

Senator SIMON. Thank you, Mr. Chairman. First, I welcome the panel and I thank you for your testimony. Just a few comments and then a general question. If you were to list who were the giants in the field of civil rights and civil liberties in this century, Joe Rauh would be one of them, and when Joe Rauh tells that today—and I think you are saying that no matter what happens with this nominee—the keeper of the Bill of Rights is Congress, I think that is something we have to weigh very, very carefully, and I believe that to be the case.

In commenting on my colleague Senator DeConcini's comments that he can't imagine George Bush nominating someone with differing views, it is interesting that every Republican President, from Calvin Coolidge through Gerald Ford, has nominated a Supreme Court Justice with views more liberal than the President. And President Kennedy nominated Justice White, and Harry Truman, who certainly wasn't short on strong views, nominated a Republican Senator from Ohio, Justice Burton.

So this idea of balance on the Court and that the Court and the law should not be a pendulum swinging back and forth has some historic precedent.

Ms. Hernandez, I think the point that you make on privileges and immunities is important. The Constitution in a great many places makes distinctions between persons and citizens, and we have had court decisions that are not good court decisions because we have not recognized the rights specifically of people who are here legally. I think of the action taken when we were involved with Iran and the hostages were taken, where I think an unfortunate decision was made by the appellate court.

And then finally this is my question to all of you. I recognize that there is a difference between Judge Bork and Judge Thomas in terms of the basis for arriving at decisions, natural law being one, the area of privacy, for example, being another.

But my question to each of you would be this: Judge Bork, who was turned down 9-5 by this committee—can you think of any specific decision of the Court where Judge Thomas might have voted differently than a Judge Bork would have voted had either been in the Court?

Mr. RAUH. Well, there is a basic difference between their views on self-restraint. I didn't say it very well when I was talking about their differences before. Judge Thomas believes, he says, in self-restraint, but he doesn't believe in original intent. Judge Bork—and that is why I mentioned the book—says in the book the only restraint that matters is original intent, which is, I think, ridiculous, since the greatest exponent of self-restraint, Justice Frankfurter, was not a believer in original intent.

So they do have differences in their purposes and in their principles of constitutional interpretation. They may come out the same way, but they do have a substantial difference. One says self-restraint; the only thing that matters is original intent. The other says, no, it is a withholding of your views as against the views of the Congress. And so I would say there are differences, but as Mr. Chambers pointed out, they are small differences and they would most times come in the same place.