can live? I don't think Jefferson City is the most exciting place in the world to spend the summer." It just so happened that my own son, who was in law school, had just told me a few weeks before that he wasn't coming home for the summer, and so almost on impulse, I said to Senator Danforth, "Yes, I do." He said, "Well, where is that?" I said, "In my own home."

And so some 2 months later, one sunny afternoon I think toward the end of May or the first of June, my doorbell rang, and at the door was a striking young man. And he said to me, "My name is Clarence Thomas," and I replied, "Yes, I know. I have been expecting you."

Then for 2 months, Clarence Thomas lived in my home as my guest. And I think members of the committee and members of the panel and everybody in this room knows, if somebody stays in your home longer than a week, you get to know a lot about them as a person. You know something about their values, something about their character. And so I have this unique insight at a time in young Clarence's life when the least thing he expected was to be a nominee to the Supreme Court of the United States.

I want to tell you several things about him that I observed: One, that he was a very disciplined person. I can't recall a young person who seemed to have clearly in mind what he wanted to do and then proceeded to do it. He was up every morning doing his exercises with my son's weights. He did have one fault, though. He started out with the weights up in my bedroom, and I had to stop that and bring them downstairs.

After that, he went off to study, and he spent the day with the books. I made only one requirement: Be home in time for dinner. And he kept his promise. He would come home for dinner.

That is when I got to know something about Clarence Thomas, because these meals were the give and take of a family of folks who like to talk about what was going on in the day-to-day life of this country. And I must say we had some lively discussions with Clarence Thomas, because he then was very, very stubborn about his views and not willing to accept anything on face value.

We didn't always agree, but I was impressed with this young man's ability to analyze, his insights, and his own sense that he had to think things through for himself.

So I can tell you that Clarence Thomas is a man of good moral character. He is disciplined. He has a very keen mind. He is, contrary to what I have been hearing today, in my judgment a scholar. And I think he will be a scholar on this Court.

He has been busy at different levels of Government where the scholarship and the ability to do that has been limited. I think the Supreme Court experience will open for this young man vistas that he has not yet displayed because he does have the fundamental keen intellect which I think is so essential for this Court.

The day he left he asked me how much he owed me. I said to him, "Clarence, you don't owe me a thing. But I do want you to make a promise. I want you to promise as you move through your career that if you are ever in a position to reach out and help somebody, like I have helped you, that you will do that." And he made that promise, and I am convinced that he has been keeping his word ever since.

Now, across the years I have been keeping in touch with him. I respect his integrity, his legal mind, and his determination. I have found him to be sensitive and compassionate, doing what he believes is right and working to make the world a better place in which to live.

Mr. Chairman, I want to speak to a comment and to the questions which were directed by Senator Kennedy—and I am sorry he is not here. But I want to provide an insight, in view of Senator Kennedy's probing and important comments and questions this morning.

Clarence Thomas I suspect was as impatient as I am now with the progress in addressing some of the fundamental problems of people who are deprived in this Nation, and particularly the problems that confronted one-third of our American citizens who are of African descent and who are still poor. Some of us have mastered the art of disagreeing without trashing anyone or any institution. Perhaps in the past in his younger days, Judge Thomas was impolitic in some of the things he said. But I think you and I will agree that Judge Thomas has now mastered the art of disagreeing without being disagreeable, that he has demonstrated this especially well in these hearings.

I trust that organizations which have expressed opposition to Judge Thomas have watched his comments and his demeanor in these sessions and are willing to temper their views. Some of them have urged that you reject his nomination. I hope that they will reconsider. Some of his critics have said that despite Judge

Thomas' chairmanship of the Equal Employment Opportunity Commission for 8 years, he does not champion the cause of civil rights. But they obviously don't know him or the real facts about his tenure on the EEOC. And I have been particularly pleased that some members of this committee have placed in the record documentation——

Senator SIMON. If you can conclude your remarks, Mrs. Wilson.

Ms. WILSON. Yes. I think I can conclude them by saying, Mr. Chairman, that I strongly support Clarence Thomas. I think he has the temperament, the background, and I appreciate this opportunity to share my views with you.

[Prepared statement follows:]

Statement by Margaret Bush Wilson

before the U.S. Senate Judiciary Committee

in connection with the

Nomination of Judge Clarence Thomas

to be an Associate Justice

of the United States Supreme Court

September 1991

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Mr. Chairman, and members of the Committee, thank you for providing this opportunity to comment on Judge Clarence Thomas as you consider whether to "consent" to his nomination to the Supreme Court of the United States.

Yours is an important constitutional duty. Particularly important because if Judge Thomas serves until the age of his predecessor he will be on the Court until the year 2030.

[Pause for Chairman's Reply]

It is appropriate that you take a long, hard look at Judge Thomas before deciding whether to consent.

It is appropriate that your questions probe, as many of them already have, the fundamental character of the man and how he thinks about and analyzes tough issues.

That, more than anything, and certainly more than his specific views on specific issues will determine what kind of a justice he will be in the first third of the twenty-first century ... what kind of a justice he will be as he deals with problems the likes of which none of us can even imagine, much less frame questions about to probe his specific views.

Maybe I can help you in a small way, to understand who this man is. I make this offer in part because, at least to some degree, the Judge Thomas I have been reading about is not the Judge Thomas I know.

I first heard of Judge Thomas from Senator Jack Danforth, who has already eloquently described the Judge. The Senator told me of a bright, young, 26 year old Yale Law School graduate he had just hired who needed a place to stay during the summer while studying for the Missouri bar.

I volunteered the room which belonged to my son, Robert, who was a law student and planning to work in Washington for that summer.

Mr. Chairman, I have never seen a young man as disciplined as Clarence Thomas was that summer. Every single day he exercised with my son's weights and then applied himself to his studies on a strict schedule and in a disciplined fashion.

I only asked of him one thing.

I would prepare dinner and he would show up – on time. We ate together every night, often with friends or relatives, and we talked about any and all of the problems of the day. Clarence had vigorous views even then, and we did not always agree.

However, what impressed me was the quality of his thinking. He did not let personal feelings interfere with adopting a principled position based on sound analysis and logical thinking.

Frankly, his arguments both legal and logical often forced me to rethink some of my own views.

I suspect that sometimes our discussion helped him to see things differently too, because he knew how to listen as well as talk.

However, if Clarence did change his view, it was not because I said it, it was because he thought it through and it made sense to him.

Across the years I have kept in touch with Judge Thomas, and to this day, I respect his integrity, his legal mind and his determination.

I have always found him to be sensitive and compassionate, doing what he believes is right and working to make the world a better place.

You have already heard from many organizations (some of which I belong to) whose goals and principles I share and whose positions I usually support.

They have urged you to reject his nomination.

I am sure that many members of these organizations have tempered their opposition to Judge Thomas after seeing him and hearing him this past week. I only hope that the leaders of those organizations see fit to soften their opposition when they testify this week, as well.

Some of his critics have said that despite Judge Thomas' chairmanship of the Equal Employment Opportunity Commission for eight years he does not champion civil rights. They obviously don't know him or the real facts about his tenure at EEOC.

For example the Washington Post has reported that he turned EEOC from an independent agency into one subject to Presidential control, when the historical record reveals that this occurred in the Carter administration.

You have heard a lot about his background so I won't repeat it, but what is important to tell you is that I knew very little about that background until he was nominated, for he was not one to dwell on the past.

His eyes were on the future and he directed his efforts towards it with diligence, enthusiasm and discipline.

Some say he gives no credit to the heroes of the civil rights movement. You have heard his praise for Thurgood Marshall, Martin Luther King, and others during these proceedings. I first heard such sentiments over seventeen years ago.

Throughout the history of the Supreme Court, I do not believe any other nominee can claim to have come so far. We need people of Judge Thomas' unique perspective not only on the Supreme Court, but also in state legislatures, the workplace, city hall, on campus and everywhere else -- including, Mr. Chairman, the United States Senate.

No one can deny that Judge Thomas would differ from Justice Marshall on some issues. I haven't always agreed with the good Justice myself.

But I do believe that both men show a fundamental belief in the inherent worth and right of the individual.

At one of his previous hearings Judge Thomas indicated he became a lawyer because he wanted "to make sure that minorities [and other] individuals who did not have access to the society gained access."

He said that while he might differ with others on how to do it, his objective "has always been to include those who have been excluded."

Let's get more specific for a minute, Mr. Chairman.

I have told you that Clarence Thomas and I have our disagreements.

I have told you that Judge Thomas might disagree with Justice Marshall.

I also know that Judge Thomas has the strength of character to stand up for what he believes and to disagree with the other justices when necessary.

Let me give you a recent specific example that supports that conclusion.

The Judicial Conference asks all judges to file a report with race gender statistics on their law clerks.

I have here an article from the Legal Times of August 5, 1991 which reports that five Reagan judges on the D.C. Court of Appeals have refused to file the data, but that Judge Clarence Thomas was one of the judges who did file his report. He has the courage and independence to disagree with anyone.

One of the most disagreeable charges leveled at Judge Thomas is that he has changed his stated views to gain confirmation. Those who make this unfair charge do not know the man. Judge Clarence Thomas would not violate his principles for any purpose -- and certainly not to gain a seat on the Supreme Court.

I will close by recalling what Judge Thomas himself told you in his original statement concerning the day he left my home and went to Jefferson City to practice law in Attorney General Jack Danforth's office.

When he asked what he owed, I told him nothing, but I did ask him to promise that if he were ever in a position to help others, as I had helped him, he would do so, and he made that promise with enthusiasm.

I think he has been keeping his word ever since and will do so at the Supreme Court.

I am confident he will make a great Justice and will continue to defend and protect the rights of the needy, the powerless and those who have suffered from discrimination.

He will not permit anyone to think for him.

He will not be pigeon-holed.

He will be intellectually honest and when the year 2030 rolls around and history reviews his record compared with what has been said in opposition to him, I am confident that those of you lucky enough still to be here will know that a vote for confirmation was a special gift to our country.

I truly believe that Clarence Thomas can become one of the great justices in our history, and I take pride in recommending him to you Mr. Chairman and to the distinguished members of this Committee. May I respectfully urge that you exercise your constitutional powers of advice and consent to the nomination of Clarence Thomas to be an Associate Justice of the Supreme Court of the United States.

Senator SIMON. Thank you very, very much.

Senator Allen, I understand you have an 8 o'clock plane to catch.

Mr. ALLEN. Senator, the statement, "Delta is ready when you are," I don't believe that statement anymore. Also the judge is on the same plane.

Senator SIMON. You are all on the same plane?

Mr. ALLEN. We are all from Georgia, Senator.

Senator SIMON. One of the questions I have is—one of you mentioned Thurgood Marshall. When you looked at Thurgood Marshall's record, you knew where he was going. He was very, very clear. As I look at Judge Thomas' record and I look at Judge Thomas as a student at Holy Cross, it is—and I don't know that much about him at Yale Law School, but at Holy Cross he was that champion of the less fortunate, very, very vigorously.

Then I look at Judge Thomas' record in the Department of Education and with EEOC and I read his speeches—and I have read some 800 pages of his speeches—I see someone who comes out on almost the opposite side of Thurgood Marshall on just about everything. And I am trying to find which is the real Judge Thomas.

Mr. ALLEN. Senator, I think they jibe.

Senator SIMON. Pardon?

Mr. ALLEN. I think they do jibe. I think you have a young man—understand something. We would have to put Justice Marshall in a framework of 1967 and his life before then, but we have here a 43-year-old young man who has seen many of the policies that we were taught and believed to have "freed us and helped us and brought us out of our predicament," and I think here is a young man who is so concerned about the plight of the downtrodden that he saw many of the old ways not working. And I think he sat back and analyzed and said let's look at another way, let's try another way. So I see no real contradiction in the so-called two Clarence Thomases that others might see.

Senator SIMON. I think there are many people on this committee, including some who are going to vote for him, who find a real difference between his testimony and his record at this point.

Let me, if I may, Senator, because you used two names, toss this out—and then I would be interested in the answer to my first question from all of you.

You used Booker T. Washington and Frederick Douglass. They took two very, very different courses.

Mr. ALLEN. No, sir. W.E. DuBois and Marcus Garvey would be the same timeframe, Garvey and DuBois.

Senator SIMON. Yes. But if I may just take the two, Booker T. Washington lifted himself up by his bootstraps—had a very exciting personal story. But in a speech in Atlanta, as a matter of fact, he said he was the accommodator. He said about Frederick Douglass' demands for voting and these other things, let's lift ourselves up, let's not push for these things. And the white majority seized on Booker T. Washington's statements, and I think history has judged—those statements unfortunately did great damage to the cause that was an important cause. Frederick Douglass was the advocate, the strong promoter of the rights for the less fortunate.

As you look at Judge Thomas, is he more the Booker T. Washington or the Frederick Douglass?

Mr. ALLEN. Senator, he is an advocate of all those personalities. The speech that you made reference to historically was one where Booker T. said that, in all matters, we can be separate as fingers, but be as mutual as the hand, and he talked about us working together. I think he understood that everyone was not meant to study Plato and Socrates, and while there are some people who have the arts in mind and literature, as DuBois mentioned, as a talented tent theory, he also mentioned that Garvey and Washington believed everyone was not equipped to be the scientist, the connoisseur of literature, and there was a place for that person, too, so I see Clarence as a conglomerate of all those philosophies to what can make things work for the downtrodden, because there was no exclusive way.

Senator SIMON. If I may, on the first question, direct it to all three of you——

Mr. BELL. If I might speak to the first question, I am testifying for Judge Thomas, because I think he is his own man. I did not come here to testify because I thought he was like Justice Thurgood Marshall. They are different. Each one as an American citizen has a right to stand on their own feet.

I do not know anything about Judge Thomas that would cause him to be tested by the standard of Thurgood Marshall. That has been a problem ever since he was nominated. People said, oh, we don't want him, because he is not the same as Thurgood Marshall. Well, that is not the test in this country. He has a right to be considered on his own merit, and on that merit I support him.

Senator SIMON. Judge Tanner.

Judge TANNER. I agree with Judge Bell that it is very difficult to compare Thurgood Marshall and Clarence Thomas. It is like comparing Joe Louis or Jack Dempsey with Mohammed Ali or Jackie Robinson with all the other black ballplayers that came along after him. It is a very difficult thing.

But I, Senator, happen to be at the time, I was on the board of directors of the NAACP, I happened to be there when Thurgood Marshall was the general counsel of the NAACP, I happened to be there when he was director of the ink fund. I do not think at any time did I ever agree with Thurgood Marshall, except on *Brown* v. *Board of Education*, so there are differences of opinion among black lawyers, among black judges, among black people in the United States, so I think it is unfair to say it, but you must remember, the Yale graduate, and I assume Yale Law School is one of those recognized law schools, even though people from other law schools might disagree, has a much better education than Thurgood Marshall and myself, because he comes along at a time in our history that everything has changed. It was not like it was before *Brown* v. *Board of Education*.

Senator SIMON. Ms. Wilson.

Ms. WILSON. I thought we had resolved the dichotomy between DuBois and Booker T. Washington. We need them both.

But I think what I really want to emphasize here is that the careers of these two men are quite different. Thurgood Marshall's entire life was devoted to the civil rights movement on the advocacy side and the framework of the NAACP. Clarence Thomas has chosen the harder route, to move into the system and work within

the system to make it change, and I think it is a much more difficult job. And I think the fact that he has reached this point is kind of a star in his crown, because it is not easy, when you are inside the system, to change it.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you very much, Mr. Chairman.

First, I want to welcome you all here today. I want to thank you for coming. This is a very distinguished panel and I doubt if we have any panel that will excel this one, a distinguished State senator of Georgia, the State of the nominee, a distinguished circuit judge, Griffin Bell, who made such a fine record as Attorney General, a distinguished retired Federal judge here, and an outstanding lady distinguished in her own right, Ms. Wilson. We are just delighted to have all of you here.

I just have two questions you can answer in one word. I will start with you, senator. Is it your opinion that Judge Thomas is highly qualified and possesses the necessary integrity, professional competence, and judicial temperament to be an Associate Justice of the U.S. Supreme Court?

Mr. ALLEN. Yes, Senator.

Senator THURMOND. Judge Bell?

Mr. BELL. Yes.

Senator THURMOND. Judge Tanner?

Judge TANNER. Senator Thurmond, I am not a retired judge, I am a senior U.S. district court judge on active duty. The answer to your question is amen.

Senator THURMOND. I correct myself in saying you were retired. I had understood you were retired. I thought you looked pretty young. [Laughter.]

Ms. Wilson.

Ms. WILSON. Senator Thurmond, yes, with great enthusiasm.

Senator THURMOND. The second question: Do you know of any reason why he should not be made a member of the Supreme Court, Senator Allen?

Mr. ALLEN. No, Senator.

Senator THURMOND. Judge Bell?

Mr. BELL. Absolutely no.

Senator THURMOND. Judge Tanner?

Judge TANNER. No, Senator.

Senator THURMOND. Ms. Wilson?

Ms. WILSON. Absolutely not.

Senator THURMOND. That is all. As far as I am concerned, you can go home, and if you rush, you might catch that plane.

Senator SIMON. We had better let Senator Specter get a question in here now. Senator Specter.

Senator SPECTER. Mr. Chairman, very briefly, because I know you have a plane to catch. I join my colleagues in thanking you for staying so late.

Judge Bell, would you classify Judge Thomas as well qualified for the Supreme Court, after having heard the ABA's recommendation of qualified?

Mr. BELL. I would classify him as well qualified, yes.

Senator SPECTER. Senator Allen, you are a member of the bar yourself, I understand?

Mr. ALLEN. Yes, sir.

Senator SPECTER. And you, of course, know Judge Thomas very well, you described your activities with him since boyhood. Do you have great confidence in his intellectual capability, based on your own personal knowledge?

Mr. ALLEN. Yes, Senator, and I wish that particular characteristic of his intellectual ability was stressed more throughout these hearings.

Senator SPECTER. Judge Tanner, I heard your comments on the radio coming over, and I thought I understood you to say that those who were opposed to Judge Thomas opposed him because he is African-American. Did I understand you correctly?

Judge TANNER. In listening to the hearings and reading the comments of the media, it appears to me that that is one of the issues, can a black man be trusted with the life, liberty, and property of the United States. I think all the questions that refer to natural law, implication or inference, are involved in that issue.

Senator SPECTER. Well, Judge Tanner, I hope no one opposes him on that basis, but how would you explain the opposition of the NAACP and some of the religious organizations which are African-American?

Judge TANNER. Well, look at the history of those organizations. I also, as Margaret Bush Wilson at one time, I was not the chairman, I was on the board of directors, I was a branch president, I helped form the National Conference of Black Lawyers. We, too, disagree, for different reasons. I was at one time a member of the Young Turks in the NAACP. We disagreed with Thurgood Marshall on the direction of the NAACP at that time. I am talking about the late 1950's and the early 1960's. We thought that the NAACP should put the resources, which were meager and perhaps still are, in the cities such as Chicago, New York, Detroit, and the large cities where the ghettos were being formed.

We also thought that then was the time to go back to the Supreme Court on *Brown* v. *Board of Education* and find out just what forthwith meant in the desegregation in the schools of America.

We ran into absolute bitter opposition on those issues, so we do disagree. We are not monolithic. We do not all agree. You see, Senator Specter, in my opinion and judgment, *Brown* v. *Board of Education*, for all intents and purposes, eradicated the legal impediments to people who had been descendants of slaves to get their fair share of America, but it did not tell us, *Brown* v. *Board of Education*, how to do that.

Senator SPECTER. Judge Tanner, I can understand how you would disagree with Justice Marshall and other African-Americans, but I do not yet understand why you would say that one African-American or a group like the NAACP would oppose Judge Thomas because he is black or an African-American.

Judge TANNER. Senator, I think history will show that it is not unusual or unknown for black people to oppose black people, just because they are black, for some reason. I am sure that there are many black lawyers and judges in the United States who are disappointed that President Bush did not call them to be the nominee to the Supreme Court of the United States.

But just because they are opposing him, and I firmly believe much of it comes, because you see that they are in these coalitions and some of them have called them special interest groups, as to how they think black America and women and other minorities should get their fair share of America. If you do not agree with them, then they think you are wrong.

Senator SPECTER. Ms. Wilson, do you agree with Judge Thomas on affirmative action?

Ms. WILSON. I think, Senator, you have to be clear, to let me sure I understand that you understand what Judge Thomas thinks about affirmative action. I have a view about it.

Senator SPECTER. Well, Judge Thomas has testified extensively about it and essentially he is opposed to affirmative action. That may be an oversimplification, but he is not in favor, for example, of having employment opportunities only of—on the basis of those who have actually been discriminated against, but not in favor of a group, to put them where they would have been, except for historic discrimination.

Have I stated that accurately, Senator Allen?

Mr. ALLEN. Sir, as we say in Georgia, somewhat muddy though.

Senator SPECTER. Somewhat what?

Mr. ALLEN. Somewhat muddy. I think I understand the judge's position to be that he has gone on record consistently in the area of quotas. Unfortunately, because in this whole process there has been no definition of terms, we have almost hitched up the phrase quota with affirmative action and they are not one and the same thing.

Senator SPECTER. Of course not. Senator Allen, you understand Judge Thomas' position on affirmative action?

Mr. ALLEN. The position as I have read, according to statements he has made, is that while he is opposed to quotas on the issue of affirmative action, I have understood his position to be that any favorite status for one that causes discrimination to another group he would, in fact, be opposed to, and that is probably the view of most Americans, particularly black Americans.

Senator SPECTER. Do you agree with him on that?

Mr. ALLEN. On that point, yes, sir.

Senator SPECTER. Thank you very much. I do not want to keep you any longer. You have a slim chance of making the 8 o'clock plane.

Senator THURMOND. I have called my car to come down and pick you all up and take you to the airport.

Mr. ALLEN. Thank you, Senator.

Senator THURMOND. I think you can make it, if you rush.

Senator SIMON. Thank you.

The committee stands adjourned until 10 o'clock tomorrow morning.

[Whereupon, at 7:43 p.m., the committee recessed, to reconvene at 10 a.m., on Tuesday, September 17, 1991.]

[Additional documents submitted for the record are contained in Part 4, Apppendix.]