Senator THURMOND. Thank you very much, Mr. Chairman. I think you anticipated what I was going to say and have already agreed to do what I wanted to do.

The CHAIRMAN. Well, that is good.

Senator THURMOND. And that is to finish today.

I want to say on this side we have only one Senator who will take his 30 minutes, another one who will take 5 minutes. And so there will be only about 35 minutes on this side, and I feel certain we can finish today.

I remember with Judge Souter we took only 3 days, and this will be 4 days with this witness. And I think that is reasonable, and I thank you for your cooperation. I feel certain we can finish today.

Senator SPECTER. Mr. Chairman?

The CHAIRMAN. The Senator from Pennsylvania.

Senator SPECTER. I don't think that Senator Thurmond——

Senator THURMOND. On the third round. I said second round. On the third round.

Senator SPECTER. On the third round? Well, I just wanted to be sure that Senator Thurmond had not intended to commit this Senator——

Senator THURMOND. I have not precluded you. I told you a while ago you could talk. You will be the only one that is going to talk. We will give you the whole time except 5 minutes.

Senator SPECTER. Well, I am still in some doubt, Mr. Chairman, but I just want to say for myself that I want to see how it goes without making a commitment at this time as to limitation. I want to cooperate with the chairman and with the ranking member in finishing today if we possibly can. I think that is a worthwhile objective, and I want to cooperate toward that. But I do not want to be committed as of this moment until I see how my second round of questioning goes. I have only had one round.

The CHAIRMAN. The one thing I have found, I would say to the Senator from Pennsylvania and to the committee, is that of all the Senators, probably the person who talks the least but asks the most pointed questions is the Senator from Pennsylvania.

Now, let me yield to my friend from Vermont, another one of my colleagues who uses the committee's time well.

Senator LEAHY. Thank you, Mr. Chairman.

Judge, Thomas, welcome back to you, Mrs. Thomas, and the family.

Judge you know, there has been a lot said by commentators and written about the purpose of these hearings. In discussing this with friends of mine back in Vermont, they ask what we are doing. For instance, is it the kind of thing, where we will all ask a certain question and you will give back a response, however prepared? That can be kind of a stylized ritual. I think the press probably correctly reported even in advance of the hearings how some of the questioning and how some of the ritual might go on here.

But I think that if these hearings are to be important for all of us—for me as a Senator and for every other Senator—they require us to have some idea about how you would think when you go to the Supreme Court. None of us is asking you, for example, how you are going to rule on an upcoming case. I think all members of the

committee agree that is an inappropriate question, and you would not answer it if we did ask such a question.

But it is appropriate for us to ask you how you think, what your background is, and what kind of a Justice you might be, if the advise and consent clause means anything. The President is asking us to confirm you to an extraordinary position. There is really no Supreme Court like ours in the world—lifetime positions, enormous power, equal branch of Government; in fact, in some ways more than equal because the Court becomes the arbiter between the other two branches of Government.

And each of us—whether conservatives, liberals, moderates, Northerners, Southerners, white, black, whatever we are—as Americans, we can always say to ourselves, "If somebody tramples on my rights, I can go to the Supreme Court. I am an American; I can go to the Supreme Court." Most Americans want to know that whoever sits on that Court is somebody who is going to have the qualities and the qualifications and the background and the integrity and the impartiality to look at their cases and decide on the merits of each case.

So, with that in mind, and because I still have a difficult time—even having met with you, and I think I have been here for 95 percent of the time you have been in this room—I still do not have quite the sense of how you think and what kind of Justice you would be. So bear with me if I might ask a general question.

Judge, you entered law school 20 years ago this year. In that 20 years, both you and I would agree, there have been some extraordinary cases in the Supreme Court. They have decided hundreds of cases, made rulings perhaps on hundreds more in that 20 years. Some may be routine, but some have been pretty significant cases.

Just tell me, to help me know how you think, what would you consider a handful of the most important cases that have been decided by the Supreme Court since you became a law student 20 years ago?

[Pause.]

Judge THOMAS. Senator, to give you a running list, I would have to go back and give it some thought. But I certainly think that during the time that I was in law school, two of the cases that were considered the most significant cases, or among the most significant cases, would have been certainly *Griggs*, which was decided while I was in law school, and——

Senator LEAHY. Would certainly be which?

Judge THOMAS. *Griggs*.

Senator LEAHY. Yes.

Judge THOMAS. And certainly I think *Roe* v. *Wade*. As you know, during that time when I was in law school, there was significant debate with respect to the inclusion and the rightful inclusion of women in the legal profession, in the law school, in higher education.

I know, for example, my own college, which was all male when I attended, had become coed. There were just very rapid changes, so that certainly would have been a significant part of that change.

Senator LEAHY. So you would include *Craig* v. *Boren*?

Judge THOMAS. *Craig* v. *Boren* also. That would have been during law school. But, you know, I think that one certainly isn't as routinely used in the press as——

Senator LEAHY. Are there some other cases that come to mind from the last 20 years?

Judge THOMAS. There would be others, Senator. I can't off the top of my head—as you mention them, perhaps I could accord some weight to them. Just not off the top of my head.

Senator LEAHY. But there are none that stand out, that might have been cases that have influenced your thinking when you accepted the appointment to the court of appeals or when you accepted this appointment? Did certain things stick in your mind. Did you say, I am being nominated to the Court that decided—whatever the case might be?

Judge THOMAS. Before my lifetime, I am being nominated to the Court that decided *Brown,* and I——

Senator LEAHY. What are some of the other——

Judge THOMAS [continuing]. And I think I mentioned that——

Senator LEAHY. You did.

Judge THOMAS [continuing]. When the President made the announcement that I would be nominated to the Supreme Court. That is certainly one of the cases—even before I knew all of the legal ramifications, it is one that changed my life and changed the South, and, of course, even though I did not go to desegregated schools until I was virtually an adult.

Senator LEAHY. Let me ask you about some of the recent cases that have been decided since you were in law school. One, of course, very recent case is *Rust* v. *Sullivan.* That was the case in which the Court upheld the regulations prohibiting abortion counseling or referral in the title X family planning program.

Now, I am not going to ask you to go into the particulars of that case because it is still a matter of some controversy. But I would like to go into some of the issues raised by the *Rust* decision. One is whether the Government can require a recipient of Federal funds to express only those views that the Government finds acceptable in any broad area. I am obviously thinking of some of the first amendment ramifications.

Let me make some specific examples. These are not cases that are about to come up before the Supreme Court, so let's talk just in the abstract. Suppose the Government wanted to further a policy of participation in the political process. Could they give out subsidies but limit them just to people who say that they will vote Republican or just to people who say they will vote Democratic? Could they do something like that?

Judge THOMAS. Senator, I certainly couldn't absolutely answer that. I would be concerned that if the Government could do that, it certainly would seem to me to be an interference with the way the freedoms that we would expect in our political processes, as well as the way that we think that we can function as citizens in this country.

Senator LEAHY. Well, let's go to another example. Suppose the Government would lay out a policy to protect the public from sexually explicit material. So, say that you are a library and you receive public funds, but you cannot have certain listed books. You

can't have Alice Walker's "The Color Purple." You can't have J.D. Salinger's "Catcher in the Rye" available. Could the Government do something like that?

Judge THOMAS. Again, Senator, I would have the same concern. I think the underlying problem that the Court has wrestled with and certainly in using the receipt of Federal financial assistance to in some way determine what the policies would be, that this body would have to wrestle with also.

I think the first that those sorts of issues arose, to my knowledge, in a general way, would have been in the *Grove City* case, where there were some concerns—at least the argument may have been raised by the educational institutions, and the Court disposed of it. But the concerns would always be whether or not the Government is conditioning the exercise of constitutional rights or the exercise of the engaging in conduct that we think that we are free to engage in this society under receipt of Federal financial assistance.

Senator LEAHY. Well, we understand, and you would accept, of course, the fact that there are times when the demonstration of Government policy or the requirement of Government policy can conflict with the basic constitutional right of freedom of speech. I mean, this has happened in our history over and over again, has it not?

Judge THOMAS. I think that particularly, Senator, with the significant involvement today of Government in virtually every aspect of our lives, the potential conflict between the Government policies or between the Government and rights that we consider fundamental to us or rights that we have considered those that we have been free to exercise, where that conflict—there is more of a potential for that conflict today. And I think that we all have to be on guard when the occasions arise when the conflicts are such that fundamental rights in ways are either denigrated or conflicted or undermined or interfered with in some way.

Senator LEAHY. You mentioned some of the issues that we here in the Congress have to wrestle with, but in addition, there is more and more a feeling that we are putting strings on Federal taxpayers' money. Now, some of those strings, I think most people would accept, make sense. We impose accounting strings; you have to account for where the money goes. I don't think anybody disagrees with that. Road-building funds must be used for road-building and not for something entirely different.

But what happens when you go to the next step—where we send money for a significant purpose, and, by gosh, we are going to tell you how to think to use that money?

For example, say the Government says "We are in favor of nuclear families." A fine, good statement of policy. But then do we also say, now, to any college receiving Federal funds—and most do in one way or another—that they cannot include information in a sociology course on divorce or illegitimacy or homosexuality or heterosexuality—whatever—because we feel it would interfere with this policy? Can we do that?

Judge THOMAS. Senator, I think that as you move more into freedoms that we consider fundamental, I think, as I have noted earlier, that the conflict becomes more accentuated, and I think the conflict becomes more evident. And to my knowledge, in those

kinds of instances, the Supreme Court has to wrestle with whether or not the Government has—if it is a fundamental right involved, for example, whether or not the Government has a compelling interest in doing that.

I understand the concern, but I can't in each specific instance say that I can resolve the problem or the specific problem. But I would have deep concerns myself if someone said that in order to receive financial assistance you are going to have to conduct your life in a particular way.

Senator LEAHY. What I am thinking of is this, Judge: What standards does the Court use—because you are going to become the arbiter of such things. If the Congress sits down and says "Here is our money for a good use"—education, health, research—but in effect, based on whatever the congressional mandate might be, we are also going to tell you how to think.

Now, when that happens, if the Congress does that, people are going to resort to the Court. I am not asking you to prejudge a lot of cases, but what basic standard—if you were to look at a case like that, one in which we send money for a very valid reason, like health care or education, and we say; "Here is what you can talk about," and "Here is what you can't talk about"; "Here is what you can read," or "Here is what you can't read," what standard would you as a judge use to determine whether we have just set aside the first amendment?

Judge THOMAS. Senator, that is, I guess, generally—and we are talking I guess in very general terms. If the right involved, of course, is a fundamental right, of course the appropriate test would have to be the demonstration by the Government that there is a compelling interest in some way infringing on that fundamental right. But let me underscore one other point that does not quite get to that and that would be a part of any analysis when this body expresses its intent to regulate a particular area or to provide assistance in a particular area, and that is accomplished in the administrative agencies.

When those agencies develop their regulations in the areas that do not touch upon and do not involve the fundamental right, of course we would have to defer to some extent to the agency and certainly to the intent of the reasonableness of the agency's regs and certainly the intent of this body.

The separate test that I mentioned initially is to the extent that it does infringe upon a fundamental right, I think the Court would have to undergo the standard kinds of analysis involving the compelling interest test, for example. In other words, hold the Government to the very highest standard to show why it can or why it has an interest in infringing on these rights.

Senator LEAHY. Judge, in my earlier question I asked you about what you considered to be some of the most important cases that have been decided since you were in law school and then we went to the next thing, what you considered some of the most important cases, period, and you mentioned *Brown* v. *Board of Education.* I absolutely agree with you that it is one of the most important cases decided in my lifetime.

But it triggered in my mind a speech you once gave in which you said that you considered *Morrison* v. *Olson*—that is the special

prosecutor case—the most important case since *Brown* v. *Board of Education*. When I asked you about cases this morning, you did not list *Morrison*, but in your earlier speech, you said that it is one of the most important cases since *Brown*.

But in that speech, you were not very kind toward the *Olson* decision. You said it was a very important case, but you did not like it. It was a 7-1 decision; Justice Scalia dissented. You called his dissent "remarkable." But you said that Chief Justice Rehnquist and the 7-1 decision failed not only conservatives but failed all Americans.

I was surprised that you did not list this this morning as one of the most important cases, but let me ask you this specific question about it: Do you feel still today that Chief Justice Rehnquist's decision failed all Americans?

Judge THOMAS. Senator, as I indicated yesterday, the point that I was making there with respect to that speech, and certainly in the rhetorical language, was this: That the structure of our Government as I saw it—and, again, I gave that speech as Chairman of EEOC—was to protect individuals. In other words, the Government is arranged in such a way that individual rights and individual freedoms are infringed upon as little as possible. And the point that I was making was that when that structure was changed and when there was a prosecutor that was not accountable to either one of the political branches, or directly accountable, that that could violate individual freedoms in a way that the three-part Government that we have, the three branches, would not permit and would not allow.

Senator LEAHY. You actually said that the special prosecutor statute could undermine the individual freedom of the person who is being investigated. You said you gave that speech and the rhetoric of it as Chairman of EEOC, but you were also at that time a lawyer and one who had thought about these issues. And what struck me is that when you link it with *Brown* v. *Board of Education*—a case which all of us look at as a most significant case and you certainly would have strong and personal reasons, as you have eloquently stated, for supporting it—when you put them together, it concerns me. In your testimony, you have stated over and over again how you want—even in your testimony here—to guarantee your impartiality. But isn't that what the special prosecutor is about—to make sure that if there is serious wrongdoing in the executive branch, Iran-Contra, Watergate, whatever, that there is an impartial prosecutor?

Should a President be in a position, for example, as President Nixon was in 1973, to be able to fire the person who is investigating him?

Judge THOMAS. With respect, Senator, to discussing that case in comparison with *Brown*, as I noted yesterday, the point was to take a case that most considered obscure and elevate it and attempt to show some of the significance of that. The important point that I was making as I told you; that individual freedoms were at risk. I wasn't looking at the case per se as a lawyer to argue the next case. I was looking at it in the context of the political theory and philosophy that I was discussing at that point. The——

Senator LEAHY. Well, I—go ahead.

Judge THOMAS. The final—if you notice, I did not parse the statute per se. Another point that I would like to make is that at that time, when we are in the political branch, I think that we advocate for the political branch. I have made comment throughout this hearing that when one moves to the judiciary, one must remain neutral in any debates between those two branches. And I certainly have done that in my position as a judge on the court of appeals and would intend to continue to do that. And as you added, this is a 7-1 decision. As I noted to Senator Kennedy yesterday, I believe, this is the—the Supreme Court has spoken. It is the law of the land.

Senator LEAHY. I agree with you on the question of impartiality, but you would accept, I would assume, that people don't expect that the second judges put on robes that it is like an eraser going across a blackboard and their whole lives are wiped out, all their thoughts, all their feelings, their prejudices—and I don't use that in a pejorative form—that all the feelings they have toward everything are suddenly wiped out.

Again, it goes back to what I said before. We are trying to see how you think, so that the American people know how you think. Because there is a great deal at stake for all of us. You or any member of the Supreme Court are one of only nine, and the Court is one of the three equal branches of the Government.

Let me ask about a very important habeas corpus case that was decided this past term, *McCleskey* v. *Zant.* I have seen your speeches and writings, and I understand your feeling that it is one thing to write or speak as a member of the executive branch. But you have frequently attacked what you call the "run-amock" liberal judges.

In *McCleskey,* the Court said that State prisoners should be limited to one bite at the apple in Federal court. I don't want to go into so much the result of that. As a former prosecutor who had to face an awful lot of habeas corpus cases, I felt that the nibbling ought to stop and after a while there ought to be a limit on it. That is fine.

But I look at this case, hailed as the work of a good conservative Court, as exactly what you are talking about in these judges running amock.

In 1989, the Chief Justice appointed a committee that was chaired by former Justice Lewis Powell, and the Powell committee was supposed to study the possibility of limiting the constitutional right to habeas corpus appeals. They testified before our Judiciary Committee and did a great deal of work on it. In fact, they came up with a proposal which would have sharply limited the right to appeal.

Now, the 101st Congress considered these proposals and did not pass the legislation that would enact the Powell committee's proposals. For whatever reason, the legislative proposals were not enacted. So after we did not, the Supreme Court went ahead this spring and, in effect, did the legislation themselves in the *McCleskey* decision.

Is that judicial restraint or is that judicial activism?

Judge THOMAS. Senator, could I address one point you made first and then address the second?

Senator LEAHY. Sure.

Judge THOMAS. With respect to judges and what happens when you become a judge, I, quite frankly, don't know that any of us who, prior to becoming judges, understood exactly how it would change us. I could not have told you when I was here for the court of appeals exactly how it would change me. I can tell you—and I think most judges would tell you—that it is not necessarily like an eraser, but it is a profound change.

With respect to the comment, the question, and the concern that you raise about that case, I think that activism, going beyond either the legislation or beyond the law on either side, is inappropriate. I don't think that any brand, whether it is conservative activism or liberal activism—if I could use those two general categories—is appropriate.

A judge is to remain impartial. I believe that it is one thing to sit in the executive branch and to take policy positions and to advocate and to disagree with the Court and to challenge the Court. It is another thing to be a judge and to be called upon to be the final arbiter in some of the most difficult cases in our country. And I think neutrality is absolutely essential.

Senator LEAHY. Judge, obviously I have dozens of other questions, but I just realized that the time is running down. I assume by now you have had a chance to read the Lehrman article. I see it sitting there. I did not want you to be disappointed. [Laughter.]

I wanted you to have at least one question that the quarterbacks behind you have been expecting here.

You have read the article?

Judge THOMAS. Yes, I have, Senator.

Senator LEAHY. Thank you. So have I.

In 1987, you called that article "a splendid example of applying natural law." Lewis Lehrman's analysis concludes that because the right to life attaches at conception that abortion of any sort is unconstitutional. Do you agree with that conclusion?

Judge THOMAS. As I indicated, Senator, to you in our last discussion, I have read this article; and as I have noted throughout my testimony and in discussions in reference to this article, my only interest was as stated: To demonstrate to a conservative audience that one of their own used this notion of natural rights——

Senator LEAHY. Judge, I——

Judge THOMAS. And the second point is that, as I have indicated, I do not endorse that conclusion. I do not think—and I have said it—that the declaration or the argument should be made in this fashion. And I have not concluded in any way or reached these conclusions or endorsed this conclusion.

Senator LEAHY. I am not sure just which conclusion we are talking about. I am talking about Lehrman's conclusion that all abortion, under any circumstance—which, of course, would go way beyond any overruling of a Supreme Court decision or anything else—his conclusion that all abortion is unconstitutional. Do you accept that conclusion?

Judge THOMAS. Senator, the——

Senator LEAHY. I am not trying to play word games with you, Judge. I am not sure whether it is the natural law or the conclusion that you disagree with. Do you agree with his—let me ask you

this specifically: Do you agree with his conclusion that all abortion is unconstitutional?

Judge THOMAS. And what I am trying to do, Senator, is to respond to your question and at the same time not offer a particular view on this difficult issue of abortion that would undermine my impartiality.

The point that I am making is that I have not, nor have I ever, endorsed this conclusion or supported this conclusion.

Senator LEAHY. Thank you, Mr. Chairman. My time is up. I do not want to intrude on anybody else's time. But I will hold my other questions for the next go-round.

Thank you, Judge. I appreciate it.

The CHAIRMAN. Thank you very much.

I apologize, Judge. It isn't that I am not interested in listening. I am trying to find out what time Senators have to catch planes so we can avoid the seniority route and let people have a chance to ask their questions, if we get that far.

Now I yield to my colleague from Pennsylvania, Senator Specter.

Senator SPECTER. Judge Thomas, one of the reasons that I was pleased to see your nomination was because of your background in civil rights work and employment opportunities. Equality of employment is so very important for the future of America.

I had asked you in the first round questions about affirmative action and about the cases and your positions. I know that early in your career, you took the position that flexible goals and timetables were desirable, and later you have shifted away from that. We all agree that quotas are bad, but you have said in your 1983 speeches that you thought flexible goals and timetables were good.

When you and I finished my first round on Wednesday, I had started to discuss the Supreme Court decision in the *Sheetmetal Workers* case and had not had time to really outline the facts. I had raised a question as to why you opposed the remedy in that case, because it was such an egregious, such a very bad case on discrimination.

Very briefly, the facts are these: In 1964, the New York State Commission found discrimination against blacks, and the New York trial court ordered changes. In 1971, Federal litigation was started to stop discrimination. In 1975, the Federal court found discrimination and bad faith, and it was upheld by the court of appeals. The court found that the union in the employment practices had consistently and egregiously violated the Civil Rights Act, and ordered a goal.

In 1982, there was a contempt citation, and in 1983 a second contempt citation. The discriminators were found guilty of contempt. In 1986, the U.S. Supreme Court upheld the contempt citation, noting a standard of persistent and egregious discrimination and found intentional discrimination. The EEOC took a position that there should be an award of relief only to the actual victims of unlawful discrimination.

Now, given the background of what had happened, it is clear that the future would have held more discrimination for the black workers there. In setting a goal, the Court was putting the employers on notice that they had to move toward hiring blacks. It was a flexible goal and the timetables had been extended.