Senator SPECTER. Thank you, Mr. Chairman.

Judge Thomas, incidentally, last July on a monthly call-in show, there was a lot of interest by people in my State, and some people didn't really understand the process as to what we were doing. And it might be well just to say that when questions are asked, that does not suggest in any way a disagreement with your position, but an effort to draw out how you would function if confirmed as a Supreme Court Justice. In moving beyond your legal qualifications, we are following a practice of going into constitutional law very much as I had said in my opening when Chief Justice Rehnquist, as a lawyer back in 1958, stated the importance of having the Judiciary Committee get into questions of equal protection of the law and due process of law; and that in the thoroughness of our efforts to find out how you would function as a Supreme Court Justice, we do so because of the tremendous importance of the role of a Justice, illustrated by 18 decisions last year by a 5–4 vote. And if you serve as long or to an age of Justice Thurgood Marshall, who is 83, it would put you on the Court for 40 years, or until the year 2031.

So I make those introductory comments, repetitious to some extent of what I said in my opening, to give some parameter as to how I see the confirmation hearings, and the importance of the separation of powers, and the Senate's role in advice and consent. Because under our system of government, the President nominates, the Senate consents or not, and then the Justices on the Supreme Court have the final word in so many issues of such tremendous importance.

Judge Thomas, in my opening yesterday, I outlined the key focus on my concern, and that is on the very fundamental issue as to the Supreme Court's interpreting law and not making law. And there has already been considerable discussion about that subject, and you have articulated your view that the Court should defer to constitutional intent and should interpret law and not make law.

You have dealt, as Chairman of EEOC, with many very important Supreme Court decisions, and there are quite a number that I would like to discuss with you. But I want to start with one for illustrative purposes—and I could pick many—and that involves the case decided by the Supreme Court back in 1987 where a woman had applied for a job as a road dispatcher. There were 238 positions, all held by men. She was competing with a man named Paul Johnson in the transportation system of Santa Clara County, which is the name of the case. Mr. Johnson had a better test score, but as part of an affirmative action program, no quotas but affirmative action, the employer gave the job to the woman.

You had commented about this case in a speech which you made in 1987, and I would like to make available to you two speeches and one article so that you can have them available during the course of my questioning. I agree with Senator Simpson; they all ought to be a part of the record, and I would ask unanimous consent, Mr. Chairman, that they be placed in the record so that the totality of what Judge Thomas had to say in those speeches is apparent.

In the course of the speech in 1987, you said this: "Let me commend to you Justice Scalia's dissent, which I hope will provide guidance for lower courts and a possible majority in future deci-

sions." The comment about guidance for lower courts we will come back to. Perhaps it will be for Senator Simon. He raised that preliminarily yesterday. But the point that I will focus on at the moment is Justice Scalia's dissent as possible guidance for future decisions.

You then said—in the article on "Assessing the Reagan Years" in the compilation by Mr. Boaz, while you did not say that they were enough, you refer to "quick-fix solutions such as the appointment of another Justice with the right views."

You further note in the Boaz article that, "In each case"—and now you refer to a series of them, including the *Johnson* decision—"In each case, Congress could have reinterpreted its legislative intent to rebut the interpretation of Justice Brennan in *Weber*, but, of course, it"—referring to Congress—"demurred."

You have commented very extensively about your view of the Congress. I don't quarrel with your view of the Congress except as it relates—and I don't even quarrel with it then. I just want to find out your views concerning the Supreme Court as to carrying out constitutional intent. And in a speech on April 8, 1988, a copy provided to you, you said, "Congress is no longer primarily a deliberative or even a lawmaking body. There is little deliberation and even less wisdom in the manner in which the legislative branch conducts business." Members act for "their own interests." "Interests of few take precedence over interests of the many."

Now, my question to you is: In a context where you think the *Johnson* case should be overruled, and in the context where you have articulated your regard, such as it is, for Congress, and you have—I really don't quarrel with your view of the Congress. A lot of people have that view of the Congress. I really don't. And I think it is important to back up for just a minute on some fundamentals for a lot of people who were listening, and that is that Congress makes the law, we make public policy, and the Court is supposed to interpret the law. And we all agree on those rules. And there are a lot of illustrations where Congress has overruled what the Supreme Court has done on legislative intent where Congress doesn't like what the Court has done.

And I would ask unanimous consent at this point, Mr. Chairman, that a list of some 23 decisions which Congress overruled between 1982 and 1986 be inserted in the record. And we could talk about those at great length, but the point is that Congress does know how to overrule the Court on matters of constitutional intent.

The CHAIRMAN. They will be included in the record.

[The information follows:]

disrespectful, to treat it as not having yet quite established a settled doctrine for the country."[102]

There is already some evidence that Congress has been less restrained in overruling the pronouncements of the Court. Between 1982 and 1986, Congress overruled at least twenty-three Supreme Court decisions—half within two years of the date of the decision.[103] These enactments cover a wide range of decisions. For example, in three separate instances, Congress directly overruled Court decisions concerning state and local liability under federal acts.[104] In addition, Congress has either passed or is presently considering five bills overruling Court decisions that ease limitations on prosecutions and sentencing.[105] In all, Congress

102. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848-1858, at 401 (R. Basler ed. 1953).

103. INS v. Phinpathya, 464 U.S. 183 (1984), *overruled by* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3439-40; Block v. North Dakota, 461 U.S. 273 (1983), *overruled by* Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351; United States v. New York Tel. Co., 434 U.S. 159, 166-68 (1977), *overruled by* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301, 100 Stat. 1848, 1868-72; Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *overruled by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845; Smith v. Robinson, 468 U.S. 992 (1984), *overruled by* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377 (1922), *overruled by* Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986); California v. Nevada, 447 U.S. 125 (1980), *overruled by* Act of Dec. 23, 1985, Pub. L. No. 99-200, 99 Stat. 1663; Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972), *overruled by* Patent Law Amendments Act of 1984, Pub. L. No. 98-622, 98 Stat. 3383; Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), *overruled by* Act of Oct. 24, 1984, Pub. L. No. 98-544, 98 Stat. 2750; Busic v. United States, 446 U.S. 398 (1980), and Simpson v. United States, 435 U.S. 6 (1978), *overruled by* Department of Interior and Related Agencies Appropriations Act, Pub. L. No. 98-473, § 1004, 98 Stat. 1837, 2138-39 (1984); Washington Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984), *overruled by* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 4, 98 Stat. 1639, 1641; Diedrich v. Commissioner, 457 U.S. 191 (1982), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1026, 98 Stat. 494, 1031; United States v. Davis, 370 U.S. 65 (1962), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421, 98 Stat. 494, 793-95; Commissioner v. Standard Life & Accident Ins. Co., 433 U.S. 148 (1977), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 211(a), 98 Stat. 494, 740-41; NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), *overruled by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390-91; Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968), *overruled by* Shipping Act of 1984, Pub. L. No. 98-237, § 7, 98 Stat. 67, 73-74; Rowan Cos. v. United States, 452 U.S. 247 (1981), *overruled by* Social Security Amendments of 1983, Pub. L. No. 98-21, § 327, 97 Stat. 65, 126-27; Standard Oil Co. of Cal. v. Agsalud, 454 U.S. 801 (1981), *overruled by* Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611-12; Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), *overruled by* Act of Dec. 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964; McCarty v. McCarty, 453 U.S. 210 (1981), *overruled by* Department of Defense Authorization Act, Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980), *overruled by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

104. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

105. *See* H.R. 5269, 101st Cong., 2d Sess. (1990) (Racial Justice Act); 136 CONG. REC. H9001,

overruled more than twice as many decisions in the first four years after President Reagan's first appointment to the Supreme Court than in the entire decade preceding his election.[106] Although there has been no suggestion that the Court's rulings in all these cases were politically motivated, the accelerated pace of overrulings may reflect a dangerous view on the part of Congress that even proper pronouncements of the Court are entitled to less respect.

CONCLUSION

The risks of constitutional quibbling have been recognized for more than a century. In 1883, Justice Harlan complained about the Supreme Court proceeding "upon grounds entirely too narrow and artificial [, sacrificing] the substance and spirit of the . . . amendments of the Constitution . . . by a subtle and ingenious verbal criticism."[107] Around the turn of the century, Dean Roscoe Pound asserted that the laissez-faire judiciary was at grave risk of being cut off from the populace. He stated that the Court, which once stood as a protection to the individual from the Crown and the State, now "really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it."[108] Today, many of these same objections are being directed at the Court: critics complain that the Court's decisions are "needlessly cramped" in order to accomplish other

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H9008 (daily ed. Oct. 5, 1990) (statement of Rep. Harris) (proposing Racial Justice Act to overrule McClesky v. Kemp, 481 U.S. 279 (1987)); S. 1970, 101st Cong., 2d Sess. (1990) (Biden Bill), 136 CONG. REC. S6873, S6875 (daily ed. May 24, 1990) (statement of Sen. Biden) (bill proposed to overrule Stanford v. Kentucky, 492 U.S. 361 (1989), and Penry v. Lynaugh, 492 U.S. 302 (1989), cases permitting the imposition of the death penalty on persons under age 16 or suffering from mental retardation); S. 148, 102d Cong., 1st Sess. (1991), 137 CONG. REC. S579-01 (1991) (Derrick-Hughes amendments to the Omnibus Crime Control Act of 1990) (proposed to overrule McKellar v. Butler, 110 S. Ct. 1212 (1990), and Sawyer v. Smith, 110 S. Ct. 2822 (1990), cases barring courts from applying newly articulated legal principles retroactively to reverse death sentences that became final prior to the ruling).

106. *Compare* note 79 *supra with* 11 cases overruled or modified by Congress between 1970 and 1980: Citizen Publishing Co. v. United States, 394 U.S. 131 (1969), *overruled by* Pub. L. No. 91-353, § 5, 84 Stat. 467 (1970); Alderman v. United States, 394 U.S. 165 (1969), *modified by* Pub. L. No. 91-452, § 702, 84 Stat. 935 (1970); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), *overruled by* Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (1972); Bunte Bros. v. FTC, 312 U.S. 349 (1941), *overruled by* Pub. L. No. 93-637, § 201(a), 88 Stat. 2193 (1975); Administrator, FAA v. Robertson, 422 U.S. 255 (1975), *overruled by* Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), *modified in part by* Pub. L. No. 94-559 § 2, 90 Stat. 2641 (1976); Wingo v. Wedding, 418 U.S. 461 (1974), *overruled by* Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976); *Ex parte* Peru, 318 U.S. 578 (1943), *overruled by* Pub. L. No. 94-583, § 4(a), 90 Stat. 2892 (1976); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *overruled by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978); District of Columbia v. Carter, 409 U.S. 418 (1973) *overruled by* Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1980); Zurcher v. Stanford Daily, 436 U.S. 547 (1978), *modified by* Pub. L. No. 96-440, § 101, 94 Stat. 1879 (1980).

107. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

108. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

Senator SPECTER. But here you have been explicit in the quick fix of judges who have the right view. You have identified the *Johnson* case as one where you hope that the dissent will provide the basis for a majority when judges are added. You have stated what you think of the Congress. And the question is: What assurances can you give to the Senate that you will follow constitutional intent as opposed to your own public policy views on those cases?

Judge THOMAS. Senator, when one is involved in the midst of a debate in the executive branch and advocating a point of view, as I alluded to earlier, one continues to advocate that point of view as an executive.

When I moved to the judiciary, as I noted earlier, I ceased advocating those points of views. I think that you can have the comfort of your position, and I felt that in those cases that the constitutional intent was one of nondiscrimination that was explicit in the language of the statute and clear in the language of the legislative history. That was my reading of constitutional intent.

Of course, the Court took a different point of view, and those of us who may not have agreed with that point of view simply had to swallow hard and go along.

I might add here that I think—and I feel very strongly—that this matter of disagreeing over what the appropriate remedies are—and this, just parenthetically, does not in any way indicate the depth of my commitment to fighting discrimination. I think it was an important disagreement as to how far you can go with your efforts to move people into the work force that you believe should be in the work force who had been left out, and the effort of trying to also preserve that notion of fairness and nondiscrimination that I thought was central in the statute.

With respect to my disagreements with Congress, I think that those of us who were in the executive branch—and I am certain that those who are in Congress have their disagreements with the members of the executive branch, that there is tension between the two political branches. And certainly I have had a sufficient number of oversight hearings and a sufficient number of battles to know that that tension was alive and well. But when one goes to the judiciary, I think it is important to remain neutral in those policy battles, and that is something that I have certainly attempted to do.

With respect to whether or not a policy point of view or a view that I advocated as a member of the executive branch will undermine my ability to rule on cases as a judge, my answer to you, Senator, is that it will not. I advocated as an advocate, and now I rule as a judge. And I think that that is important. I think it is an important distinction. I think it is a requirement that I be impartial, and I have attempted to do that.

Senator SPECTER. Well, Judge Thomas, I am going to come to the issue of remedies, and I can understand your disagreement on oversight. Both of those are different issues. And I understand your assertion of impartiality, and I do not question it. But where you have repeatedly over such a long period of time expressed a very strong view as to congressional ineptitude—and you did that in the *Fullilove* case: "What can one expect of a Congress that would pass the ethnic set-aside law?" And you have, again in the speech on

April 8, 1988, referred to the extensive policymaking role of the Court: "When they have made important"—referring to the courts—"made important political and social decisions in the absence of majority support, they have only exacerbated the controversies they have pronounced."

If the Court rules in the presence of majority support, does that give the Court any license to act? It suggests that it does.

The problem I have, Judge Thomas, is that if you take a large body of your writings, where you disagree with these cases and you disagree to the core with the congressional function, what assurances will we have that you will respect congressional intent?

Judge THOMAS. Senator, I throughout my writings—and I can't find all the quotes now—made it clear that those difficult policy decisions debating the large issues are precisely the role of Congress. There may be disagreements when one is in the executive branch, but those disagreements cease and policymaking debates cease when one goes to the judiciary.

The difficulties that I have expressed differences, particularly as one who has been involved in the oversight process, but I think I have made it clear that the legislative function of Congress, that the oversight function of Congress are very appropriate. And, again, I can't go back through all the speeches, but my view would be that the Court—it is the Court that cannot legislate, not Congress, and that the Court would be misplaced in attempting to establish policy, not Congress.

Senator SPECTER. Judge Thomas, I am not talking to you about oversight now. That is the second time in response to a question about carrying out congressional intent you have referred to the congressional oversight function. I know you had very severe disagreements, and I hope to have a chance to ask you about that later. But congressional oversight is very different from a clear-cut expression of congressional intent.

We had Justice Scalia before us, and it has already been referred to, the difference and what happens on the bench as opposed to in the nomination process, and that is understandable. Justice Scalia doubts that there is any such thing as congressional intent. And when he writes about the absence of congressional response—and this is enormously important because we have the 1964 Civil Rights Act. And it was interpreted in 1971 by a unanimous Supreme Court in an opinion written by Chief Justice Burger. And Congress was satisfied with that interpretation, left it alone. Then 18 years later, the Supreme Court comes up 5-4 and changes that law and does so with four Supreme Court Justices who put their hands on the Bible in this room, or similar rooms, swore to interpret the law and not to make new law.

Justice Scalia writes in his dissent in the *Johnson* case that when Congress doesn't act, it could be a result of many things, including political cowardice. I think Justice Scalia might have a point, but the major area of congressional or Senate political cowardice perhaps came when we didn't ask him very many questions in his confirmation hearing.

I would be interested in your observation. I won't ask you what you think of Justice Scalia's comment, but I will re-ask the question that Senator Grassley put to you. When Congress doesn't act,

would you agree that that is a sign that Congress doesn't think anything should be done?

Judge THOMAS. Senator, I think that if there is a long-standing interpretation of a congressional legislation——

Senator SPECTER. Is 18 years long enough, like in *Ward's Cove* and *Griggs*?

Judge THOMAS. If there is a longstanding interpretation and Congress does not act, that certainly would seem to be considerable evidence of Congress' intent. And it certainly would be, at least from my way of looking at a statute, evidence that cannot be ignored in revisiting that particular statute.

Senator SPECTER. Two subquestions. No. 1, is 18 years long enough?

Judge THOMAS. Eighteen years is quite a long time. I don't know whether we could put a mathematical or a numerical standard on that, to have that kind of quantification as to whether or not that would be enough not to revisit a statute. But I think that when you have a statute that has been interpreted for that long a period, that is so well known, that Congress is very aware of, that it would be an important consideration in finding that to be the appropriate interpretation, the fact that Congress didn't act for such a long time.

Senator SPECTER. Well, Judge Thomas, I have a problem, and I am not saying any of this is determinative. We are just talking about your approach as a prospective Justice if confirmed. But I have a problem with long enough not being enough in the context of *Griggs* and *Ward's Cove*, and I have a problem with "cannot be ignored," which are your words, as opposed to being determinative. It seems to me, that when a unanimous Supreme Court decision stands for 18 years, that is long enough. Or if it is not, I would like to know what is long enough. And when you talk about "cannot be ignored," I would look for something more there as to a sign of what does establish what the Congress expects the Court to do.

Judge THOMAS. The point I was attempting to make, Senator, was this: That when Congress doesn't act, I think it is more difficult to determine precisely why Congress doesn't act. For example, if Congress takes an explicit action and fails to change a particular statute, then that might be more evidence than simply not doing anything.

But the additional point that I was attempting to make was this, that the fact that Congress did not act for 18 years is an important consideration in determining whether or not the prior ruling or the prior interpretation was the correct interpretation. It would be a part of the calculus of legislative history.

I think it would be going too far to say definitively that definitely 18 years or 15 years or 10 years is the cutoff period, but I understand the point that you are making and I do not think that a judge or a court can simply ignore the fact that Congress has not acted in an important area.

Senator SPECTER. Judge Thomas, in my questioning you on how you handle the cases of *Johnson* and also the predecessors of *Weber* and *Fullilove*, we do not have time to go into all the facts now, I do so for a number of reasons. One is the one we have already examined, and the other is that you had shifted a position on it, that in

1983 you appeared to be in agreement with *Fullilove* and with *Weber*, and then your reconfirmation hearings came and you agreed to abide by them, and they relate to your approach to affirmative action and to your development of your legal thinking as you have taken the problem of discrimination and racism and how you have analyzed affirmative action, and in your career in the early 1980's stated that you favored it, and then appeared to accept the Supreme Court decisions, and then later disagreed with those decisions, although you agreed to abide by them, and still later just absolutely plundered those decisions with the very strong hostile comments about Congress.

In your writing, Judge Thomas, you have made a very strong comment that I agree with. You said that the *Dred Scott* decision upholding slavery and Chief Justice Taney's opinion in that decision provide a basis for the way we think today. You wrote that in 1987, "Racism and discrimination are deeply rooted in the history of the United States." I agree with you about 1987 and 1991.

And then there was the article by Mr. Juan Williams in Atlantic Monthly, which sought to provide an understanding of your philosophy and your approach to programs against discrimination, and quoted you as saying this, and these are the words which he says are yours, "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do, you'll never know the same contacts or opportunities, you will never be seen as being equal to the whites."

Now, given that very strong statement, black skin, given your very strong statement about things being in 1987 like they were in the 1950's in *Dred Scott*, and given the fact that it is just not possible for the Equal Employment Opportunities Commission to take care of all the cases, one by one, why is it that you come down so strongly against any group action to try to put minorities or African-Americans in the position that they would have been as a group, but for the discrimination?

This is a broad subject, but let's get it started with just a few minutes to go of my time.

Judge THOMAS. Senator, I think that over my years in public life, as well as my adult life, I have made it clear what I think of racism and discrimination. I made it clear during my tenure as the Chairman of EEOC that it had to be eliminated, and I did everything within my power.

I have also, even in the heat of debate, attempted to talk reason, even though I, like perhaps everyone else, was susceptible to the rhetoric in that debate. I think that we all have to do as much as possible to include members of my race, minorities, women, anyone who is excluded into our society. I believe that. I have always believed that, and I have worked to achieve that.

Senator SPECTER. What is the best way to do it?

Judge THOMAS. And that is the question, how best to do it. I think that you have a tension, you want to do that and, at the same time, you don't want to discriminate against others. You want to be fair, at the same time you want to affirmatively include, and there is a real tension there.

I wrestled with that tension and I think others wrestled with that tension. The line that I drew was a line that said that we

shouldn't have preferences or goals or timetables or quotas. I drew that line personally, as a policy matter, argued that, advocated that for reasons that I thought were important.

One, I thought it was true to the underlying value in the statute that would be fair to everyone, and I also drew it because I felt and I have argued over the past 20 years and I felt it important that, whatever we do, we do not undermine the dignity, self-esteem, and self-respect of anybody or any group that we are helping. That has been important to me and it has been central to me.

I think that all of us who are well-intentioned, on either side of the debate, at any given time, wanted to achieve the exact same goal. I would have hoped, if I could revisit the 1980's, that we could have sat down and constructively tried to hammer out a consensus way to solve what I consider a horrible problem.

Senator SPECTER. But the problem I have with that response, if you take a case like Local 28 of the Sheetmetal Workers, where the New York City Human Relations Commission cited them for discriminatory practices in 1964, and EEOC finally brought a lawsuit in 1971, and there was a finding of discrimination in 1975, and there was a court order to correct that discrimination, which there was contempt in 1977 and again in 1982 and contempt again in 1983, and you have written that you are astounded that there is more of a penalty for breaking into a mailbox than for discriminating against a minority or African-Americans, and you have advocated jail sentences and heavy fines for those who are in contempt of court, and you have this kind of outrageous conduct that spans a 20-year period, and then EEOC comes in at the latter stages of this litigation in the 1980's and takes a different position and argues against the court orders to stop the flagrant discriminatory practices and the practices which have been labeled by the courts repeatedly in violation, contempt of court, and you criticize the Supreme Court's decision in trying to do something to deal with proved discrimination, not taking a class which wasn't discriminated against and giving them a boost forward, but in dealing with laborers who were discriminated against, judicial determinations, contempt citations, ignoring by the people who were the discriminators, and you, as Chairman of EEOC come in and oppose it, and then you sharply criticize the decision of the Supreme Court of the United States in upholding that kind of a remedy.

That seems to me to come right within the purview of what you say ought to be done to remedy active discrimination, and yet you take the other side.

Judge THOMAS. With respect to the weight of that case proceeded through the court, Senator, the Commission itself, to my knowledge, did not approve and it was not required to approve that litigation, because the general counsel had already been authorized at the lower courts to pursue that, but the point is well taken.

My view with respect to cases like that has been that, as a policy matter and one that I have stated clearly on the record, is this: I think that, rather than a court attempting to punish these individuals with a quota or preferential treatment, I thought that in this case and in the egregious cases there could be criminal contempt citations, I felt that there should be appropriate roles for heavy fines, I think or I felt that individuals who discriminated against

other individuals should be subject to the same kinds of fines and penalties that are available in some of the antitrust litigation.

I felt that there was an undervaluation of the effects and the damage done by discrimination, and I felt that this kind of a case was very susceptible and appropriately susceptible to criminal contempt citations.

Senator SPECTER. I have been handed a note that my time is up, and we will return to it with my first question being why did EEOC, in your tenure, join with petitioners in trying to upset the contempt citation and taking the position that the discriminators ought not to be held for contempt and ought not to be punished.

Thank you, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge Heflin. Senator Heflin. Just so everybody does not think it was a slip, you were a judge. Senator Heflin.

Senator HEFLIN. Judge Thomas, I try to approach these hearings on the basis of fairness, fairness to you, fairness to the President, fairness to your opponents, and try to consider all of the evidence before I make up my mind. I tried to follow that procedure in the other confirmation processes, not only of the Supreme Court Justices, but of all appointments to the judiciary.

So, I do not at this time have any firm opinion one way or the other. I have done a good deal of reading and tried to listen to testimony. Of course, it has entered into my mind from your testimony, as opposed to some of the spoken and written words that you have given in the past, an appearance of confirmation conversion.

Now, this term is a term that came from the mouth of my colleague Senator Leahy here in the Bork hearings, which would indicate that the confirmation processes cause one to change his mind or to give answers that will hurt him in regards to seeking the confirmation. But it also can raise issues that can affect the evaluation that members of the committee may give as to integrity and temperament.

Now, in reading some of the articles and reading speeches that you had given beforehand, most of them in about the last 5 years, or at least since you have been on the EEOC, not back when you were 20 years of age or 25 or 30, but fairly recently, there appears to be a conflict on natural law between what you have stated in the past and what you state here at these hearings.

You are stating in these hearings basically that you do not think that natural law ought to be used in constitutional adjudication. Some interpretation—and it depends on how you interpret your written and spoken words beforehand—would lead one to believe that you had previously advocated the use of natural law in constitutional adjudication.

Now, natural law, of course, is a term that is broad and there seem to be at least two schools of thought, and there may be many others, one a liberal school of thought, another a conservative school of thought on the use of natural law. Those who are of the conservative viewpoint indicate that it would be using the ninth amendment, where there is no deprivation of unenumerated rights that a judge could pick an unenumerated right, something that he said was and then defend it under the concept of natural law.