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.

So, given the history, it was pretty plain that in the future there would be discrimination against specific individuals, and when you dealt with a base of about 3 percent, it was plain that there had to be more blacks qualified. Whether you could get to a higher number or what number you could get to was uncertain. But wasn't that remedy reasonably calculated, in a remedial sense, to prevent discrimination against specific blacks in the context where it was obvious that would happen? Wasn't it in the context where there would be blacks at least equal to, if not superior to, some of the whites who would be competing for the same jobs?

Judge THOMAS. Senator, since you mentioned that in our last round and that you would come back to it, I tried to give that some thought on what the context of that case was. As you know, one among many of those cases involving this difficult area of relief to nonvictims of discrimination during the 1980's, and the Supreme Court was going back and forth, I believe that this case occurred after cases such as *Stotts,* in which the Supreme Court limited relief or indicated that relief should not go to nonvictims.

With that said and noted as I indicated in my prior testimony that this is an issue that reasonable people have disagreed on, I think that people who are well-intentioned all want to make sure that you do include individuals who have been excluded, but at the same time not violate the sense of fairness that is in the statute.

In this particular case—and this is more of an intramural concern of the EEOC and the way that the agency operated—at the lower court level, the general counsel, which is quasi-independent, and we respected that independence, had already been given the authority to litigate the case, so that when it was appealed to the Supreme Court, to my knowledge, there was no additional vote of the Commissioners needed. That decision was made between our general counsel, who has already been authorized to litigate the case, and the Solicitor General.

The argument, as I remember it, was consistent by the Solicitor with what you said, but I will add this point: Independent of our processes and as an individual in reflecting on this, I do recollect urging the Solicitor to argue for contempt proceedings in this case in the brief, and that there be sanctions brought against such an egregious violation of a court order.

That was consistent with the approach that I think I attempted to outline in some of not only my speeches, but in some of my other writings, that when there was a violation of the antidiscrimination laws or a court order that was in place to resolve it, that the appropriate response should not be the numerical approach but, rather, that the appropriate response should be for the court to use its powers, its inherent powers to force compliance.

Senator SPECTER. Judge Thomas, I quite agree with you that reasonable men can differ on these issues, and I think that is one of the good features about your participation in this field. You have been able to advocate positions, as a black American which had unique standing. When you were against affirmative action, that had special significance, because of your unique background.

You have affirmative action having been sanctioned on all sides by the National Association of Manufacturers and the liberals on one side and by the conservatives on the other. When you talk

about contempt citations, I agree with you. But it is very hard—and I have had experience in the law enforcement field—to deter people or to penalize them enough to really get the job done, to materially affect their future conduct. So, that brings us back to the remedy of establishing a flexible goal, which at one time you had agreed with.

Now, you have just repeated the position you have taken consistently, and that is that there should not be relief to nonvictims. My question to you goes to the likelihood of future victims. In a context where blacks have been egregiously discriminated against, it is clear that that is going to happen in the future under the same circumstances, and the way to prevent future victims is to set the goal. My question to you is, isn't that a reasonable course which the Federal court followed and the Supreme Court upheld, and, of course, which you disagreed with?

Judge THOMAS. It is certainly the course that the Supreme Court has upheld, and I disagree with that as certainly a policymaker. The point that I have made that underscored this—and it has to be kept in the context and I have argued for it, it seems as though only one side of the equation finds itself in the debate oftentimes.

I felt, as a policymaker, that the best way to enforce the law, to enforce antidiscrimination laws, is to increase the remedy, the direct remedy for discrimination. I think that my view would be, my view was that the first step should have been that the relief under title VII should have been much stronger.

Senator SPECTER. Well, when you say relief, you mean the sanction——

Judge THOMAS. Right.

Senator SPECTER [continuing]. The contempt citation, the fine or the penalty. But should that be the only relief? Where you have a remedy which is directed to secure the employment of blacks who may be predicted, with reasonable certainty, are going to be actual victims, why not? Why not protect their rights, where you have virtually certain grounds to conclude that they are going to be the next victims, and the remedy is directed to future victims?

Judge THOMAS. First of all, during my tenure at EEOC, Senator, regardless of what my own concerns were, we did approve and did use goals and timetables in instances in which we felt they were appropriate, and the general counsel had developed and the Commission adopted, I believe, if not used, a specific policy on goals and timetables, but there are other approaches.

One of the things that I thought was appropriate—and let's just talk about the case where you are saying making sure, we know these employers are not going to do what they should do. I felt very strongly that EEOC should have been and we did become more intrusive in their personnel matters; that is, that it is one thing to say, well, we are going to have goals and timetables and there is no monitoring, you don't make sure that they are doing specific things to achieve specific goals.

We made sure that there was specific conduct required, and EEOC monitored to determine whether or not that specific conduct was, in fact, taking place or being engaged in. I think that is an appropriate way. And we have talked earlier in these hearings about outreach and recruitment, et cetera, but I felt that we could

be much stronger with a combination of monitoring and a combination of specific activities. Again, I underscore that with saying we did use goals and timetables.

Senator SPECTER. Well, I understand the variety of other processes, but it just seemed to me, in the context of that New York case, where you knew that there would be future discrimination, the remedy was very carefully tailored and that that was an alternative which would be reasonable to use.

Let me move on to the question of—Mr. Chairman, you have asked about the vote on and my preference. Perhaps this is as good a time to break, since we must break and vote and return.

The CHAIRMAN. We have about 10 minutes to get over to the floor to vote, and the Senator has about roughly 15 minutes left in his questioning, so I think it may be appropriate to take a break now. You can decide whether you want to break after this as well. Why don't we recess for—it will probably take us 12 or 15 minutes to go over and back.

[Recess.]

The CHAIRMAN. The committee will come to order.

Judge we will resume now with the questions. I want to make sure my time is precise. I said about 15 minutes, I am told the Senator has about 20 minutes, is that right, to be exact—19 minutes, so I want to be sure we are clear on that. We will now yield back to the Senator from Pennsylvania, and then we are going to go to the Senator from Alabama, and then we will make a judgment whether that is the appropriate place to break for lunch or whether we go back to Senator Brown.

Senator Specter.

Senator SPECTER. Judge Thomas, before the break I had been discussing with you affirmative action, to gauge your own thinking as you have moved in favor of flexible standards and goals to bring against it, against the backdrop of deciding cases. I had asked you about the pros and cons on having a remedy for a category which I classified as affirmative action for future certain discrimination victims. I think this was the fact under the New York case.

Let me move now to another category—regrettably, there is not a great deal of time to cover a matter of this importance, where I think the American people really need to know what is going on. I think there is no better person to tell them than you, sir, with your background—to a category of what I would denominate as affirmative action for previous discrimination victims in another context, where that person has the potential or apparent potential for being as good as, if not better than the person displaced.

I want to come to the Yale Law School admission, and not to personalize it with you, but take Prof. Steven Carter, who is an African-American and a distinguished professor now at Yale. Yale is a very good law school. Professor Carter has just written a book, "Affirmative Action Baby," and he says flat out that he enjoyed the benefits of racial preference.

Let's assume, although it may not apply to Professor Carter, that somebody who comes to Yale, an African-American, a product of inferior elementary school, high school, and college, but has the potential. Why shouldn't Yale give a preference? You in your testimony, in response to my question, oppose a preference. But why

shouldn't the law school like Yale give a preference. Shouldn't a school give that person an opportunity to blossom fully, even though on the test scores at the moment that African-American doesn't measure up quite to the white person he has displaced?

Judge THOMAS. Senator, I guess the difference that we have there is perhaps semantics, but let me explain to you what I have supported and what we argued for when I was in school, and that was that schools like Yale or other schools across the country should look at how far a person has come as a part of the total person, that you can look at kids who had gone to elite schools or had the finest family background and professional parents, or you could take a kid from the inner city who did not have all those advantages, but had done very, very well, and assess whether, one, the fact that this kid has done so well against the odds, is that an indication of what kind of person this is or how good that kids can be, is that an indication of how much drive that person has, how much stick-to-itivity that person has.

I think that during that era, those of us who were then the beneficiaries of what were called preferential treatment programs—I think that was the exact terminology—that it was an effort to determine whether kids had been disadvantaged, had socioeconomic disadvantages, had done very, very well in other endeavors against those odds, and I think that the law schools, that the colleges involved attempted to determine are these kids, with all those disadvantages, qualified to compete with these kids who have had all the advantages.

That is a difficult, subjective determination, but I thought that it was one that was appropriately made. One of the aspects of that is that the kids could come from any background of disadvantage. The kid could be a white kid from Appalachia, could be a Cajun from Louisiana, or could be a black kid or Hispanic kid from the inner cities or from the barrios, but I defended that sort of a program then and I would defend it today.

Senator SPECTER. Judge Thomas, what you are just saying, though, is a preference implicit. If I understand you correctly, the fact that the kid, as you put him, has come a long way, does not at that precise moment, going into Yale, have as good a record as another person. Take an African-American who has come a long way, come from a disadvantaged circumstance, at the moment of critical judgment, that applicant, an African-American, does not have as good a record as a white student. Would you then give him the preference, do I understand you correctly?

Judge THOMAS. What I said is that kid, particularly with the socioeconomic background, I think the law school—we all make that determination, how much drive does this person have. You know, we hear in playing sports, sometimes you hear coaches talk about it's not the size of the dog, it's the size of the fight in the dog. I think that the point that I am attempting to make is that Yale or other schools try to make that subjective determination about the total person, and I thought that was appropriate. I think there are other individuals like myself, when we hire, we look for more than just the person who has had all the advantages. We look for people who have had some of the disadvantages and have overcome those odds. I think it is very important.

Senator SPECTER. Judge, I hear you very close to my position. But what I believe I am hearing is that you are in favor of affirmative action preference, at least in that context.

Judge THOMAS. I think I have said that.

Senator SPECTER. Well, I haven't understood it from all your writings.

The CHAIRMAN. Would the Senator yield for 30 seconds, because I am confused.

Senator SPECTER. You are going to destroy a 5-minute train, Mr. Chairman, but go ahead.

The CHAIRMAN. Is that constitutional?

Judge THOMAS. Senator, I have not looked at it in that context. I assume that it was good policy to help to include others, and I have not looked at it in that context, Senator.

Senator SPECTER. Mr. Chairman, it will only take me 4 minutes to get back on my train of thought. [Laughter.]

If a preference there, Judge Thomas, if a preference there for the disadvantaged kid, as you put it, has come a long way, but he can't quite measure up at that moment, why not a preference in employment?

Judge THOMAS. I think, again, Senator, I have looked at education as a chance to become prepared. I have in my thinking personally—and I am talking totally from a policy standpoint—that education was that chance to be prepared to go on in life. It was an opportunity to gain opportunities.

For example, when we have our programs, even the ones that I established at EEOC, the effort was to give training, to bring kids in, to bring individuals in and give them an opportunity to prepare themselves, not in a way that I thought was offensive or in a way that was strictly based on race but rather, based on a number of criteria, a number of factors, including how far that person had come. I think that is important, and I think that you can measure a person by how far that person has come and by what that person has overcome to get there.

Senator SPECTER. Judge Thomas, that is fine for those of us who have gone to Yale, but what about the African-American youngster who doesn't have an educational background and is fighting for a job. You have a case like *Crawson* v. *Richmond,* which upset a minority set-aside. After that happened, the Philadelphia plan was one of the first in the country to move ahead with affirmative action. You should see the figures taking an immediate nosedive in African-American young people.

So, that if you have a Judge Thomas or a Professor Carter, who comes to Yale Law in that context, that is fine for their next step ahead. But if you have someone who is a 10th grade dropout and is struggling to get a job in a trade union in Philadelphia or in New York in the case we talked about, why not give that person a preference, because of the discrimination which has affected that person in his schooling. Where that person has the potential to be ultimately as good as, if not better than the white applicant who he displaces?

Judge THOMAS. Senator, of course, you do have the question that I have indicated, and I don't think that the cases necessarily break down that way. They don't make the distinction subjectively that

way. I believe it just strictly says it doesn't say that this kid has to come from a disadvantaged background, it doesn't say that the kid has to have had problems in life. It is race-specific, and I think we all know that all disadvantaged people aren't black and all black people aren't disadvantaged.

The question is whether or not you are going to pinpoint your policy on people with disadvantages, or are you simply going to do it by race. That is a difficult question. I was the first to admit that. It is one that needed constructive debate and discussion. But I don't think there is a person in this country who cares more about what happens to kids who are left out. What I have tried to offer and what I have tried to say, from the first days I entered the executive branch, was that we need to look at all avenues of inclusion.

You talk about education. In this day and age of mandatory education up to the 12th grade, I think we should ask ourselves a rhetorical question: Why is it that a kid who completes 12 years of mandatory education can't function in our society. That is particularly detrimental to minorities. We know it, and we know that there is a tremendous correlation between education and the ability to live well in this society, as well as to be employed and to have a good life in this society.

Senator SPECTER. Judge Thomas, I accept and applaud your sincerity, and I agree that there are disadvantaged people who are not in minorities. But focusing on minorities for just as moment, because that is the central problem, when you talk about the lack of educational opportunity for African-Americans, it is true across this country. That is why it seems to me that the logic that you accept on a preference to get into Yale Law School ought to be applied as a preference to get a job in New York City, where the local discriminated, or Philadelphia where the Philadelphia plan had been put into operation, where there is good reason to conclude that that person has the potential to succeed.

Judge Thomas, have you seen this very recent report by the U.S. Department of Labor on the glass ceiling?

Judge THOMAS. I have heard of it. I haven't seen much beyond my backyard in the last 70 days.

Senator SPECTER. Well, it is a stark picture about minorities and women holding less than 5 percent of managerial positions, and one conclusion, to put it plainly, the glass ceiling existed at a much lower level than first thought.

I would turn to one critical line from Professor Carter's book, which I think really puts in a nutshell much of this affirmative action debate. He says, "The reason for the surge is to find the blacks among the best, not the best among the blacks," and that if you have the affirmative action, as you concur, on preference in law school, then the potential is developed through a Professor Carter or a Judge Thomas. I would submit to you that if you give the struggling disadvantaged high school dropout who is African-American a preference, because of the collateral past discrimination, and the high likelihood that he is going to be a victim of future discrimination, that it makes sense.

Judge THOMAS. Well, what I have said—and I don't know, you know, I think it is easy to point out conflicts and to draw very

sharp lines, but let me make a couple of points, Senator, if you don't mind.

I have been an aggressive advocate of giving minorities the opportunity and the occasion to develop potential. We have done that. I have done that as the head of an agency, as well as my own approaches in my personal life. I think it is critical, and I have heard the same arguments for most of my adult life, and we have, of course, many of the same problems.

With respect to the existence, the current existence of those problems, we attempted, when I first arrived at EEOC in 1983, to point that out in a project that we called Project 2000, what would the work environment look like, where would minorities be, where would women be, what would some of the problems be. I think some of what the Department of Labor did later on involved similar approaches. That was an expression of our concern about what was happening in the educational arena.

When I was at the Office for Civil Rights, I think it was clear to us then that there were going to be problems in the future, because of the minority participation in education, and I think we are beginning to see evidence of those problems. At every level, we could begin to attack these problems. I have been concerned about it from a policy standpoint, and I have spent my adult life being concerned about it on a personal level.

Senator SPECTER. You talk about your position in 1983. Judge Thomas, you were in favor then of flexible goals and timetables, and perhaps you will be again. The great advantage of a Judge Thomas or a Professor Carter is a role model, and I think that is one of the aspects which speaks very well for your current position and is a big boost for the Supreme Court of the United States.

There is a good bit of politics at all levels of this proceeding, but one level of the politics which you wrote about in a speech back on April 25, 1988, complaining that the liberals play with the ill-treatment of the blacks and give them give-away programs, and your point that blacks will move toward a conservative line.

You may well be a role model which will attract many, many blacks to the cause of conservatism and to the Republican Party, and that is something that you and I discussed back in 1984, after the reelection of President Reagan. You had made a speech that the Republican Party did not reach out for blacks, and I picked up the phone and you and I had lunch and had a program to bring blacks into the Republican Party. We didn't do very much and we began a year later, and we still haven't done very much, but we may do something now.

As stated in considering your nomination, I am undecided and want to hear all the witnesses, and I am not going to vote for you for helping bring blacks into the Republican Party. My support will be based solely on your qualifications, but I think a collateral consideration might well be the benefit of seeing an African-American with a different line of thought as a role model.

Let me move on to *Rust* v. *Sullivan*. Senator Leahy took it up, but I want to approach it from a little different angle. The question I have, Judge Thomas, turns on the change in the agency regulation and you approve that principle in a speech you gave earlier this year at Creighton University, on February 14. I have a concern

about shifts in regulations, where the Congress has let them stand very much in my first round as I expressed a very substantial concern about disregarding congressional intent and having later Supreme Court decisions like *Wards Cove* reverse cases like *Griggs*.

The background of the controversy arises from the Federal statute which says that no funds shall be used where abortion is a method of family planning, but a regulation was issued in 1971 which said there could be counseling. Then in 1988, 17 years later, the Secretary of Health changed that.

In your speech at Creighton University, you agree with Justice Scalia that agencies should be able to change their regulations. You make reference to political accountability in a somewhat different context, but I think the political accountability is important. And then the Supreme Court, in *Rust* v. *Sullivan*, says that the Secretary can change the position, when the new regulations are more in keeping with the statute's original intent, are justified by client experience under the prior policy, and accord with a shift in attitude against the elimination of unborn children by abortion.

Now, without respect to the abortion issue, I have a grave concern about a shift in regulation based on political considerations which you appear to sanction in your Creighton speech. And I have a very deep concern about the Supreme Court upholding a change in regulation, because they accord with a shift in attitude.

When Congress passes a law that no funds may be used for family planning, where abortion is involved, no procedure where abortion is used for family planning is acceptable, but that does not preclude counseling or the exercise of freedom of speech, and stands for 17 years, what is the justification for changing, when Congress has ordained congressional intent which has stood, because there is a shift in attitude or some political change of wind?

Judge THOMAS. With respect, Senator, to the change in regulations, I think that what I pointed to in the Creighton speech was the line of cases beginning I think with *Chevron*, which involved a change in regulations and whether or not the agency could make those changes. That is the controlling Supreme Court case with respect to the Court's deference to the agencies, when reviewing their regulations, and the point that I was making about accountability is that this body, in its relationship with those agencies, could change the rules for them, and I assume that is the kind of accountability that the Supreme Court was referring to. I don't know.

But if you note in that speech, also, I took issue with the sense that this deference to agency can continue to be expanded and be unlimited. That was a concern, because at some point you would defer so greatly to the agency, even when the Court thinks it is moving away from the intent of Congress, that there is no judicial review, so the question became what are the limits of that. But, of course, in deciding our cases, we would follow the lead case of *Chevron*, which, as I indicated, permits changes in regs.

My concern would be the similar concern that I expressed earlier here, and I think that when you engage in judicial review in administrative law, this would be the same concern and it would be actually the bottom line or the baseline of analysis in those cases, is the agency's interpretation a reasonable interpretation of congressional intent. That is the important line to draw, with the ref-

erence being, as it is in statutory analysis, what is the intent of Congress. if Congress changes that intent, then the agency, of course, can't go beyond that.

If Congress is explicit about that intent, then the agency has very, very little room within which to maneuver. If broad, of course, the agency may be able to engage in a significant range of reasonable conduct and choosing of options. That was the point that I was trying to make in the Creighton speech, but the bottom line for us, the baseline, the anchor in the administrative law cases is always what is the intent of Congress and is this a reasonable interpretation of that intent, whether we agree with the policy of the agency or not or the change in the agency's policy or not.

Senator SPECTER. My time is up. I will return to that in the next round. Thank you very much, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Before I yield to the Senator from Alabama, I would like to make a point of clarification. Did you say, Judge, that affirmative action preference programs are all right as long as they are not based on race?

Judge THOMAS. I said that from a policy standpoint I agreed with affirmative action policies that focused on disadvantaged minorities and disadvantaged individuals in our society.

The CHAIRMAN. For example——

Judge THOMAS. I am not commenting on the legality or the constitutionality. I have not visited it from that standpoint, Senator.

The CHAIRMAN. As we all know, I went to one of those State schools. My son went to one of those Ivy League schools. I didn't realize that in those Ivy League schools you all attended, there are preferences based on whether or not you are a—what is it called if your father went there? A legacy. If you are a legacy——

Judge THOMAS. Or if you are a football player.

The CHAIRMAN [continuing]. Or if you come from a certain part of the country. My son might not have been accepted by the school because his father didn't go there, even though his marks are higher than the kid who got in. That is how it works. As long as everybody knows that. If that is not preference, I don't know what is. But I will come back to that point because it seems to show that preference for whites is OK, but preference for blacks isn't.

Let me go to the Senator from Alabama.

Senator HEFLIN. Judge, just to follow up briefly, it is my information that as the Chairman of the EEOC you hired 49 individuals who reported directly to you in the headquarters office. Of these, 26 were women, 53 percent; 33 were members of minority groups, 67 percent; and that you hired 29 special and executive assistants, of whom 14 were women, 15 were black, 1 was Hispanic, and 2 were Asian.

Did you have a policy of preferences during the time you were hiring them?

Judge THOMAS. Senator, my policies were as I stated. I looked long and hard to make sure that any number of people, whether they were minorities, women, individuals with disabilities, were included in my search. I always, to the best of my abilities, hired the best qualified people.

Senator HEFLIN. All right. Now let me briefly visit this issue of privacy. You have testified that you find in the word "liberty" of the 14th amendment a right of privacy, and you indicated that this right of privacy extended to the marital relationship. And then to Senator Biden, you testified that you thought an individual had a right of privacy.

Now, I don't want to misquote you or anything. Would you clarify your exact status as to the right of privacy and how it applies particularly to individuals?

Judge THOMAS. The point, I think the exchange that we had was along this line: That there was a right of privacy as established in *Griswold,* and that that applied to the marital relationship. The question then became was there a right of privacy that applied to nonmarried individuals, and the point that I was making was that that right of privacy in the intimate relationship was established using equal protection analysis under *Eisenstadt* v. *Baird.* And I think that is where we left it.

Senator HEFLIN. Now, do you come to the conclusion that the fifth amendment contains a right of privacy under the word "liberty"?

Judge THOMAS. That is a question that I have not considered, but I don't see where there would be—in the analysis I would parallel the analysis with the 14th amendment. But, again, that is an analysis that I have not—I don't know of a particular case that has based it on that.

Senator HEFLIN. What are your feelings regarding the incorporation doctrine?

Judge THOMAS. Senator, I certainly have not any occasion—and I certainly don't—to object or to criticize the incorporation doctrine. I think the only concern that I have seen that has been raised has to do with individuals who might think that the incorporation doctrine limits—I think along the lines perhaps of Justice Black, would be the limit of rights that individuals have.

Senator HEFLIN. Would you have any concerns with the selectivity of Justice Black's incorporation doctrine?

Judge THOMAS. The exclusivity of it.

Senator HEFLIN. Now, under the Constitution, I don't think there is any question that there is a right to life in the 14th and 5th amendments. It may well be that one of the purposes of government is to protect life.

I think we have found that the right to life is not absolute and that there are questions as to whether or not the right of privacy would be absolute. Regarding the right to life, you have the death penalty, for example, which is a limit. You have to go through the due process of law and other aspects that might be controlling.

In the event that there is a conflict between two principles of constitutional right, do you have a methodology by which you would give a priority to one right over another when there is such a conflict?

Judge THOMAS. Senator, I think that the occasions on which there has been conflicts or the ones usually in which there is a right asserted have to do with the Government in some way becoming involved or regulating a particular right. And what the courts have attempted to do, of course, is to determine how to value that

right—is it a fundamental right? And if it is a fundamental right, then, of course, the state would have to show that it has a compelling interest in some way regulating this particular activity.

I think that that is important. It is one thing to state what the constitutional analysis is, but I think what it says to us all is that we place a very high value on certain rights that we have that we consider core fundamental rights in our society. And the state must show a reason that is extraordinary, compelling, overwhelming as to when it decides that it is going to do something that interferes with these rights that we value very highly. So I think that—and that, of course, can be stated with different degrees of precision, but in the equal protection analysis, that is precisely what we are attempting to do, is to value those rights and to require more of the States—we are not going to defer to what the state is doing simply because it is the Government, but rather you must have a reason for doing it.

Senator HEFLIN. You have testified several times during this hearing that when you were Director of the EEOC you felt that the EEOC laws pertaining to discrimination in employment didn't have enough teeth in them. What teeth would you advocate being added to the discrimination in employment rights statutes that give remedies?

Judge THOMAS. Well, I am not going to—let me answer it in this way, Senator, without being evasive. I know that there is pending legislation before this body in that area, and I don't think I should get involved in that debate.

But during my tenure at EEOC—and I think it is a matter of written record that I abhor discrimination, and I think that title VII undervalues the damage done by discrimination in the employment context. I have advocated damages. I have advocated contempt proceedings. I have advocated penalties. Something that would do more than say to an employer, All you have to do is hire the person that you discriminated against or pay that person what you would have paid that person.

That was my approach to saying I think—or the country saying we are serious about the damage done by employment discrimination, at least as serious as we are about other kinds of noncompliance with our civil laws.

Senator HEFLIN. Well, you have stated a number of times that you didn't think there were sufficient teeth in those laws. Did you ever make a recommendation, in writing or orally, as to additional teeth that should be added by the administration—that they ought to look at it from a legislative viewpoint?

Judge THOMAS. I certainly did.

Senator HEFLIN. You did?

Judge THOMAS. I did. I can't remember whether I ever reduced it to writing, but it was something—I guess at some point I probably began to sound like a broken record.

I advocated it in this context, Senator: I felt that we should have had a positive civil rights agenda, a very aggressive civil rights agenda, even if we disagreed as to specific policies. And I felt that adding to and enhancing the sanctions of title VII could be a significant part of that.

Senator HEFLIN. Do you remember any of the specifics that you advocated?

Judge THOMAS. I think they were generally as I indicated to you, that there should be increased damages, perhaps penalties, and even treble damages, and certainly a use of contempt proceedings where there were violations of court orders.

Senator HEFLIN. Treble damages would be punitive damages, then, wouldn't they?

Judge THOMAS. Well, I think discrimination—my view was that discrimination was abhorrent enough to make that appropriate.

Senator HEFLIN. All right. From your life and history, you are somewhat of an enigma. You have gone through many changes in your life, and American society in the last three decades has gone through many changes. The thinking of individuals evolves, and individuals change with time.

You have told us about your background in your opening statement and through testimony here. It is interesting to note that you decided at one time in your life that you wanted to study to be a priest, and you went to a seminary and then to another seminary in Missouri.

Articles that I have read by Juan Williams of Atlantic Monthly and by Karen Tumultree of the Los Angeles Times, among others, have described your experiences—that you suffered the pains of racial slurs in the seminary when at night people in the dormitory would say, "Clarence, smile, so we can see you."

Then I believe instances have been recited on the death of Martin Luther King and the callous statements of hatred that were made by your fellow students relative to that. Would you tell us what happened?

Judge THOMAS. Well, Senator, with respect to going to the seminary, of course, that is always a very, very deeply personal choice, it is a deeply personal religious choice. When you make that decision at 15, there is always opportunity for change and growth and development.

The point that I was in my first year of college, though, and beginning to grow and to develop as an adult, I can still remember that afternoon—actually, it was in the evening that one of the students who was walking up the stairs in front of me, whose name I have never revealed and won't, didn't know I was behind him, and someone yelled from the basement, "Martin Luther King has been shot," and he said, without looking behind him to see that I was there, "That's good, I hope the s.o.b. dies." That was the moment, the precise moment that I decided to leave the seminary and the moment when I began to be involved personally in much of the marches and participating in changing our society, and left the seminary.

The seminary, at Conception, was in a very, very remote area. If you are in the area, it is Conception Junction, MO. That is near Savannah, MO, near St. Josephs, MO. It is in the northwest corner of Missouri. One would have to really be there or lost, to know where you are. You either know where you are or you are definitely lost.

We went down immediately after that to Kansas City to participate in a number of the marches, and there were other events

which I won't get into that occurred that summer that were equally as difficult and touching, and it was at that point that I transferred to and went to Holy Cross College.

Senator HEFLIN. Also, I believe you told me in my private conversations with you that this was an influencing factor which caused you to decide not to become a priest, is that correct?

Judge THOMAS. It was as deeply influencing factor in that decision and many, many aspects of my life.

Senator HEFLIN. Of course, I think part of this shows you do have a sensitivity to the factors that have occurred relative to the movement or progress of race relations, and I think that ought to be brought out, in fairness to all parties concerned.

Now, you went to Holy Cross. What did you major in at Holy Cross?

Judge THOMAS. Well, I transferred to Holy Cross for my sophomore year and I majored in English literature. People would ask me why I majored in English literature, and my response has been, and it is accurate, I majored in English literature as a second language. I simply did not have the capacity to speak and use English at a level that I thought necessary to function in this society, so I decided to major in English. I had been fortunate enough in the seminary to have had Latin, to have had German, and to have had French, which all were helpful in teaching grammar, but I needed English, I needed to be immersed in something that I found painfully difficult, and that was the basis of my major.

Senator HEFLIN. What did you minor in?

Judge THOMAS. I think protest. [Laughter.]

Senator HEFLIN. Protest?

Judge THOMAS. I didn't have a minor, Senator. We had a core requirement, those were the last years of core requirements, and you were required to take specific courses, metaphysics, philosophy, those sorts of things.

Senator HEFLIN. At Holy Cross, of course, you were proud of that time that you had been involved in demonstrations. In Karen Tumultree's Los Angeles Times article, it says,

> In combat boots and army fatigues and sometimes a leather tam of the Black Panthers, Clarence looked the part of the angry radical, as he strolled down the campus of Holy Cross College. He opposed the Vietnam War, but helped found the College Black Student Union. Thomas' most notable act of defiance came after a 1969 protest against the parents of a recruiter from General Electric Company, a company that had been heavily involved in the Vietnam War. Thomas was one of a group of black students who believed that blacks had been unfairly singled out and disciplined by campus officials. They walked off, effectively resigned from the college in protest. The protestors didn't wear T-shirts and jeans, but suits and ties. Later, they were granted amnesty and allowed to return.

Other articles would indicate that you led a protest against the South African investments of Holy Cross trustees. Is that a description that is fairly accurate of your attitude and your participation in various protests and affairs of that time?

Judge THOMAS. Senator, I think as I have attempted to indicate over the past few days, that I have always been—not always, but throughout my adult life and perhaps since the age of 16 or 17, very much involved and interested in all of these issues.

When I went to Holy Cross, there was as tremendous amount going on, and one of the areas that was of great concern to me was

what I perceived at that age as injustices in our society, and what I attempted to do was to be involved and to protest and be active in protesting what I thought were injustices in a way that is permitted in our society.

One of the activities was what we designated in later years, in 1969, the walkout, that is that we felt that some students, minority students, were being unfairly treated, and as I remember it, we did not walk out with the intention of coming back. The walkout was, to my way of thinking, a walkout, it was leaving, in fact returning home. The only thing I hadn't figured out was how I was going to face my grandfather.

But the other activities that we were involved in included free breakfast programs, tutoring programs, and I think that interest has been true throughout, the same interests that I have had throughout my life, that has not changed, although I have eschewed the combat boots and the fatigues for suits that I think are overpriced. [Laughter.]

Senator HEFLIN. In this Los Angeles Times article, it says, "Today, he seems embarrassed about those days."

Judge THOMAS. No.

Senator HEFLIN. Do you want to respond to that?

Judge THOMAS. No, I am no more embarrassed about feeling strongly and passionately about injustice than I am about doing anything else in my life. I think that I would rather have those days of wanting to participate in our political process, even though I have grown and matured, than saying that I spent all of my college days drinking beer and having a good time.

Senator HEFLIN. In this article, it goes on and says,

> In a November 1987 interview with Reason Magazine, he lamented, the thing that bothered me when I was in college was that I saw myself rejecting the way of life that got me to where I was. We rejected a very stable and disciplined environment, an environment with very strict rules, an environment that did not preach any kind of reliance on government.

Do you want to comment on that?

Judge THOMAS. Well, as I have indicated in these hearings, the environment in which I grew up was a disciplined environment, it was one in which you were expected to be up early. I can still remember my grandfather on Saturday mornings, when he thought we were going to sleep until 7 or 7:30, he would come to the open windows of our bedrooms and just simply say, "Y'all think y'all rich," and that had a way of inspiring me to get up. [Laughter.]

But it was as disciplined environment and it was one that required a lot of effort. My concern wasn't so much or juxtaposing that environment with the protests that we were engaged in. I thought that was appropriate. But if you remember that time, it was as protest or challenging of all authority and all rules that we grew up by, and it was that. The question was raised, why should we take metaphysics, why should we study until 11 or 12 at night, all those questions were raised.

I thought that the efforts or among the factors that had permitted me, in addition to Holy Cross being so good as to accept me, the things that had permitted me to survive and to do well there was to take advantage, to work and to take advantage of those opportunities, again, as I said earlier, to burn the midnight oil, and that

was a part of the past that I saw us beginning to challenge or question.

Senator HEFLIN. Why did you decide to go to law school and become a lawyer?

Judge THOMAS. There were a couple of reasons, Senator, that I thought at the time were of major proportion. You know, we all wanted to change the world at that time. I guess at that age you think you actually can go out and change the world. I wanted to right some wrongs that I saw in Savannah, some specific wrongs with respect to my grandfather and what he was able to do with his life, as well as to the overall wrongs that I saw as a child there.

During law school, I did go back in the one summer that I worked for a law firm to Savannah, in an effort to do that. I did not decide to return to Savannah and, instead, went to Missouri, but it was my goal during the entirety, it was my reason for going to law school and it was my goal until my third year to return to Savannah and practice law.

Senator HEFLIN. I started talking about your background. You were in an enigma or experiencing a good deal of uncertainty or changing ideas. During these hearings I think you have maybe surprised some people with your position, for example, on the fact you don't think natural law ought to be used as a method of constitutional adjudication, that you support, in effect, public housing, that you believe multiple languages ought to be used and we ought not to have an English-only approach in governmental activities and schools. You found a right of privacy. You seem to have an adherence to the present methodology in deciding cases on separation of church and state. You have expressed some ideas that would indicate you believe that the Constitution evolves and develops, as issues change, and certainly in your own office, it is subject to the idea that you did follow some affirmative action, which brings us to the question of what is the real Clarence Thomas like or what will the real Clarence Thomas do on the Supreme Court, if he is confirmed.

Some believe you are a closet liberal, and some, on the other hand, believe you are part of the right-wing extreme group. Can you give us any answer as to what the real Clarence Thomas is like today?

Judge THOMAS. Senator, I think that during the past 10 weeks, people have written and formed conclusions about me, and that has gotten to be a part of this process. I think they are free to do that. But it reminds me of the story that I heard about Judge Haynsworth during his ill-fated nomination and confirmation process in which he was reading about himself in the morning paper, and having read the story, he looks up and says to his wife, "You know, I don't like this Haynsworth guy either." [Laughter.]

Senator HEFLIN. I thought it was otherwise; that his wife said that. [Laughter.]

Judge THOMAS. Well, either way, it works.

The point is, though, Senator, that people form conclusions. The one aspect of a lot of the publicity that I did like was that my friends from as far back as my college years—and I mean my friends, not people who have claimed to be friends—have pointed out the continuity and consistency, the growth and development.

That has been one of the most touching aspects and rewarding aspects of the past 10 weeks in reading and hearing.

But those conclusions that people form about you were not—about me were not the real Clarence Thomas. I am the real Clarence Thomas, and I have attempted to bring that person here and to show you who he was, not just snippets from speeches or snippets from articles. The person you see is Clarence Thomas. I don't know that I would call myself an enigma. I am just Clarence Thomas. And I have tried to be fair and tried to be what I said in my opening statement. And I try to do what my grandfather said, stand up for what I believe in. There has been that measure of independence.

But, by and large, the point is I am just simply different from what people painted me to be. And the person you have before you today is the person who was in those army fatigues, combat boots, who has grown older, wiser, but no less concerned about the same problems.

Senator HEFLIN. I believe my time is up.

The CHAIRMAN. Thank you. I think we will continue to go, and we will move to Senator Brown, and then we will break for lunch after Senator Brown finishes.

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, I must confess this morning's testimony has helped me understand you a great deal better, particularly your comment about why you chose English. If I heard it correctly, you said it was because it was painfully difficult for you. It does help me to understand why you would want to undergo a fifth confirmation hearing, if nothing else.

I am sure you appreciate the reason for this extended confirmation hearing and the multitude of questions. Some have alleged that the Senate is made up of 100 Secretaries of State, but I have long thought it was more like 100 Justices of the Supreme Court than Secretaries of State. And it is obvious that we have a fascination and a continued interest in the work that you may well take on.

Over the course of our hearings, you have declined to indicate how you would rule on specific cases, and clearly that is in line with what both Democrats and Republicans on this committee have indicated is the practice and, in effect, the canons of ethics for judges, to not rule on a case without hearing the facts and listening to it.

The media advise us that you had a meeting with the President, however, up at Kennebunkport, and I am wondering if in your discussions with the President you took a similar position. Did you decline to discuss with the President or indicate to the President how you would rule on specific cases?

Judge THOMAS. Senator, after I arrived in Kennebunkport, somewhat bewildered and not knowing exactly what was going to happen—in fact, not knowing what was going to happen—the President asked me to chat privately with him, and he said that he had two issues that he wanted to discuss. The first was: If you are nominated, will your family be able to sustain or to survive this process, because it will be a difficult process? Not knowing really what would come, my answer was yes. In retrospect, I might adjust

that a little bit and certainly would have conversed with him more at length about it.

The second question that he asked me was—and I think this is almost verbatim: Can you call them as you see them? And then he went on to indicate that if he did not agree with me, were I to be confirmed and sit on the Supreme Court, that I would never see him criticizing me in public, even if I disagreed with him or he disagreed with me. And I assured him that I could call them as I saw them and that I would as honestly as I could and to the best of my abilities. And he indicated that he was going to nominate me at 2 o'clock and suggested that we have lunch.

Senator BROWN. Since that meeting, have you had any discussions with the President where you have committed how you would vote on a particular case or a particular legal doctrine?

Judge THOMAS. No, Senator.

Senator BROWN. In other words, you have given the President the same ethical treatment you have given us?

Judge THOMAS. Well, I have tried to be consistent across the board, Senator.

Senator BROWN. Earlier, Senator Heflin had mentioned property rights, and we discussed a great deal about various theories of protecting property and individual rights. If I understand the cases correctly, our courts protect personal rights like abortion and others with a standard called "strict scrutiny"—that is, the Government has to have a compelling Government interest for any restrictions on those rights—but that a different standard applies for the protection of property rights, called the "rational basis test," "rational relationship test," protected by requiring some rational relationship between the legitimate, not necessarily compelling, purpose and means chosen to achieve that purpose.

At least in my mind, I think there are a number of reasons why this distinction between personal rights and property rights simply doesn't hold water, is artificial.

First, it strikes me that the property rights are of obvious concern to the Framers of our Constitution. They are named specifically in the Constitution with explicit references both to contracts and property.

Second, I believe that property is simply an extension of personal rights and vice-versa, that to separate them, to assume that they are different somehow, really reflects, I think, a distorted view of how our society works.

Third, the political and moral values that we all hold dear strike me as dependent upon private property and the freedom to contract.

When I first decided to run for the State legislature, I was very dependent on a job. My boss was a very liberal Democrat who was active in the Democratic Party. If I had lost my income to support my family, if I had lost my job, I think it would have had a major effect on my freedom of speech and my political rights. And for the courts or this country to pretend that somehow your right to property is inferior or isn't integrated with your personal rights, I think is ignoring the reality of our society.

I must say I am troubled by the artificial distinction that has been discussed. To provide a lower level of protection for property

rights I think endangers personal rights, and perhaps the opposite is true.

I raise this because I think that artificial distinction, that different treatment, the second-class protection that some have advocated strikes me as a real problem. We have talked a lot about a zoning case, the *Moore* case, calls it to mind. It strikes me that that was as much a violation of the right to use property as it was a violation of the personal rights of the individuals involved. And it seems to me it is an insult to the American people to somehow think that you can protect one without protecting the other or that there is a second class of rights even though they are specifically mentioned in the Constitution.

Well, I mention that because I want to ask you about that again. Professor Tribe is one who has great credibility, I think, with many members of this committee, and many members have quoted the professor. I thought it would be worthwhile to quote him in this case on this subject.

Here is a quote of what he wrote:

> The attempt to distinguish between economic rights and personal rights must fail.

He later wrote:

> It will not do to draw a bright line between economic and civil liberties or between property and personal rights. As Justice Stewart observed, the dichotomy is a false one. Property does not have rights. People have rights. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. That rights in property are basic civil rights has long been recognized.

The question, Judge, is this: Do you find laid out in our Constitution language that calls for a second-class level of protection for property rights?

Judge THOMAS. Senator, I think that we have certainly—as we have discussed in these hearings, I have said in my own writings that there should be a recognition of property rights—economic rights, and I was talking in that case more about my grandfather and his ability to, as you say, earn his living, not be denied that.

But I think what the courts have done in the regulation of the social and economic affairs of our country has been—and I think appropriately so. As I have noted, I have no quarrel with the equal protection analysis that the Court uses. The Court has tried to defer to the decision of the legislature. In other words, the balances should be struck by this body or by the political branches and not second-guessed by the courts.

I have no reason to quarrel with that approach. It recognizes that the considerations are very complex and involve any number of factors that are best left to the legislative branch.

Senator BROWN. In relation to the comments by Professor Tribe—by phrasing it this way, I am not suggesting that I want you to become an adherent of the good professor. But on this subject, thinking about the comments of Professor Tribe and Justice Stewart, when they conclude that the dichotomy between personal rights and property rights is a false one, would you agree with that? Do you find yourself in agreement with that? Do you have any observations about that?

Judge THOMAS. Senator, I think certainly I have not re-examined that or looked at that as a judge. It would require me to sit here

and attempt to formulate an opinion on that. Of course, I think we all at bottom feel strongly that we should have the freedom to work and to support our families or to provide a part of the support for our families and for ourselves. And we certainly don't feel that—that is one of the reasons why this body passed title VII of the Civil Rights Act of 1964 and made those difficult choices. But it is also reasons why you protect individuals in the work force so that they are not harmed in a variety of ways by the conduct of their employer or the environment itself.

I think that those are complicated decisions. We value our ability to own property and to engage in work. But there is a balancing that must take place, and I think that the courts have appropriately chosen to defer to the Congress or to the legislature, the political branches, in making those balances.

Senator BROWN. Well, I appreciate that comment. I must say from my own point of view, at least my judgment in society, those that are extremely wealthy don't have to worry about this very much. They have got theirs. But a right to work and save and have an opportunity to keep a fair share of what you produce in this world is darn important to somebody who starts off in life without much, because it is one of the ways they go from the bottom to the top. And I would hate to think in this country that we would assign second-class treatment to someone's ability to go from the bottom to the top, to acquire property, to save, to reinvest, to have a chance to protect the things that they produce for themselves.

I for one think a distinction, an artificial distinction between those rights misses the whole point and perhaps jeopardizes that fundamental ability to be a mobile society, to move up.

A couple other areas that I want to invite you to comment on. I appreciate that these are areas that the Court may take up, but if you have observations you would care to make, I would like to have them on the record.

The interstate commerce clause is one that has critical impact in terms of Congress and its ability to direct the States and others in this society. Over the years we have had a wide variety of decisions regarding the extent of the interstate commerce clause. One of the landmark cases in the early 1940's basically indicated almost anything we do in any way can affect interstate commerce.

I would be interested in your view of the interstate commerce clause and how philosophically you would approach the questions that deal with it.

Judge THOMAS. I think that you are right in the sense that the Court has read those provisions rather broadly. But I make this point, and I underscore that by saying I don't have any objection or basis to object or at this point any quarrel with the way that the Court has interpreted the interstate commerce clause.

But I make this point—and I have heard some academic objections from time to time. But I can remember reading, I believe the *Heart of Atlanta Motel* case which challenged, I believe, the accommodations provisions in the Civil Rights Act of 1964, which is based on the interstate commerce powers. And one of the factors that was used there was that blacks who traveled across the country were impeded from traveling because of the lack of accommodations.

What that brought to mind was that when I was a kid and we would travel occasionally—I think two or three times during my childhood—by highway from Savannah to New York, my grandfather would go through this long exercise of making sure that the car was working perfectly, that you had new tires, that we had a trunk full of food, et cetera, because there were no accommodations. And should you break down, you would be met with hostilities. That was the reality. So there was indeed some, I would consider significant, impediment on the ability of us to travel and certainly, by extension, on the flow of commerce or travel in our society.

I have no quarrel, Senator, with the approach that the Court has taken and certainly have had no opportunity to review all of the cases.

Senator BROWN. Thank you.

The ninth amendment has come up a great deal in the hearing, and I think continues to be an evolving area of the law. Some have viewed the ninth amendment as providing a limitation on the powers of the Federal Government over the individual. Others have viewed the ninth amendment as a provision that, in effect, mandates governmental activity of a certain nature.

Would you share with us your thoughts on that particular amendment?

Judge THOMAS. Senator, as I have indicated earlier, I think that whatever we do with open-ended provisions such as the ninth amendment, that we make sure as judges that those decisions are fettered to analysis or something other than our own predilections or our own views. That would be the concern, the generic concern, as I have said before, with any of the open-ended or more open-ended provisions.

The Court, to my knowledge, has not used the ninth amendment, a majority of the Court, to decide a particular case. And there has been debate about what the purpose of the ninth amendment is.

There could be a time when there could be an asserted right under the ninth amendment that would come before the Court in which there could be found to be a basis for that right in the ninth amendment. I don't know. But as scholars do more work and certainly as individuals begin to assert rights and the Court begins to consider those, I wouldn't foreclose that from occurring.

Senator BROWN. One last question—and I think I still have time. There has been a great deal of discussion about antitrust policy in the last several decades. I end up viewing antitrust policy as essential for helping guarantee a competitive economy. It is one of the features about America that is somewhat unique. While many other countries have sanctioned monopolies, sanctioned conglomerate control over the markets, the United States has really been a pace-setter in demanding that we have competition within our marketplace.

There have been many challenges to those concepts of antitrust statutes in recent years. I can appreciate that you do not want to deal with specific cases, but I would be interested in your view of the antitrust concepts and any remarks you would like to make about their merit.

Judge THOMAS. Senator, my grandfather was a small businessperson, one oil truck, an ice truck, and a vacuum cleaner to clean stoves, and two little kids to run with him and also to help answer phones.

I think that competition in the private sector is healthy in our society. It is healthy not only from the standpoint of the businesses themselves, particularly the smaller businesses, but it is also healthy from the standpoint of products, quality of products that are brought to consumers, as well as prices.

I think that our economy and our country expands and provides opportunities to absorb individuals who otherwise would not have a chance. It is one that is very interesting. After growing up in a household where there is a small business, literally not a separate office, it is the house, you get the feeling of how important it is to have this opportunity to be a part of this competition and to not be foreclosed by certain individuals monopolizing an entire area. So, just reacting as a person, I think that it is important that we have healthy competition in the economic arena.

Senator BROWN. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you very much.

It is 20 minutes to 1 now. Do you want to keep going? Actually, I think that we should break for lunch, and come back at quarter to 2. We will recess until quarter to 2.

[Whereupon, at 12:45 p.m., the committee recessed, to reconvene at 1:45 p.m., the same day.]

The CHAIRMAN. The hearing will come to order, please.

We will attempt to finish tonight, but I want to emphasize that if Senators continue to have questions, we will not. I still think that it is possible to finish. All of the Senators were told at the beginning of thse hearings that we would not go late today, and I want to be able to accommodate those Senators who made plans in their home States. Since deregulation, I know you can't catch a lot of planes to a lot of places other than at specific times.

Our good friend from Wyoming has such a commitment based on the assertion the Chair made that we would not go late on Friday. My two colleagues from Illinois and Wisconsin, who have not yet had a second round, have been gracious enough to yield to him for a third round or part of a third round so that we can try to meet the twin obligations.

Just as the Court always has to balance things, Judge, we are having to balance needs here, and we are going to apply a strict scrutiny test after Senator Simpson asks his questions to determine whether he met it.

But, at any rate, all kidding aside, the Chair recognizes Senator Simpson, and then we will go in order, Illinois and Wisconsin.

Senator SIMPSON. Mr. Chairman, I do very much appreciate that. I do have to catch a plane. There are others, and you have accommodated us all on both sides of the aisle, but particularly I want to thank my friends, Paul Simon and Herb Kohl, I appreciate that very much. And I really intend to just do 2 minutes, and then that will conclude my activities. Thank you for your courtesies on that.

My remarks I wanted to share, I think the committee would be interested. I became so intrigued as to the EEOC issue that I went down to the EEOC. I had seen our colleague from Missouri go

there. I don't know how many of my colleagues on the committee have paid a visit to the EEOC, but I made it a point to do that about 6 weeks ago.

I spent a couple of hours there at the agency's offices on 18th Street speaking with their employees about the effects and the results of Clarence Thomas' tenure at that organization. I visited with employees who were black, white, Hispanic. I spoke with persons who were handicapped, old, and young. I spoke with employees holding jobs from that of manager to maintenance man. Some had worked for both Eleanor Holmes Norton and Clarence Thomas. Some had been there for many years while others had come during his tenure.

And I was stunned, as I looked in my notes, from what those people said that day about Clarence Thomas; from just plain, you know, "He did a hell of a good job," to things like, "We are a lot better agency than we were when he came"; "We came further in his 8 years than we did in the previous 18." I am quoting now. "We feel proud now. Many of us didn't used to."

"He may have opposed affirmative action goals and timetables but told us that was his personal philosophy, and that we were to follow the letter of the law." And then they did, and they cleaned up the backlog.

"From the time I got here until he left, I never saw Clarence Thomas try to influence the way a case was being handled." "His honest and integrity are what inspired me." "Clarence Thomas' way was you follow the law."

Another lady in this instance, "Clarence Thomas believed in rewarding good work." And Hilda Rodriguez said, "Clarence Thomas told us that we were the EEOC and that he was not, that he was just a short-timer."

One other person said, "We feared for our jobs when he came, but I felt very proud about working for him after he came. Before Clarence Thomas came here, you could just not move forward. On his last day, one of the employees followed him out crying."

Another person: "Over the last decade, this agency has gone from mediocre to one of the Government's premier agencies. We have earned that reputation, but Clarence led us there. The problem now is that other agencies hire away our good employees."

One attorney said to me, "When I told Clarence Thomas about the lapses in the age discrimination cases, he said, 'That is nearly as bad as a lawyer dropping his client's case,' and he personally told Senator Melcher about the laspses." However, the attorney pointed out that "Less than 1 percent of all cases had lapsed."

A handyman who went to work there in 1984 told me about a problem he had with his daughter and how he could walk right into Clarence Thomas' office and talk to him about that. That is what he said.

Another employee told me that, "He is the kind of person I would like to have decide my case if I ever go before a judge. He listens, keeps an open mind, and makes a decision based on reason."

I was told that, "When he left, on his last day he went down from his upper floor office to the ground floor to leave. Every foyer on every floor was filled with people." No one was out drumming

that up. The employees were doing this. These employees made an effort to have the building named after him, but they found they couldn't do that because the Government didn't own the building. However, the employees purchased, with their own funds, and put up a plaque in the lobby. I have never seen that in any building because it is really quite—it is almost corny in Washington, DC, that that could happen. That is something out of one of those old black-and-white movies.

The plaque says:

Clarence Thomas, Chairman of the U.S. Equal Employment Opportunity Commission, May 17, 1982, through March 8, 1990, is honored here by the Commission and its employees with this expression of our respect and profound appreciation for his dedicated leadership exemplified by his personal integrity and unwavering commitments to freedom, justice, and equality of opportunity, and to the highest standards of government.

Well, those are the folks from all walks of life who worked with Clarence Thomas during his 8 years at the EEOC, and I think it is very important that we hear those who know Clarence Thomas best and what they have to say about him.

And it came to me when Senator Leahy this morning noted that we shouldn't ask or expect answers to questions about how you might rule in specific cases. I do greatly concur obviously with that. But Senator Leahy also noted that we need to know "how you think, your background, your integrity, and impartiality, what kind of a judge you will be." And I agree with that ever more.

So I just wanted to share with the committee as to how the people that worked with you felt about you. I think to a politician it is like the moment of truth, and that is how many votes do you get in your home precinct. I always like to look at that when I see people here in this place. I always go back and go into their State record and see how many votes they got in their home precinct. It gives you a better idea of how they do and how they operate. So among those that know you best, those are the things that I wanted to share—integrity, impartiality.

And my question—and I am going to conclude here. You were interviewed for an article by Sarah J. Davidson. Do you recall that article titled "Clarence Thomas, The Pragmatic Chairman of EEOC"?

Judge THOMAS. Senator, I don't recall specifically the interview, but I know the name.

Senator SIMPSON. You were asked a question by that lady in her journalistic pursuit. Her question was: "How do you think that history will record your achievements?" Do you recall that question?

Judge THOMAS. I don't recall the question, Senator.

Senator SIMPSON. Oh, you should because you gave quite a glowing answer to her. You don't remember the answer to it either?

Judge THOMAS. It is probably still the same answer.

Senator SIMPSON. Well, let me give it to you, and then I am going to leave, get on the plane and skip out of here.

You were asked the question, How do you think that history will record your achievements? "Well," you say,

I just hope that whatever is said, whether someone agrees with me or disagrees with me, they don't waste a whole lot of time on nonsensical things like where I went to school and where I have worked and what I did before I came here. Simply

bottom line, after everything is said, to hope that at least they say, "This was somebody who tried to do what was right." That is all. They don't have to say anything else. Just that, "In his lifetime, when he came to this agency, he tried to do what was right and did not try to play politics and did not succumb to pressure from various interest groups or politicians; he just took a mandate, took a job, and tried to do what was right."

That was your response to that lady's question. So it was. And I wanted to report that very moving trip to the EEOC, and I really have no questions.

I thank you for your courtesies and thank especially my colleagues, Paul and Herb, Senator Simon and Senator Kohl, for their courtesies. And thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator. Have you answered the question?

Senator SIMPSON. He did answer the question. [Laughter.]

The CHAIRMAN. Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

One of the questions that we face is: What really makes Judge Thomas tick? That is really what Senator Heflin's questions were approaching.

When you told the story about Judge Haynsworth saying to his wife, "I don't like this Judge Haynsworth guy," if we were to vote in this committee on whether we like this Clarence Thomas guy, it would be unanimous that we like Clarence Thomas. That is not the question that we have to face. It is where you are going.

When you told about being a student at Holy Cross, I would feel comfortable voting for that student for the Supreme Court. And then in describing yourself, you said, "Then we thought we really could change the world"—making it past tense.

Some of us still think we can change the world. Maybe not in huge giant steps, but in little steps. And you are going to a place where you are going to change the world for a lot of people.

The people on the Supreme Court who voted for *Dred Scott* changed the world. The people who voted for *Plessy* v. *Ferguson* changed the world for a lot of people. The people who voted in the *Brown* decision and *Roe* v. *Wade*, changed the world.

Members of the Supreme Court who voted on the *Crowson* decision that Senator Specter referred to, the set-aside, the *Richmond* decision, have denied the right, the opportunity for a great many people. They have changed the world for a lot of people.

The *Ward's Cove* decision changed the world for a lot of people, people like—again, quoting Senator Specter, "that 10th-grade dropout." And that is, I guess, the person that I am concerned about.

Frankly, a person with Clarence Thomas' ability is going to make out all right. Whether you get confirmed or not confirmed, you are going to do very well. That 10th-grade dropout may not do well.

We all bring something of a philosophy to our jobs, and Senator Simpson perhaps partially answered this question with his quotation from that interview, the bottom line. But what is the political philosophy, what is the judicial philosophy you bring to the U.S. Supreme Court?

Judge THOMAS. Senator, when I spoke earlier about changing the world, I think I would distinguish between the way that as a youth

you feel that you can go out and take on everything tomorrow morning and get it all accomplished tomorrow morning. At some point I think you realize that you have to take a step back and begin to approach it more—not so much in a rush or impatiently, but persistently. And if there was one lesson that I learned during that period, it was the difference between impatience and persistence, the difference between being upset and being committed to something.

So today I didn't suggest or mean to suggest by using the past tense that we felt that we could make a difference, or that we could change the world, that we can't do that today or have an impact today. I indicated earlier that I felt that if I were confirmed by this body and were fortunate to be on the Supreme Court that I could make a difference. And I also indicated that the same person that was at Holy Cross with the same feelings, a little older and a little wiser, is sitting before you.

There was a time when in law school—and I was asked why I went to law school. But there was a time actually before I went to law school that I didn't think there was any reason to go to law school. There was no further reason to prepare, to be ready to make some of the changes in society. There was a time when many of us didn't feel that working through the system, as we called it, was worthwhile.

So at some point we had to make the decision that if we prepared ourselves—and as Abraham Lincoln said, I paraphrase it, I will prepare myself and when the time comes I will be ready. What will you be ready for? I don't know exactly, or didn't know. With respect to my own approach, though, I tried to be persistent about preparing to make a difference.

As far as overall philosophy, Senator, as a judge I think that the approach that I have taken has been one of starting with the legislation or the document before me. It has been one to arrive at the intent of this body in statutory construction and certainly in broader analysis to not certainly impose my own point of view, but to be honest, intellectually honest and honest as a person in doing my job. I have done that.

But there is something that you point to also that goes beyond that, and I think this is either the third or the fourth time I have appeared before you for confirmation. And the something that you have been interested in is this, and I took it to heart—perhaps you don't remember it, but in my job, my current position on the court of appeals, one of the things that I always attempt to do is to make sure that in that isolation that I don't lose contact with the real world and the real people—the people who work in the building, the people who are around the building, the people who have to be involved with that building, the people who are the neighborhood, the real people outside. Because our world as an appellate judge is a cloistered world, and that has been an important part of my life, to not lose contact.

Senator SIMON. I think that is important, incidentally, and it is—if you are confirmed—I assume that is not a message for me to stop here, Judge.

The CHAIRMAN. A vote.

Senator SIMON. I think it is important, if you are confirmed, to go out of your way to do that. It becomes very easy, whether you are a Senator or a Supreme Court Justice, to become isolated.

How do I reconcile what I sense are two Clarence Thomases? One is the Clarence Thomas who is testifying here, that Holy Cross student, and the other is the Clarence Thomas that says government cannot be compassionate. Though here you have said, "I favor public housing," if I can use another illustration, you were in the magazine, Reason. You were interviewed. And they say, "So would you describe yourself as a libertarian?" And you say, part of the answer, "I certainly have some very strong libertarian leanings, yes." And then you say, "I tend to really be partial to Ayn Rand, the author. When she died, the New York Times had this comment about her. It said, "Her morality constituted"—and I am quoting now—"a reversal of the traditional Judeo-Christian ethic because it viewed rational selfishness as a virtue and altruism as a vice." She was opposed to Medicare. She was opposed to a lot of things that a lot of us would say are part of having a responsibility to those less fortunate in our society.

Anyway, I see these two Clarence Thomases: One who has written some extremely conservative and I would even say insensitive things—maybe you wouldn't agree with that description—and then I hear the Clarence Thomas with a heart. And Senator Heflin says you are in part an enigma, and that is part of the enigma here.

How do I put those two Clarence Thomases together, and which is the real Clarence Thomas?

Judge THOMAS. Senator, that is all a part of me. You know, I used to ask myself how could my grandfather care about us when he was such a hard man sometimes. But, you know, in the final analysis, I found that he is the one who cared the most because he told the truth, and he tried to help us to help ourselves. And he was honest and straightforward with us, as opposed to pampering us, and prepared us for difficult problems that would confront us.

With respect to the statement about government, I think I attempted—the government being compassionate, and I don't have that full quote. But I think the rest of that statement was something to the effect that people are compassionate. Government in my view has an obligation to solve those problems and to address those problems. We may disagree as to what the best solution is as policymakers, but the fact of the matter is that from my standpoint, as a community, as people who live in an organized society, we have an obligation as a people to make sure that other people are not left out. And I think I have said that, and it is important.

But as individuals, I think that we have the capacity to be compassionate to others without that obligation, beyond that obligation.

Senator SIMON. Well, as individuals, no one will argue with that. But collectively we also have responsibilities.

Judge THOMAS. Exactly.

Senator SIMON. Your statement, "I don't see how Government can be compassionate. Only people can be compassionate, and then only with their own money, not that of others."

We have to make decisions here where we are going to say we are going to take some money from taxpayers for public housing, for food stamps, for things that are important.

Anyway, this is one of the dilemmas that we face. And in this quote here you are siding with the privileged on a lot of things, and that is the reason for my question about South Africa yesterday. One of the reporters said, "Why do you ask him about South Africa? He is not a nominee for Secretary of State."

I want to know what makes Clarence Thomas tick, and in that connection, I mentioned the article where you were quoted as objecting to the tactics of the protestors at the South African Embassy. Does anyone remember any more of the details of that?

Judge THOMAS. Senator, you asked me a question, as I remember it—and correct me if my recollection is inaccurate. You asked me whether or not that was coordinated in any way.

Senator SIMON. Yes.

Judge THOMAS. And my response and recollection remains the same; that to the extent there was any—to the extent that those comments coincided, I think it was as a result of a reporter calling around.

Senator SIMON. I also asked about Jay Parker, and yesterday's Newsday, New York newspaper, has this article by Timothy M. Phelps:

> Clarence Thomas asserted in Senate testimony yesterday that he did not know that his good friend, James J. Parker, represented South Africa although former aides say he did. A former assistant of Thomas, who asked not to be identified, said recently that Thomas brought up the subject of Parker's representation of South Africa in 1986. At that time Parker and a partner, William Keyes, were being paid more than $360,000 a year to lobby for South Africa's foreign agents, according to Justice Department records.

Then I will skip a few paragraphs, but I don't think I am taking anything out of context here.

> Thomas was asked yesterday by Senator Paul Simon about a New York Newsday story outlining his relationship with Parker. The 43-year-old Federal appeals court judge said he knew that Parker had represented some South African homelands but not South Africa itself. "I was not aware, again, of the representation of South Africa itself," Thomas said. "I was aware of Mr. Keyes' relationship with South Africa. I was not aware of Mr. Parker's." But the former aide of Thomas at the Equal Employment Opportunity Commission said in an interview that Thomas talked about Parker's representation of South Africa for 45 minutes at a staff meeting in 1986. He said that somebody had to represent the South Africans, and that if sanctions were passed, it would affect the black people more harshly than supporters of apartheid. "—well, I will not comment on that, though I think you would find most blacks in South Africa differing—" the former aide said. She said that when staff members entered the room for the meeting, Thomas had with him a newspaper article outlining Parker's relationship with South Africa. She said he asked the staff members what they thought of the article and became very angry when one said it was hypocritical of Parker to take money from South Africans.

Do you recall that at all?

Judge THOMAS. No, Senator. As I indicated to you, I understood or I knew about Mr. Keyes' representation. That is the best of my recollection. I did not recollect nor was I aware until recently of Mr. Parker's representation. I was aware, as I indicated, about his involvement with the homelands. And I don't know who that aide is or what article she is talking about.

Senator SIMON. And you do not recall that meeting?

Judge THOMAS. I do not recall that exchange at all. I was aware, however, of his representations and his trips to South Africa and his representation of the homelands, but not the paid representation of South Africa itself.

I do remember reading an article at some point indicating the involvement of Mr. Keyes and the significant amount of money that he was paid. I do recollect that.

Senator SIMON. In the exchange, you mentioned your position on divestiture at Holy Cross, and I commend you for that position. You say, "I took a strong position on the board of trustees of Holy Cross that we divest of stocks in South Africa. That was important to me then, and, of course, that is contrary to a position that they might take. But it was one that I felt strongly about."

I have to say I find a little bit of conflict in that and your opposition to sanctions for South Africa. But a publication that has just come out says—and I ask you whether this is accurate or not: "The Reverend John Brooks, the school's president, says there was no significant board opposition to Brooks' recommendation for divestment and that he does not recall Thomas or anyone else taking or needing to take a strong stand."

Judge THOMAS. As I indicated yesterday, there was significant discussion, and it is as I recall it at the board meeting.

Senator SIMON. OK. So that there was division——

Judge THOMAS. There was no opposition. Whether or not we would act now or later was the nature of the discussion, as I remember it.

Senator SIMON. One of the people you quote from in the course of some of the speeches—and in fairness, if somebody went over all of my speeches as carefully as I have gone over yours, I am sure they could find a lot of things that I wouldn't be too proud of today. But one of the things you say—Thomas said that the congressional committee "beat an ignominious retreat before Colonel North's direct attack on it and, by extension, all of Congress." That was a speech before the Cato Institute in 1987. And then in a speech a few months later, you say, "Congress' aggressive oversight of Federal agencies"—in commenting on it, I am quoting, it says, "As Ollie North made perfectly clear last summer, it is Congress that is out of control."

I am concerned about quoting Oliver North, who I assume you, along with all Americans, knew shredded papers, destroyed evidence. This was done, in fairness, before he was convicted of a felony. But how does Oliver North end up getting quoted, someone who is, at least in my mind, not a hero, not for what he did as a member of the Armed Forces, where he apparently was outstanding. But when he shredded paper, when he destroyed evidence, he is not the kind of person I would want to quote and I would think Clarence Thomas would not want to quote.

Judge THOMAS. Senator, I do not think I condoned—in fact, I think I remember us having discussions about whether he had done something improper, and my saying very distinctly that I felt that if he had done something improper or wrong, that should be addressed.

The point that I was making there, and you note it in the context—and I do not have that speech before me, but it was in the

context of oversight hearings, and I think during a time when I was having my own difficulty in that oversight process, and sometimes those hearings, though they serve the very, very important function of ferreting out facts and responding to those, they can often become highly charged, politicized public events.

I think myself, like many others, that in that highly charged political environment that Colonel North took the advantage to himself and used that environment to his advantage, as opposed to succumbing to it.

Senator SIMON. Since you are talking about the process, you have spent 4 days now before this committee and you have had to go through this grueling process, and it is that. What is your feeling, as you reflect upon this process that you are going through? Does it serve the Nation well, or does it not serve the Nation well?

Judge THOMAS. Senator, even before I was nominated, I was asked that question, because when I was nominated to the court of appeals, that was not exactly a joy ride and it had its difficulties. I would——

Senator SIMON. I helped create those difficulties, as I recall.

Judge THOMAS. Pardon me.

Senator SIMON. I helped to create those difficulties, even though I ended up voting you for the court of appeals.

Judge THOMAS. That is OK, Senator. You know, we each have to do what we think is best.

Senator SIMON. Right.

Judge THOMAS. I was asked that question then, and my response to people who felt I should have returned to the kind of acerbic comments about the process, was simply this, that we are, as judges, in the least democratic branch of government. We have lifetime appointments. We make very, very important decisions, and we do not stand for reelection. This process has to work.

People can disagree as to the nature of the process, we can say that it is flawed in one way or the other. Even in the speeches where I talk about oversight, I may talk about the flaws, but I also point out the importance of the legislative and oversight process.

This process is necessary and it has to me become more clearly necessary since I became a judge, and I have no reason to change that view and, in fact, would feel very strongly about it, even through this process, even if the process is difficult for me.

Senator SIMON. Earlier, Senator Heflin asked you about the fifth amendment and privacy implications. I mentioned yesterday, I guess, or the day before, we were talking about the ninth amendment, and there are in the Constitution some specific privacy things about quartering militia and searching your home. When you combine those specifics with the history of the ninth amendment, is there a privacy implication also, in your opinion, in the ninth amendment?

Judge THOMAS. Senator, I think I have made two points with respect to that and with respect to the finding of the right of privacy. I indicated that I felt that it was the analysis that I tended to agree with or agreed with, was the finding of that interest or that right in the liberty component of the due process clause.

The approach that you are talking about, of course, and I think we discussed, was the approach that Justice Douglas took, and similar to that was Justice Goldberg's approach.

I think that no one really knows the extent to which the ninth amendment can be used. There is a considerable amount of scholarly working being done, as I said before, and there may be a point where the Court has a case before it in which an asserted privacy right or privacy interest is or could be found in the ninth amendment. To date, though, a majority of the Supreme Court has not done that.

I would not foreclose it, Senator, but with respect to the privacy interest, I would continue to say that the liberty component of the due process clause is the repository of that interest.

Senator SIMON. Let me just lobby you here now, if I may. This is the only chance we get to lobby future Supreme Court Justices. I think the ninth amendment is a very fundamental protection of basic liberty and I would hope—there is an article written I believe by a person named Rappaport at the University of—maybe it is William and Mary, I am not sure where it is, but I will send you the article, that gives some additional background on the ninth amendment. I think that is important.

I just received today, and I assume my colleagues have received, a letter from 12 subcommittee and committee Chairs from the House who worked with you in the EEOC, asking that—well, let me just read the final line, and we can put the full letter in the record:

"We conclude Judge Thomas should not be confirmed as an Associate Justice of the United States Supreme Court. His conformation would be harmful to that Court and to the Nation."

I do not know if you have seen the letter at all. There was a somewhat similar letter when you were up for nomination for the appellate court. Do you care to comment on that?

Judge THOMAS. As you indicated, Senator, there was a similar letter when I was nominated to the court of appeals, and I think as I may have indicated, either privately to you or maybe even in the hearings, I can't remember which, that, of course, I would want individuals with whom I have had dealings in the past to be supportive of me, certainly to be as supportive of me as the people who worked with me every day.

But during my tenure at EEOC, we did have some differences of opinion and some disagreements in a political and policymaking context. I certainly do not agree with them and do not think——

Senator SIMON. I did not expect you to agree with their letter.

Judge THOMAS. I think it is unfortunate, but, Senator, we had our disagreements and I did not think that they rose to the level to require a letter of that nature, but I can understand that they have to take positions that they feel comfortable with.

Senator SIMON. Thank you. I see that my time is up. I also see we have a vote over on the floor.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge, Senator Kohl, to accommodate your schedule and everyone else's schedule, went over to vote and should be back here by the time we all are up and leaving. The committee will recess until

Senator Kohl returns, which should be momentarily, and at that time I would ask the staff to inform him that I would like him to begin his questioning before I return or chair the hearing and start the matter up.

We will recess until Senator Kohl arrives.

[Recess.]

Senator KOHL [presiding]. The hearing will come to order.

We are awaiting the return of Chairman Biden, but in the interest of expediting the hearing, I will begin my conversation with Judge Thomas.

Let me say, Judge, as I said to you a minute ago, I am not sure if I will be back for round three, but I have enjoyed having a chance to talk with you this week. I think you have been just as forthcoming as you possibly could be with the committee, to the best of your ability, and to the best of my ability I have tried to be honest and fair with you, and it is an experience that I will not forget and I have enjoyed having a chance to be with you.

Judge THOMAS. The same here, Senator.

Senator KOHL. I would like to ask you for a minute about cameras in the courts, Judge Thomas. As you know, many, many States have cameras in the courts to some extent, and I think it has been highly successful in helping to educate the public.

Just in passing, I would like to say that I watch television perhaps 10 hours a week and I would say 9 or 9½ hours of C-SPAN, which I think does an outstanding job of educating the American public about public affairs and Government and things that are really important in our society, if we are to foster democracy and its growth and enlightenment—which certainly is very important nowadays.

But we do not have cameras in the Supreme Court. If you had to make a judgment—yes or no—would you support the experimentation, at the very least, with cameras in the Supreme Court? After all, as you know, virtually everybody in this country knows who Judge Wapner is, and no one knows who Chief Justice Rehnquist is. Can we do something about that?

Judge THOMAS. Maybe we should give Chief Justice Rehnquist his own sit-com. [Laughter.]

Senator I too watch C-SPAN and, as a citizen, have had the same reaction. It is a wonderful opportunity to see our governmental processes at the national level disseminated over the entire country.

With respect to the court systems, the only reservation that I would have is that it not be disruptive of the exchange between the Court and the individuals who appear before the Court. It is a different environment, particularly at the appellate level than perhaps at the trial court level, but I have no objection beyond a concern that the cameras in the court room be unobtrusive or as unobtrusive as possible. Of course, that is just my own reaction. I have not looked at that in detail.

Senator KOHL. So you have a positive feeling about it, you think if we can do it without disrupting the activities of the Court it would be a good thing for the American public?

Judge THOMAS. I think it would be good for the American public to see what is going on there. I do not know how long they would

be interested in what goes on in appellate argument. It tends to be not so—it does not rivet your attention, except maybe perhaps in the cases that have garnered a tremendous amount of publicity, but I see no reason why, beyond that concern, the American people should not have access to the courts.

Senator KOHL. All right. Judge Thomas, no doubt you have been reading the newspapers and listening to members of this committee. It is clear that many here on the committee seem troubled by your failure to answer some of our questions, and others on the committee seem troubled because they think that you have been badgered too much.

In terms of your own role and our role, what parts of the process would you keep the same, if you could make a recommendation at this time, and what do you think we ought to change to make these hearings as productive and useful as possible—which is, after all, what we are attempting to do in behalf of the American public that we serve?

Judge THOMAS. Well, you know, Senator, I probably would be freer to make that kind of an analysis after the fact. [Laughter.]

I would certainly love to come back. [Laughter.]

Senator, the process of advice and consent is an important process, it is critical, particularly for judges. In the executive branch, we have appointments and serve at the pleasure of the President. As judges, we serve for life. This process may have its flaws, but it is so important that, with flaws and all, it is worthwhile.

From my own standpoint, just going through the process, of course, I would like to have been able to have gone through it in a shorter period of time, but that is not an indication of anything other than the manner and the timing of my appointment, but I think that the process has been overall a very fair process to me.

Senator KOHL. All right. I would like to quote from today's New York Times, and ask your comment:

> Justice Souter did not feel pressed to remake himself, rather, his fluent testimony gave the impression that his entire adult life had been a natural preparation for being a Justice. On the other hand, in Thomas' case, strenuous efforts have been made to fit what he has described as the proper judicial role. Judge Thomas has at times given the appearance of having wrenched himself from his most authentic personal moorings.

Do you agree, disagree, or have some feelings about that—some comments you would like to make, as we try to understand you and your background, where you are today and where you have come from?

Judge THOMAS. Senator, let me make two points, and one I alluded to this morning. I think that various individuals created their own images of me and what they see is that the real person does not fit those images. I think the more accurate assessments to follow would be the people who have worked with me every day over the past or for significant portions of my adult career, both in the executive branch and in the judiciary, as well as my other jobs, and not to individuals who have created this persona.

I am the same Clarence Thomas. I have been a sitting Federal judge, Senator, for about a year and a half, and the person that you see here is the same sitting Federal judge, someone who at-

tempts to be openminded, who works at it, being impartial, objective, listen and to work through very difficult problems.

And a final point: When I was in the executive branch, as I indicated to you yesterday, there were battles and there were give and takes. I participated in that, but I am not in the executive branch any more, I am not a part of the tension between the two political branches. I am a sitting Federal judge, and those are entirely different roles, and to the extent that individuals may see legitimate differences, they are the differences in the roles.

Senator KOHL. Would you agree that if, in Justice Souter's case, we were seeing a person more natural and comfortable in the judicial setting, it is simply a reflection of the fact that he had been in that setting for a much longer time than you have been in the judicial setting?

Judge THOMAS. I think there is an additional factor, as well as that, and that is that he did not have 138 published speeches in the executive branch and he was not in agencies in the executive branch involved in very, very controversial policies and difficult policy areas. I brought with me a background in some very difficult areas and areas in which people have strong, but honest opinions on different sides. I think that is an important difference.

If I had had the opportunity to remain, as he did, in an environment as a judge, without those controversial sorts of policy-making positions, I think much the same would have been said about me, because that is more suited to my personality.

Senator KOHL. All right. Judge Thomas, you have been extremely critical of the Senate's rejection of Judge Bork. In fact, in a 1987 speech to the ABA Business Law Section, you said that the Senate's failure to confirm Judge Bork was "a tragedy." I am interested in your views on how the Senate should discharge its advice-and-consent responsibility, so would you tell us what it was about the Senate's rejection of Judge Bork that was so improper?

Judge THOMAS. I guess, Senator, the point for me there and, again, my approach if I were making the decision, I think each member of this body would have to decide for himself, but my view was that Judge Bork was qualified as to his temperament, as to his competence, and certainly qualified as to his overall abilities.

The others may have had disagreements and for other reasons felt that he should have been excluded and, of course, you have to discharge your duties in the best way you see fit, but that was my view at the time.

Senator KOHL. So, you are saying your overall assessment of the man is that he was qualified, and that fact simply makes his rejection, in your opinion, a tragedy, just that simple overall assessment that you——

Judge THOMAS. The other aspect of it——

Senator KOHL. Why was it——

Judge THOMAS. I thought, again, as a person and someone who knew Judge Bork, that the publicity surrounding him and the characterizations of him were ad hominem in nature and that the articles that I read and the things that had been said about him simply, even if there were substantial disagreements on attack of the person, I have, even as I indicated during my own confirmation

processes, I think ad hominem attacks on individuals, even when there are legitimate differences, are just simply wrong.

Now, I do not think that this committee and did not say that this committee engaged in that, but that was certainly a part of the overall process from the outside.

Senator KOHL. And had you been sitting on this committee, the chances are you would have voted for his confirmation?

Judge THOMAS. Again, my view from where I sat, was, as to his competence, as to his temperament, that he was qualified.

Senator KOHL. For the past few days, Judge Thomas, you have repeatedly suggested that this committee disregard a number of the articles you wrote and speeches that you made while you were in the executive branch. Using the same logic, should the Senate have ignored Judge Bork's writings, because when he did them he was in another area—he was an academic?

Judge THOMAS. I think, Senator, that the one point I made was that if I gave speeches as a Federal judge, I thought that particularly those should be closely examined, what I said as a Federal judge, my opinions while I was in the judicial branch of Government, in the judiciary.

I think that you have to weigh or discount to the best of your abilities or in your judgments speeches that are made outside of the judiciary, when one has a different role, for example, a person who is a law professor or a person who is in the executive branch, but I think it would be important to look closely at a speech that I made as a judge.

Senator KOHL. What I said is that he made many of those speeches when he was an academic, and you made many of the speeches that you have asked us to disregard when you were outside of the judiciary. So using the exact same logic, it would be consistent for you to say that you would support the contention that the things Judge Bork said when he was an academic should, at his request, be disregarded?

Judge THOMAS. I would not say disregarded, Senator, and I do not think I said disregard everything I have written. I think what I suggested is that is a different role.

Senator KOHL. Qualified or whatever the word is.

Judge THOMAS. Exactly. I think that they are different and that difference should be taken into account. One is freer to make comments outside of the judiciary and to discuss issues in different ways than one is within the judiciary, just as one is freer to make policies and make decisions in a different way. In the judiciary, it is more confined and I think appropriately more neutral.

Senator KOHL. Judge Thomas, throughout the hearings, when asked about specific speeches or articles, you have said that you have not read or reviewed the articles or speeches recently. The question I would like to ask is why you have not or why you did not, in preparation for this hearing. I would have expected that you anticipated being questioned about them. Why is it that you did not read some of these obvious things that you or your advisers would have forewarned you we were going to be talking about and deserved a look? Why wouldn't you have become familiar with them?

Judge THOMAS. I think, Senator, there are a lot of speeches and it is hard to review all of them, but what I have attempted to do is review some here and some there, the ones that I felt were going to be raised.

Senator KOHL. Well, let us talk about the Lew Lehrman article. Now, that was clearly a focus since the day that you were nominated, and it could have been understood by you—or anybody with whom you were having breakfast from time to time—that this was going to come up. There has got to be some reason you did not read it other than you didn't think it was important. I mean you knew we were going to talk about it, and yet you said at this hearing that you haven't read it and are not really fully familiar with it. I want to understand that from the point of view of one who wants to believe what you say, so explain it to me a little better.

Judge THOMAS. Well, I re-read my speech at the Heritage Foundation. What I suggested was I did not read his article. There is just so much material, Senator. I attempted to read as much of my own material, as well as to consider the fact that there was going to be just a vast body of legal material, as well as my biographical material, my background, my days at EEOC, my days at the Office for Civil Rights, my opinions on the court.

Senator KOHL. Yes, I understand, but this was an article that had been referred to dozens of times all summer and, as I recall, you came here—and correct me if I am wrong—but I think you said, look, I can't really talk about that article, because I haven't really read it or I will have to go back and re-read it, so don't hold me responsible for its content, word for word, because I am not really familiar with it. That was part of your distancing yourself, however sincerely, from natural law and its applicability.

Again, this may be my last opportunity to speak to you, and I want to walk away with the strongest positive feelings I can, I am puzzled as to why, in all the hours that you spent this summer thinking about this week, why that article would not have been an article that, in your mind or your friends' minds, wouldn't have been something that you have to read it and understand what is in it, because it is going to come up?

Judge THOMAS. I guess to this extent, Senator, that my response to questions concerning that article was that I cited it or praised it for a very limited purpose or made comments about it for a very limited purpose, and I stated what that purpose was. And that purpose didn't suggest from my standpoint the need to go back and learn everything about that particular article.

The point that I am trying to make with respect to the volume of other material, there were a lot—there were any number of areas beyond that that have come up also that I have had to attempt to address.

Senator KOHL. Well, that is true. But I still want to say it was clear that this article was going to be discussed in detail because of what you said about it with relationship to natural law and its applicability. It was clear.

There may have been other things, too, which you are alluding to, but it was clear that this one was going to be talked about. So I think it is logical for me to ask the question and expect some answer on that—that I can feel comfortable about—why you

wouldn't have come here fully familiar with the article and what it said, and the fact that you had regarded it with great admiration

Judge THOMAS. Well, I guess I would have to respond to that in a similar manner to the way I just simply did, and that is that I did not refer to it for the portions of the article that raised the questions.

Senator KOHL. OK. Last subject, and that is antitrust law. Judge Thomas, last year we celebrated the centennial of the Sherman Act. For over 100 years, this landmark measure has protected the principles that we consider most important—of competition, fairness, and equality. The antitrust laws are important to us because they ensure that competition among business of any size will be fair and that consumers will pay the lowest possible prices for all sorts of goods that they buy. These laws, as you know, are nonpartisan. They have been vigorously enforced by both Republican and Democratic administrations.

I know you have worked on antitrust issues as both an advocate and a judge. In fact, in a 1983 speech, you suggested that we create treble damages for violations of the civil rights laws so that they would have the same deterrent effect that the antitrust laws have.

My question is: Do you agree that the antitrust laws have been very important in shaping our economy?

Judge THOMAS. Senator, I think that all of our efforts, including the antitrust laws, to keep a free and open economy, one in which there is competitiveness, where the smaller businesses can have an opportunity to compete, and where consumers can benefit from that—those efforts, including the antitrust laws, have been beneficial to our country from my standpoint.

Senator KOHL. Judge, do you believe that an important purpose of the Sherman Act is to protect against consolidation of economic power to make sure that consumers are not charged high prices by large companies that have swallowed up their competition; that an important purpose of the Sherman Act is to protect against consolidation of economic power?

Judge THOMAS. Yes, Senator.

Senator KOHL. All right. So you believe the principal beneficiaries of vigorous enforcement of the antitrust laws are the consumers?

Judge THOMAS. I think the consumers and the country benefit from strong competition. We certainly as consumers benefit when there are new products, when there is development of products, when the quality of the products are improved as a result of competition, and, of course, when there is no temptation toward supracompetitive pricing; in fact, pricing is at the lower levels.

Senator KOHL. Well, then, how do you square this philosophy, with which I agree, with a decision like the *Illinois Brick* decision which bars the actual victim of any pricefixing from recovering damages, which would, for example, prevent mothers claiming that they were victimized by a conspiracy among infant formula companies from filing suit and collecting damages?

Judge THOMAS. I can't say exactly, Senator, how I would square it with that opinion. Certainly from my answers and certainly from my own position, I would be concerned if any consumers are having a more difficult time raising challenges in areas where they

have been harmed by practices of—unfair practices or unlawful practices of businesses.

Senator KOHL. So a decision like *Illinois Brick* is a decision that, if it came before you again in a similar fashion, you might review with great interest?

Judge THOMAS. I would certainly be concerned when consumers don't have access to our judicial system to have their injuries as a result of unfair practices or illegal practices or unlawful practices remedied.

Senator KOHL. All right. Judge Thomas, I am concerned that some judges would disregard the legislative intent of the antitrust laws and substitute their own ideological agenda, an agenda that may mean helping large corporations and ignoring consumers. I would like to read you a statement by Judge Posner of my own seventh court: "If the legislature enacts into statuary law a common law concept, as Congress did in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they interpret a common law principle, in which event the values of the Framers may not be controlling at all."

Do you believe that this is a legitimate approach to interpreting statutes in general, and should the courts interpret the Sherman and Clayton acts without exploring the legislative intent of their authors?

Judge THOMAS. Senator, as I have indicated—and I think it is very important for a judge to always be in search of, in adjudicating a case or interpreting a statute, the intent of the legislature and certainly not to ignore that intent and not to substitute his or her point of view or predilection for that intent.

Senator KOHL. All right. And the last question is on resale price maintenance, Judge Thomas. I want to talk about price-fixing for just a minute, because it is particularly of concern to me with my background. Since the *Dr. Miles* case in 1911, we have had in this country a rule that prohibits the manufacturer from dictating the retail price of his product. But some people have begun to argue that we should treat vertical price-fixing differently from horizontal price-fixing. And Robert Bork suggested in "The Antitrust Paradox," that it should be completely lawful for a manufacturer to fix retail prices.

Would you comment on that, please?

Judge THOMAS. Senator, I have no basis and have had no basis to take a position different from the one that finds that there are problems or concerns or perhaps illegality in vertical price-fixing or that vertical price-fixing be exempt from the antitrust laws—let me restate that.

I have had no reason to argue or basis to argue that vertical price maintenance should be exempted from the antitrust laws.

Senator KOHL. Thank you very much, Judge Thomas.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. [presiding]. Judge, it is my responsibility to ask questions now, but one of our colleagues, again, based on our belief at the outset that we would end early on Friday, has a plane to catch. We are going to try to finish, but we may have to go late in order to finish. With the permission of my colleagues, I will go out of order and yield to him, and then return to myself. I would yield

at this time to my colleague Senator Grassley. It will not affect who gets to ask questions next, except Senator Thurmond indirectly. You are next in line after me.

Senator THURMOND. Oh, you are through?

The CHAIRMAN. No.

Senator THURMOND. Well, go ahead.

The CHAIRMAN. I was just trying to——

Senator THURMOND. Mr. Chairman, you go next.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. It is seldom that it is recognized that I am the chairman by the chairman, but I am delighted that I am the chairman. [Laughter.]

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Thomas, if I could go back to an area that we discussed yesterday, the privacy area, and set a little background by reminding you, in response to the chairman's question, you agreed that "single people have the same right of privacy as married people on the issue of procreation." And you agreed with the chairman that "the privacy right of an individual is fundamental."

Yesterday I tried to find out parameters on the constitutional right to privacy, and let me make very clear I don't expect you to prejudge any case. But if I could, I would like to get an idea of the framework of the test to be applied in analyzing privacy rights. You have endorsed the rationale and the holding of *Eisenstadt*. Yesterday Senator Simpson and I raised the *Bowers* decision.

Now, the dissenters in *Bowers* found that *Eisenstadt* compelled the opposite results from the outcome that the majority reached. So the four people who were on the dissent did so on the basis of *Eisenstadt* to recognize a broad and sweeping constitutionally protected privacy right. So I hope that this puts in context my concerns and why I am bringing this up again.

I wonder if your endorsement of *Eisenstadt* could lead you to the same conclusions that the *Bowers* dissenters reached.

Judge THOMAS. Senator, I don't think that the majority in *Bowers* in any way felt compelled to undercut *Eisenstadt* in order to reach the conclusion that they did. Again, I have not gone back and re-read the majority opinion in that case, but I believe what the majority did is simply say that in looking at our history and tradition, the fundamental right of privacy did not include homosexual sodomy. I believe that was Justice White. But the point is that it left intact the holding in *Eisenstadt* that the right of privacy attached to the individual.

Senator GRASSLEY. Well, that helps me a little and makes me feel better than the answer that you gave yesterday.

You agree that the right of privacy is not absolute; indeed, protection is derived from the liberty clause of the 14th amendment as part of the Constitution. And so then in conclusion—and this is the only question I have of you in this round—I would like to read for you a portion of the majority opinion in the *Bowers* decision, and it is a few sentences long so I hope I read it carefully for you.

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

That this is so was painfully demonstrated by the face-off between executive and the Court in the 1930's which resulted in a repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

"Otherwise"—and this is the last sentence.

Otherwise, the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

While you have probably stated this already, but as a sort of summary, can you agree that this expression of judicial restraint is an important consideration in determining the parameters of the right of privacy?

Judge THOMAS. Senator, I think that in areas in which a court or a judge is adjudicating or interpreting the more openended provision of the Constitution that judges should restrain themselves from imposing their personal views in the Constitution; that their adjudication must be rooted in something other than their personal opinion. And as I have indicated and the Court has attempted to do, attempted to root the interpretation or analysis in those areas in history and tradition of this country, the liberty component of the due process clause, and I think that that is an appropriate restraint on judges.

Senator GRASSLEY. Is what you just said, your way of telling me that you agree with those statements?

Judge THOMAS. Yes.

Senator GRASSLEY. Thank you, Mr. Chairman, and also thanks to my colleagues for the courtesy of going out of order.

The CHAIRMAN. This may be an appropriate time to take a break. We will break until 3:30.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Let me say that, after consultation with Senator Thurmond and with Judge Thomas, it looks like our best efforts to get finished today—finished in the sense that Judge Thomas' testimony is finished—are not going to work. We would be here well into the night for that to happen. But it also appears after consultation with Judge Thomas and with Senator Thurmond, that we can get still a good hour-and-a-half more, maybe even more than that, in today, and can then resume at 9:30 on Monday morning. And I believe that we can finish by lunch on Monday. That will be the Chair's express intention, and it looks like that is very reasonable that that could be done.

So, Judge, instead of being finished today at 5, you will in all probability be finished at lunchtime on Monday. With that, why don't we just get under way and see how much more we can get finished tonight, if everyone is agreeable.

Now, unless I have miscounted, I believe it is my turn to ask some questions, Judge. I would like to go back and ask one very straightforward question because it has been mentioned 87 different ways by 6 or 8 different people. And I don't think you in any way have confused it. I think maybe we have confused it—we, the members of this committee, Republican and Democrat, and as I read some of the press accounts, the press even seems mildly con-

fused on it. Again, not you. I think you are perfectly clear on it, but let me make sure my recollection is right.

I want to ask you a very precise question, similar to what I indicated I would ask you. And if it requires more than a yes or no answer, obviously elaborate. But if you could answer it yes or no, it sure will save a lot of time and be on point.

Judge very simply, if you can, yes or no: Do you believe that the liberty clause of the 14th amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. Senator, I think I answered earlier yes, based upon the precedent of *Eisenstadt* v. *Baird.*

The CHAIRMAN. Well, you know, what folks are going to say is that *Eisenstadt* v. *Baird* was an equal protection case. All right? That is not the question I am asking you. Let me make sure and say it one more time. Do you believe the liberty clause of the 14th amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?

Judge THOMAS. I think I have answered that, Senator.

The CHAIRMAN. Yes or no?

Judge THOMAS. Yes, and——

The CHAIRMAN. I like it. I mean, not I like it. I think we can end confusion. If it yes, the answer is yes——

Senator THURMOND. Well, if he wants to explain it——

The CHAIRMAN. If you want to go on, go on. But, I mean, I think that is what you mean.

Judge THOMAS. I have expressed on what I base that, and I would leave it at that.

The CHAIRMAN. OK. Let's switch to what I thought was a very, very interesting and informative exchange you had with Senator Brown earlier. Now, we don't have the actual record because it is not able to be transcribed as we move, although they do a phenomenal job of transcribing it quickly, and we don't have it yet. But here is what I understood that exchange to say.

In your exchange with Senator Brown, Senator Brown in my view accurately stated the law and Supreme Court decisions. He accurately stated the law and the stated decisions in the Court as to where the law now stands with regard to the standard of review that judges use in determining whether an action taken by the Government against an individual is constitutional, against their individual rights of privacy or against their individual right relating to their property. And he pointed out that when the Court looks at whether an action by a State to limit an individual's fundamental right to privacy, like in *Griswold* or *Moore*, the State has an overwhelming burden. He pointed out the Court says the State in those kinds of cases has to apply a standard of strict scrutiny. They have to have an overwhelming reason to justify their action impacting upon that person's right.

But, he went on to say, if a State impacts on a person's use of their property, they now apply a rational basis test, he said. Now, he went on to explain that the Court looks at the State and determines whether or not it had a rational reason for impacting on

that person's property right, not an overwhelming reason, a lower standard.

Senator Brown said that he thought this was wrong. He said that property rights should not be separated out in that way, and he went on to point out—if my notes are correct—that property is the basis of all our moral rights. And he further pointed out that—he said—I believe this is the quote, "The courts ignore this reality now."

Senator Brown then cited *Moore* v. *East Cleveland* as an example of the failure of the Supreme Court to recognize what he calls the reality of their mistake. He said that *Moore* was a violation—the way the Supreme Court ruled, *Moore* was a violation of the right of someone to use their property.

He then quoted as authority for that Professor Tribe. He probably knows it, but he didn't have an opportunity to say it. He quoted Tribe's comments on *Lynch* v. *Household Finance*. The Tribe quote he read was about *Lynch* v. *Household Finance*, although he didn't state that, not about *Moore*.

Now, he then looked at you and he said, Do you agree? Do you agree that these two different standards—the Court has a strict scrutiny standard for matters with regard to privacy and matters with regard to other things other than property—race, suspect categories, classifications. They have this standard, and with property they have this standard. And he said, That is wrong; do you agree?

And the answer you gave, as I understood it, was exactly the opposite of the position he staked out—if I understood it correctly. You said you have no quarrel with what the Court does, how the Court deals now with regard to regulations of property. You said that this is where the Court should defer to the legislative branch. As you and I know, there is a venerable theory in constitutional law that says the reason why there should be a strict scrutiny standard on matters like privacy and suspect categories is because that is where democratic institutions have erred the most. That is when the legislative bodies have made the most mistakes, like saying people can be slaves. So, historically, we have applied a stricter standard.

But, as you pointed out, in areas where it related to property, the legislature didn't err that much. That is the basis of the thesis underlying the argument—the point, I should say. They don't err that much, so the courts have been more ready to rely on what the legislature says. A different standard.

And you went on to say, "I don't quarrel with this approach." That was the quote I do remember writing precisely.

Now, Judge, either you completely fundamentally disagree with everything that Senator Brown said and he thought you agreed with him, or the following: You said you had no quarrel with the equal protection analysis in this area, which is, of course, the area where terms like rational basis and strict scrutiny are most often used. But, of course, Judge, technically we are not dealing with the equal protection analysis when we are talking about the taking of property, as you well know. We are dealing with the fifth amendment and the due process analysis.

Now, there are always two questions in analyzing whether a regulation is valid, whether the regulation by the Government to reg-

ulate somebody's property, take their property, is valid. I can see the press and others are bored by this, but this is the single most important question you can be asked in this entire hearing.

One of the tests they apply is whether the object that is being served by the law, taking the property, is an object that falls within the scope of police power. And the other, as you well know, is whether the means chosen to legislate accomplishes an objective that is reasonably related to the reason they say they are doing this thing.

Now, Judge, the Court's current approach is to give the legislature a broad latitude in both these areas—the area of determining whether or not the means is an appropriate means and whether or not the objective being served is an objective that falls within the police power. That is the state of the law now, and they essentially use a rational basis test for a much lower standard.

So my question is this: Do you agree with the state of the law as it is now with regard to property, as I understood you to say it? Or do you agree with Senator Brown who said it is wrong the way we are doing it now; property and the test applied to the taking of property should be elevated to the same level as other constitutional rights—that is, the case he cited, the right to privacy in *Moore*?

What is your position?

Judge THOMAS. Senator, I think that I indicated to Senator Brown as well as, I believe, to the question from Senator DeConcini on equal protection analysis, that the current manner of equal protection analysis I have no quarrel with.

The CHAIRMAN. But do you have a quarrel—I am sorry. Go ahead.

Judge THOMAS. With respect to the area of the current law, in the area of taking, I have no basis to quarrel with that either.

The CHAIRMAN. That is what Senator Brown was talking about.

Judge THOMAS. Well, I thought that he recognized that we disagreed.

The CHAIRMAN. OK. Good. That is all I want to make sure because——

Judge THOMAS. I thought that was recognized.

The CHAIRMAN. Because I thought Senator Brown—Senator Brown, please correct me if I am wrong. I thought Senator Brown said, well, I understand, we agree, and, you know, property should have a higher scrutiny and should be treated with more respect in the law, et cetera. I thought he thought you agreed.

Senator BROWN. I was doing my best to get him to agree.

The CHAIRMAN. But you are aware that on the record under oath he does not agree with that.

Senator BROWN. And was very disappointed that he disagreed with Professor Tribe. [Laughter.]

The CHAIRMAN. Well, if you have an opportunity to read the case that Tribe was talking about, you will know that it is not related to the issue that we are talking about.

Anyway, now—in that I don't mean to defend Professor Tribe. I don't care one way or another whether Professor Tribe is right or wrong. It is just that it doesn't relate directly to this issue.

Now, Judge, the reason I bothered to take you through all of this I think you know well, and that is that it is a big deal at least to

me, and a big deal, in fact, to this country, that if the theory and thesis promoted by Senator Brown, espoused in great detail with significant annotation and with great articulation, and is a first-rate book by Professor Epstein, if you agree with this view, it means that, as the Brown-Epstein view, it means very simply that, to use his phrase, that—let me get it straight here—"if what follows, I shall advocate a level of judicial intervention far greater than we now have and, indeed, far greater than we have ever had"—that is what is being advocated by a very brilliant, informed, respected school of thought.

Now, I will not go into all the nuances of it. You understand them well. I might add that a couple newspaper articles that have written about this thesis said it has nothing to do with natural law. Let me quote from the book, so they are informed, quote from Mr. Epstein: "Thus, the political tradition in which I operate and to which the Takings Clause itself is bound rests upon a theory of natural rights."

I read from a very informed newspaper that natural rights had nothing to do with this theory. It is the thing upon which this theory is based. So, I am happy to hear your answer. If you would like to elaborate or speak on anything at all about this subject matter, I would be delighted to hear it. If you do not, that is OK, too. It is up to you. I do not want to cut you off.

All right. Now, let me move to another area, if I may, and that is to the area we have touched on very briefly, religion, if I may, not your religion or mine, how the court deals with religion.

Judge this is one area where the level of protection accorded fundamental rights is changing, and I do not think most of us even know it. You know it, and that is the right of free speech and the free exercise of religion. These rights, which, perhaps more than any other, are central to what most of us believe to be what it means to be an American.

In my view, these rights deserve the highest level of protection by the court, and I would like to start first with the Free Exercise Clause of the First Amendment, which provides, as you well know, "Congress shall make no law prohibiting the free exercise of religion."

Now, until last year, the Supreme Court applied the standard known as strict scrutiny, when reviewing legislation that restricted religious practice. Under the strict scrutiny standard we have discussed a number of times, but it bears repeating, the State first needed a compelling reason for restricting the religious practice, and, second, the State had to show that no other alternatives were available for it the State to achieve its goal. It has been a test now for about 40 years, 35 years, a two-prong test.

Under this doctrine, the Supreme Court held, for example, that the compulsory education law could not be used, for example, to require Amish children to attend school, when their parents believe that they have a religious duty to be educated at home, the *Yoder* case, *Wisconsin* v. *Yoder*.

The Court reasoned that, even though the State was not acting out of any hostility, and even though the State had a compelling reason for making children attend school, in general, in *Yoder* they held the State law could not constitutionally be applied to the

Amish, because there was "no compelling reason for abridging the religious freedom to educate their children."

Then, last year, the Supreme Court decided the case of the *Employment Division of Oregon* v. *Smith*. In the *Smith* case, the Court held that the Free Exercise Clause permits the State to prohibit sacramental use of peyote. I think that is how it is pronounced, is that correct? Never having used it, I am not sure of the pronunciation. Peyote, it is a drug used in an Indian ceremony and it has been used historically by them. Thus, a State could deny unemployment benefits to those who were discharged from employment for such use.

Now, I do not want to discuss the specific case of the case nor the specific outcome. Instead, I want to ask you about your understanding of the reasoning the Court used in this case. Justice Scalia, writing for a 5-to-4 majority, concluded that, as long as the Government is not specifically trying to restrict religion or as long as it is not trying to discriminate against religion, it can apply a general law against a religious activity, and it doesn't matter what effect the law has on that religion, in a sense striking down what historically—not historically, what the last several decades has been the second test needed to be passed, in order for the State to be able to take such action.

In other words, even if the law passed by the Government has a devastating impact upon a religious practice, the law is still constitutional, according to the majority, Scalia writing for them, is still constitutional, so long as the Government acted with a legitimate purpose when it passed the law.

Now, Justice O'Connor, on the other hand, said she would have upheld the ban on peyote, without changing the legal test that has historically been applied, without abandoning the strict scrutiny test. Now, Judge, which approach do you agree with, not whether or not it should be outlawed or not outlawed—that is not the issue as far as I am concerned. Do you agree with Scalia's approach, or do you agree with O'Connor's approach?

Judge THOMAS. Senator, I think as I indicated in prior testimony here, when the *Sherbet* test was abandoned or moved away from in the *Smith* case, I think that any of us who were concerned about this area, because, as we indicate, I think we all value our religious freedoms, I think that there was an appropriate reason for concern, and I did note then that Justice O'Connor, in applying the traditional test, reached the same result.

The CHAIRMAN. Correct.

Judge THOMAS. I cannot express as preference. I have not thought through those particular approaches, but I myself would be concerned that we did move away from an approach that has been used for the past I guess several decades.

The CHAIRMAN. Judge, I asked the same question of our most recent Justice and Justice Souter had no problem telling me that he agreed with the O'Connor approach. I do not care which approach. You obviously know the area well. You obviously know the facts of the cases. You obviously have an intense and deep commitment to religion and your faith in God. Do you mean to tell me you have not thought, when this came out, which approach you thought was appropriate.

Judge THOMAS. Let me restate my answer. My concern would be that, without being absolutist in my answer, my concern would be that the Scalia approach could lessen religious protections.

The CHAIRMAN. Judge, as a matter of fact, it does. I mean it is not whether it could or should. I mean it does, it limits the protection, for example, in the case—I guess it was in New Mexico, where they passed a law saying minors cannot drink wine under any circumstances. As you know, in our church and in many churches, there is a sacramental taking of wine at communion, and in most churches that occurs in most Christian religions—I cannot speak for others—and it occurs when kids are 7 years old or 8 years old, and it impacts significantly.

You know, it was struck down, that restriction in New Mexico, it never got up to the Supreme Court, to the best of my knowledge. But clearly, under the test applied by Scalia, such a law could be passed and it would be held constitutional. It has a big impact, it is a big deal, not a minor thing.

Judge THOMAS. And I guess my point is our concerns are the same, that any test which lessens the protection I think is a matter of concern. The point that I am making, though, in not being absolutist is that I think it is best for me, as a sitting Federal judge, to take more time and to think that through, but my concern about the approach taken by Justice Scalia is that it may have the potential and could have the potential of lessening protection, and I think the approach that we should take certainly is one that maximizes those protections.

The CHAIRMAN. Judge, you know, when your confirmation is over and if you are on the bench, you are on the bench and the next nominee comes up, we now talk about the Souter standard and how Souter did not answer questions that some suggest he should or shouldn't have, I am not making a judgment on that. We are going to have a new standard, the Thomas standard, which is you are answering even less than Souter.

Senator HATCH. First of all, Mr. Chairman, I do not think that is true. I think he has answered forthrightly and very straightforwardly all the way through this thing. He may not give the answers you and I want——

The CHAIRMAN. No, I am not looking for an answer that I want, let me make it clear, Senator. I am just making a statement of fact. I asked the precise same question of Judge Souter. Just Souter, sitting not as a Federal judge, sitting as a State court judge, said "I agree with O'Connor," no ifs, ands, buts about it, just click, bang, I agree with O'Connor. That is the only point I am making.

Senator HATCH. But he has answered things that Justice Souter had not answered, so I am saying——

The CHAIRMAN. I cannot think of any, but maybe yes.

Senator HATCH. I can.

Senator BROWN. Mr. Chairman, if I could have 30 seconds, I would like to comment on the previous business you were kind enough to bring up.

The CHAIRMAN. Surely.

Senator BROWN. Thank you.

I thought perhaps it was worthwhile, while the transcript is not out, as you noted, to note a couple of things that had been dis-

cussed. First, my concern about having property rights treated as second-class rights, I did not mean to indicate that property rights are the basis for moral rights. I do believe they are integral, that they are interdependent, but I do not believe that is the basis for it.

Second, the tribe citation was meant to indicate their interdependence, not necessarily as a support for more.

Third, at least my view of it is the tribe showed the interrelationship between personal and property rights, not necessarily having a different implication than that, so I cited it for its interdependence of those rights and not for another purpose.

Thank you for allowing me to interject, Mr. Chairman.

The CHAIRMAN. I did misunderstand, though, you do think *Moore* was wrongly decided, you did say that, did you not?

Senator BROWN. I cited *Moore* as an example of a case where it is very difficult to separate personal rights and property rights, where the problems that were exemplified by *Moore* clearly affect both.

The CHAIRMAN. Right. I thank my colleague and I think that is a perfect case, because where two rights come in conflict, the right of the government to tell someone that they cannot live in an area, unless they live in that area with what is defined as a traditional family, and that a woman moves in and lives there, grandparents live there and they have two grandchildren who are cousins, not brothers and sisters, and the State, in the form of the county or city, East Cleveland, says you must leave, you are violating our laws, our zoning laws which affect property, and the Supreme Court says wrong, is a basic fundamental right to privacy for grandmom to have her grandchildren, even though they are cousins and not brothers who live together.

The reason I raised this is a perfect example of this. That is why I raised the White House Working Group report. I do not want to go into whether or not you signed it or did not. I am not talking about you now. There are a number of very intelligent, very well-intended, and maybe even right, but people have a very different view than I do, and I believe you are one in this score, Senator, who argue that, hey—not you, I am not talking about you, Judge, I am talking about my colleague—but there is a whole group of people in this town, in this country who say wrong, we ought to let States, counties, cities make those judgments, and if they do they should be upheld by the Supreme Court.

From my perspective as to how I read the Constitution, I think that is absolutely, categorically wrong to say that the State should be able to tell a grandmother she cannot have two grandsons living in her house, fine kids, no problems, cannot have them living in the house because they are cousins and not brothers. I think that is bizarre, but there are a lot of people who do not think it is bizarre, and that is why I asked you questions about that, because if you thought that way, Judge—which you said you did not—but if you did, I would do everything in my power to keep you off the Court, but you do not, so you said and I believe you.

My time is up, but that is what the debate is about and that is why I am asking the questions. I can think of no way to frame it better than it was just framed in terms of your discussion with me, Senator.

My time is up, and I yield now to my colleague from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I have no questions of my own, but I will reserve my time in case something comes up I have not anticipated.

I do have one question to clear up something that was asked this morning by Senator Leahy.

Judge Thomas, this morning when you answered Senator Leahy's question about important Supreme Court cases, did you understand him to be referring to important cases decided when you were in law school?

Judge THOMAS. My understanding was that he was asking me for cases decided during the period that I was in law school, from 1971 to 1974, and I think I answered him in response to that *Griggs* and *Roe* v. *Wade*.

Senator THURMOND. I just wanted to clarify that if there is any question about it.

Now, Mr. Chairman, I believe the distinguished Senator from Illinois brought out that 12 Members of the House have opposed you. Is that correct?

Judge THOMAS. That is right.

Senator THURMOND. Well, Mr. Chairman, I wish to offer for the record a letter signed by 128 Members of the House endorsing Judge Thomas, several of whom are Democrats, and ask that that be made a part of the record.

The CHAIRMAN. Without objection, it will be made a part of the record.

[The letter follows:]

CONGRESSMAN DICK ARMEY
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EDUCATION AND LABOR

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(214) 221-4627

1301 SOUTH BOWEN ROAD
SUITE 422
ARLINGTON TX 76013
(817) 461-2555

(817) 383-3375
(FROM CITY OF DENTON)

Congress of the United States

House of Representatives

Washington, DC 20515

July 3, 1991

The Honorable Joseph R. Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden,

We are writing to express our strong support for the nomination of Judge Clarence Thomas as an Associate Justice of the United States Supreme Court.

In our view, Judge Thomas is a man of impeccable character. Judge Thomas, a grandson of a sharecropper, was born in the segregated South and faced seemingly insurmountable obstacles. But through hard work and discipline he was able to overcome his impoverished condition achieving success in every task he undertook.

In Washington, Clarence Thomas has served in an exemplary manner as a judge on the U.S. Court of Appeals for the District of Columbia, and he was an outstanding Chairman of the Equal Employment Opportunity Commission which he chaired from 1982 to 1989.

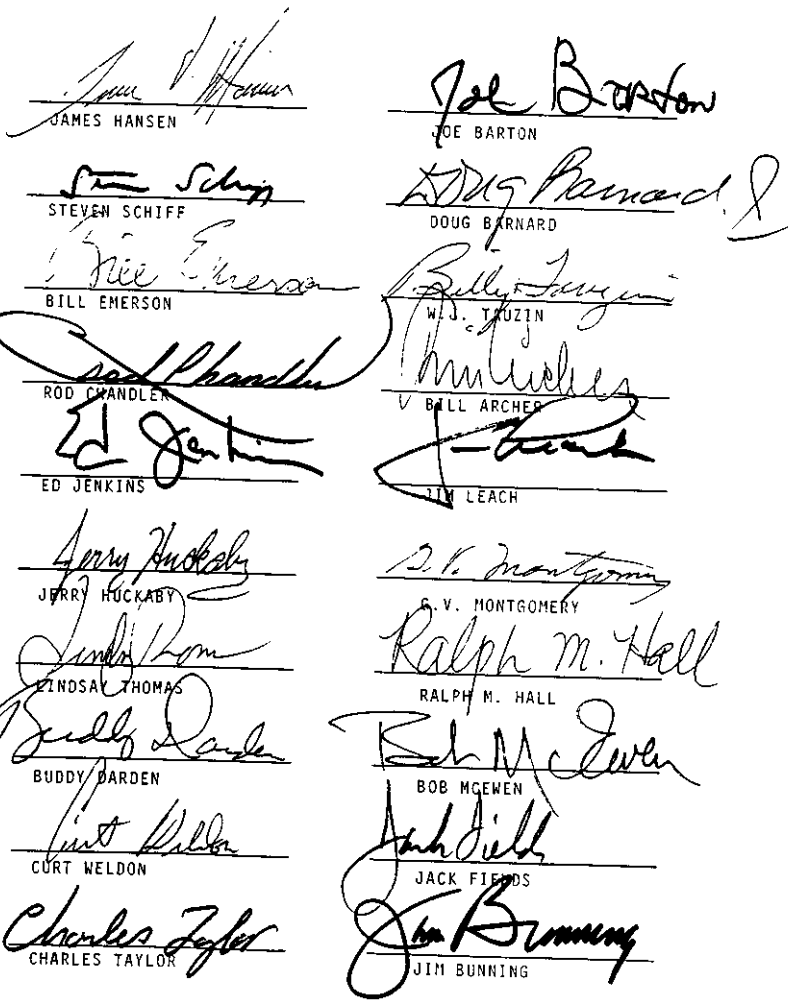
Judge Thomas has worked with the United States' civil rights laws for more than a decade and his commitment to equal opportunity for all is second to none. Under the chairmanship of Judge Thomas, the EEOC effectively streamlined operations and clarified the rules and regulations of the Commission while enhancing its ability to fairly respond to claims of discrimination. Consistent with the purpose of the EEOC, Judge Thomas played a vital role in ensuring that older Americans and minorities have access to a fair and equitable means of redress.

Together with his tenure at the U.S. Court of Appeals, Clarence Thomas' record--both past and present--reveals that he has the qualifications and character to uphold the high standards the American people demand. We strongly support the nomination of Judge Clarence Thomas to the United States Supreme Court.

Respectfully yours,

DICK ARMEY

GARY A. FRANKS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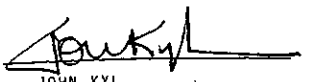
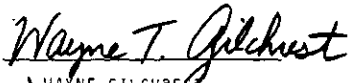
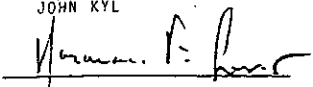


JOHN KYL



WAYNE GILCHREST



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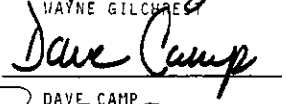
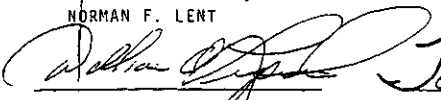


DAVE CAMP



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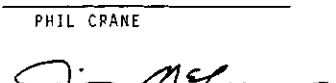

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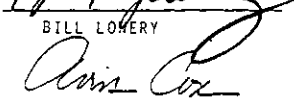

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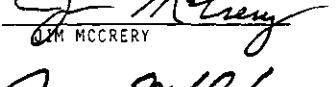

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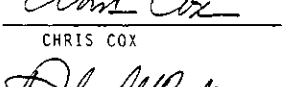

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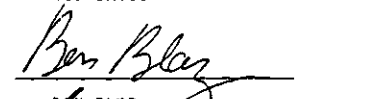

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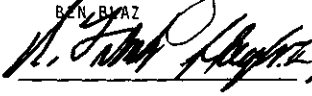

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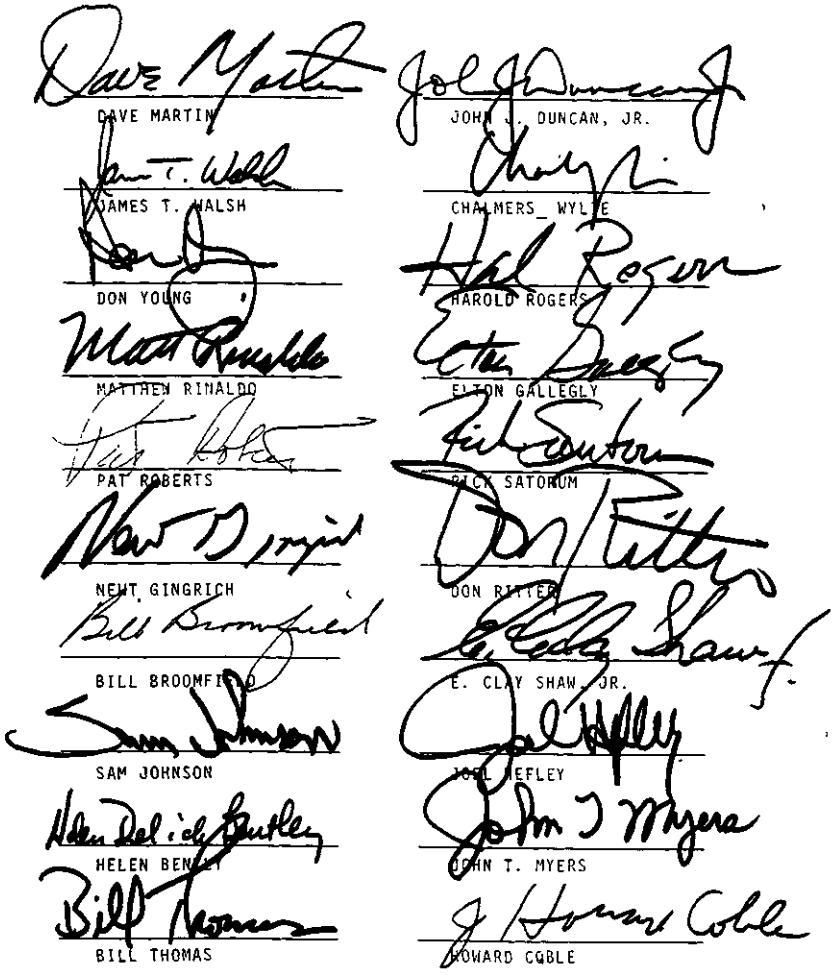
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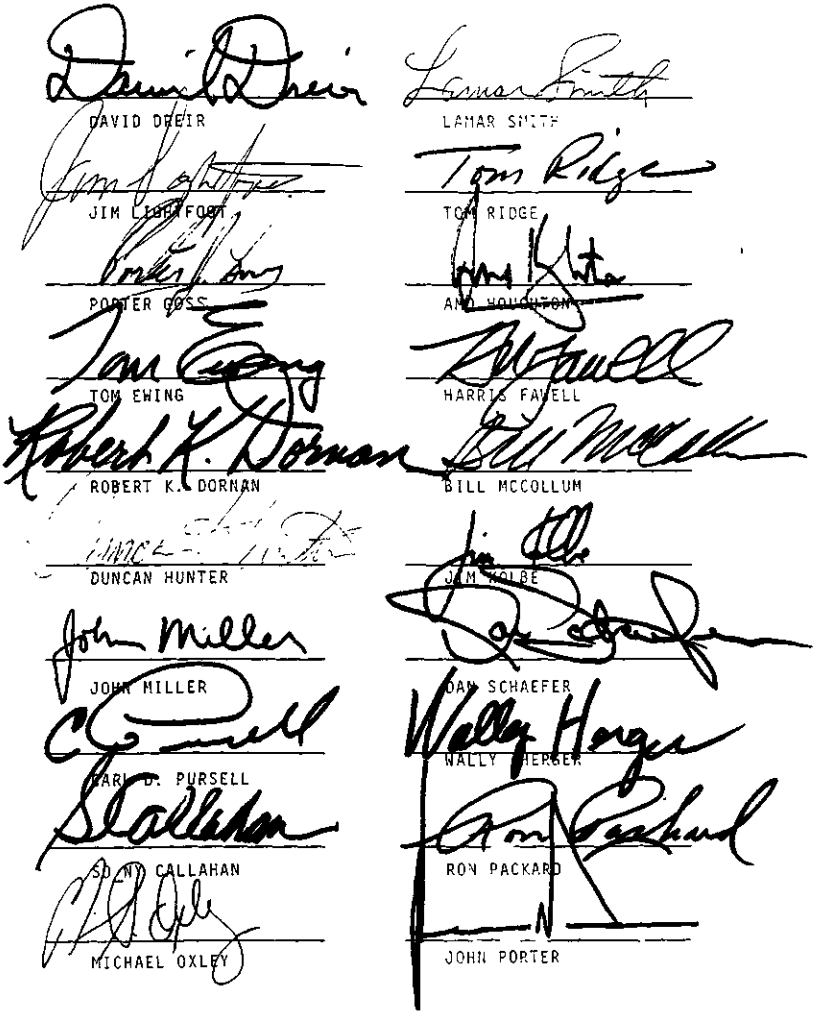
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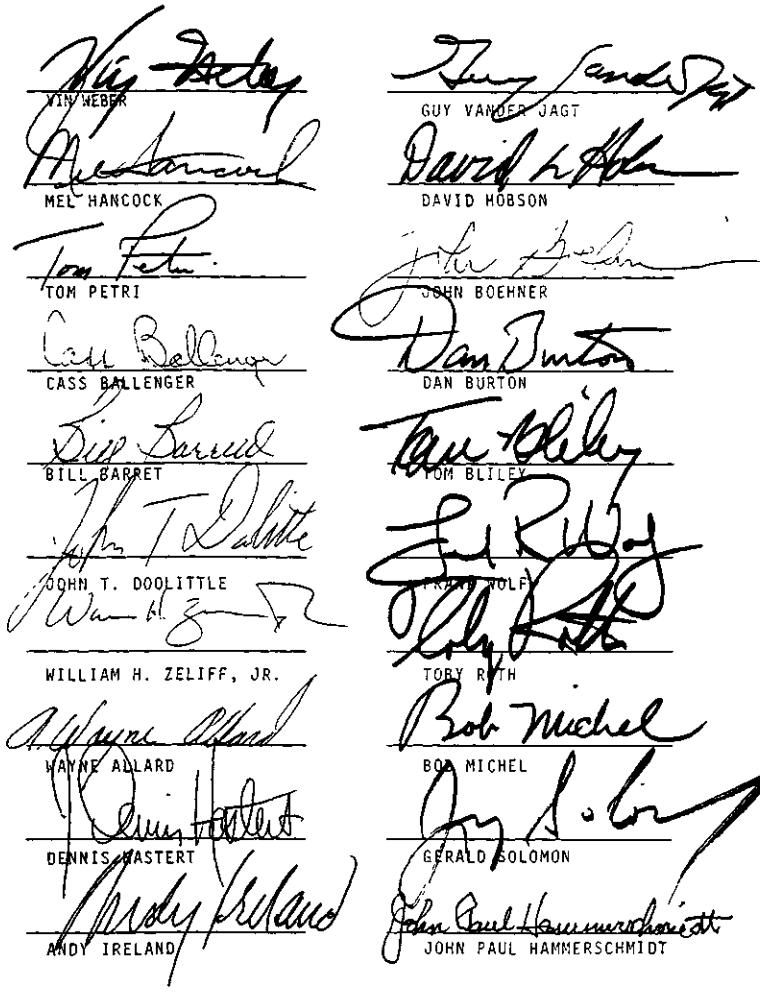
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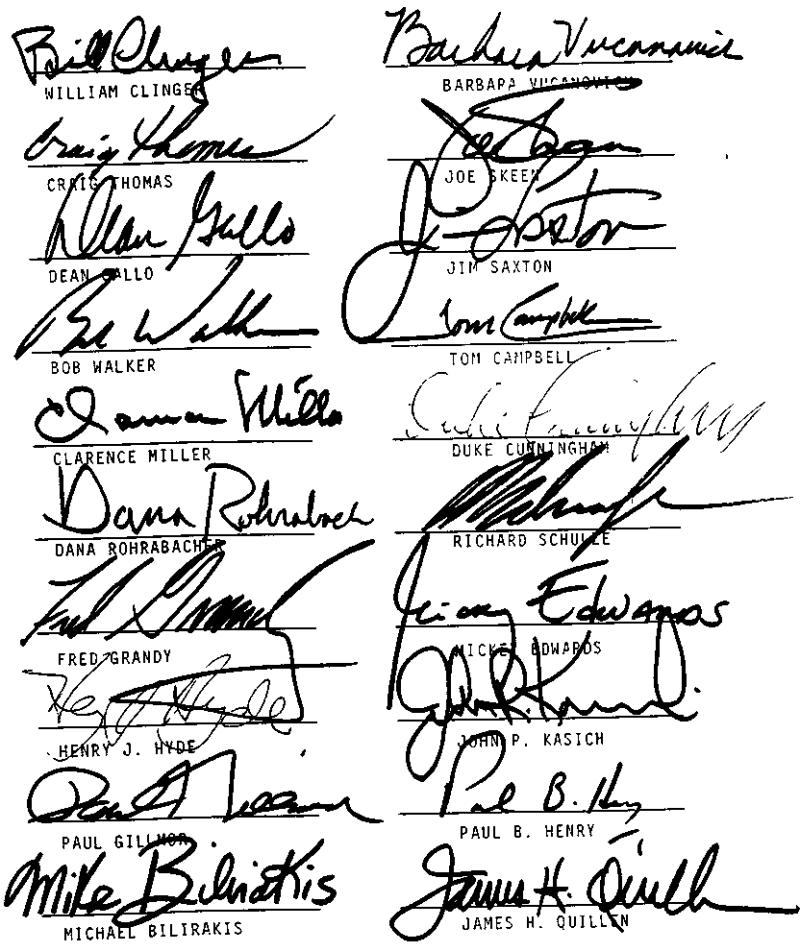
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WILLIAM DICKINSON

ALEX MCMILLAN

DOUG BEREUTER

CLIFF STEARNS

STEVE GUNDERSON

BEN GRADISON

Senator THURMOND. I will reserve the rest of my time.

The CHAIRMAN. Senator Kennedy——

Senator THURMOND. And, Judge Thomas, let me just say this, since I think I am through, unless something comes up I don't anticipate. I want to compliment you on the way you have conducted yourself during this hearing. I think you have shown that you are fair, you are open-minded; and you have answered all the questions you could without violating the oath that you will have to take as a judge on cases that might be coming up in the future. We are very pleased with the way the hearings went.

I want to compliment the chairman, Senator Biden, and the other members on this hearing and the way it has been conducted throughout. In my opinion, you deserve to be confirmed on the Supreme Court, and I anticipate you will be.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you. Mr. Chairman, if it is agreeable with the other members of the committee, even though I am entitled to the half-hour, Senator DeConcini will be at the Gates hearing on Monday. What I would like to do is just—there were three areas I would like to get into. I would like to divide the half-hour with Senator DeConcini and take 15 minutes, or try even to take less time and give the remaining time to Senator DeConcini and then go back over to the other side. But I would like to be able, at a reasonable hour on Monday, to be able just to finish up those additional areas, if that is agreeable.

The CHAIRMAN. Without objection, you will be.

Senator KENNEDY. Judge, the right to vote is at the very core of our democracy, and the Voting Rights Act has been extremely important in assuring that all Americans can exercise that fundamental right.

In a speech at the Tocqueville Forum in April 1988, you criticized Supreme Court decisions applying the Voting Rights Act. You said, and I quote, "Unfortunately, many of the Court's decisions in the area of voting rights presuppose that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual racial or ethnic group has sufficient clout."

Do you remember what the Supreme Court decisions on the Voting Rights Act were that you were referring to?

Judge THOMAS. I can't remember precisely, Senator, but I was perhaps referring to the effects test. Again, that has been quite some time.

I do know that I also was critical of the administration for not supporting the Voting Rights Act, and I do treasure it, of course, coming from a background or an area where that right was considered enormously important and difficult to secure.

Senator KENNEDY. Well, prior to the meeting, I think we made available to the Justice Department that we would be talking about the voting rights cases. I gave, I believe, some notice that I would be getting into these because I read through your speeches where you talked about the administration's position on the exten-

sion of the Voting Rights Act. But also in the speeches it has the criticism of the Voting Rights Act, and I think in the speeches, as I mentioned here, you were talking about the ethnic group having sufficient clout, and you were critically generally, as I understand, of many of the Court's decisions. There are only really three important decisions by the Court. You mentioned one. The other two were the *White* decision and the *Thornburgh* decision.

Judge THOMAS. Senator, my only concern would have been that in that context whether or not we were assuming that—for example, if you had an all-black district or an all-white district, whether that would necessarily always be good for black Americans. And I think some of the concerns would be that even now, as I have followed in the newspapers or in other journals, that perhaps some of the black individuals feel that the district, the white district that is left becomes more conservative and offsets the newly created minority district. That would have been the only concern.

I certainly have absolutely nothing but the greatest support for legislation that secures the right to vote.

Senator KENNEDY. Well, of course, the point that you make here is explicitly prohibited by the Voting Rights Act, which says that—the Voting Right Act explicitly says, "No group is entitled to legislative seats in numbers equal to their proportion in the population. The Act simply bans States from taking actions which result in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."

In these two cases, they basically struck down the at-large districts, both in North Carolina and also in Texas, specifically in Dallas, Texas, and San Antonio. And I was wondering if—otherwise, what we can do is come back on Monday to give you a chance to review these, if you would like. That is fine. I thought I had mentioned to the Justice Department that we would get into it.

Judge THOMAS. You did, Senator, and the underlying concern that you have is the same as the one that I have; that minorities have the ability to vote and to have an effective participation in our political processes.

My concerns were not intended to suggest that I was in any way opposed to voting rights or concerned that we have them. I think that they are critical, and I certainly have been most supportive and felt that we should have been more aggressive in stating that position during the Reagan years.

Senator KENNEDY. Well, I understand from reading your speeches that you were in support of the Voting Rights Act. Also in your speeches you talked about the criticisms of the Supreme Court on the voting rights.

Judge THOMAS. Yes.

Senator KENNEDY. And what I was interested in is finding out, you know, what the nature of the criticisms really were. You had said many Supreme Court decisions in voting rights are unfortunate, and I am just trying to find out what aspect of the Voting Rights Act that was decided by the Supreme Court and the major Supreme Court decisions affecting the Voting Rights Act dealt with at-large districts in the areas which I have just outlined.

I was just trying to understand what in particular the Supreme Court decided on voting rights that you found objectionable. That was basically my question.

Judge THOMAS. I think my only concern, Senator, was with the effects test. But it was not—I did not go into detail into the voting rights cases, and that certainly was not my area. But what I am trying to, I guess, communicate to you is that my view is that voting rights should be aggressively protected, and I felt that we should have done that during the Reagan years.

Senator KENNEDY. Well, we all agree.

What was your trouble with the effects test, the holding?

Judge THOMAS. Well, I guess the only point that I was making, Senator, was whether or not it was on—again, this is general—whether or not we could really judge from the number of individuals who held office, for example, how effective a person's voting rights were being implemented or how effective the statute was implemented or how effective the minorities were in participating in the political process. I think it is one measure, and I felt that it was one measure.

But I underscore that by saying this, Senator: I did not study that area in detail. That was simply a concern. And I think that other individuals now are concerned because of the creation of what is perceived as more conservative districts, political districts.

Senator KENNEDY. Well, do I understand you correctly that in two of the major decisions by the Supreme Court that struck down the at-large districts, both in San Antonio and Dallas, also in North Carolina, at-large districts which historically had been in effect for years by individuals that wanted to deny effective rights to vote by minorities, blacks and Hispanics—that in one case, the *White* case decided unanimously by the Supreme Court, that there had been significant diminution of the effectiveness of the right to vote in Dallas as well as in San Antonio. I understand that their requirements that they go to single-member districts is not offensive to you.

Judge THOMAS. Senator, I again would go back and look at those cases, consistent with what you are saying, but I underscore that by saying that that was my general concern. It was not an objection to the aggressive enforcement of the Voting Rights Act.

Senator KENNEDY. Perhaps over the weekend, if you can sort of refresh——

Judge THOMAS. I will try.

Senator KENNEDY [continuing]. Your recollection about what were the particular aspects in the voting rights cases, because this was something that many of us were very much involved in here at the time of the extension.

I have just 5 minutes left of the 15.

In your article in 1989, "The Higher Law Background of the Privileges and Immunities Clause, the Fourteenth Amendment," one of the arguments you made for using the natural law to interpret the Constitution was that it is, and I quote, "The only alternative to the willfulness of both run-amuck majorities and run-amuck judges." I think those words have been used at other times in the hearing.

Are you willing to name any judge whom you considered to be a run-amuck judge? [Laughter.]

Judge THOMAS. Senator, I thought about it when I looked at that language again, and I couldn't name any particular judge.

Senator KENNEDY. Well, was Oliver Wendell Holmes a run-amuck judge?

Judge THOMAS. He was a great judge. Of course, we all, when you have opportunities to study them, we might disagree here and there. But I had occasion to read a recent biography of him, and obviously now he is a giant in our judicial system.

Senator KENNEDY. Because in your speech on how to talk about civil rights, you called Justice Holmes a nihilist who, and I quote, "sought to destroy the notion that justice, natural rights, and natural law were objective." And you went on to say about Holmes, and I quote, "No man who has ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach."

Judge THOMAS. I think that was a quote from someone else, Senator.

Senator KENNEDY. Well, I will——

Judge THOMAS. I may be wrong on that, but I think it was a quote from someone else.

Senator KENNEDY. I will provide that for you over the weekend. Maybe you can get a look at it.

Whatever time is left I will yield to Senator DeConcini.

Senator DECONCINI. Senator Kennedy, thank you very much. I am sorry to impose on you and the committee, but I do intend to be at the Gates hearing.

I only have a few follow-up questions. I may not even take 15 minutes, Judge Thomas. Yesterday, when I was asking you some questions on judicial activism, I made reference to *Missouri* v. *Jenkins,* which is a current case of 1990, and, as you may recall, it was a case where the Court imposed an increase in taxes.

The only question that I did not quite get an answer from you, although perhaps it is because of my own inadequacies, is do you believe that taxation is within the Federal power of the Federal bench, or is taxation power exclusively that of the legislative branch of government?

Judge THOMAS. Senator, I think that is explicit in the Constitution that the legislative branch imposes taxes.

Senator DECONCINI. So, without talking specifically about this case, which, who knows, might come up again, although I rather doubt it, do you feel that it would be judicial activism, if the court does impose taxes?

Judge THOMAS. I think, just in the abstract, I think it would be, and I do not know that it would be tolerated.

Senator DECONCINI. Thank you, judge.

Let me just touch on another area, a little bit of concern of mine, and you may have answered this and I might have missed it, and that deals with the Equal Protection Clause. You have taken a very strong position on the case of *Brown* v. *Board of Education.* Its companion case is the *Bolling* v. *Sharpe* case. Are you familiar with that case?

Judge THOMAS. Yes, sir.

Senator DECONCINI. As you know, the Court recognized that the 14th amendment's equal protection clause does not apply to the Federal Government, as a result, the Court held that the Federal law segregating the District's schools violated the due process clause of the fifth amendment, and the *Bolling* court ruled that the fifth amendment embodied the quality principles of the 14th amendment. Do you agree with the *Bolling* decision? Do you have any problems with that?

Judge THOMAS. I have no quarrels with *Bolling* v. *Sharpe,* Senator.

Senator DECONCINI. Thank you.

Last, in the area of literacy, I just want to go back to that case. When Judge Bork was here, and just so people understand that I make a great distinction so far, Judge Thomas, between you and Judge Bork. Bork was very critical of the *Bolling* decision and he said it was a clear rewriting of the Constitution by the Warren court. He labeled it "social engineering from the bench." I do not bring this up to open up wounds or anything else, but I do bring it up to point out that I think you are very different in your philosophy and in your approach to the Constitution than Judge Bork was, and, as far as I am concerned, that is important for your confirmation process.

In section 5 of the 14th amendment, it gives Congress the power to enforce, by appropriate legislation, the provisions of that particular amendment. Invoking its authority under section 5, the Congress, in 1965 and in 1970, adopted provisions of the Voting Rights Act banning literacy tests in certain instances, and those provisions were upheld in the *Katzenbach* case and in the *Oregon* v. *Mitchell* case. The Court held in those cases that Congress had the power to determine that requiring literacy tests in specific instances deprives voters the equal protection of the law.

Again, just for the record, Judge Bork told the Senate Judiciary Committee during his confirmation hearing that *Katzenbach* was bad constitutional law. How do you feel about that case? Maybe you have already answered that, but I missed it, if you did. Have you had a chance to review that voting rights case, and do you believe that they were correct in their interpretation?

Judge THOMAS. Senator, I did read that case. Again, I do not remember all the details of it and I cannot and did not have a basis or any quarrel with the case or the result in the case.

Senator DECONCINI. So, you feel that is, in your philosophy, a proper interpretation of the Constitution of this particular section 5?

Judge THOMAS. I just have no quarrel with it, Senator. I do not object to it.

Senator DECONCINI. When you say you have no quarrel, you mean that you agree with it, is that fair to say?

Judge THOMAS. I mean I do not disagree with it. I do not have a basis to disagree with it and I have not raised any objections about it.

Senator DECONCINI. Fine. I do not mean to quarrel with you, Judge. It is just a lot easier to yes, I agree with it, than to say I do not have any quarrel with it. It immediately raises a flag in some

people's mind as saying, gee, he won't take a position. I think you have taken a position.

Judge THOMAS. Yes.

Senator DECONCINI. I was just trying to get you to say yes, I agree with it, that is all.

Judge THOMAS. Well, I guess the difficulty that I have, I was more apt to say that when I was in the executive branch and be more categorical in answers. You asked me yesterday about my comments at the hearing, the contempt hearing, and my answer was categorical.

Senator DECONCINI. Yes, it was.

Judge THOMAS. And you asked me what I learned from that and the response was not to be categorical. Certainly, as a judge, I think that it is important that when I do not know where I stand on something or I have not reviewed it in detail, that it is best for me to take a step back and say I have no reason to disagree with it, rather than saying I adopt it as mine.

Senator DECONCINI. I guess that is a fair idea. But when we are talking about a literacy test on the right to vote and if you have read the *Katzenbach* case or the *Oregon* case, it does not seem unreasonable to say yes, I agree with those cases. Now, if a different set of circumstances came up and it was a different kind of literacy test, it seems to me it gives you every ample right, once you are on the bench, if you are confirmed, to say, well, this is different than the *Katzenbach* case. My only concern is I think these cases, and I have read them and I'm sure you have too—seem to make sense to me, and my question is does it eminent sense to you?

Judge THOMAS. It makes eminent sense to me to find unlawful literacy tests that are used to deprive people of the right to vote.

Senator DECONCINI. That is all I wanted.

Judge THOMAS. And let me just give you——

Senator DECONCINI. That is all I am looking for.

Judge THOMAS. I want to give you a quick anecdote as to why it is so important.

Senator DECONCINI. Yes.

Judge THOMAS. I can remember my grandfather poring over the Bible, in order, as he said, to go and get his right to vote and it was a painful experience watching that, so I understand what you are saying.

The only point that I was making in the reservation is that the way you approach it and the way you reached that result, but the underlying concern I think we both share.

Senator DECONCINI. Oh, I do not think there is any question, we share that underlying concern. It is just that we have certain cases that are beacons in a particular area, and these two cases are. And without having you comment on what you are going to do if another voting rights case comes, it just seems appropriate for you to take a position and answer it. And I think now that you have answered it, that, yes, you believe these cases are correct, and that is really all I want to know. I only say that because I think some people get disturbed up here when they cannot get you to say yes or no. And after maybe what I asked you yesterday, you are a little bit leery of saying yes or no. But when there is as a case as clear as this, I appreciate the affirmative answer, clearly.

Those are all the questions I have, Judge.

I want to thank my friend from Massachusetts for permitting me to intervene here. I think there still is some time, Senator Kennedy, on your time, because I do not think I have taken the full 15 minutes.

Senator KENNEDY. Well, I understand from the previous agreement that would conclude this portion of the hearings for today and, as the chairman has pointed out, we will resume the hearings at 9:30 on Monday morning.

The committee stands in recess.

[Whereupon, at 4:30 p.m., the committee recessed, to reconvene on Monday, September 16, 1991, at 9:30 a.m.]