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——