

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.]