

with him anyplace else. This is because he recognized the three tests, and particularly the intermediate scrutiny test and that it applied to aliens. I didn't ask him if it applied to nondocumented aliens, but the question was aliens, and maybe I should have been astute enough to be more precise, nevertheless he accepted that as a given in our constitutional interpretation and had not only no quarrel with it, he supported it.

So, I came away, quite frankly, far more satisfied than I did when Bork for a long time failed to recognize the three tests, until the Senator from Massachusetts finally got him to change his position, I thought. To me, this man did satisfy that, but the distinction you make, I see it, but I cannot agree with it. I just don't understand how you can make that fine distinction, when he clearly said that he accepted the intermediate scrutiny for aliens.

Ms. HERNANDEZ. The distinction I would like to have made is not so much as to the Equal Protection Clause, but as to what he believes should be supreme with the Fourteenth Amendment, the Equal Protection Clause or the Privilege of Immunities, because if, in fact, he believes it is the Equal Protection Clause, then your questions and his answers follow, as he is talking about that specific one.

Senator DECONCINI. Yes.

Ms. HERNANDEZ. If it is the privilege of immunities, and he says that I would argue that—if he were to argue that the privilege or immunities clause should be supreme, then whatever his views are on the equal protection are irrelevant.

Senator DECONCINI. And your point is in the article he makes that argument?

Ms. HERNANDEZ. Yes.

Senator DECONCINI. And so, based on that article, not on his testimony here, you conclude that his view, if confirmed on the Court, will be that the privilege and immunities clause is supreme and, therefore, the equal protection clause and these three tests would fall as it deals with aliens, that is your position?

Ms. HERNANDEZ. Exactly.

Senator DECONCINI. OK.

Let me ask any member here, I have struggled with this a great deal, as I struggled with Bork. I don't think anything is more important than what we do here, and we may make mistakes, as you all thought we did on Souter, but I struggled with that one and I struggled with Bork.

I gather, from looking at your testimony here, you compare Judge Thomas' judicial philosophy with that of Robert Bork, is that correct, or am I incorrect? Does anyone want to say that is not—do you consider him of the same philosophical bent, Mr. Rauh or Mr. Chambers?

Mr. RAUH. I will try to answer that. I don't think you can say that the thing is the same, except if you want to mean how far to the right have they gone, because they have gone in different ways.

I bet I am the only person in this room that has read Bork's book that came out afterwards. Have you read it, Senator?

Let me say what I think. He has very strong views, but he wouldn't necessarily be the same as Thomas. For example, in the book he takes the position that the only real self-restraint of a

judge is not the Frankfurter restraint that you hold the statute presumptively constitutional, he says that isn't his restraint. His great restraint is simply that a judge has got to say no in certain circumstances. In other words, I think if you try to compare—

Senator DECONCINI. It is not a matter of degree and area.

Mr. RAUH [continuing]. If you try to compare the two, don't do it on some specifics. I think if you want to go back over that book with me, you will find that in specifics it is different, but in general attitude I think you would find they are very similar, and I think—

Senator DECONCINI. Ms. Hernandez, you said in your statement that they reveal an ideological conservatism which differs little from that of Judge Bork.

Ms. HERNANDEZ. Yes, and what we meant in that is that a certain set mind and view of the world, notwithstanding his testimony, and if you look at the latter part of my testimony, we review his statements during the last 5 days, that he has very strong views on the world, on life and how he views the world, and I think it is unreasonable to expect or ask of a person, notwithstanding what happened here, that that person is going to change.

People that go into the courts do not change, you don't want them to change.

Senator DECONCINI. Thank you. I know that my time is up. Thank you. I just want to note that, you know, unlike Bork, Thomas stated that he recognizes the right of privacy as a constitutional right. Bork didn't recognize that. I find that a big distinction. Maybe you do not, but I find that a big distinction.

He comes up with the three-tier test in the equal protection clause of the 14th amendment. Bork had real problems with that, under careful scrutiny from a number of us. So, I see a great difference. I still respect your feelings that he should not be on the Supreme Court, but I see a great difference between these two.

My last comment, Mr. Chairman, I wonder, really, if the panel thinks that President Bush could appoint anybody that you would support. Based on President Bush's very strong conservative bent and philosophy, it appears to me that, you know, you have to take what you have, and we might do this for months and months, if we turn this one down, because I do not see any movement on the President or any indication that you are going to see somebody a whole lot different.

Mr. RAUH. Let me say in answer to that, may I please, Senator—

Senator DECONCINI. It is more gratuitous than anything else.

Mr. RAUH [continuing]. That there is a difference here. If this nominee were turned down, the threat often used on us is, well, you will get somebody worse. Well, there is precedent for beating the second person and getting somebody much better, and the precedent is Haynsworth, Carswell and Blackmun. We got a very excellent judge by the fact that the Senate, in its wisdom, turned two persons down.

I do not believe the President, as a matter of politics, is going to take it on a third time. I think if President Nixon had to appoint a Harvard *summa cum laude* with moderate views in Blackmun, I think President Bush would not want a third struggle. The ques-

tion is is this Senate ready to turn down a Thomas and someone of that ilk. I think the third time would be the charm, as it was in the Blackmun case.

Mr. BUCHANAN. Mr. Chairman, can I respond? You know, members of this committee have repeatedly expressed something of a redemption theory in terms of Clarence Thomas, notwithstanding his writings, because of his origins, because of what he said about a different attitude if he reached the Court, that he would be different.

And I want to express a redemption theory so far as the President is concerned. I think many of us who are concerned about such things believe that the Federal judiciary over the last 10 years has been filled with ideological conservatives to an extent that Franklin Delano Roosevelt never dreamed of, on the other side.

I think—I can't prove it sitting here, Mr. Chairman, but I think there is significant evidence that that process has taken place in the Court itself, and its sea change in 1989 would reflect that change.

The President is replacing the towering figure of Thurgood Marshall, truly an exclamation point. He appears to have done so with someone who is a long series of question marks. He could decide to attempt to replace a Thurgood Marshall with a towering figure. The Court already has a strong conservative leaning. But think of the strength he could give the Court, and think of what it would mean to the President in terms of statesmanship in terms of history if he were to decide, wait 1 minute. Maybe we have done enough of this. Maybe it is time to truly look through that large pool of, yes, black Americans who might be persons of more clearer stature, longer experience, clear track record, and decide to make an appointment that is truly statesmanlike.

Senator DeCONCINI. You have a lot more faith in President Bush than I do, Mr. Buchanan, I must say.

Mr. BUCHANAN. Well, it is the redemption theory, Senator.

Mr. CHAMBERS. May I briefly respond to that too? And first going to the question by Senator DeConcini about the similarities between Judge Thomas and Judge Bork.

I think, as Mr. Rauh mentioned, they may differ in some areas or in some degrees, but I think the adamancy and the position that they are advancing and the unwillingness to look at approaches that are necessary in order to provide some meaningful relief, as in the race area, they are pretty much together.

And I think it is pretty clear from Judge Thomas' writings, speeches and action that he would come out in a sitting with the Court that would be at odds with many of the precedents that the Court has adopted.

But finally in that connection, on the equal protection clause that you are talking about, one also has to remember that there are three tiers, and one of those tiers provide very limited relief. And, in the alien situation there is a real problem in terms of the kind of protection that is there.

And finally, I think when we look at a candidate like this we make a decision on the basis of the qualifications of the candidate. Regardless of what the President may do tomorrow, we are faced now with a candidate.