

unintended consequences could be, and indeed having a chilling effect on litigation in appropriate cases might well be such one unintended consequence.

Senator THURMOND. Judge Thomas, if you are confirmed, what do you believe will be the most rewarding aspect of serving on our Nation's highest court?

Judge THOMAS. I think the reward, Senator, for being entrusted with that great a responsibility is actually discharging that responsibility in a dignified, professional and judicial or judicious way, and to realize that you are doing all you can to preserve and protect the Constitution and the freedoms of the people in our country. I think the reward itself is in the doing of the job and doing it right.

Senator THURMOND. Judge Thomas, international drug cartel members have sometimes avoided prosecution as a result of the difficulty of finding the appropriate forum of prosecution. International drug courts have been discussed as an option. Would you discuss whether you believe our Nation's concept of due process can be reconciled with other countries' principles of what constitutes due process, if such a court was implemented?

Judge THOMAS. Senator, I think that our notions of due process in criminal cases is so imbedded and so important in our way of life and important to our way of life and to us, that I would be concerned if there was any diminution of our respect for those rights and our regard for those rights in the creation of other tribunals.

Senator THURMOND. Judge Thomas, you mentioned yesterday in your opening statement that you wished your grandparents, who were a major influence in your life, could be here today. What do you think your grandfather would say, and what advice would he give you?

Judge THOMAS. Well, I used to go back home and visit him after I was a member of the Reagan administration, and the one thing he would always say is, "Tell that Mr. Reagan don't cut off my social security." [Laughter.]

Senator KENNEDY. What did you say? [Laughter.]

Judge THOMAS. I told him I would look out for him and make sure that didn't happen. He was a wonderful man. I can only repeat, the last time I saw my grandfather was in the hospital, we were visiting my grandmother, who was ill, and they both died. They died about a month apart.

I can remember having had a long conversation with him in the lobby of the hospital, St. Joseph's Hospital in Savannah, and the elevator door, he marched me to the elevator and I was waiting on the elevator and we were talking away, and his final words to me, because I was complaining about the difficulty of doing my job and the criticisms and thinking about giving up, and his last words to me, as I can remember, in 1983, February of 1983, was "Stand up for what you believe in," and I think he would give me the same advice.

Senator THURMOND. Judge Thomas, in a speech before the Palm Beach Chamber of Commerce in 1988, you spoke about the implementation of civil rights legislation and its complex relationship between Congress and the executive branch. Would you care to

expand on this for us and include the courts in describing the roles of the three branches of Government in the area of civil rights?

Judge THOMAS. I think that we have an obligation in this country, and I have tried to do that in writings and speeches and efforts to open this country up to everyone, and we have an obligation to aggressively enforce laws that require people to not discriminate, to enforce laws that say you can't treat a person arbitrarily, to push for programs that say let's open up our society.

Now, there is disagreement on how far you should go and what is the precise approach, but there is no disagreement that we have got to eradicate discrimination, and I think all three branches have a role in that. I also believe that we have got to open up doors, and there may be disagreements over that, but it has just got to happen.

I don't think that we can be content in this society, when the gap between have's and have not's continues to expand, and I don't propose to have all the answers and I am sure that there will be debates about how best to do that and whether or not there would be drawbacks to a certain approach, but at bottom I do know it has got to be done.

Senator THURMOND. Judge Thomas, would you please give us your view of the role of antitrust today, including those antitrust issues which you believe more seriously affect competition and the consumer.

Judge THOMAS. Senator, I think it is important that we recognize that, in a country such as ours, where we have an economy and a free enterprise system that has the capacity to absorb a variety of individuals and to allow people to participate, a small business person like my grandfather, that it is important to keep that economy open to access and open to competition, and I think that the antitrust laws are important. I think they are important for those individuals who do want access, and I think that they are important for individuals who use the products of that process, from a price standpoint, quality standpoint, and efficiency standpoint.

Senator THURMOND. I don't have any more questions at this time. I would like to take this opportunity to commend you for your calmness, steadfastness, and courtesy in answering questions of the members of this committee.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Judge Thomas, one of the Supreme Court's most important roles under the Constitution is to resolve the disputes between the President and the Congress about the limits of executive power. The role of the Court has grown more independent, important in the past quarter century because we have had a divided government for most of the last 25 years.

The Framers of the Constitution believed that unchecked executive power is one of the greatest threats to freedom and individual liberty. You yourself have made many strong statements in your speeches about the need for limited government. Yet you harshly criticized a Supreme Court in 1988, *Morrison v. Olson*, which upheld the constitutionality of a statute authorizing the appointment of independent special prosecutors to investigate criminal conduct by high officials in the executive branch.

The Supreme Court upheld that law by 7-1, the opinion written by Chief Justice Rehnquist. Justice Scalia was the only dissenter, and in a speech that same year, you condemned Chief Justice Rehnquist's decision. You praised Justice Scalia's dissent. You said, and I quote, "Unfortunately conservative heroes such as the Chief Justice failed not only conservatives but all Americans in the most important case since *Brown v. Board of Education*. I refer, of course"—and this is your quote. "I refer, of course, to the independent counsel case, *Morrison v. Olson*. As we have seen in recent months, we can no longer rely on conservative figures to advance our cause. Our hearts and minds must support conservative principles and ideas. Justice Scalia's remarkable dissent in the Supreme Court points the way toward those principles and ideas."

Now, that is a very strong statement opposing the validity of independent special prosecutors. But no branch of the Government should be trusted to investigate itself. Independent prosecutors are sometimes needed to ensure that high executive branch officials do not violate the law. We all remember Watergate. The Justice Department voluntarily appointed Archibald Cox as a special prosecutor. Mr. Cox began to do his job too well, fired by President Nixon on the Saturday Night Massacre.

So Congress enacted legislation authorizing the courts to appoint independent special prosecutors to prevent that from ever happening again.

Now, the Iran-Contra scandal could never have been fully investigated and the wrongdoers brought to justice without the appointment of the special prosecutor. And if the circumstances warrant it, a special prosecutor should be available to investigate the savings and loan scandal. Yet you say that special prosecutors are unconstitutional. Why?

Judge THOMAS. I don't think that my point of departure was that it was unconstitutional, although I disagreed and argued that the Scalia opinion was the better approach.

Let me make a couple of points. I discussed that with Senator Biden earlier. My concern was this: I—

Senator KENNEDY. Well, I am not interested in so much Scalia's rationale in terms of the natural law. I was here during your response. I am taking a different approach, and that is with regards to the decision, only one dissent on the issue of the constitutionality of the special prosecutor. And in that one dissent, in which Justice Scalia developed his opposition to the strong majority opinion, he expressed his view that it was not constitutional.

Now, why shouldn't we have the capability when there is the wrongdoing in the executive branch? Why isn't it important that we maintain the majority's opinion in that special prosecutor case?

Judge THOMAS. I think that is a fair question. The point that I was trying to make there was not that there shouldn't be a way to aggressively investigate and determine wrongdoing. I agree with that. I think that is very important. That is the way you keep government honest. And I think you find ways to sustain people's belief in Government by making sure that it is honest.

The point that I was trying to make there was that when you have an individual that—the way that our Government has protected the individual is the tension between the branches, that you

have three branches, none really dominating the other; and that when you have one member or one individual that is not directly accountable to either, then the consequence could be—and I thought in this case, again speaking broadly—the consequence was that individual rights were at stake, the individual rights of an individual who is investigated, not responding to Congress or responding to the Executive, but to a person who was not responding to either.

Senator KENNEDY. Well, all of the rights and protections of the Constitution are still there even under the special prosecutor. All of the other kinds of protections of the Constitution are there. This is basically a question about whether, as the Founding Fathers pointed out, spelled out very clearly, article II, section 2, permits Congress to vest appointments of such inferior officers, as they think proper, in the courts of law. We have seen both in Watergate, potentially in the whole savings and loan scandal—no one is prejudging that at this time, but there may very well be those within the executive department that ought to be subject to that particular kind of process and procedure. And all of the constitutional rights and liberties are still retained by those that are going to be found by the special prosecutor to be subject to prosecution. So why aren't those rights and protections sufficient?

Judge THOMAS. I agree with you that where there is wrongdoing, it should be ferreted out aggressively.

Senator KENNEDY. Well, how are you going to do that in the executive branch if they have the responsibility of investigations?

Judge THOMAS. The point that I was making was very simply this: that it wasn't that it should not be determined or that wrongdoing should not be ferreted out, nor did I indicate that perhaps there could not be—that the executive could necessarily totally oversee itself. I don't think that was my point.

My point was that the individual, when an independent body was involved in the investigation and conducted the investigation, that there wasn't that responsiveness directly to either one of the three branches, and that that concern led to a view that an individual—that that lack of accountability could actually undermine the individual freedom of the person who is being investigated. That was the totality of that point. And that is, I think, an important point, and it was one that I made in the context of a speech about individual freedoms.

Senator KENNEDY. Well, the Attorney General can remove a court-appointed special prosecutor for cause. Isn't that enough protection?

Judge THOMAS. Well, again, that may be—the Court found it to be enough, and I would assume that case stands decided, that that is enough in order to—from a standpoint of constitutional law that is enough protection in a legal sense. But my point was just simply—and I think the Court also found that none had been removed or that that had not been used. But my point was not so much the legal analysis per se, but rather what the effect of a ruling that allowed a person to investigate someone who is not responsive to either of the branches of the Government.

Senator KENNEDY. Well, do you feel now that as a matter of law that there is the special prosecutor process and procedure decided by the Supreme Court overwhelmingly is the law of the land?

Judge THOMAS. That is right. I agree with that, Senator. I think it is. It is a decided case. I was simply expressing, from a point of view as a member of the executive, my disagreements with it.

Senator KENNEDY. Let me, if I could, go back to a case that was discussed earlier, the *Johnson v. Santa Clara Transportation*. Just quickly to go over the facts, this is a leading case in the rights of women to be free from job discrimination in the 1986 the Supreme Court decision in *Johnson v. Santa Clara* agency. In that case, a male worker challenged the promotion of a woman to the job of road dispatcher. She was the first woman ever to hold that kind of job in the county. In fact, she was the only woman to hold any of the 238 skilled positions in the agency.

The county was making a voluntary effort to bring qualified women into these positions, and the woman had experience comparable to the men who had applied for the job, and she had been rated qualified by the county. She had scored 73 out of 100 in her subjective oral interview. The man had scored 75 on the oral interview. But the employer said that the different scores were not significant. There were actually seven, as I understand it, employees that met the qualification standard which had been established.

The man took the agency to court saying he had been the victim of sex discrimination. The woman had had more than ample experience on the job. She was found qualified for the job. She ranked only two points below the man on a subjective interview, according to the agency. She had demonstrated that she was qualified. In fact, she was a pioneer, willing to be the first and only woman on road maintenance crews in the county.

How could you conclude that she was not qualified to receive the job?

Judge THOMAS. Senator, the point that I was trying to make was this—and I think I alluded to it earlier—that when you have a statute that seems to be clear that there should be no discrimination and it doesn't prefer or it doesn't deter any particular group or individual, and you do something that seems not to comport with that language, there is a problem. I for one agree that, and I certainly did it in my job at EEOC, that there are ways and it is important to include minorities, women, and individuals with disabilities in the work force and to aggressively do so. And I am proud of that record.

But there is this value in the statute that does not—that makes discrimination wrong on any basis, whether you want to do good or you want to do bad. And I think it is important to recognize that. Now, that can be changed; that can be altered; that can be adjusted perhaps. But that value is in the statute, and it was that movement away from that that I was criticizing.

Senator KENNEDY. The movement away is effectively two points, and this was on the basis of a subjective interview. That was only part of what the agency looked at. The record shows that one of the officials who interviewed her had previously refused to issue coveralls when she worked on the road crew until she had ruined her clothes and filed a grievance, although he did issue coveralls to

male workers. The second member of the three-person interview panel had described her as a rabble-rousing, skirt-wearing person. So two of the three officials who participated in the interview had clearly displayed a bias against her. She endured that discrimination as a road maintenance worker, and her employer found that she was among the best qualified to be the road dispatcher. And yet you would hold that the law bars that employer's decision.

Judge THOMAS. Senator, it is clear that if the hiring process is discriminatory that she has a direct claim; that is, she can argue that the individuals who interviewed her engaged in discriminatory conduct. And I would clearly be in favor of actions such as that. That is my point.

The question in this case wasn't that there was discrimination in the application process or in the employment process with respect to the woman in the case. The question was whether or not the man who was rated higher in that process, again without challenge to the selection process, the question was whether or not he was discriminated against because of his gender, because at the end of the process he was rated most qualified.

Now, let's turn it around. If at the end of the process the woman had been rated most qualified and the man was not rated as qualified, and the man was hired and the woman brought a sex discrimination charge, what the agency would have to do is process a charge indicating that there was gender discrimination against the woman.

Senator KENNEDY. Well, the fact remains that seven individuals were qualified, according to the scores. So the employer made the selection that they had 238 individuals that are serving in these positions and not a single woman. There are seven in the pool that the employer says are qualified, voluntarily selects this individual who only scored two points lower than the one who brought the case on a subjective test where two of the individuals clearly expressed some bias against that individual. And you are suggesting, well, they are going to have to—the employer is going to have to state that they have some kind of a plan of discrimination in the past. If any employer were to make that kind of finding or judgment based upon the past, they would be subject to a good deal of liability, wouldn't they?

Judge THOMAS. Well, they should be if they were discriminating.

Senator KENNEDY. All right. Well, how are you going to encourage people, how are you going to encourage any of those employers? How are you going to encourage employers such as the Santa Clara County who said that we have got 238 executive positions, all men. We have this one woman who has been a real pioneer in terms of striking down the stereotyped jobs and is able to perform that. The employer says qualified to perform it. And a clear kind of bias in terms of the subjective test, expressions, refusing to provide the coveralls and the other statements about it. And you are prepared to say to us now that you would continue to deny that woman who has been found qualified by the employer of that particular job.

Judge THOMAS. Well, let me answer it this way, Senator. The problem that has to be confronted is that the statute does not make that distinction.

Now, with respect to the underlying concern that you have in the treatment of individuals in our society based on gender or race, I think that many of these exclusions, many of the problems that we have are abhorrent. And I have said so on the record, and I have conducted myself consistent with that. I believe that one way to address some of these concerns where there does not seem to be an effort to include minorities and women is something that you and I have discussed in the past, and I still think—I thought as Chairman of EEOC—I won't comment on legislation as a judge. But one of the major weaknesses in that statute is that there are no real deterrents. There is no real damage. All you have to do if you discriminate against someone is to give that person the job he or she would have had or the back pay involved.

I was convinced as Chairman of EEOC that if there was real teeth in that statute, that would more than encourage employers to do the right thing.

Senator KENNEDY. Well, of course, the Court decided 6-3 that it was consistent with the statute.

Now, you have expressed your opinion about the hiring of a woman. Wasn't the county just opening its doors to a woman whom it felt to be qualified in attempting to provide some degree of diversity in its institution, like Yale was in its institution? Why isn't it the same?

Judge THOMAS. Senator, I have looked at that hiring process in this case. There is an explicit statute on its face that says here is how it is supposed to occur. I agree with the notion of diversity. I am a strong supporter of including people who have been excluded. Yale went about it in a way where it looked all over the country. It looked for people to include in its class, individuals it felt were qualified from among a number of qualified individuals. It made the decision that certain minorities were qualified, as it did with respect to certain whites. And it found that individuals, including myself, were qualified. We were not talking about two people competing for one job. We were talking about an educational institution that was very subjective in its selection process.

Senator KENNEDY. Well, of course, educational institutions have to conform as well under title VI.

Judge THOMAS. They have to conform, Senator, but we are not, again, talking—there is nondiscrimination. It gives you what the selection process is.

Senator KENNEDY. You don't see any similarity with what Santa Clara is trying to do in terms of providing some degree of diversity and what Yale was attempting to do—

Judge THOMAS. I do, Senator. That is the point I am trying to make; that the problem that I have wasn't in what Santa Clara was trying to do. The problem is that you have got a statute that provides for a fairly neutral principle, and that is that you cannot discriminate based on race or sex or national origin.

Senator KENNEDY. Before winding up on that, that decision was 6 to 3; was it not?

Judge THOMAS. I believe it was, Senator.

Senator KENNEDY. You were an official of EEOC at that time, you were part of the administration, and yet you recommended to courts, though your speeches recommended that lower courts

follow the Scalia decision, did you not? You said, "Let me commend to you Justice Scalia's dissent, which I hope will provide guidance to lower courts." Weren't you inviting lower courts to find ways to disregard the majority ruling in that case in a way that would make it even harder than it already is for women to prevail against sex discrimination on the job and achieve equal opportunity?

Judge THOMAS. Senator, I think that, in using the word "guidance," I suggested what we do in our job now, and I think most any judges do, is we look at the opposite side of the argument. But let me make a point with respect—

Senator KENNEDY. Well, the majority is 6 to 3, that is the law of the land, and if the Cato Institute—you used those words, "Let me commend to you Justice Scalia's dissent, which I hope will provide guidance for lower courts." Now, you are an executive official. Why are you recommending that they follow the dissent in that case, when the 6-to-3 majority says that is the law of the land?

Judge THOMAS. Senator, I think that if I wanted to say follow that, I would have said it, and I don't think that any of us is sufficiently off our rockers to say that dissenting opinions are controlling. In fact, in my confirmation before my second term at EEOC, I indicated just that point to you.

But the point that I am making is that, even as I had my own concerns, we used that precise case, *Johnson v. Santa Clara*, in our development of rules for affirmative action in the Federal Government and we refer to *Johnson* explicitly for affirmative action in the Federal Government.

Senator KENNEDY. Well, hopefully, since it is the law of the land—

Judge THOMAS. It is the law of the land and that is the point I am making.

Senator KENNEDY. But your language will, I believe, state, at least, your position to the Cato Institute.

Let me go into a different area. I noted with interest that you were asked by Senator Simon yesterday about the constitutional issues involved in a case on freedom of religion and the so-called *Lemon* test used by the Supreme Court to decide cases involving the separation of church and state, and you answered, "I have no personal disagreement with the test," and you repeated that view this morning in response to a question from Senator Kohl. You said, as I recall, that you have no quarrel with the *Lemon* test.

Now, as a matter of fact, the Supreme Court is scheduled to hear a particular case this fall on that issue, the *Lee v. Weisman* case. The Supreme Court has been called upon to consider its earlier decisions, and the Justice Department has already filed a brief in that case calling for the Supreme Court to abandon the constitutional test it has been using, the *Lemon* test. I have the brief here: "The case offers the Court the opportunity to replace the *Lemon* test with the more general principle implicit in the traditions relied upon in *Marsh* and explicit in the history of the establishment clause."

So, if you are confirmed as Justice, you will be sitting on that case this fall as a member of the Court. Yet, you did not hesitate yesterday and today to tell us that you have no personal disagree-



ment with the *Lemon* test now being used by the Supreme Court. My question is, do you have any personal disagreement with the test used by the Supreme Court in *Roe v. Wade* to decide the cases on abortion? That test requires the State to have a compelling State interest, if it is to justify an infringement on a woman's right to choose an abortion.

Judge THOMAS. Senator, without commenting on *Roe v. Wade*, I think I have indicated here today and yesterday that there is a privacy interest in the Constitution, in the liberty component of the due process clause, and that marital privacy is a fundamental right, and marital privacy then can only be impinged on or only be regulated if there is a compelling State interest. That is the analysis that was used in *Roe v. Wade*, you are correct.

I would not apply the analysis to that case or can't do it in this setting, and I have declined from doing that in this setting, the analysis separate from that case, if that is the test, the compelling interest test. I don't have a problem with that particular separate analysis separate and apart from that case, but I think it is inappropriate for me to sit here as a judge and to say that I think that should be used in a case that could come before the Court, for the reasons that I have stated previously.

Senator KENNEDY. Judge, you have indicated a willingness to comment on the constitutional cases affecting the establishment clause, the test which you would be willing and do support under the *Lemon* case. I am not asking you how you would rule in *Roe v. Wade*. All I am asking you is, since you have been willing to state your agreement with the current test in the *Lemon* case and you will be sitting on the Court in October on that case, if confirmed, and you have been willing to express your opinion here on the test that is used in terms of the establishment clause.

My question is, without getting into the outcome of *Roe*, whether you have any problem in the test, the compelling State interest test.

Judge THOMAS. What I have said, Senator, is that the *Lemon* test I had no quarrel with, but the Court has had difficulty in its application. I think that was my complete statement.

With respect to the compelling interest test in the application of that to fundamental rights, fundamental privacy rights, I have said that I have no problem with that, so I have said that the compelling interest test I have no problems with. I said that yesterday, I believe, with Senator DeConcini, when we were talking about the equal protection analysis. What I have said that I cannot do is now import that and superimpose it and apply it to a specific case.

Senator KENNEDY. I am not asking you to do that. As I understand, you do not have a disagreement with the compelling interest test, when it was applicable in the abortion standard.

Judge THOMAS. Could you repeat the question, Senator?

Senator KENNEDY. You don't have, as I understand you, you don't have a quarrel with the compelling interest test used in *Roe*.

Judge THOMAS. As I have indicated, Senator, with respect to the application of the compelling interest test to that—

Senator KENNEDY. I am just talking about the test. That is all I am talking about, is the test.

Judge THOMAS. You are doing two things, and I am trying to separate them.

Senator KENNEDY. I think I understand what you are trying to do. [Laughter.]

Judge THOMAS. What I am saying is that the compelling interest test I do not quarrel with, and I do not quarrel with the application of the compelling interest test where the right of privacy is found to be fundamental. My point is that I cannot apply that test in the specific instance involving the issue of abortion involved in *Roe v. Wade*. That is what I am declining to do.

Senator KENNEDY. What test are you going to apply?

Judge THOMAS. I think, Senator, that is what I am trying to remain impartial to—

Senator KENNEDY. We are just talking about the test, not what the outcome is going to be, what the standard is that you are going to use. We found out that the Supreme Court has applied this test. I am not trying to make the judgment of what the outcome would be. You have been willing to express your view about tests with regard to another extremely important provision of the Constitution. My question again is whether you are prepared to make that same kind of comment with regards to the application of that test in abortion cases.

Judge THOMAS. Senator, what I think I have done is I have said that the *Lemon* test, I had no quarrel with the application of the *Lemon* test generally to establishment clause cases. I have said that I had no quarrel with the application of the compelling interest test to the area of privacy cases, when privacy is a fundamental right.

Senator KENNEDY. Including abortion?

Judge THOMAS. And what I have done is left open, and I think appropriately so, for the reasons that I expressed yesterday and again this morning, is not apply that to the difficult issue of abortion and the case of *Roe v. Wade*. I think that is important for me to do, in order to not compromise my impartiality.

Senator KENNEDY. Well, do I understand that you may overrule it or you may sustain it?

Judge THOMAS. I have no agenda, Senator. I have tried to here, as well as in my other endeavors as a judge, remain impartial, to remain open-minded, and I am open-minded on this particular important issue.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

We have been breaking for an hour and a half, giving us time to go back and return calls and the rest. We have been running a little late this morning, so we will break until 2:15.

[Whereupon, at 12:53 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.]

#### AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Hatch for as much time beyond 30 minutes as he thinks he needs. [Laughter.]