Judge THOMAS. Senator, I think that what the Court was attempting to do is to set out some guidelines to prevent, as you have noted, constitutional violations and certainly to deter law enforcement officials in the case of the exclusionary rule from benefiting from improperly or unconstitutionally seized evidence.

Senator DECONCINI. Do you consider that judicial activism?

Judge THOMAS. I do not consider it judicial activism. I see it as the Court trying to take some very pragmatic steps to prevent constitutional violations.

Senator DECONCINI. What do you think judicial activism is? Well, before you answer that, what about the famous tax case where a court, not the Supreme Court, imposed on a local school district to raise the taxes? You were an assistant attorney general in Missouri handling tax issues at one time. Would you consider that case judicial activism?

Judge THOMAS. I think there are some who certainly would. I don't know——

Senator DECONCINI. Your good friend and mine sitting behind you does, and I happen to agree with him.

Judge THOMAS. I think there are some who would because of the extent of the remedy. But I couldn't say because I have not reviewed that case and I haven't studied the record in that case. I think any of us would be concerned in the area of judicial activism when we conclude that a judge is imposing his policy decisions or her policy decisions instead of the law.

Senator DECONCINI. Is that your interpretation or definition of judicial activism?

Judge THOMAS. I think that is one such definition.

Senator DECONCINI. Can you give me any other one? Then I will wind up here.

Judge THOMAS. I wish I had some off the top of my head. I just think that when judges move away from interpreting the law and applying the law as written or interpreting the Constitution in an appropriate way and begins to read his or her views into those documents, I think we are venturing into an area of judicial activism.

Senator DECONCINI. You think, Judge, that you can refrain from that as a Supreme Court Justice?

Judge THOMAS. Oh, I certainly can, Senator.

Senator DECONCINI. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Now we will go to Senator Grassley of Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Thomas, I think maybe just for the record I will go through some of the issues with *Adams* v. *Bell.* I don't know whether there is a necessity for you to answer any questions or not, but just to make the record clear. I think that first of all we need to make clear that not only has this issue been brought up at this hearing, but it was also a basis for some special interest to find fault and try to prevent your appointment and confirmation to the Supreme Court.

You took over as head of the Department of Education on July 3, 1981. You were appointed in May of 1981. The contempt motion that is part of the discussion here was actually filed on April 21,

1981, and, of course, that was before you were appointed and 3 months before you were sworn in. So the contempt motion was based on somebody else's conduct since it was filed before you arrived at the Education Department. That is your understanding of that.

Judge THOMAS. I believe that is accurate, Senator. Certainly something that was in existence before I arrived.

Senator GRASSLEY. Your predecessors at the Education Department were Carter administration officials. They also had difficulties meeting these timeframes. The timeframes were very unreasonable. The Office of Civil Rights had 15 days to acknowledge the complaint, 90 days to investigate it, 90 days to negotiate a settlement, and 30 days to go into an enforcement, which was administrative litigation.

If I could quote from the contempt motion which was based upon actions or inactions of Carter administration officials, the plaintiffs complained that enforcement under Carter appointees "demonstrates wholesale violation by the Office of Civil Rights of the timeframes for compliance review."

"The plaintiffs also cited OCR's large number of very old unresolved complaints pending at the end of 1980." That last sentence was also part of a quote.

So I think it is fair to say, Judge Thomas, that you inherited in that position a very unworkable situation, that you showed no disregard or contempt for the law, that you simply admitted the truth to the judge, the impossibility of meeting those timeframes that I mentioned. And I guess it is a way of saying that you were being very accurate with the judge.

You were not held in contempt by the judge, and, of course, what the judge directed was to go back and ask for more realistic timeframes. And the judge let the parties come up with the timeframes.

I don't think that there is much more to this that we need to go into, but, Mr. Chairman, if there is a lot of concern about this, I would very much ask—and I will leave this up to the judgment of you as chairman, because there is no sense of printing a lot of costly material if not. But if this is going to be in dispute, I hope that we could put as part of the hearing record the transcript of the hearing that has been referred to here, Judge Thomas' appearance before the judge, so that the full explanation and discussion with the judge can be reflected.

The CHAIRMAN. Let me suggest, unless anyone would like me to do otherwise, that I will make copies of that hearing record available as part of the record, rather than have it reprinted in the record now, unless that is the request of the witness or of you.

Senator GRASSLEY. That is OK with me.

Judge Thomas, moving on to another matter, I would like to follow up on the matter of individual privacy. And as Senator Simpson said, the right of family privacy is not absolute. There are limits. The Supreme Court stated it best in the *Bowers* case: The dimension of protected privacy will include fundamental liberties that are either "implicit in the concept of ordered liberty, such as neither liberty nor justice would exist if they were sacrificed," and are "deeply rooted in this Nation's history and tradition."

Let me simply ask you this, whether you have any objections to this test as a method of determining the extent of protectable private interests.

Judge THOMAS. As I indicated earlier in my testimony, Senator, I think that that is an appropriate manner in adjudicating cases on the liberty component of the due process clause of the 14th amendment. Justice Harlan I think appropriately sets out a methodology that I certainly find agreeable.

Senator GRASSLEY. And you don't have any problems with the *Bowers* decision?

Judge THOMAS. Well, Senator, I think I have not commented on the outcome in these important cases, and that particular case is a recent case. It is an important case. The Court is continuing to attempt to define the contours of the privacy interests, privacy protections. It is simply at this moment drawing the line with respect to certain types of intimate relationships.

Senator GRASSLEY. Well, Judge, this morning you said that you didn't have any quarrel with the *Eisenstadt* case, and I don't have any problems with that statement. And I can appreciate the fact that the *Bowers* case is a very recent case. But I would like to point out that the Bowers test was derived from Justice Cardozo's opinion in the *Palko* case, and that dates from 1937, and from Justice Powell's decision in the *Moore* case, 1977, which has been discussed. And so I guess the *Bowers* decision, even though being a recent decision of the Court, is based upon a lot of established precedent. So what objections do you have with the *Bowers* decision based upon my statement to you that it is not really just newly created law, but based upon 14 years back and 50-some years back?

Judge THOMAS. I did not certainly quarrel with the precedents cited in that case, Senator. My point is simply that I am not expressing agreement or disagreement. My point is that I think it is inappropriate for me to—would be inappropriate for me to comment on the outcome in that case.

There are important precedents in that case, and I would not question those underlying precedents, the older precedents that you are discussing, *Palco* and some of the others. My point is that I think it is inappropriate for me to comment on a case, a recent case in this very troublesome and very difficult area.

Senator GRASSLEY. Well, let me think about what you said before. I am not sure I am very happy with that. But we will have another opportunity maybe to go into that.

Let me continue with the subject of privacy. Like several of my colleagues, I want to approach it a little bit differently. I would like to talk to you about an appeals court case. You sat on an en-banc panel on *New York Times* v. *NASA*. Although you did not write the opinion, I think the case illustrates how the Government can recognize and protect the right of privacy.

Let me relate facts briefly. The New York Times filed a Freedom of Information to get a copy of the black box tape from the *Challenger* tragedy, and you know that was the shuttle blow-up. A transcript of the tape had been released, but the tape itself, because of the anguish some of the astronauts expressed, had been withheld. NASA asserted that the tape fell within exemption 6 of FOIA, and that is personnel and medical files and similar files, the disclosure

of which would constitute clearly unwarranted invasion of personal privacy.

The majority opinion found the tape came within exemption 6 but remanded the case to the lower courts so that it could balance the privacy interest with the right of the public to be informed. There was a clear split in the appeals court, and it was 6–5, and the minority would have found the tape to be exempt and would have allowed immediate disclosure.

It seems to me that the majority in this case, some would say the conservative on the court, actually had more sensitivity to the privacy issue. So I would like to have you offer us your perspective on these competing issues, the right of privacy and the right of the public to know.

Judge THOMAS. That was, as you noted, Senator, an en banc case, a very close one and a very important one, and the issue for us was whether or not there was an exemption provided by statute for information about a person. The Supreme Court has held that personal information of that nature is not disclosable, if it would violate the privacy of that individual.

The question was whether or not this was personal information. The transcript of the voices of the astronauts involved in the disaster was made available under the Freedom of Information Act. What had not been disclosed to the public was the voice recordation of the astronauts.

The question became whether or not the information that was disclosable in the record, the recordation of those voices was more personal or different from the information, the actual transcript that had been disclosed, and what the court essentially found is that there was more information in the voice record of the astronauts than there was in the transcripts, and that that information was personal information and could only be disclosed after it was balanced against the interests of the family and the interests of the individuals involved.

Senator GRASSLEY. Your answer is very correct, as far as that specific case is concerned, but from your vote and your reasoning, how do you in your own mind see the right of privacy versus the right of the public to know, in other words, philosophically, as you might approach some cases in the future where this is an overriding issue in the case?

Judge THOMAS. I think, very generally, Senator, we are all concerned, certainly those who are in the public arena and making available to the public information about the operations of those public agencies and about the officials in those agencies in their official capacities.

The concern in these cases, the Freedom of Information Act cases, as I have seen them, and I think it is a general concern, is whether or not one should disclose information that is personal to the individuals, even if they are government officials.

For example, should you disclose a person's personnel record or should you disclose information that is similar to the personnel or medical record. And if that information is a personnel or similar record, then the question becomes what are the interests in disclosing that, are there competing interests that outweigh the public's interest in knowing what is in those records. And what the courts

have attempted to do, and they certainly do at the trial level, is to balance those competing interests, and certainly under the Freedom of Information Act, Congress has made a judgment as to what that standard of review should be.

Senator GRASSLEY. Now, the reason that this case struck me is because of my concern about the individual right to privacy and something you wouldn't know about, but some of my involvement is expressed in Senator Biden's Violence Against Women Act and contains an amendment of mine expressing the sense of the Congress that the name of the rape victim should be kept confidential by the news media.

There are parallels between I think this NASA case and the situation of rape victims. In the *Challenger* case, the transcript of the tape had already been released, and the public could know and read the last utterances of the tragic victims.

There was a lot to be learned without the release of the tape itself. There was a lot made public, without the release of the tape itself. Likewise, of course, the public can learn a great deal about the victim of a rape, without having her name disclosed by the news media, and it seems irresponsible to me that the media would make the victim a victim the second time by dragging her name through the press.

I realize that you cannot comment on protecting rape victims' names, since there are first amendment implications and so-called rape shield laws may come before the Supreme Court, so I think I will leave you with my views on the subject and not ask for a response from you.

I would like to go on to a point dealing with the overall subject of precedent. You have discussed this to a considerable extent even with me. When you came to the Senate Judiciary Committee as a nominee for the court you now sit on, you explained your obligation to follow Supreme Court precedent as an appeals court judge, and I think sitting on that court, I believe that you have carried out that obligation.

In addition, you have shown appropriate deference to the findings of lower courts and administrative agencies. We discussed that some yesterday. Your opinion in the antitrust case of *U.S.* v. *Baker's Shoes* is a good example of that deference. But on the Supreme Court, there are different considerations with respect to precedent.

For example, Justice Frankfurter wrote that precedent "is a principle of policy, and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such an adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder and verified by experience." That is from way back in 1940, the *Helvering* case.

In your discussion with Senator Specter, you referred to the length of time as being part of the evaluation of precedent, and in your discussion with Senator Brown you referred to the development of institutions as a result of prior precedent, and those are your words.

Are there any other factors which the high court should consider, in deciding to overrule a prior case? And how would you weigh or prioritize those factors that you might give me now?

Judge THOMAS. I certainly, Senator, could not give you a precise calculus as to how that would be done.

Senator GRASSLEY. No, but just a general approach.

Judge THOMAS. But I think, as I indicated yesterday, that whenever one begins to reconsider, as a judge, a prior precedent, that one must understand that is a very serious undertaking, that it is a matter, at least from my point of view, the burden is on that judge to demonstrate why that precedent should be reconsidered.

In the statutory area of law, in the case law involving statutes, there seems to be less of an inclination on the part of judges to reconsider or overrule cases, primarily because of the view or the feeling that if it were wrong to begin with, then the legislature would have corrected it, and I think that sort of underscores the point that Senator Specter was making yesterday about revisiting statutory interpretation cases or precedent.

In the area of constitutional cases or constitutional law cases, at least those cases are very, very important, but the feeling is or the sentiment is on the part of the Court that those cases can only be revisited in a realistic way by the judiciary, since the amendment process is one that is very remote, as far as the possibility of occurring, and that those cases are more likely to be revisited or reconsidered.

Again, I don't think there is a precise calculus in approaching those two areas. I do think that you start with the case being wrong, one has to view that case as wrong, and I think one has to understand and take into account the continuity in our legal system and has to understand or I think demonstrate why this continuity should in some way be broken.

I don't think that is necessarily an easy task, and it is certainly one that should be considered with a high level of seriousness and high level of concern about what the judge is doing, even if the case is found to be wrong.

Senator GRASSLEY. I appreciate what you said. I would say that your approach is slightly different from that of Justice Rehnquist in the recent *Payne* case, where he said that the most compelling precedents are those which deal with property and contract rights, and that decisions dealing with procedural or evidentiary rules would be given less weight.

On the other hand, some others have suggested other lines be drawn. Justice Powell and Justice Brandeis have made a distinction between constitutional cases and cases involving interpretation of law, and I guess I would ask you to give attention to a Brandeis quote:

> In cases involving the Federal Constitution, where correction through legislative action is practically impossible, the Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

So, let me as you if you share views of Brandeis that the approach to precedent is different when the cases involve constitutional interpretation.

Judge THOMAS. I think that the underlying considerations, again, without in any way suggesting that the cases aren't of equal, if not in some instances greater importance, that the underlying concern that dictates whether or not the court would revisit these more

readily, those prior precedents more readily, the fact that changes can't be made by the legislative body, that only the Court, if it finds itself wrong, can make that change.

I think that is an important consideration and it is not one certainly that I have a quarrel with, although I might add that I don't precisely know how a judge can quantify the differences between considering reconsideration of statutes, as opposed to constitutional cases.

Senator GRASSLEY. President Lincoln warned, in the context of the *Dred Scott* decision, against Government policy irrevocably fixed by the Supreme Court. He said the risk would be that the people would cease to be their own rulers in those circumstances. The reality is that the Supreme Court has overturned more than 260 of its decisions, and that figure is from the Congressional Research Service. Of course, we never would have had the historic *Brown* case, if the Court had declined to overrule the wrongly decided *Plessey* case, and we wouldn't, of course, be carrying paper money today, if the Court was strictly bound by precedent.

This term, the Court has overruled five prior decisions, and one of them sparked some discussion during these hearings, *Payne* v. *Tennessee*. I am particularly interested in that case, because of my work in the area of victims' rights.

Contrary to how some have characterized your testimony, I reviewed what you said, and I don't believe that you in any way endorsed that decision, much as I would like you to state your approval of that case. But my point is that 5 decisions overturned this term is a very modest number of decisions, when you consider the activism of the Warren and Burger courts, 9 decisions overturned in 1963, 10 in 1964, 9 in 1976, and 11 in 1978.

In the closing days of last year's term, the remaining liberal judges overturned a 1-day precedent which involved the constitutionality of the Arizona death penalty. On one day, the full Court upheld the death penalty, and the next day, in a similar case, but one in which Justices O'Connor and Kennedy had to recuse themselves, the Justices used their numerical advantage to strike down the same death penalty provision.

You know, this ought to bring to quick attention those of us or anybody who speaks so highly of the sanctity of precedent, because it can be a fleeting sort of thing on occasion, as well.

The American people do not want a Justice who willy-nilly overrules prior cases. Stability and predictability have merit, but at the same time I don't think that we can suffer, and I don't believe you would allow us to suffer decisions wrongly decided.

Let me ask you if you would agree with a Frankfurter statement on this point that the test is what the Constitution says, and not what nine people wearing black robes have said about it?

Judge THOMAS. The Constitution is certainly, Senator, the law of the land, and judges are called on to do the very difficult task and engage in the very difficult endeavor of determining precisely in specific cases before the court what that all means.

Senator GRASSLEY. I would like one more comment, before I leave this subject area, and I thank you for your responses. It is interesting to observe that some now want to hold onto the past, whether it is protecting criminals at the expense of victims or sanctioning

special preferences or group entitlements. Some Supreme Court cases have become enshrined.

Justice William Douglas, one of the more liberal activist judges that we have seen, and not someone with whom I agreed very often, was actually quite prophetic when he wrote in 1949, and I quote:

> Today's new and startling decisions quickly become a coveted anchorage for newly vested interests. The former proponents of change acquire an acute conservatism in their new status quo. It will then take an oncoming group from a new generation to catch the broader vision, which may require an undoing of the work of our present and their past.

You may be part of that new generation.

On the subject of natural law—and you are probably tired of talking about this—I had some concerns about your view of natural law when we started these hearings, but I think as I have sat and listened to you respond—and I think I mentioned this with you in the privacy of my office just for you to be thinking about it—but I think I feel comfortable with your approach.

The American people have probably been confused about natural law, but I think you helped clarify things, when you explain it as a basis on which our Government was constructed, the Founders were inspired by higher law to erect a Government of limited powers, one filled with checks and balances and ultimately accountable to the people.

You have indicated that the concept of natural law doesn't play a role in the deciding of cases, and, of course, I am glad to hear that you take that position. After all, Justice Brennan was motivated by natural law and it was license for judicial activism and legislating from the bench. He saw his role as a great effort in achieving what he called the constitutional ideal of human dignity, the meaning of the constitutional text that was constantly, in his words, evolving.

I sense that you see the Constitution more appropriately as an anchor for judicial decisionmaking, and that you will leave morality to us in the legislative branch. Is that a fair conclusion?

Judge THOMAS. I think it is important certainly that judges not confuse their role as judges in interpreting the Constitution with your role in this body, the important role of making policies and determining the statutory or legislative policies that we should have in this country in a variety of areas. I think it is very important that judges realize that their role is a limited one.

Senator GRASSLEY. Can I close with a passage from Robert Bolt's, "A Man for All Seasons." I think it is a passage that you will recognize and I hope that will capture for us a proper place for natural law. Toward the end of the first act, Sir Thomas More is with his wife Alice, his daughter Margaret and his son-in-law Roper. They are clamoring for the arrest of an individual.

Margaret tells her father that the man is bad. More replies, "There's no law against that." Roper tells him, "There's God's law." More answers, "Then let God arrest him." More continues with a lesson to his son-in-law: "The law, Roper, the law, I know what's legal, not what's right and I will stick to what's legal." Roper accused him of setting man's law above God's. More answered, "No, far below, but let me draw your attention to a fact: I

am not God. The currents and eddies of right and wrong I can't navigate, but in the thickets of the law, oh, there I am a forester."

Well, Judge Thomas, we expect you to also see your way clearly through the thickets of the law. We will count on you to understand and apply the law, but natural law can be abstract, elusive and uncertain. I hope we in the legislative branch, like the Founders did, derive some of our inspiration for our work from natural law, but I would equally hope that any individual judge's natural law doesn't come into play as he or she decides a case, and I guess, let me say, I think you would agree with that.

Judge THOMAS. Senator, as I have indicated in my conversations with Senator Biden, with the chairman, and with other Senators, there is a limited role only to the extent that we are looking to what our Founders believe, and that is a part of our tradition and our history in analyzing and in attempting to adjudicate under some of the more open-ended provisions in our Constitution.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I think the best line in that is the one you didn't read, where he says, "And when the devil turns around on you, Roper, what would you do then, all the laws being flat?" I hope we all keep that kind in mind, because he says Roper wants to cut them all down.

At any rate, I don't want to cut any laws down or I don't want to cut anybody off, but it is 5:20 and there is no possibility of us finishing this round today. So we will adjourn until 10 o'clock tomorrow, and then we will begin with Senator Leahy and then Senator Specter.

We are adjourned.

Senator THURMOND. Mr. Chairman.

The CHAIRMAN. I beg your pardon. The Senator from South Carolina.

Senator THURMOND. When we finish two rounds of each Senator——

The CHAIRMAN. If we could have quiet for just a minute. The Senator had something to say.

Senator THURMOND. When we finish two rounds by each Senator, which we will do sometime tomorrow, I was just thinking, on this side of the aisle I think that we will feel that is adequate, except one on this side will probably want to take 30 minutes more. Is there any way we could come in earlier and get through all this testimony with him tomorrow, so we can get through with him?

The CHAIRMAN. We will try very hard to get through all the testimony, but we will not come before 10 o'clock tomorrow. It is not possible to do that before 10 tomorrow. It will depend on whether or not Senators have questions beyond the second round. We unfortunately go through this with every nominee in terms of this discussion. If there are no questions on the Republican side, I am sure that will allow us to move much, much more rapidly. I don't know how many people will have a third round over here, but we will continue——

Senator THURMOND. I don't think that there will be but one on this side that will want to question.

Senator GRASSLEY. Could I correct that? I might want 10 more minutes.

Senator THURMOND. Ten more minutes?

Senator GRASSLEY. Ten more minutes.

The CHAIRMAN. I expect there may be additional corrections as we go, but the point is we will try to finish tomorrow, that is if it is possible to do so within the framework that I set up when we started these hearings on Tuesday.

Senator THURMOND. I think that will be fine. We appreciate it and we will start with the other witnesses next Monday.

The CHAIRMAN. If that is possible. I am not certain that is possible, but we will try.

We will adjourn until tomorrow at 10 o'clock.

[Whereupon, at 5:20 p.m., the committee recessed, to reconvene on Friday, September 13, 1991, at 10 a.m.]