Senator GRASSLEY. Judge Thomas, again I want to welcome you, and particularly welcome you and your family, and I admired how patient they have been sitting through all of this. They are to be complimented, and particularly complimented for their support of you during this time of trial, although you tend to be handling the trial very well.

I do not know what your son's career is going to be, but I am sure it is not going to be in law, after he observes what you go through. [Laughter.]

Much of the discussion has focused on natural law, and while I have listened intently to this and have some questions in that area, I would like to pursue what I believe is a related subject, judicial restraint. An understanding of your view on the role of the courts in our democracy will, I really think, give us a better understanding of where natural law fits into your judicial philosophy.

The Founding Fathers, as Alexander Hamilton wrote in the Federalist Paper 78, intended the judiciary to be, in their words, the least dangerous branch of government. Now, in your writings and speeches, you have cited Hamilton's framework for Federal power, power based on the sword, the purse, and the power of reason. Hamilton said the President would hold the power of the sword, the Congress the power of the purse.

The judiciary, having neither power of the purse nor sword, would derive its power and influence from its ability to provide reasoned and persuasive decisions, establishing sound legitimate reasons for every dispute that it decided.

I understand this to mean that judges would have to be fair, unbiased, openminded, devoted to addressing the facts and the law before them, without freedom to apply their own values in reaching a decision. I would like to refer to what Judge Harlan Fiske Stone expressed well, when he wrote—and then this will bring me to a question for you—and this is Justice Stone, "While the unconstitutional exercise of power by the Executive and Legislative Branches of government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint."

Yesterday, you told Senator Hatch that there was no room to apply personal philosophies in one's effort to adjudicate cases. In my first question, I hope that you will reaffirm what you said along this line in your confirmation hearings for the Court of Appeals of the D.C. Circuit. You said, "The ultimate goal should always be to apply the will of Congress, the will of the legislature, I don't think it is ever appropriate for a judge to replace the intent of the legislature with his or her own intent." Is that something you can reaffirm today, after being on the circuit court of appeals?

Judge THOMAS. Senator, when I spoke those words in my confirmation hearing for the court of appeals, of course, I had not been a judge. But now I can reaffirm those words with the experience of having had to be a judge and having had to judge in some difficult cases.

I do not believe that there is room in opinions in our work of judging for the personal predilections, the personal opinions and views of judges. I think in statutory construction, the ultimate goal for us is to determine the will of the legislature, the intent of the

legislature, not what we would have replaced the legislative enactment with, if we were in the legislature, and we have no role in legislating.

Senator GRASSLEY. To continue along the same line, it seems to me your notion of the role of courts is very similar to that of Justice Anthony Kennedy. He cautioned that judges are not to make laws, they are to enforce the laws. He said the courts could not be "the aristocracy of the robe," that is to say black robes of a judge give the individual no special mandate to declare the law. How close would you be to the statement made by Judge Kennedy?

Judge THOMAS. I think, Senator, that we all who have been judges are pretty close to the same statement. We recognize that when we sit to judge cases, one, that we have to be open and we have to think and we recognize our fallibility, as I said yesterday, but we also have to recognize—and this is something that I do before I sit down in each case, and in each of the cases that I sat on on the court of appeals, I ask myself a very simple question, what is the role of a judge in this case. I think that is an important question. It is not so much to determine that we are going to in any way constrain the development of individual rights. Indeed, I am for the robust development of those rights. But, rather, it is a question to restrain judges and to restrain me, so that I have a confined and defined role.

Senator GRASSLEY. I like those responses, but let me now refer to a speech you gave that maybe on my reading of it bothers me, and maybe on your explanation of it, you can clear it up. But I would like to contrast what you said and also what you said in the earlier confirmation hearing for the D.C. Circuit Court of Appeals with a speech at Wake Forest University in 1988, and I do have a copy of the speech, if you want me to give it to you.

There you said, "Once a law passes, the action shifts to the problem of administration, it is up to the courts and the bureaucracy to fill in generalities and sometimes resolve the contradictions of the law."

Now, the reason this concerns me is because it is vaguely like something Justice Souter said in response to some of my questions last year, that the courts—and these are his words—"fill vacuums left by Congress." That statement, of course, troubled me a year ago. He later somewhat qualified it in responses to additional questions the following day.

I guess my question is very basic. How much filling in are you going to do, as a Supreme Court Justice? I hope you can clarify something here. Do you think there is a role for the courts to be activist this way in the terms of filling vacuums or, as you said, filling in the generalities and resolving contradictions of the law?

Maybe, you know, in a wider area, I would want you to explain when is judicial activism legitimate.

Judge THOMAS. I do not think that it is legitimate, Senator, and perhaps let me respond to your specific question.

Senator GRASSLEY. Surely.

Judge THOMAS. The point that I was making there, and it is one that was an important point, is that when an agency, an administrative agency receives a statute, it is called upon to implement that statute, to develop regulations, perhaps internal rulings or

procedures, but it is always called upon to do that consistent with the intent of this body. The statute on its face may be general, it may be ambiguous. The agency has to go through a process, however, of determining in a reasonable way what your intent was.

I think a court does the same thing, that when there is ambiguity in the statute, the court simply goes back to your legislative history and attempts to discern what was Congress' intent. To the extent that we are talking about filling in in that instance, I think it is simply a process of statutory interpretation and development of rulemaking within the agency or the administrative bodies in the executive branch.

Senator GRASSLEY. Judge Scalia testified here, and has practiced it as a Justice, that in looking at history, he is not going to look to the committee reports, he is not going to look to congressional debate, he is going to look at the statute and just determine congressional intent from the language of the statute. Is that where you are going to get congressional intent?

Judge THOMAS. Senator, I don't know how you can resolve ambiguities in statutes, and when we do have ambiguities in statutes, then we look to legislative history, we look to the debates on the floor, of course, we look to committee reports, conference reports, we look to indications, the best indications of what your intent was.

Of course, some legislative history is perhaps more accurate or better than others, but the point is our effort is always to look for your intent, to discern your intent. I don't know how one can go about that process, the process of interpreting ambiguous statutes, without looking to legislative history.

Senator GRASSLEY. Let me go to maybe, along the same line, but to some specific cases you have been involved in, because the docket of the court you now sit on is filled with regulatory cases, and in this position I think a judge could be tempted, with such a big caseload, to direct and manage bureaucracy and, of course, thereby substituting his or her own judgment for that of a more politically accountable administrative agency.

In fact, one of your colleague, Judge Mikva, has written that the court should be on the lookout for—and this is as he termed it—a sudden and profound change in agency policies, as such changes constitute, in his words, danger signals and give license for court intervention in agency action, in his view.

Considering this, I was struck by your opinion in *Citizens* v. *Busey*, and that is the Toledo Airport expansion case. Your opinion expresses some important elements of judicial restraint. You found that the FAA, in reviewing the expansion plans, carried out its lawful authority. The plaintiffs wanted more review of the environmental issues. What did you base your decision on—your opinion, I should say?

Judge THOMAS. First of all, let me say, Senator, that Chief Judge Mikva and I and our other colleagues worked together very well and have very vigorous debate internally on these important issues, and I enjoy sitting with him as a colleague.

In this case, the initial question was this: In determining whether or not or where Burlington-Northern was to place its hub, who makes that initial decision or who determines the objective or the goal of the project. And if the objective or the goal of the project is

determined in a broad way, that is, Burlington-Northern is entitled, the goal is a hub, then the alternative to be explored can be very significant, they can be countless, a hub where in the United States, or is a determination of the goal or objective to be made by the city of Toledo and Burlington, that is, Burlington wants a hub in Toledo, then the question becomes that the alternative is between that specific hub and no project at all.

What we, in essence, found was that the decision should have rested, the goal, the objective of the project rested with the individuals who were applying for the FAA permission to build the hub, rather than this broad expanse of possibilities.

Senator GRASSLEY. Let me quote briefly from that opinion of yours, and I guess not that you need to react, but I want to know if this is good basis for me to judge your opinion of judicial restraint:

Federal judges enforce the statute—

In this case, it was the National Environmental Policy Act—

by insuring that agencies comply with NEPA's procedures, and not by trying to coax agency decision-makers to reach certain results. We are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport. We are required, instead, only to confirm that the FAA has fulfilled its statutory obligation. Congress wanted the agencies, not the courts, to evaluate plans to reduce environmental damage, but the Federal courts are neither empowered nor competent to micro-manage strategies for saving the Nation's parklands.

That is you.

Judge THOMAS. I think that, Senator, was my view, my opinion as to what the intent of this body was, and my effort was to faithfully apply that in adjudicating in that particular case.

Senator GRASSLEY. There are a lot of other cases like that I would like to go over, but let me just do one more. It is your concurrence in the *Cross Sound Ferry* v. *Interstate Commerce Commission*. The case involved the issue of standing. You agreed with Judge Mikva's result, but just not the reasoning; is that correct?

Judge THOMAS. That is right. I concurred in the result in that case, Senator.

Senator GRASSLEY. I would like to have you elaborate on those differences of views between Judge Mikva on the one hand and your reasoning on the other.

Judge THOMAS. My concurrence, the purpose was really a simple question, one of the challenger. The case involved two ferry companies. One was an established ferry company, and there was a newcomer who wanted to travel back and forth across Long Island Sound. ICC determined that the newcomer was exempted from regulation. As we received the cases, one of the challenges was by the existing ferry company that the ICC should have required of the newcomer a filing or compliance with two environmental regulations, NEPA and the Coastal Zone Management Act.

The question was for me initially the question that I ask in all cases and in all areas: Do we have jurisdiction to consider this? And there is an argument sometimes that when the merits of the case are easy and the jurisdictional component of the case is hard, that it is easy enough to skip over determining jurisdiction and determine the easy-merits portion of the case.

My point in the concurrence was that it was inappropriate to skip over the jurisdiction determination to get to the merits, that

Federal judges had an obligation to determine at each turn whether or not we as judges had any role in that particular case. And my view was that there was no standing to raise the issue on the part of the existing ferry company.

Senator GRASSLEY. One sentence that you said in that decision, "Federal courts are courts of limited jurisdiction. When Federal jurisdiction does not exist, Federal judges have no authority to exercise it, even if everyone—judges, parties, members of the public—wants the dispute resolved." It seemed to me like you set a very narrow role for the courts. And my question then in regard to going to the Supreme Court, you assume that is going to be the same philosophy you start with, on standing and other things?

Judge THOMAS. Senator, I don't think that we as judges should be stingy or crabbed in our review of individuals' access to our judicial system. I think it is important, as I said yesterday, that the courts and our judicial system be available to all, that they have a place where their case can be adjudicated in a fair way.

My concern, however, is that we are judges who are required to determine what our jurisdiction is before we can decide a case, and I see that more as a restraint on us than it is on the individual having access to the court system, although the two, of course, could ultimately be the same thing in some cases. But the jurisdictional determination to me is an important determination.

Senator GRASSLEY. The doctrine of standing is a limitation on the exercise of judicial power. Your opinions to me are good examples of how a judge must restrain himself or herself in exercising power he or she possesses. Has that general approach—maybe you have had it throughout your lifetime as a lawyer, but has this been strengthened in the year or 2 years you have been on the circuit court?

Judge THOMAS. Senator, a couple of points. I think when one becomes a judge, as I have noted earlier, one begins to realize the difficulty of the cases that come before us. You don't have the comfort of your position as an advocate. You don't reinforce your own arguments. You have got to listen to all the arguments. And the arguments can be equally forceful on either side.

So I think that when we recognize our own fallibility and our own humility, we become concerned about what our role is in each of these cases, which is the second point. And we ask ourselves, Do we belong in this case? What is our role? Do we have the authority? And one learns a sense of humility.

So I would say that my view—and one also recognizes, Senator, I might add, that we are the least democratic branch of the Government, and we have to restrain ourselves as judges. And I think that is important. Indeed, I think it is critical so that we do not begin to see ourselves as superlegislators.

Senator GRASSLEY. Right there let me say that what you have just said it seemed to me like is what Judge Scalia described himself and his colleagues on the High Court as: The unelected and life-tenured judges who have been awarded extraordinary undemocratic characteristics. And that was from a concurrence that Scalia wrote in the *Webster* case. And that is your approach. Your approach would be similar to Scalia's, then? I mean, I think you have said the same thing.

Judge THOMAS. I think if his point is, Senator, that we are not elected to make policy, we are not in the position to make the kinds of difficult decisions that the elected, the political branches make, then I think he is right. We are judges, and I don't think that we should stray beyond our role in the undemocratic, the most undemocratic branch of the Government into the political, the authority and the role of the political branches.

Senator GRASSLEY. Well, the political branches, too, have great responsibility to protect our liberties, and since judges are not accountable to the body politic and should not have the responsibility of deciding sensitive and controversial issues of the day, and that is judicial activism, that is legislating, judges trying to do our job from the bench. I guess I need to have you tell Americans what you see as the dangers of judges substituting their ideas for those of the political branches of government.

Judge THOMAS. Senator, I think that, briefly, the danger is inherent in the fact that there are no checks and balances as you have in the political branches for judges. We don't stand for elections. If we do the wrong things, we are not challenged by an opponent, and we don't lose our incumbencies as an elected official. We don't have to go back to our districts and be told that we have done the wrong thing. We are lifetime appointments. And I think that there is a danger with the lack of that check, the lack of that exposure to elections, and the lack of the tensions between the political branches that we could do things as judges that we think are nothing more than a matter of our personal opinions. And I think it would be inappropriate. I think it is a very significant danger.

Senator GRASSLEY. I would ask if you, in just what you have said, if you would be standing behind a 1987 speech that you gave before the Cato Institute. The quote: "When political decisions have been made by judges, they have lacked the moral authority of the majority. When courts have made important political and social decisions in the absence of majority support, they have only exacerbated the controversies." My question, in a sense, is then you are saying leaving the difficult, sometimes contentious decisions to the elected representatives, then there should be no concern or fear among the American people.

Judge THOMAS. I think that, of course, Senator, we always have concerns and fears and different points of views, and there is always debate and give and take. But I think that those political decisions, those policies should be developed and debated and established in and by the legislature; that the judge's role is not to legislate and it is not to set policy, and it is certainly not to engage in political decisionmaking.

Senator GRASSLEY. There may be a trend away from judicial activism, but I don't think we have seen the last of it. I would like to draw your attention to some recent cases in which district judges engaged in judicial activism. The first is a case that arose in a New Jersey Federal court. It was in Morristown. The public library board of trustees issued regulations designed to ensure that the library did not become home to vagrants. The regulations required that patrons use the library as it was intended to be used; that is, "for reading, studying, or using library material." So the court

struck down the library's regulation saying that everyone has a right to receive ideas, and the library cannot restrict access.

There was a New York Federal judge who just this past June found that panhandling might be protected speech under the first amendment, and this was despite the fact of a second circuit ruling to the contrary from last year.

Now, I realize that you are going to be reluctant to comment on the merits of these cases since such issues could come before the Supreme Court. But I hope—and I suppose this is more of a statement than a question—no, I guess I would really want it to be a question. Can you see these as examples of a court's usurping the function of legislative bodies and making rather than applying or interpreting the law?

Judge THOMAS. Senator, unfortunately, I don't know the full facts in those cases, and I think it would be inappropriate for me to try to comment on those particular cases. But let me just simply say this: That I think that we all as judges should be concerned and should be aware, or at least be cautious not to move into areas that are best left to, as I said, the political branches and to the legislature. But those specific cases, I simply don't know the details of them, and I think even if I did, it would be inappropriate to comment on them.

Senator GRASSLEY. OK. Maybe it is, but let me make this point to you to think about, and whether or not those cases might not be inconsistent with the point you made in that 1987 Cato Institute talk, where you stated, "Maximization of rights is perfectly compatible with total government regulation. Unbound by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state. The rhetoric of freedom [license, really] encourages the expansion of bureaucratic government."

My time is up. I just want to leave the subject with a quote from Felix Frankfurter on the role of judges. He found the duty not to enlarge his authority to be one of the greatest challenges of being a judge. He continued, and let me quote probably about 40 words—

> That the court is not the maker of policy but is concerned solely with the question of ultimate power, is a tenet by which all justices have subscribed. But the extent to which they have translated faith into works probably marks the deepest cleavage among the men who have sat on the Supreme Court. The conception of significant achievement on the Supreme Court has been too much identified with largeness of utterness and too little governed by inquiry into the extent to which the judges have fulfilled their professed role in the American constitutional system.

I hope I see your confirmation bringing to the Supreme Court one more person like Felix Frankfurter, who is going to be looking at and inquiring into the extent to which judges have fulfilled their role in the American constitutional system.

Thank you, Mr. Chairman.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you, Senator, and thank you, Judge. We will recess until 2 p.m.

[Whereupon, at 12:40 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Leahy.