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-

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:]

1-1-82 1704

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.

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 reviewe 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 headquarters 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.]