

The CHAIRMAN. We sure did. We gave everyone else 15 minutes, and you 5. [Laughter.]

No, Senator, we are giving everyone 5 minutes.

Senator SIMPSON. Oh, it is because Howard is done, is that it?

The CHAIRMAN. That's it. [Laughter.]

Senator SIMPSON. Well, I will come back. Thank you, Mr. Chairman.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Thank you.

Welcome to the panel. I appreciate the effort that you put in in analyzing this Judge, I must say, you have spent more time studying his opinions than I have, although my staff has spent a great deal of time analyzing them.

I am really interested in the comparison, Ms. Hernandez, that you make regarding the privilege and immunities clause of the 14th amendment and the equal protection clause. I specifically went to Judge Thomas, when it was my turn, and asked him whether or not he accepted, understood and would follow the three tests used by the Court under the equal protection clause of the 14th amendment. We discussed the three and the heightened scrutiny test, and he said yes, he understood it, that it did apply to alienage, as well as gender, and yet that doesn't satisfy you, is that correct? And can you make the distinction why, if he accepts those three standards, that the question of undocumented aliens would not fall into that intermediate scrutiny, assuming that we can believe him that he does accept that, that is what he told us?

Ms. HERNANDEZ. Well, there are two points. One is that the Constitution does distinguish, even if you just take the equal protection clause of the 14th amendment, there are distinctions in coverage between a citizen, a legal resident, and very few benefits to an undocumented person.

What we are really talking about is the difference between citizens and legal resident aliens, and the Court has spoken on those issues. In granting certain rights to legal resident aliens, they did not give the strict scrutiny, they found an in-between.

Senator DECONCINI. Yes, they found the intermediate scrutiny, right?

Ms. HERNANDEZ. That is assuming that you accept the equal protection clause. The problem that we have is in reading Clarence Thomas' writings, he would hold the privilege or immunities clause supreme and paramount above the equal protection clause, and if his legal philosophy and constitutional philosophy is that and you carry it in a consistent manner, it is very clear what it says.

Senator DECONCINI. Yes, and that is partly from his article in the Harvard Journal of Law and Public Policy, is that right, the article that he wrote in 1988—

Ms. HERNANDEZ. Yes.

Senator DECONCINI [continuing]. Entitled "The Higher Law Background of the Privilege and Immunities Clause of the Fourteenth Amendment." Is that where that comes from?

Ms. HERNANDEZ. That is part of it.

Senator DECONCINI. I did not get into the distinction here that you make, and I appreciate it, but I did go to the 14th amendment equal protection clause, and I was satisfied, whether you agree

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

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

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

Senator DECONCINI. Yes.

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

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

Ms. HERNANDEZ. Yes.

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

Ms. HERNANDEZ. Exactly.

Senator DECONCINI. OK.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator DECONCINI. It is more gratuitous than anything else.

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

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