this specifically: Do you agree with his conclusion that all abortion is unconstitutional?

Judge THOMAS. And what I am trying to do, Senator, is to respond to your question and at the same time not offer a particular view on this difficult issue of abortion that would undermine my impartiality.

The point that I am making is that I have not, nor have I ever, endorsed this conclusion or supported this conclusion.

Senator LEAHY. Thank you, Mr. Chairman. My time is up. I do not want to intrude on anybody else's time. But I will hold my other questions for the next go-round.

Thank you, Judge. I appreciate it.

The CHAIRMAN. Thank you very much.

I apologize, Judge. It isn't that I am not interested in listening. I am trying to find out what time Senators have to catch planes so we can avoid the seniority route and let people have a chance to ask their questions, if we get that far.

Now I yield to my colleague from Pennsylvania, Senator Specter.

Senator SPECTER. Judge Thomas, one of the reasons that I was pleased to see your nomination was because of your background in civil rights work and employment opportunities. Equality of employment is so very important for the future of America.

I had asked you in the first round questions about affirmative action and about the cases and your positions. I know that early in your career, you took the position that flexible goals and timetables were desirable, and later you have shifted away from that. We all agree that quotas are bad, but you have said in your 1983 speeches that you thought flexible goals and timetables were good.

When you and I finished my first round on Wednesday, I had started to discuss the Supreme Court decision in the *Sheetmetal Workers* case and had not had time to really outline the facts. I had raised a question as to why you opposed the remedy in that case, because it was such an egregious, such a very bad case on discrimination.

Very briefly, the facts are these: In 1964, the New York State Commission found discrimination against blacks, and the New York trial court ordered changes. In 1971, Federal litigation was started to stop discrimination. In 1975, the Federal court found discrimination and bad faith, and it was upheld by the court of appeals. The court found that the union in the employment practices had consistently and egregiously violated the Civil Rights Act, and ordered a goal.

In 1982, there was a contempt citation, and in 1983 a second contempt citation. The discriminators were found guilty of contempt. In 1986, the U.S. Supreme Court upheld the contempt citation, noting a standard of persistent and egregious discrimination and found intentional discrimination. The EEOC took a position that there should be an award of relief only to the actual victims of unlawful discrimination.

Now, given the background of what had happened, it is clear that the future would have held more discrimination for the black workers there. In setting a goal, the Court was putting the employers on notice that they had to move toward hiring blacks. It was a flexible goal and the timetables had been extended.

So, given the history, it was pretty plain that in the future there would be discrimination against specific individuals, and when you dealt with a base of about 3 percent, it was plain that there had to be more blacks qualified. Whether you could get to a higher number or what number you could get to was uncertain. But wasn't that remedy reasonably calculated, in a remedial sense, to prevent discrimination against specific blacks in the context where it was obvious that would happen? Wasn't it in the context where there would be blacks at least equal to, if not superior to, some of the whites who would be competing for the same jobs?

Judge THOMAS. Senator, since you mentioned that in our last round and that you would come back to it, I tried to give that some thought on what the context of that case was. As you know, one among many of those cases involving this difficult area of relief to nonvictims of discrimination during the 1980's, and the Supreme Court was going back and forth, I believe that this case occurred after cases such as *Stotts,* in which the Supreme Court limited relief or indicated that relief should not go to nonvictims.

With that said and noted as I indicated in my prior testimony that this is an issue that reasonable people have disagreed on, I think that people who are well-intentioned all want to make sure that you do include individuals who have been excluded, but at the same time not violate the sense of fairness that is in the statute.

In this particular case—and this is more of an intramural concern of the EEOC and the way that the agency operated—at the lower court level, the general counsel, which is quasi-independent, and we respected that independence, had already been given the authority to litigate the case, so that when it was appealed to the Supreme Court, to my knowledge, there was no additional vote of the Commissioners needed. That decision was made between our general counsel, who has already been authorized to litigate the case, and the Solicitor General.

The argument, as I remember it, was consistent by the Solicitor with what you said, but I will add this point: Independent of our processes and as an individual in reflecting on this, I do recollect urging the Solicitor to argue for contempt proceedings in this case in the brief, and that there be sanctions brought against such an egregious violation of a court order.

That was consistent with the approach that I think I attempted to outline in some of not only my speeches, but in some of my other writings, that when there was a violation of the antidiscrimination laws or a court order that was in place to resolve it, that the appropriate response should not be the numerical approach but, rather, that the appropriate response should be for the court to use its powers, its inherent powers to force compliance.

Senator SPECTER. Judge Thomas, I quite agree with you that reasonable men can differ on these issues, and I think that is one of the good features about your participation in this field. You have been able to advocate positions, as a black American which had unique standing. When you were against affirmative action, that had special significance, because of your unique background.

You have affirmative action having been sanctioned on all sides by the National Association of Manufacturers and the liberals on one side and by the conservatives on the other. When you talk

about contempt citations, I agree with you. But it is very hard—and I have had experience in the law enforcement field—to deter people or to penalize them enough to really get the job done, to materially affect their future conduct. So, that brings us back to the remedy of establishing a flexible goal, which at one time you had agreed with.

Now, you have just repeated the position you have taken consistently, and that is that there should not be relief to nonvictims. My question to you goes to the likelihood of future victims. In a context where blacks have been egregiously discriminated against, it is clear that that is going to happen in the future under the same circumstances, and the way to prevent future victims is to set the goal. My question to you is, isn't that a reasonable course which the Federal court followed and the Supreme Court upheld, and, of course, which you disagreed with?

Judge THOMAS. It is certainly the course that the Supreme Court has upheld, and I disagree with that as certainly a policymaker. The point that I have made that underscored this—and it has to be kept in the context and I have argued for it, it seems as though only one side of the equation finds itself in the debate oftentimes.

I felt, as a policymaker, that the best way to enforce the law, to enforce antidiscrimination laws, is to increase the remedy, the direct remedy for discrimination. I think that my view would be, my view was that the first step should have been that the relief under title VII should have been much stronger.

Senator SPECTER. Well, when you say relief, you mean the sanction——

Judge THOMAS. Right.

Senator SPECTER [continuing]. The contempt citation, the fine or the penalty. But should that be the only relief? Where you have a remedy which is directed to secure the employment of blacks who may be predicted, with reasonable certainty, are going to be actual victims, why not? Why not protect their rights, where you have virtually certain grounds to conclude that they are going to be the next victims, and the remedy is directed to future victims?

Judge THOMAS. First of all, during my tenure at EEOC, Senator, regardless of what my own concerns were, we did approve and did use goals and timetables in instances in which we felt they were appropriate, and the general counsel had developed and the Commission adopted, I believe, if not used, a specific policy on goals and timetables, but there are other approaches.

One of the things that I thought was appropriate—and let's just talk about the case where you are saying making sure, we know these employers are not going to do what they should do. I felt very strongly that EEOC should have been and we did become more intrusive in their personnel matters; that is, that it is one thing to say, well, we are going to have goals and timetables and there is no monitoring, you don't make sure that they are doing specific things to achieve specific goals.

We made sure that there was specific conduct required, and EEOC monitored to determine whether or not that specific conduct was, in fact, taking place or being engaged in. I think that is an appropriate way. And we have talked earlier in these hearings about outreach and recruitment, et cetera, but I felt that we could

be much stronger with a combination of monitoring and a combination of specific activities. Again, I underscore that with saying we did use goals and timetables.

Senator SPECTER. Well, I understand the variety of other processes, but it just seemed to me, in the context of that New York case, where you knew that there would be future discrimination, the remedy was very carefully tailored and that that was an alternative which would be reasonable to use.

Let me move on to the question of—Mr. Chairman, you have asked about the vote on and my preference. Perhaps this is as good a time to break, since we must break and vote and return.

The CHAIRMAN. We have about 10 minutes to get over to the floor to vote, and the Senator has about roughly 15 minutes left in his questioning, so I think it may be appropriate to take a break now. You can decide whether you want to break after this as well. Why don't we recess for—it will probably take us 12 or 15 minutes to go over and back.

[Recess.]

The CHAIRMAN. The committee will come to order.

Judge we will resume now with the questions. I want to make sure my time is precise. I said about 15 minutes, I am told the Senator has about 20 minutes, is that right, to be exact—19 minutes, so I want to be sure we are clear on that. We will now yield back to the Senator from Pennsylvania, and then we are going to go to the Senator from Alabama, and then we will make a judgment whether that is the appropriate place to break for lunch or whether we go back to Senator Brown.

Senator Specter.

Senator SPECTER. Judge Thomas, before the break I had been discussing with you affirmative action, to gauge your own thinking as you have moved in favor of flexible standards and goals to bring against it, against the backdrop of deciding cases. I had asked you about the pros and cons on having a remedy for a category which I classified as affirmative action for future certain discrimination victims. I think this was the fact under the New York case.

Let me move now to another category—regrettably, there is not a great deal of time to cover a matter of this importance, where I think the American people really need to know what is going on. I think there is no better person to tell them than you, sir, with your background—to a category of what I would denominate as affirmative action for previous discrimination victims in another context, where that person has the potential or apparent potential for being as good as, if not better than the person displaced.

I want to come to the Yale Law School admission, and not to personalize it with you, but take Prof. Steven Carter, who is an African-American and a distinguished professor now at Yale. Yale is a very good law school. Professor Carter has just written a book, "Affirmative Action Baby," and he says flat out that he enjoyed the benefits of racial preference.

Let's assume, although it may not apply to Professor Carter, that somebody who comes to Yale, an African-American, a product of inferior elementary school, high school, and college, but has the potential. Why shouldn't Yale give a preference? You in your testimony, in response to my question, oppose a preference. But why

shouldn't the law school like Yale give a preference. Shouldn't a school give that person an opportunity to blossom fully, even though on the test scores at the moment that African-American doesn't measure up quite to the white person he has displaced?

Judge THOMAS. Senator, I guess the difference that we have there is perhaps semantics, but let me explain to you what I have supported and what we argued for when I was in school, and that was that schools like Yale or other schools across the country should look at how far a person has come as a part of the total person, that you can look at kids who had gone to elite schools or had the finest family background and professional parents, or you could take a kid from the inner city who did not have all those advantages, but had done very, very well, and assess whether, one, the fact that this kid has done so well against the odds, is that an indication of what kind of person this is or how good that kids can be, is that an indication of how much drive that person has, how much stick-to-itivity that person has.

I think that during that era, those of us who were then the beneficiaries of what were called preferential treatment programs—I think that was the exact terminology—that it was an effort to determine whether kids had been disadvantaged, had socioeconomic disadvantages, had done very, very well in other endeavors against those odds, and I think that the law schools, that the colleges involved attempted to determine are these kids, with all those disadvantages, qualified to compete with these kids who have had all the advantages.

That is a difficult, subjective determination, but I thought that it was one that was appropriately made. One of the aspects of that is that the kids could come from any background of disadvantage. The kid could be a white kid from Appalachia, could be a Cajun from Louisiana, or could be a black kid or Hispanic kid from the inner cities or from the barrios, but I defended that sort of a program then and I would defend it today.

Senator SPECTER. Judge Thomas, what you are just saying, though, is a preference implicit. If I understand you correctly, the fact that the kid, as you put him, has come a long way, does not at that precise moment, going into Yale, have as good a record as another person. Take an African-American who has come a long way, come from a disadvantaged circumstance, at the moment of critical judgment, that applicant, an African-American, does not have as good a record as a white student. Would you then give him the preference, do I understand you correctly?

Judge THOMAS. What I said is that kid, particularly with the socioeconomic background, I think the law school—we all make that determination, how much drive does this person have. You know, we hear in playing sports, sometimes you hear coaches talk about it's not the size of the dog, it's the size of the fight in the dog. I think that the point that I am attempting to make is that Yale or other schools try to make that subjective determination about the total person, and I thought that was appropriate. I think there are other individuals like myself, when we hire, we look for more than just the person who has had all the advantages. We look for people who have had some of the disadvantages and have overcome those odds. I think it is very important.

Senator SPECTER. Judge, I hear you very close to my position. But what I believe I am hearing is that you are in favor of affirmative action preference, at least in that context.

Judge THOMAS. I think I have said that.

Senator SPECTER. Well, I haven't understood it from all your writings.

The CHAIRMAN. Would the Senator yield for 30 seconds, because I am confused.

Senator SPECTER. You are going to destroy a 5-minute train, Mr. Chairman, but go ahead.

The CHAIRMAN. Is that constitutional?

Judge THOMAS. Senator, I have not looked at it in that context. I assume that it was good policy to help to include others, and I have not looked at it in that context, Senator.

Senator SPECTER. Mr. Chairman, it will only take me 4 minutes to get back on my train of thought. [Laughter.]

If a preference there, Judge Thomas, if a preference there for the disadvantaged kid, as you put it, has come a long way, but he can't quite measure up at that moment, why not a preference in employment?

Judge THOMAS. I think, again, Senator, I have looked at education as a chance to become prepared. I have in my thinking personally—and I am talking totally from a policy standpoint—that education was that chance to be prepared to go on in life. It was an opportunity to gain opportunities.

For example, when we have our programs, even the ones that I established at EEOC, the effort was to give training, to bring kids in, to bring individuals in and give them an opportunity to prepare themselves, not in a way that I thought was offensive or in a way that was strictly based on race but rather, based on a number of criteria, a number of factors, including how far that person had come. I think that is important, and I think that you can measure a person by how far that person has come and by what that person has overcome to get there.

Senator SPECTER. Judge Thomas, that is fine for those of us who have gone to Yale, but what about the African-American youngster who doesn't have an educational background and is fighting for a job. You have a case like *Crawson* v. *Richmond,* which upset a minority set-aside. After that happened, the Philadelphia plan was one of the first in the country to move ahead with affirmative action. You should see the figures taking an immediate nosedive in African-American young people.

So, that if you have a Judge Thomas or a Professor Carter, who comes to Yale Law in that context, that is fine for their next step ahead. But if you have someone who is a 10th grade dropout and is struggling to get a job in a trade union in Philadelphia or in New York in the case we talked about, why not give that person a preference, because of the discrimination which has affected that person in his schooling. Where that person has the potential to be ultimately as good as, if not better than the white applicant who he displaces?

Judge THOMAS. Senator, of course, you do have the question that I have indicated, and I don't think that the cases necessarily break down that way. They don't make the distinction subjectively that

way. I believe it just strictly says it doesn't say that this kid has to come from a disadvantaged background, it doesn't say that the kid has to have had problems in life. It is race-specific, and I think we all know that all disadvantaged people aren't black and all black people aren't disadvantaged.

The question is whether or not you are going to pinpoint your policy on people with disadvantages, or are you simply going to do it by race. That is a difficult question. I was the first to admit that. It is one that needed constructive debate and discussion. But I don't think there is a person in this country who cares more about what happens to kids who are left out. What I have tried to offer and what I have tried to say, from the first days I entered the executive branch, was that we need to look at all avenues of inclusion.

You talk about education. In this day and age of mandatory education up to the 12th grade, I think we should ask ourselves a rhetorical question: Why is it that a kid who completes 12 years of mandatory education can't function in our society. That is particularly detrimental to minorities. We know it, and we know that there is a tremendous correlation between education and the ability to live well in this society, as well as to be employed and to have a good life in this society.

Senator SPECTER. Judge Thomas, I accept and applaud your sincerity, and I agree that there are disadvantaged people who are not in minorities. But focusing on minorities for just as moment, because that is the central problem, when you talk about the lack of educational opportunity for African-Americans, it is true across this country. That is why it seems to me that the logic that you accept on a preference to get into Yale Law School ought to be applied as a preference to get a job in New York City, where the local discriminated, or Philadelphia where the Philadelphia plan had been put into operation, where there is good reason to conclude that that person has the potential to succeed.

Judge Thomas, have you seen this very recent report by the U.S. Department of Labor on the glass ceiling?

Judge THOMAS. I have heard of it. I haven't seen much beyond my backyard in the last 70 days.

Senator SPECTER. Well, it is a stark picture about minorities and women holding less than 5 percent of managerial positions, and one conclusion, to put it plainly, the glass ceiling existed at a much lower level than first thought.

I would turn to one critical line from Professor Carter's book, which I think really puts in a nutshell much of this affirmative action debate. He says, "The reason for the surge is to find the blacks among the best, not the best among the blacks," and that if you have the affirmative action, as you concur, on preference in law school, then the potential is developed through a Professor Carter or a Judge Thomas. I would submit to you that if you give the struggling disadvantaged high school dropout who is African-American a preference, because of the collateral past discrimination, and the high likelihood that he is going to be a victim of future discrimination, that it makes sense.

Judge THOMAS. Well, what I have said—and I don't know, you know, I think it is easy to point out conflicts and to draw very

sharp lines, but let me make a couple of points, Senator, if you don't mind.

I have been an aggressive advocate of giving minorities the opportunity and the occasion to develop potential. We have done that. I have done that as the head of an agency, as well as my own approaches in my personal life. I think it is critical, and I have heard the same arguments for most of my adult life, and we have, of course, many of the same problems.

With respect to the existence, the current existence of those problems, we attempted, when I first arrived at EEOC in 1983, to point that out in a project that we called Project 2000, what would the work environment look like, where would minorities be, where would women be, what would some of the problems be. I think some of what the Department of Labor did later on involved similar approaches. That was an expression of our concern about what was happening in the educational arena.

When I was at the Office for Civil Rights, I think it was clear to us then that there were going to be problems in the future, because of the minority participation in education, and I think we are beginning to see evidence of those problems. At every level, we could begin to attack these problems. I have been concerned about it from a policy standpoint, and I have spent my adult life being concerned about it on a personal level.

Senator SPECTER. You talk about your position in 1983. Judge Thomas, you were in favor then of flexible goals and timetables, and perhaps you will be again. The great advantage of a Judge Thomas or a Professor Carter is a role model, and I think that is one of the aspects which speaks very well for your current position and is a big boost for the Supreme Court of the United States.

There is a good bit of politics at all levels of this proceeding, but one level of the politics which you wrote about in a speech back on April 25, 1988, complaining that the liberals play with the ill-treatment of the blacks and give them give-away programs, and your point that blacks will move toward a conservative line.

You may well be a role model which will attract many, many blacks to the cause of conservatism and to the Republican Party, and that is something that you and I discussed back in 1984, after the reelection of President Reagan. You had made a speech that the Republican Party did not reach out for blacks, and I picked up the phone and you and I had lunch and had a program to bring blacks into the Republican Party. We didn't do very much and we began a year later, and we still haven't done very much, but we may do something now.

As stated in considering your nomination, I am undecided and want to hear all the witnesses, and I am not going to vote for you for helping bring blacks into the Republican Party. My support will be based solely on your qualifications, but I think a collateral consideration might well be the benefit of seeing an African-American with a different line of thought as a role model.

Let me move on to *Rust* v. *Sullivan*. Senator Leahy took it up, but I want to approach it from a little different angle. The question I have, Judge Thomas, turns on the change in the agency regulation and you approve that principle in a speech you gave earlier this year at Creighton University, on February 14. I have a concern

about shifts in regulations, where the Congress has let them stand very much in my first round as I expressed a very substantial concern about disregarding congressional intent and having later Supreme Court decisions like *Wards Cove* reverse cases like *Griggs*.

The background of the controversy arises from the Federal statute which says that no funds shall be used where abortion is a method of family planning, but a regulation was issued in 1971 which said there could be counseling. Then in 1988, 17 years later, the Secretary of Health changed that.

In your speech at Creighton University, you agree with Justice Scalia that agencies should be able to change their regulations. You make reference to political accountability in a somewhat different context, but I think the political accountability is important. And then the Supreme Court, in *Rust* v. *Sullivan*, says that the Secretary can change the position, when the new regulations are more in keeping with the statute's original intent, are justified by client experience under the prior policy, and accord with a shift in attitude against the elimination of unborn children by abortion.

Now, without respect to the abortion issue, I have a grave concern about a shift in regulation based on political considerations which you appear to sanction in your Creighton speech. And I have a very deep concern about the Supreme Court upholding a change in regulation, because they accord with a shift in attitude.

When Congress passes a law that no funds may be used for family planning, where abortion is involved, no procedure where abortion is used for family planning is acceptable, but that does not preclude counseling or the exercise of freedom of speech, and stands for 17 years, what is the justification for changing, when Congress has ordained congressional intent which has stood, because there is a shift in attitude or some political change of wind?

Judge THOMAS. With respect, Senator, to the change in regulations, I think that what I pointed to in the Creighton speech was the line of cases beginning I think with *Chevron*, which involved a change in regulations and whether or not the agency could make those changes. That is the controlling Supreme Court case with respect to the Court's deference to the agencies, when reviewing their regulations, and the point that I was making about accountability is that this body, in its relationship with those agencies, could change the rules for them, and I assume that is the kind of accountability that the Supreme Court was referring to. I don't know.

But if you note in that speech, also, I took issue with the sense that this deference to agency can continue to be expanded and be unlimited. That was a concern, because at some point you would defer so greatly to the agency, even when the Court thinks it is moving away from the intent of Congress, that there is no judicial review, so the question became what are the limits of that. But, of course, in deciding our cases, we would follow the lead case of *Chevron*, which, as I indicated, permits changes in regs.

My concern would be the similar concern that I expressed earlier here, and I think that when you engage in judicial review in administrative law, this would be the same concern and it would be actually the bottom line or the baseline of analysis in those cases, is the agency's interpretation a reasonable interpretation of congressional intent. That is the important line to draw, with the ref-

erence being, as it is in statutory analysis, what is the intent of Congress. if Congress changes that intent, then the agency, of course, can't go beyond that.

If Congress is explicit about that intent, then the agency has very, very little room within which to maneuver. If broad, of course, the agency may be able to engage in a significant range of reasonable conduct and choosing of options. That was the point that I was trying to make in the Creighton speech, but the bottom line for us, the baseline, the anchor in the administrative law cases is always what is the intent of Congress and is this a reasonable interpretation of that intent, whether we agree with the policy of the agency or not or the change in the agency's policy or not.

Senator SPECTER. My time is up. I will return to that in the next round. Thank you very much, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Before I yield to the Senator from Alabama, I would like to make a point of clarification. Did you say, Judge, that affirmative action preference programs are all right as long as they are not based on race?

Judge THOMAS. I said that from a policy standpoint I agreed with affirmative action policies that focused on disadvantaged minorities and disadvantaged individuals in our society.

The CHAIRMAN. For example——

Judge THOMAS. I am not commenting on the legality or the constitutionality. I have not visited it from that standpoint, Senator.

The CHAIRMAN. As we all know, I went to one of those State schools. My son went to one of those Ivy League schools. I didn't realize that in those Ivy League schools you all attended, there are preferences based on whether or not you are a—what is it called if your father went there? A legacy. If you are a legacy——

Judge THOMAS. Or if you are a football player.

The CHAIRMAN [continuing]. Or if you come from a certain part of the country. My son might not have been accepted by the school because his father didn't go there, even though his marks are higher than the kid who got in. That is how it works. As long as everybody knows that. If that is not preference, I don't know what is. But I will come back to that point because it seems to show that preference for whites is OK, but preference for blacks isn't.

Let me go to the Senator from Alabama.

Senator HEFLIN. Judge, just to follow up briefly, it is my information that as the Chairman of the EEOC you hired 49 individuals who reported directly to you in the headquarters office. Of these, 26 were women, 53 percent; 33 were members of minority groups, 67 percent; and that you hired 29 special and executive assistants, of whom 14 were women, 15 were black, 1 was Hispanic, and 2 were Asian.

Did you have a policy of preferences during the time you were hiring them?

Judge THOMAS. Senator, my policies were as I stated. I looked long and hard to make sure that any number of people, whether they were minorities, women, individuals with disabilities, were included in my search. I always, to the best of my abilities, hired the best qualified people.