Judge Thomas, if you are confirmed and if you join the current revisionist Supreme Court—and I call it a revisionist Supreme Court as opposed to a conservative court because the current court has gone beyond the conservative judgments illustrative of the unanimous opinion of Chief Justice Burger in the Griggs court. I think—I would ask if you would be philosophically attuned more to the Justice O'Connor line or the Justice Scalia line. And I will deal with two cases for illustrative purposes.

When I had finished my questioning, when my time ran out on the second round, I had been asking you about *Rust* v. *Sullivan*. And in *Rust* v. *Sullivan*, Justice O'Connor dissented. That was the case where you had a regulation by the Department of Health and Human Services which had stood from 1971 to 1988 and then it was changed, and the Supreme Court upheld its change on a variety of grounds which I had specified in my last round. But the one which struck me the most peculiarly was the ground that it is appropriate to change a regulation when it is in accord with a shift in attitude. That has related, in part, to your compliment of Justice Scalia in your Creighton speech where he had referred to political considerations on changes in regulations.

Justice O'Connor on the other hand voted to uphold the original regulation and to strike down the new regulation because, as she put it, "It would raise serious constitutional problems and would constitute a serious first amendment concern." But I would ask whether you would side with the O'Connor branch or the Scalia branch of the revisionist court.

Judge THOMAS. Senator, without reference to *Rust*, I think as I attempted to explain when we addressed this last week, *Chevron* v. *U.S.A.* involved an instance in which EPA changed its regulation, an existing regulation concerning the bubble concept. That was a concept that was hotly contested, and EPA had adopted a regulation rejecting the bubble concept, as I remember it.

Subsequent to that, EPA revisited the concept and adopted it, and the question was whether or not this new regulation was a reasonable interpretation of EPA's underlying statute, or the statute in that case. And the Court held that it was, indeed, and upheld the regulation.

That is generally the existing law with respect to deference to agencies' reasonable interpretations in the administrative law area. Whether or not that is easily transported to the difficult case that you have just mentioned or is easily reducible to an instance in which there seems to be just a change and, as you say, shifts in political—shifts of attitudes and whether shifts of attitudes would constitute a reasonable basis for making such a change or that shift in attitude comports with a reasonable interpretation of the underlying statute is, I think, a totally different question.

But the point that I am making is simply that the Supreme Court has permitted—in the leading case in the administrative law area has permitted there to be a change of regulations by the agency, even when the existing regulation had been in place for some time.

Senator SPECTER. Judge Thomas, in *Rust* v. *Sullivan*, the Court concluded that the regulation was acceptable, saying that:

The regulations simply ensure that appropriate funds are not used for activities, including speech, that are outside the Federal program scope.

That ruling gives me enormous concern. It has given many, many people in this country enormous concern in light of the very extensive Federal rule on funding. So that if you have a Federal program which is funding a given activity and you say that no one can speak in opposition to that program, there is an enormous latitude for restricting freedom of speech. And my question to you is: Do you think that it is appropriate when there is Federal funding involved to limit speech when that speech is outside the Federal program scope?

Judge THOMAS. Senator, I think that in this case, with respect to the question, the underlying question in *Rust* v. *Sullivan*, I think it would be, from my standpoint, moving too far to comment on the underlying issues.

Senator SIMON. Why?

Judge THOMAS. As I have indicated in other instances, Senator, in these difficult cases, it is important to me that I not compromise my impartiality should cases of this nature, similar cases be considered by the Supreme Court in the future, if I am, of course, fortunate to be confirmed.

Senator SPECTER. But, Judge Thomas, I am not asking you about any specific issue, let alone any specific case. I am asking you about a very broad—a broad, broad philosophical question. It is as broad as the areas of Federal funding, which are gigantic, and it is as broad as the first amendment freedom of speech, which we hope even exceeds the breadth of Federal funding. And the issue is, just because the Federal Government gets into funding and establishes a scope of a program—and I am not talking about any specific issue—doesn't that give you at least some concern about limitations on speech, if you could curtail speech where Federal funding is involved?

Judge THOMAS. I think as I suggested last week, Senator, I was very concerned in instances in which it appears or in instances in which regulations by the Government curtail our fundamental freedoms, and in this case freedom of speech. I share that concern.

What I am attempting to avoid is offering a judgment on an agreement with a point of view on a very hotly contested and difficult case that could certainly come before the Court again.

Senator SPECTER. Well, Judge, I am really beyond the case, but I will not press it further. Let me move on with my question to you about the revisionist court and, if you join, whether you will be on the Scalia branch or the O'Connor branch, and go back to *Johnson* v. *Santa Clara.* Justice O'Connor takes Justice Scalia to task for his dissent which he says is an academic discussion, and then I think in a very important doctrinal view says that:

Justice Scalia's dissent rejects the Court's precedents and addresses the question of how title VII should be interpreted as if the Court were writing on a clean slate.

You have already stated that you believe the constitutional interpretation is a moving body, depending on the tradition and customs of our society, without being rigidly controlled by original intent. And here you have Justice Scalia taking title VII, as Justice O'Connor says, writing on a clean slate. And Justice O'Connor rejects

that and says that we have to take into account the Court's precedents.

My question to you: Would you choose a preference between the approaches between Justice O'Connor and Justice Scalia on that issue?

Judge THOMAS. Senator, I think it is important for any judge to take into account, even when he or she disagrees with a particular case, to recognize that there is the additional burden and additional question of whether or not this case should be overruled; that is, a question about the doctrine of stare decisis.

I do not think that judges should assume, simply because they disagree with a particular case, that we are operating as though there was no prior case law or there are no precedents and feel free to act as though they are not in any way controlled or restrained or constrained by prior case law.

My sentiments, without expressing a particular judgment on that case, my sentiments would be toward a preference for recognizing that there is significant weight to be given to existing case law and that the burden is on the judge who wants to change that precedent, to not only show why it is wrong, but why stare decisis should not apply.

Senator SPECTER. Thank you. I am going to score that one for Justice O'Connor, which may make it one to one.

Let me move on to the war powers issue, Judge Thomas, a question which has not yet been broached and one that I think is enormously important and one which you and I had discussed in the informal session which we had before the hearings started.

We have just seen a historic event in the course of the past year with the gulf war and the vote by the Congress authorizing the President to use force in the gulf war. In your writings, you have been concerned about congressional activity in many areas; and in your speech at Brandeis University on April 8, 1988, you said:

> In many areas of public policy, including foreign policymaking, Members of Congress can thwart or substitute their will for that of the Executive.

And you focus on foreign policy.

You have been very critical of the Congress, as I had commented earlier, noting that there is little deliberation and even less wisdom in the manner in which the legislative branch conducts its business. And in your speech on September 3, 1987, at the American Political Science association, you quoted with approval a statement by Gary Jacobson that in Congress there is great individual responsiveness, equally great collective irresponsibility.

There are many issues where there is a confrontation between the President and the Congress, which we all know, and I would like your views as to the authority of the Congress under its constitutional, exclusive responsibility to declare war, as opposed to the President's authority as Commander in Chief, which is a very central issue, was a central issue earlier this year.

Let me start with the question that I told you I was going to ask you, and that is whether the Korean conflict was, in fact, a war.

Judge THOMAS. Senator, I, in response to our informal discussions, did attempt to resolve an issue that scholars and political scientists, lawyers, seem to have been debating for the last 40 years

and I recognized, I believe as I indicated to you, the hostilities in Korea and the President's response. Of course, I don't think that there was a suggestion that the President could not respond, but your question at the time went to whether or not there should have been a declaration of war.

Senator SPECTER. Correct.

Judge THOMAS. And the short answer to that is, from my standpoint, I don't know. I have attempted to look at that question, but, again, it is one that scholars haven't resolved and that legal minds haven't been able to resolve. And I think that I would be imprudent to attempt to resolve it in this environment.

Senator SPECTER. Well, Judge Thomas, when I asked you the question at our informal session as to whether the Korean conflict was a war, you said, "You asked that question of Judge Souter." And I said, "That is right." And he ducked, and then I said, "Well, let me give you the weekend." He came back and he said, "I don't know."

Now, I thought that was OK under those circumstances where it was from Friday to Monday, but you and I talked about this on August 1 and now it is September 16. And I don't think that the Korean incident is going to be repeated. It is not asking you to comment on a pending case, and it is well established historically as to what happened. And this is a crucial issue as to whether American troops are going to be committed to combat on the President's word alone as Commander in Chief or whether it is going to require a congressional declaration of war.

So, to the extent that I can push it just a little bit, let me repeat the question. Was it a war?

Judge THOMAS. Senator, this isn't one of the instances in which I am saying that the issue of whether or not the Korean—the hostilities in Korea was a war would be coming before the Court. This is an instance when, as I have indicated to you, I simply don't know.

Senator SPECTER. Well, let me try again. Instead of moving to an easier question, I will move to a harder one.

In early January of this year, there was a lot of debate as to whether the President had the authority to commit troops in the gulf war without a resolution. President Bush asserted he did. And this Judiciary Committee held hearings in early January, and some even suggested, I think ridiculously, that the President would be impeached if he moved ahead without waiting for a congressional resolution. I thought it was ridiculous because Congress had sat on its hands for months and had allowed the United Nations to set a date for the use of force January 15, and finally—finally—Congress acted, started some discussions on January 10 and moved on it on January 12.

I am not going to ask you whether you think the Constitution required congressional action or the President had the sole authority to act as Commander in Chief, because if you won't answer the Korea question, you are not going to answer that one. So let me ask you instead: What would the considerations be that you would work through in approaching that kind of a legal issue?

Judge THOMAS. It is a very difficult issue, Senator. I have addressed whether or not—in the War Power Act, resolution, of course, is very complex and has a variety of reporting provisions,

as well as the more difficult provision involving the withdrawal of troops.

I think that, as I may have alluded to in our conversation earlier in private, the whole issue of what the President's authority is, as opposed to the authority of Congress, seems to be one that is more amenable to the kind of process that this body and the Executive went through or engaged in the Persian Gulf conflict; that is, one in which the conflict is resolved in the political context.

I don't think there is certainly not very much in the way of judicial precedent or judicial consideration of this particular issue. And as I have noted before, there is an ongoing debate among scholars on both sides of the issue. I for one, just as I have viewed the issue, as I have looked at it, it seems to be one of those instances in which the differences, particularly when there is an existing conflict, are better worked out in cooperation between the executive and the legislative branches.

Senator SPECTER. Well, Judge Thomas, I agree with you totally that it is better to work them out, but that issue could come before the Court. And a concern which I have expressed is your statements suggesting a lack of wisdom in the Congress, and I know you have already said that you will be fair and impartial and that what you had said in the past was as an advocate as opposed to where you stand as a judge. So I don't think there is any use in pursuing that one any further.

Let me turn to a specific case which you have decided, Judge. Although you did not write the opinion, it is a case of some significance involving the *United States* v. *Jose Lopez*. It is a case which involves the interpretation of socioeconomic status under the Uniform Sentencing Guidelines which have been enacted to try to bring uniformity on sentences in criminal cases. Those guidelines say that socioeconomic status should not be considered on the sentencing issue.

The facts in this case were very compelling about Mr. Lopez in terms of his own background, where, as the opinion of the court said, the tragic circumstances involved the death of his mother by his stepfather murdering her, his own threats that he had to leave town to avoid problems, his growing up in the slums of New York and Puerto Rico, and of not fitting in because of his dual background.

The U.S. attorney prosecuting the case on behalf of the Government in asking for a tough sentence argued that—and this is also from the opinion:

> The Government urges that a focus on particular life experiences would permit every defendant to distinguish himself from all others, and this would undermine the purpose of the uniformity of sentencing procedures.

You were on the panel which upheld an expansion of the sentencing guidelines which prohibited considering socioeconomic circumstances. And my question to you is: How far do you think it is appropriate to go in that line? And was the U.S. attorney prosecuting the case, in asking for a tough sentence, really totally wrong in the concern expressed that it would permit every defendant to distinguish himself from all others and thus undermine the purposes of uniformity in the guidelines?

Judge THOMAS. The concern—as you indicated, Senator, I didn't write the opinion, and——

Senator SPECTER. But you joined in the opinion.

Judge THOMAS. I joined in the opinion. After awhile, you learn that when you don't—after about 150 or 200 of these cases, they are a little hard to recall. But this case was a difficult case. It is one that took into account the notion or the concern that this body had that sentences be uniform, that there not be wide disparities in sentences.

At the same time, the question was when there is an individual, such as Mr. Lopez, who has had very difficult and traumatic circumstances in his or her life, is this a factor that is not socioeconomic. Even though it may have resulted from socioeconomic status—that is, where he lived—are these factors that should be considered?

I think what the court did in that case—and I haven't had an opportunity to review that opinion—is to wrestle with that difficult issue, but also to recognize that there was in the uniform guidelines a prohibition against considering socioeconomic status and I think ultimately feeling compelled to comply with that requirement.

Senator SPECTER. Judge Thomas, the issue of the death penalty has not arisen in these proceedings except for one reference earlier to Federal court habeas corpus, but that is a very important subject. There are deep-seated differences of opinion on the matter. I was a district attorney in Philadelphia for many years and believe the death penalty is a deterrent. Philosophically, is there anything about the application of the death penalty which would bother you from upholding it, if confirmed for the Supreme Court?

Judge THOMAS. Philosophically, Senator, there is nothing that would bother me personally about upholding it in appropriate cases. My concern, of course, would always be that we provide all of the available protections and accord all of the protections available to a criminal defendant who is exposed to or sentenced to the death penalty.

Senator SPECTER. Well, since *Furman* v. *Georgia*, there have been elaborate circumstances set up for consideration of all the mitigating circumstances. But there has been a concern beyond the imposition of the death penalty in terms of its not violating the eighth amendment to cruel and unusual punishment. And I frankly am pleased to hear your answer that you would support it in the appropriate case.

There has been another concern about the tremendous delay, in some cases as long as 17 years, an average of 8½ years. And there are proposals pending which I have authored which would set time limits within the Federal system to give an opportunity in the Federal court for a full hearing, but to make it a priority case because it is really watched by so many people as to whether law enforcement is really serious in carrying out penalties.

One of the legislative provisions calls for a time limit in the Supreme Court to decide these matters within 90 days, unless the case is so unusual that it requires an extension of time, in which event the Court could take longer on a stated reason.

But I have two questions for you. One is—and people said this was too much for Congress to do because the Court didn't sit in the summertime, and the response to that was, well, the Court could sit in the summertime like other courts do. And my question to you is: Do you think that Congress has the authority to establish a timetable—as we have under the Speedy Trial Act, for example—and, second, to try to abbreviate it, whether 90 days is a reasonable time? Or if not, what time limit would be?

Judge THOMAS. Of course, there is precedent, as you have alluded to, Senator, for establishing timeframes. Whether or not Congress has the authority to do it in this particular case I have not had an opportunity to think about. But Congress certainly has established timeframes in a procedural way that governs the way Federal courts at the district court level, certainly in our Rules of Civil Procedure that govern the way that we do business. The Speedy Trial Act I think is the best example, the one best example.

The question as to whether or not 90 days is the appropriate time, I don't know. My concern would be this: I know that there is the attitude that we must move on, that you must clear these cases from the docket. We feel that way. We certainly feel that pressure as judges. But I think that there can be instances in which 90 days is not enough. There can be instances in which it may take more time to assure oneself that a particular defendant has been accorded all of his or her rights.

I would be reluctant to say that I endorse a particular cookie-cutter approach, but at the same time, I have no alternative to offer as to what is an appropriate length of time. But my concern would always be that we do not put ourselves in the position of adopting an approach that would ultimately in some way curtail the rights of the criminal defendant.

Senator SPECTER. Moving, Judge Thomas, to the Voting Rights Act, you have criticized Supreme Court decisions there and have, as noted in your Wake Forest speech back on April 18, 1988, referred to the individual right to vote as opposed to protecting some ethnic group with sufficient clout. But the Voting Rights Act has been very carefully tailored to try to provide that there is organization of voting districts so that a specific group does have some clout, as opposed to a large representation or a configuration which deny a group of some meaningful participation in the electoral process.

My question to you is: Don't you think, aside from the generalization of individualism, that there is some very important objective to be reached through the Voting Act to have a group with an adequate meaningful participation in the political process?

Judge THOMAS. Yes, I agree with that, Senator. My concern—I think when I wrote that, these speeches on individual rights versus group rights, I believe, and that was a one-paragraph example. I was using this general example, and it is the general concern that I have had throughout my speeches, and that is in according group rights that you don't overlook individual rights. I was not—I loosely, I think, referred to the voting rights cases, but the debate that I was referring to was the school of thought when—I remember in the early 1980's there was some suggestion and some feeling that the Supreme Court cases prior to the amendments of the Voting

Rights Act required proportional representation. And, of course, there were denials to that, but there was that school of thought.

My attitude was that if, indeed, there is proportional representation that that presupposes—I think that is the word I used in that speech—that presupposes that all minorities would vote alike or all minorities thought alike. And that is something that I have—those kinds of stereotypes are matters that I have felt in the past were and continue to feel are objectionable.

Senator SPECTER. Thank you, Judge Thomas.

I know my time is up, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you very much, Senator.

Our next questioner would be Senator Kennedy, but I understand he is prepared to yield to Senator Metzenbaum because Senator Metzenbaum is also required to be at the Gates hearing and to question there.

Senator METZENBAUM. Thank you, Mr. Chairman, and thank you, Senator Kennedy.

Good morning, Judge Thomas. It is nice to see you again.

Judge Thomas, your testimony before this committee has touched upon the subject of economic rights several times. This is an area of concern because over 50 years ago, the Supreme Court used economic rights arguments to strike down laws that were designed to protect workers' rights and establish a minimum wage.

In a 1987 speech to the Business Law Section of the American Bar Association, you stated that, "The entire Constitution is a Bill of Rights and economic rights are protected as much as any other rights."

You also stated that, "Legislative initiatives such as the minimum wage in Davis-Bacon provided barriers against black Americans entering the labor force." You went on to say, "It is amazing just how little attention has been paid to these outright denials of economic liberties."

Frankly, Judge Thomas, I am amazed to hear you say that legislative initiatives such as the minimum wage provided a barrier against black Americans. I would say percentage-wise in my opinion—I don't have the statistical data, but I would guess that percentage-wise no group of Americans benefited more from the fact that employers could not pay them less than $3.35 an hour. And, of course, it has gone up since that time.

But, Judge Thomas, in this 1987 speech you characterized the minimum wage as "an outright denial of economic liberty," and you stated that, "Economic rights are as protected as any other rights in the Constitution."

My question to you is: In 1987 did you believe that the minimum wage law violated economic rights which you thought were protected by the Constitution?

Judge THOMAS. No, Senator. And I think I have made myself clear here, and I have discussed it here. I don't have a copy of the speech in front of me.

The point that I was making with respect to minimum wage was a policy point, not a constitutional point. But let me address the constitutional point first.

I have indicated that I believe that the Court's post-*Lochner* decisions are the correct decisions; that those cases were appropriately

decided; that the Court is not a super-legislature to second-guess the very complicated social and economic decisionmaking of the legislative and executive branches.

With respect to the minimum wage, there was an ongoing policy debate concerning what the impact of the minimum wage was on certain minorities, particularly minority teenagers, and there is data to suggest that each time the minimum wage rises, minority teenagers, the unemployment rate increases.

Now, that is not to suggest that the minimum wage itself is not beneficial; indeed, it is. I think we all want everyone to make a decent wage. I certainly believe in that. But I think that there was a legitimate debate as to what are some of the impacts or unintended consequences of it, and that was the basis of that comment.

Senator METZENBAUM. Well, Judge Thomas, as Chairman Biden pointed out on Wednesday, economic rights currently are not entitled to the same degree of protection as other rights, such as due process, equal protection, and free speech. If they did receive that degree of protection, it would be much harder for Congress to pass laws protecting the environment, workers' rights, and the safety of workers in the workplace.

The speech in which you made that statement regarding economic rights was not a speech on political philosophy that you were giving to the Cato Institute. You were talking about the Constitution and economic rights, and you were talking to the Business Law Section of the American Bar Association. These were corporate lawyers. I am sure many of them were delighted to hear what you had to say about economic rights being protected by the Constitution as much as any other rights.

But on Wednesday, in response to a question from Chairman Biden, you stated that in constitutional adjudication, it would not necessarily be the case that the protection of economic rights "would be at the same level that we protect other rights."

Now, based on what you said in 1987 and what you told this committee, it would appear to me that today, as well as in your response to the chairman, that you have changed your views regarding this subject. You didn't make a distinction in your speech between young blacks and older blacks. You were talking about all blacks.

What has prompted you to change your views on this matter of economic rights?

Judge THOMAS. Senator, I have not changed my views. The point that I was making is that we do have rights, property rights, economic rights, within our Constitution. Now, we have other rights in our Constitution. The question becomes in constitutional adjudication at what level of scrutiny can those—or at what level of scrutiny does the Court look at regulation of those rights? They do exist. They are in the Constitution. I don't think there is any disagreement about that. The level of scrutiny for socioeconomic—in this case, the relevant factor for economic rights is rational basis. I have not quibbled with that, and I have made that clear.

In fact, in that very same speech or in one closely related to that, I made the point that the individuals who wanted to revisit the level of scrutiny for economic rights, I disagreed with them—individuals, as Chairman Biden mentioned, such as Macedo. But the

mere fact that you don't review those rights in the same way doesn't mean they don't exist, and it does not mean that they are not important.

However, I think what we do recognize in this society is that there are some rights that we value that are so deeply embedded in our society, at the core of our society, such as our first amendment rights, that we will review with a different standard. But to review it as a different standard in no way says these rights are unimportant. It recognizes our political process.

The CHAIRMAN. Will the Senator yield on my time?

Senator METZENBAUM. Of course.

The CHAIRMAN. Professor Macedo has come up several times. I have raised him. And I would like for the record to read a letter I received from Professor Macedo on Friday afternoon. I am sure he wouldn't mind. And this is his book. He said I kept holding up Epstein's book. I might as well hold up his book. [Laughter.]

It says, "Dear Senator Biden: Many thanks for giving me 15 minutes of fame, as Andy Warhol promised. Quite apart from this, though, it might be hard to profess objectivity now"—that is not relevant.

He said, "I could not agree more that the natural law issue is worth pursuing and have been a bit disappointed by Judge Thomas' vagueness." I might note parenthetically I have been very happy with that.

As a token of my appreciation, I wanted to offer a few pieces of work to you and your staff. The article, "The Right of Privacy: A Constitutional Moral Defense" is pretty clear and straightforward, I think, on the question of why something like natural law is inescapable in constitutional adjudication, as you have said at the hearings. I send along the book.

Then I want to read from just one paragraph of the article he sent along to make sure everything is clear in the record as to why both Senator Metzenbaum and I are pursuing this about Dr. Macedo. This is Steve Macedo's article, "Economic Liberty and the Future of Constitutional Self-government," sent to me Friday by Professor Macedo, and it is Macedo, M-a-c-e-d-o. He says:

The future economic liberty under the Constitution depends on the viability of the double standard—

his words, the double standard—

that has for nearly half a century characterized judicial interpretations of our fundamental law. The modern court applied a searching level of scrutiny to challenge laws that interfere with a list of preferred freedoms, including liberties associated with speech, religion, and privacy, or that involve discrimination against discrete and insular minorities. At the same time, and despite the Constitution's several explicit supports for economic freedom, laws interfering with economic liberties and property rights are typically subjected to a lax test designed to establish only the merest rational basis exists for the law in question. In applying this double standard, as I shall explain at greater length below, the modern court ignores the Constitution's support for economic liberty, disparages close connections between economic and other forms of freedoms, and invests legislators with unwarranted measures of trust, trampling at the core ideal of our constitutional regime the aspiration of reasonable self-government.

Now, the judge knew and I knew and everyone else knew why I asked that question, because Professor Macedo believes that the standard—which I understand you have no quarrel with and

accept, that has been around for half a decade, as he points out, is one that we should continue.

Judge THOMAS. That is right.

The CHAIRMAN. He believes it is one we should jettison. That was the reason for the questions and the reason why I appreciate—whether I agree with it or not—your answer distinguishing the fact that you do not agree with Macedo that we should jettison this double standard, as he called it. Am I correct?

Judge THOMAS. Right.

The CHAIRMAN. I thank the Chair, and I ask unanimous consent that the letter to me be introduced in the record as if read.

[The letter follows:]

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September 12, 1991

Senator Joseph Biden
Chairman, Judiciary Committee
SD-224, Dirksen Senate Office Building
United States Capitol
Washington, DC 20511

Dear Senator Biden:

Many thanks for giving me 15 minutes of fame - as Andy Warhol promised.

Quite apart from this - though it might be hard to profess objectivity now - I have been very impressed with your questioning. I could not agree more that the "natural law" issue is worth pursuing, and have been a bit disappointed by Judge Thomas's vagueness.

As a token of my appreciation, I wanted to offer a few pieces of work to you and your staff. The article on "The Right to Privacy: A Constitutional and Moral Defense" is pretty clear and straightforward, I think, on the question of why something like natural law is inescapable in constitutional adjudication, as you have said in the hearings.

I ~~send along the book, in~~ part, in case you need another prop. It was a good visual ~~effect~~ when you waived the Epstein and Fried books - but I wouldn't want you to wear them out!

May I make one humble request? I believe that Warhol's promise has a proviso to the effect that when you get your 15 minutes they've got to spell your name right. Mine seems to have entered the transcript as "Masito," according to the New York Times at least. Since I am not Japanese but Portuguese (like many of your constituents in New Jersey) I wonder if someone could correct the transcript?

Again, many thanks. You are doing an honorable job, and doing it well. Keep up the good work!

~~Sincerely~~,

Stephen Macedo
Associate Professor

The CHAIRMAN. I thank the Chair for allowing me—not the Chair.

Senator METZENBAUM. You are the Chair.

The CHAIRMAN. Well, I thank you very much. Sitting next to Senator Thurmond I am never sure what I am. He is always the Chair. But thank you very much for the interruption, but I thought it important to put that in the record. Anyone who wants to look at the book, this is it, "Liberal Virtues."

Senator METZENBAUM. One last question on this matter of the minimum wage. You gave me a rather lengthy answer, but I think this just takes a simple yes or no.

Do you still believe that the minimum wage law is an outright denial of economic liberty for employers?

Judge THOMAS. Senator, I think that I characterized it in the way that I think that I meant it, and that is that it does have unintended consequences of eliminating certain individuals or precluding them from entering the job market. There is data on that. I have——

Senator METZENBAUM. You haven't answered the question, Judge Thomas, I beg to point out to you. You are talking about the impact. I am not asking about the impact. You are saying it does preclude certain individuals from obtaining jobs. My question is: Do you still believe that the minimum wage law is an outright denial of economic liberty? Which is what you had stated, I think it was in 1987?

Judge THOMAS. And I explained, Senator, I think, what I meant by that. It does not allow certain individuals to enter the work force. And I did not intend to suggest, as I have also indicated to you, that this was some sort of constitutional judgment.

If we are talking about constitutional law, liberty in that sense, then the answer is no. That is not what I am saying.

Senator METZENBAUM. One of the most puzzling parts of your testimony to the committee last week is your suggestion that we should discount most of your past statements on legal and policy issues because those were made in your role as a policymaker rather than as a judge. The interesting thing is that your supporters assert that your childhood experience of growing up poor in the segregated South is a very important part of our consideration, and I agree with that. Your supporters argue that your personal history demonstrates that you will bring sensitivity to the bench when considering issues of race and poverty. I am not sure whether I agree with that.

You have basically said the same thing to us. In other words, your argument seems to be that your childhood background is more relevant to assessing your qualifications for the High Court than are a decade of speeches and writings and an 8-year record while head of the EEOC. Frankly, Judge Thomas, I have difficulty with that. Your tenure at EEOC is the major portion of your record. That is what qualified you for the court of appeals. Quite frankly, your tenure on the appellate court has been so brief that it gives us little indication of what kind of Justice you would be on the High Court. By your own admission, you spoke out on a number of issues during your chairmanship at the EEOC.

Judge I start from the assumption that public officials mean what they say. I do not think you were going around the country articulating views and advocating policy positions that you did not believe in. And if you were articulating views or advocating positions that you did not believe in, I think it is incumbent upon you to tell this committee when and why you were doing that.

I have to assume that when you expressed views on legal and policy issues as EEOC Chairman, those were your views. I can accept the idea that your views on certain matters may have changed between now and the time which you expressed yourself on a particular issue. But it is difficult to accept the notion that the moment you put on that judge's robe, all the views and positions which you held prior to going on the bench just magically disappeared. That is not my experience of the way it is in the real world.

If that was the case, then there would be no point in looking at anything beyond the past 16 months of your life. The pre-judicial record and positions of a nominee are usually a good indicator of what kind of judge that nominee will be. That is why we have these hearings—to explore that record and those positions.

You have spoken out a great deal on contemporary social and political issues. I want to ask you about some statements you have made on these issues because so often today's political or social issue becomes tomorrow's legal issue for the Court.

I think it is important for the Senate to have a sense of how you think about these matters. I have copies of speeches I want to ask you about. If you need to refer to those speeches or believe that a quote has been taken out of context, you should say so. I am trying to get a sense of how you think about political and social issues, and it is important that we be accurate.

For example, in an April 1987 speech at the Cato Institute, which has been referred to quite often, you stated that you "agree wholeheartedly" with former Treasury Secretary William Simon's statement that:

> We are careening with frightening speed toward collectivism and away from free individual sovereignty, toward coercive, centralized planning and away from free individual choices, toward a statist, dictatorial system and away from a nation in which individual liberty is sacred.

Now, Judge, this statement frankly does not comport with the reality of American political life in 1987. Why is it that in the seventh year of one of the most conservative administrations in this century you believe that this country was "careening with frightening speed toward a statist, dictatorial system"?

Judge THOMAS. Senator, I think that I have not an opportunity to go back and review that speech in detail. I have looked at it and don't know exactly where that quote appears in it. But the point I think throughout these speeches is a notion that we should be careful about the relationship between the Government and the individual and should be careful that the Government itself does not at some point displace or infringe on the rights of the individual. That is a concern, as I have noted here, that runs throughout my speeches.

In quoting former Secretary of the Treasury Simon, I think I was just underscoring that point.

Senator METZENBAUM. Well, Judge Thomas, if you have the speech in front of you—if you don't, I will send it to you—let me point out to you where it appears because I think that is very significant, and I think you have made a significant point. It is in your windup. "I find myself agreeing wholeheartedly with former Treasury Secretary William F. Simon when he asserts that"—and then I read the whole quote. And then you go on to say, "I can't think of a more appropriate time for truth than the Bicentennial of our Constitution"—thank you. Was there some material in between?

I am informed by my staff that——

Judge THOMAS. Which speech——

Senator METZENBAUM. That was the very end of the speech.

Judge THOMAS. Which speech was that, now, Senator?

Senator METZENBAUM. This was the speech to the Cato Institute on April 23, 1987. My question to you, so we don't lose sight of it, is that this was the seventh year of the Reagan administration, and I am trying to find out from you how you concluded that the country at that time was "careening with frightening speed toward a statist, dictatorial system."

Judge THOMAS. Senator, as I indicated to you and I think as I indicated throughout this speech, the point that I was making is that we were losing sight of the—it was my feeling that we were losing sight of the relationship, the appropriate relationship between the individual and the Government. And in quoting former Treasury Secretary Simon's speech, I think it was simply to underscore that point.

Senator METZENBAUM. And you thought this was happening during the Reagan administration?

Judge THOMAS. I think the relationship—my point was, again, as I indicated, that the concerns seemed to be diminished about the rights of the individual, and I was underscoring that point with that quote.

Senator METZENBAUM. I will go on. In an April 1988 speech at Cal State University, you declared that:

> Those who have been excluded from the American dream increasingly are being used by demagogues who hope to harness the anger of the so-called under class for the purpose of advancing a political agenda that resembles the crude totalitarianism of contemporary socialist states much more than it does the democratic constitutionalism of the Founding Fathers.

Now, Judge Thomas, I think most Americans believe that any laws that resemble "the crude totalitarianism of contemporary socialist states"—your quote—would be inconsistent with our Constitution. I think most Americans believe that, if you are confirmed, you would have a duty to strike down any such laws. That is why we need to know what you meant when you used such terms.

In 1988 when you made that statement, what programs and policies did you have in mind when you spoke of "a political agenda that resembles the crude totalitarianism of contemporary socialist states"?

Judge THOMAS. The point that I was making in that particular portion of the speech, again, was this: That there seemed to be some efforts to disenchant or to encourage or to take advantage of disenchantment of certain individuals in order to, I think—and this

was, again, a policy point of view—to enlarge the role of Government. That was a concern of mine, and I think it is consistent with the concern that I expressed to you or that I expressed in the Cato speech.

I think that that was an appropriate concern. Of course, once again there is quite a bit of rhetoric there, but the point is quite simply that the relationship that I felt was getting lost in the shuffle and in the confusion was the relationship of the individual to the Government.

Senator METZENBAUM. That speech was in 1988, and in your speeches in 1987 and 1988, you seem to be talking about running toward this totalitarianism, toward a socialist state. And yet it is in a very conservative President's administration.

I sort of wonder, were you just using words to make a good speech, or did you really believe the things you were saying? Because the facts belie your assertions.

Judge THOMAS. I think, Senator, I also made it a point to bring the same concerns with respect to particularly minority individuals whom I have noted in this speech in its relationship even with the administration, that the administration was not addressing those concerns and certainly were not at that time addressing minorities as individuals. I think that that was one of the reasons and one of the bases of the Heritage speech.

Senator METZENBAUM. Yes, but the concern for the minorities was not being expressed by that administration. It was the reverse, and it wasn't that totalitarian socialist state about which you speak. That wasn't the problem. The problem was to try to prevail upon a conservative Republican administration to be concerned about minorities' problems. It wasn't this other concern about which you speak that was affecting minorities, as I see it.

Let me go on.

You wrote a chapter of a 1988 book entitled "Assessing the Reagan Years," in which you dismissed as an invention the argument that the ninth amendment undergirds the right to privacy. In the article, you expressed concern that the ninth amendment provides judges with a blank check to strike down legislation deemed by the Court to violate certain unenumerated rights. You also state that, "The ninth amendment will likely become an additional weapon for the enemies of freedom."

In 1988, Judge Thomas, who are these enemies of freedom that you were referring to?

Judge THOMAS. Senator, the point, again, that I was making, I have noted what my approach and concern about the ninth amendment itself was. It was the concern that judges would use the ninth amendment without reference to anything more than his or her own predilections, and that the adjudication of the ninth amendment had to be rooted in something other than that, had to be rooted in tradition and history.

With respect to my concern, the larger concern, it was that the efforts would be to enlarge the Government at the expense of the individual, not so much a commentary on the ninth amendment, but it is the overall point that I have made throughout these speeches, the relationship of the Government to the individual.

Senator METZENBAUM. But you didn't answer. Who were these enemies of freedom?

Judge THOMAS. Well, I don't think I named any. I think it was just a general—those who——

Senator METZENBAUM. Did you have anybody in mind?

Judge THOMAS. Not in particular, Senator.

Senator METZENBAUM. In an October 1987 speech at the Cato Institute, you expressed concern that:

> Maximization of rights is perfectly compatible with total Government and regulation. Unbound by notions of obligation and justice, the desire to protect rights simply plays into the hands of those who advocate a total state.

It sounds like you had serious misgivings about protecting rights. In 1987, how did you think the protection of rights could lead to a total state?

Judge THOMAS. Senator, I think the point that I made earlier in the hearings is that I wasn't talking about the rights that we consider fundamental, but that one could just simply say that he or she has a particular program and that program then becomes a right, and that it would actually be nothing more than one's preferences, as opposed to the rights protected in the Constitution, and that a proliferation of these rights or policies would actually undermine the value of the rights that we hold near and dear or the rights that are currently protected by our Constitution.

Senator METZENBAUM. But in a 1988 speech at the Pacific Research Institute, you said, "Too great an emphasis on rights can be harmful for democracy." I needn't tell you that if you are confirmed, your job on the Supreme Court will be to protect the rights of Americans.

What made you believe that emphasizing rights can harm democracy?

Judge THOMAS. Senator, as I indicated, the rights that I was talking about there were not constitutional rights but rights that could proliferate simply by name, and these rights are nothing more than programs or policies as opposed to our constitutional rights or our fundamental rights.

Senator METZENBAUM. Let me go to a different subject. During the past 15 years, a number of American companies adopted policies which barred women from certain jobs unless they could prove that they were not capable of bearing children. These so-called fetal protection policies left the working women in the unconscionable position of having to undergo irreversible sterilization if they wanted to keep their jobs. Tragically, that is just what happened to a number of women at companies such as American Cyanamid and Johnson Controls. Six months ago, the Supreme Court completely banned these policies as illegal sex discrimination.

Judge Thomas, as head of the EEOC from 1982 to 1990, you had responsibility for protecting the millions of working women in this country against sex discrimination. Shortly before you took over, the EEOC decided not to resolve allegations of sex discrimination involving these fetal protection policies until it developed a formal position on the issue. In the interim, the sex discrimination charges were investigated in the field and then simply sent to the Commis-

sion's headquarters in Washington where they were held, pending the development of an EEOC position.

But under your leadership, under your command, the EEOC failed to address this intolerable situation, not for 1 week, not for 1 month, not for 1 year, but for over 6 years. During this entire period, dozens of charges of women involving fetal protection policies sat at your headquarters without resolution. The women who filed those charges had rights, but their right became meaningless in the absence of enforcement. And they didn't just lose their rights, Judge Thomas. These working women lost their jobs, their careers, their dignity, and in some cases even their ability to bear children.

Under increasing pressure from a House Education and Labor Committee investigation, the EEOC finally took a position in 1988 and began to resolve these charges in 1989. By that point, over 100 charges had piled up. Your agency couldn't even find many of the women who had filed the charges, so their cases were thrown out. For these women, justice delayed was justice denied.

I am very troubled by the EEOC's complete abdication of its entire enforcement responsibilities in this area. I am particularly disturbed because it appears that you were personally—personally—involved in the Commission's decision not to protect women from these policies. First, a memorandum prepared by the EEOC's Office of Legal Counsel described your personal preference that the EEOC refrain from deciding whether these fetal protection policies could be illegal under any circumstances:

> On Chairman Thomas' suggestion, the EEOC staff manual now emphasizes that the Commission has not decided whether an exclusionary policy or practice is or can lead to a violation of Title VII.

In a second memorandum written to you in 1983, one of your own staff aides emphasized the need for the EEOC to decide whether these policies were illegal. "Since the charges, once investigated, will have to"—this is the quote in a memo—"Since the charges, once investigated, will have to be dealt with in some fashion, I recommend that the staff now begin preparing options for handling them. Otherwise, the Commission could end up with an inventory of unresolved and unresolvable charges." That was in 1983.

You responded by writing at the top of the memorandum, "Let's discuss. I have serious problems with this area."

You must, indeed, have had serious problems because you ignored that staffer's warning and left women unprotected for a total of 6 years.

Judge Thomas, why did it take you 6 years to help the women or to take any action to help the women who had filed these charges?

Judge THOMAS. Senator, as you noted, this was as very difficult area. The question for us was if an employer has a policy that says that women will not be allowed in a certain job, because the job itself, the radiation or, I believe in *Johnson Control*, battery acid could lead to harm to the ovaries or to the woman's ability to bear a healthy child or the next generation could have problems such as cancer, et cetera.

Initially, the concern was how do we make a judgment as to these health risks. I think we had extensive coordination or worked

with OSHA. I believe we worked with the EPA, et cetera, to try to make this determination, what standard do we apply and what role do we play. Again, I am basing this on my recollection of the early 1980's.

We subsequently decided to—our normal procedure in that instance is to bring the cases into headquarters until we develop a policy. This was one of the more difficult areas, as we were developing other policies. This was not the only policy.

Ultimately, I think we moved to giving guidance that indicated that the decision would have to be made based on business necessity, which was a strict standard. Finally, the position which we adopted was that if an employer were going to exclude women, it had to be based upon a bona fide occupational qualification, and that is ultimately the standards that the Supreme Court adopted.

Senator METZENBAUM. Mr. Chairman, I have about 10 or 15 minutes more on this one subject, and then I would be concluded. I am perfectly willing to wait my turn and come back for the next round. I just wanted to know if the Chairman desires me to conclude.

The CHAIRMAN. Well, I would think that we should take a break now, in any event, to give the Judge an opportunity to stretch his legs, and we can just huddle here for a second.

I might say right now, Judge, I am trying to figure out the time, because we are going to finish with you today and early, as I said on Friday, even if we have to declare 2 o'clock the lunch hour. It looks as though we have somewhere between 20 minutes or half an hour more on the Republican side, maybe. I am not positive of that. I think that is right. Senator Hatch has a few questions and I do not know whether anybody else has any more questions.

On the Democratic side, my questions, depending on how quickly we go through them, could take anywhere from 20 to 45 minutes, I do not know. It depends on the discussion we get into, if we do get into one. It is mainly recapitulation. I can tell you now I am going to talk to you a little bit about expressive conduct in speech and separation of powers.

Senator Kennedy has around 20 or 30 minutes. The Senator from Ohio has 15 minutes or so. The Senator from Vermont has——

Senator LEAHY. Mr. Chairman, I think I will take my full time. I understand Senator Thurmond stated that the witness misunderstood my question when I asked about cases during the past 20 years. I may want to go back into that, too, now that the question is fully understood. But I also have some other areas of questioning, so I would expect to take my full time.

The CHAIRMAN. The Senator from Alabama has roughly one round, half an hour, is that correct?

Senator HEFLIN. Yes.

The CHAIRMAN. And the Senator from Illinois is about 10 minutes.

Senator SIMON. Less than that.

The CHAIRMAN. Less than that. So, we are down to the wire now. What I would do is ask you, as we break these 10 minutes, to make a judgment as to how we are going to do that, but let us——

Senator THURMOND. Mr. Chairman, in view of Senator Metzenbaum's question, Senator Hatch desires some time to answer it.

The CHAIRMAN. OK. Well, let us not get upset about it. We are close and let us just keep plugging along.

Let us take a 10-minute break now, Judge, and then maybe Mr. Duberstein and I can speak a minute here.

[Recess.]

The CHAIRMAN. The committee will come to order.

Before I yield to Senator Hatch, what we have been doing, I say to the public, in the interim is trying to figure out how we best order bringing the testimony of Judge Thomas to an end, without cutting off legitimate questions that are left, and there are some. I think if we just let the string run here, we are going to do just fine.

I received an admonition, though, Judge, I want to tell you this. Your mom may be angry. She said she wants to go home. She told me she has one of her patients who is 104 years old, has been watching this on television, saying when is she coming home, and she told her patient, "Clarence won't let me," and I am sure you are going to tell her, "Biden won't let Clarence. [Laughter.]

Let us see if we can move this along now. Again, I do not mean in any way to disparage you. There are some very important questions that are left, but I think if we can just move with dispatch here, whether or not we get it done by lunch, we will get it done. We are not going to be long beyond that. I think we may still be able to do that, but let us just move along.

Senator Hatch.

Senator HATCH. Thank you, Chairman Biden.

I do not want you to go home, either, just yet. I think you have really added a lot to these proceedings, so we are proud to have you here.

Judge, I think you fully understand that it is awful tough when you make a lot of speeches in the past, and I am sure that some of those speeches were written by an ardent and well-intention staff, as they are for us in many cases, and I think we all understand that.

You are being criticized on one side for not being liberal enough, and then I notice in the press this morning there are other articles that are criticizing you for not being conservative enough, so I think it just goes to show that you cannot please everybody.

I do just want to take a few minutes, because Senator Metzenbaum did go into your EEOC record, and I think the Washington Post sums it up pretty well, because on May 17, 1987, the Washington Post said this—and you had been in there for, what, 5 years at that time?

Judge THOMAS. That is right.

Senator HATCH. OK. Here is what the Washington Post said:

> Things are markedly different at the Equal Employment Opportunity Commission. Here the caseload is expanding and budget requests are increasing under the quiet, but persistent leadership of Chairman Clarence Thomas.

Now, that is pretty darn good, after 5 years, being in this very tough maelstrom of a position, to have the Washington Post praise your leadership, knowing that you were in the Reagan administration, which they did not very often praise, and some people think with just cause, but I think it is important to point that out.

Second, let me point out some more. When you became Chairman of the EEOC, I was chairman of the Labor Committee at that time. Senator Kennedy was my ranking member, and now it is reversed. He is chairman and I am ranking. But we overviewed the EEOC. When you became Chairman of the EEOC, the General Accounting Office right at that time issued a report on the state of the EEOC, and that report listed the numerous financial and managerial problems at the Commission. In fact, it was entitled, "Continuing Financial Management Problems at the Equal Employment Opportunity Commission," and it was issued May 17, 1982, right at the time you came into office.

Now, if you would just look at some of the—well, first of all, the 1982 GAO report, talking about the predecessors who operated the EEOC, they found that the agency up to that time couldn't even control its funds or its accounting practices. They said:

> The Commission has failed to properly maintain and operate the system. Records and reports produced were unreliable, receivables were not properly collected, and bills were not paid on time. Also, in failing to follow some established procedures, the Commission's employees have created violations of law that now must be dealt with.

These problems predated you coming into the Commission. In the 1981 interim report, GAO stated that, "Some of EEOC's actions"—now this is even before you were put in—"Some of EEOC's actions may be thwarting its efforts to eliminate employment discrimination."

Then the Office of Personnel Management released another report on the EEOC in May 1982. It was entitled, "A Report on Personnel and Administrative Management in the Equal Employment Opportunity Commission." They had audited some 60 jobs at the EEOC's Office of Administration before you became Chairman or went to that Commission. They audited the 60 jobs to determine the relative accuracy at the EEOC's pay scale, and they found that 53 positions were overgraded, 42 percent of the positions were overgraded by 3 or more grades, 26 percent were over 2 grades, and 32 percent were by 1 grade.

Just look at the headings of the summary of findings. I think they indicate the disarray the EEOC was in when you came, No. 1, "Substantial overgrading exists within the Office of Administration and likely exists in other parts of the agency." This is before you came in. This is the predecessor agency.

No. 2, "The supervisory structure is excessive and expensive." No. 3, "The Personnel Office's two core programs, staffing and classification, are not in compliance with OPM requirements." No. 4, "Administrative operations are deficient in closing out contracts, accounting for physical property, cataloging in the library and mail room operations." No. 5, "The agency's management accountability plan may be failing to account for quality of its achievements." No. 6, "Management appears to have tolerated and contributed to a work environment beset by acrimony, improperly employee conduct, poor performance, and favoritism." Those are the titles or the headings of the sections in that OPM or Office of Personnel Management report.

Let me ask you a question: Did you work on those problems?

Judge THOMAS. Senator, during my confirmation hearings in 1982, one bit of advice that you gave me, indeed you told me you would hold me accountable for, was within a short period, to correct particularly the financial problems within a short period of time, and we were able to do that. In fact, we were able to correct the financial accounting problems and have a GAO certified system, I believe within 2 years.

Senator HATCH. In fact, the EEOC had $1 million they could not even account for, is that not so, at that time?

Judge THOMAS. That was one of the items that you told me specifically to account for in the travel area.

Senator HATCH. And you cleared that up and resolved it?

Judge THOMAS. We cleared that up and put in place a variety of procedures and a variety of checkpoints, so that would not reoccur. I think it would not be overstating the case to say that EEOC today has one of the finest financial accounting systems in Government.

Senator HATCH. Is it not true that each one of those problems listed in that OPM report and listed in the GAO report, you either improved or resolved?

Judge THOMAS. We resolved those, I believe, shortly after you instructed us to do so, as chairman of the Labor and Human Resources Committee. We attempted to address some of the long-term problems, but the recommendations that were made in the GAO report became the basis for our short-term plan, the immediate actions that we had to take upon arriving at EEOC, but most of those problems were corrected, I believe, within the first year or two.

Senator HATCH. In fact, you cleared up monitoring consent decrees and settlements, you insured not only that the judgments were won, but that they were enforced. I think most would say, having watched your tenure, would say you were creative when changed circumstances necessitated an alteration in ongoing consent decrees, some would cite the Ford Motor Co. situation as one of the highlights. You certainly aggressively corrected and improved management of the systemic litigation system, which was in disarray at the time.

I could go into all of that, but I do not want to take the time. I just want to make the point that some of these criticisms that are being brought up about the EEOC are not only wrong and misinformed, but they are distorting what really happened, because you inherited an agency that was in disarray, the people were fighting with each other, they were not bringing the litigation as they could. Even the age discrimination cases were in disarray. You did not have a central management system that was working well, you did not have a good accounting system or a good financial system, you had a lot of back-biting among employees, because they were upset with each other because there was not a management team that was necessary. All of that, as far as I could see, during your tenure was improved upon or resolved. Is that a fair statement?

Judge THOMAS. We did our best, Senator, and we think that we not only addressed those problems, but we were able to engage in some practices and to engage in some programs and develop programs that took EEOC far beyond where it was in 1982.

Senator HATCH. Well, I have to say that I think most who really know the situation, and I happen to know it, can find something to

criticize, no matter what, because it is a big agency with a lot of problems, and they are tough problems, they are among the toughest problems in our society today, they involved equal employment opportunities and all kinds of other civil rights issues. It is a very complex area, so they can find fault, but the fact is that you cleared up all of these tremendously difficult problems that existed down there.

Some would say that you really—in fact, most who know would say, in fact, I think all would say who know that you put forth an aggressive effort to stamp out workplace discrimination at the time that you ran the EEOC. In fact, some would say that is unquestioned.

Litigation recommendations received from district offices increased dramatically. The changes went up as high as 400 or 500 percent increase in better approaches of the EEOC.

I do not want to take the time of the committee, because I know we are trying to get through this and do our very best to finish today, and I do not want to take anybody's time. But let me just go into this one problem on fetal and reproductive hazards that Senator Metzenbaum brought up.

If I understood his charge, it was basically that, at the EEOC at the time you were Chairman, women who were barred from certain jobs because of fetal protection concerns did not have their rights enforced, but let me just respond to that.

During your tenure there at the EEOC—and you correct me if I say anything wrong here—there was a legitimate difference of opinion among lawyers and others over whether title VII forbids employers from excluding women from jobs that might endanger any unborn children that they might be carrying or that they might carry in the future.

Now, that is a very, very complicated area of employment law and title VII law. It involves scientific and medical considerations, as well as legal considerations. And because of the complexity of the issue and because other Government agencies such as OSHA, the Occupational Safety and Health Administration, and the EPA, the Environmental Protection Agency, had to weigh it in their views or weigh in with their views on this issue, it naturally took some time for the EEOC to formulate a position on this issue, and as it did, fetal protection discrimination charges that were filed with the EEOC were naturally held in abeyance, because a judgment had to be reached, a fair judgment, taking into consideration all of the matters, including medical and legal and other matters.

But because the charges were filed that were held in abeyance, they were not prejudiced because they actually had been filed, is that correct?

Judge THOMAS. That is right.

Senator HATCH. So, you had protected the rights of these people during the time that the medical, legal, scientific, and other considerations were taking place, and the filing of the charges tolled the statute of limitations and stopped it from running.

Moreover, the plaintiffs whose charges were held in abeyance, they were free, as I understood it—and correct me if I am wrong—they were free to sue privately in Federal court, is that correct?

Judge THOMAS. They could have perhaps received the right to sue later and gone into Federal court, Senator.

Senator HATCH. If they had wanted to.

Judge THOMAS. That is right.

Senator HATCH. So, nothing was interfering with their rights to do that, which was a very important right.

Judge THOMAS. That is right. The difficulty, Senator, as you pointed out, was that it was as very complex area and an area that involved a tremendous amount of work safety-related problems, as well as health and medical problems and concerns, and we attempted to work them out or to wrestle with them, but EEOC does not have the scientific and medical capability on its own to make or did not have the capability to make all of those determinations.

We attempted to coordinate, as I said to Senator Metzenbaum, with the other agencies and that took some time. However, even during that process, we gave significant detailed guidance, I believe in 1983 or 1984, to the field on how to handle and how to investigate these charges, and then ultimately to forward those to our headquarters.

Senator HATCH. After study of the issue in 1988, the EEOC, as I understand it, issued regulations reflecting case law as it had developed up to that time in the Federal courts of appeals.

Now, the regulations permitted fetal protection restrictions on female employees only when the employer demonstrated that there was a substantial risk of harm to the fetus and that there were no other reasonably available less discriminatory alternatives that would effectively protect female employees' offspring, is that correct?

Judge THOMAS. That sounds accurate, Senator.

Senator HATCH. Further, the EEOC regulations required that if there was a similar danger to male offspring, that fertile men be excluded from the positions, as well, so you handled it that way. When I say you, I mean the EEOC, because you just do not do these things by yourself.

After the seventh circuit ruled in 1989 that plaintiffs had to bear the burden of disproving that an employer's sex-based fetal protection policy is justified by business necessity, the EEOC announced that it rejected that decision and that its regulations, the burden of proof remained on the employer to show that a fetal protection exclusion was a bona fide occupational qualification under the criteria of the 1988 regulations.

This year, the Supreme Court, in *International Union* v. *Johnson Controls, Inc.*, agree with the EEOC, that the burden of proof is not on plaintiffs in fetal protection exclusion cases, so they came down to the same point of law that you had come up with. In addition, however, the Court went further and held that a fetal protection exclusion policy can never be justified as a bona fide occupational qualification.

But the bottom line is that no one was prejudiced by the EEOC's consideration of this extremely complex set of cases or issues, should I say, and that the position taken by the EEOC was reasonable, in light of the fact that it was based on the developing case law in the courts of appeals.

I just wanted to bring that out, because I think that if that is not brought out, you are not being treated very fairly, because you did everything you knew how to do under the circumstances, and finally the Supreme Court resolved it, and it resolved it going a little further than EEOC went, but, nevertheless, adopting basically your ideas up to that point.

Now, one last thing: When the Justice Department was considering amicus participation in the *Meritor Savings Bank* v. *Vincent* case, concerning whether sexual harassment on the job constituted a title VII violation, would you be kind enough to tell us what role you played in formulating the Government's position?

Judge THOMAS. Senator, that case, of course, involved the instance of whether or not there could be sexual harassment outside of the context in which a woman does not receive her promotion as a result of not agreeing to engage in the prohibited conduct; that is, if a woman does not concede to the wishes of the supervisor. It was whether or not there could be a hostile working environment.

Our agency, as was the practice, communicated with the Justice Department that we felt that the Government should be actively involved in this case. There was some resistance. Some individuals argued that hostile environment was not a violation of title VII as sexual harassment.

My direct role was not only at EEOC in developing the arguments that were transmitted to the Justice Department, but to personally meet with the Solicitor, his staff, individuals who disagreed throughout the Justice Department, and to argue for the Government's involvement in that case in the Supreme Court. And ultimately EEOC itself played a very extensive role in the development of the legal arguments in that case in the Supreme Court.

Senator HATCH. Well, that is great, because that issue of whether sexual harassment on the job constituted a title VII violation, then Solicitor General Charles Fried of the Harvard Law School said that that was an open question the Court had not resolved. So he then sought the views of the EEOC.

Judge THOMAS. That is right.

Senator HATCH. He came to you and said, We would like to have your ideas on this tough question, we would like to know where you stand. And he personally said that you, Judge Thomas, then Chairman Thomas, Chairman of the EEOC, forcefully argued that the Federal Government should side with the woman plaintiff that sexual harassment is clearly discriminatory and cognizable under title VII, this issue that was not decided, had never been decided by the Court.

As you know, the Government did side with the woman plaintiff in the *Meritor Bank* v. *Vincent* case, and the Court finally held that sexual harassment creating an offensive, hostile, or abusive work environment constitutes sex discrimination under title VII.

I think it needs to be pointed out, for a number of reasons, but the principal reason is that when the chips were down, when that case could have gone either way, as either not within the confines of title VII—in other words, outside of title VII and therefore not enforceable, or within, Chairman Thomas argued forcefully with the Solicitor General's office and with the administration that sexual harassment of women should be included within title VII,

and the Supreme Court upheld your position. Now, I just wanted to bring that out.

I think it is also important just to conclude with this comment. These are very difficult areas of law. Reasonable people can disagree and without any prejudice on the part of anyone. And I contend that, Chairman Thomas, once you get on that Court, you are going to be watching out for the people, the little people out there that many are worried about, who need help and who need their rights resolved and watched over. And you will do it in a fair and reasonable, responsive way, as you did at the EEOC.

I have to say the EEOC still has plenty of room for improvement, as does every agency of Government. But compared to what it was in 1982 when you took over, it is worlds apart. And you are the person who helped bring about the effective and good changes. That needs to be said by somebody like me who has watched it for all these years and takes a special interest in it and who wants that agency to work right and well.

So I just wanted to say that and correct the record and commend you for the service you have given, and I have absolutely no doubt that you will give equal service, if not better service, on the Supreme Court in the interest of everybody in America.

Thank you, Mr. Chairman. I think I took about 15 minutes. I didn't intend to take more than 10, but I apologize.

The CHAIRMAN. Thank you very much, Senator.

The Senator from Massachusetts, Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I wanted just to return very briefly to a couple of areas that we talked about last Friday, Judge Thomas. Welcome back.

Judge Thomas, I want to come back briefly to the subject that we talked about on Friday, your view of Justice Oliver Wendell Holmes. On Friday, when I asked you for your view about Justice Holmes, you said that—and I quote—

> He was a great judge. Of course, when you have opportunities to study him, 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.

I then read your quotation from a speech you gave at the Pacific Research Institute in 1988, including a portion in which you quote a statement by Walter Burns on Holmes. And you correctly stated that I was quoting your reference to Walter Burns' view of Holmes. But I just want to read the entire passage into the record so that your view of Justice Holmes in 1988 is not misunderstood.

You stated, and I quote:

> We cannot expect our views of civil rights to triumph by acceding the moral high ground to those who confuse rights with willfulness. The homage to natural rights inscribed on the Justice Department building should be treated with more reverence than many busts and paintings of Justice Oliver Wendell Holmes in the Department of Justice. You will recall Holmes as one who scoffed at natural law, that brooding omnipresence in the sky. If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes. As Walter Burns puts it in his essay on Holmes, most recently reprinted in William Buckley and Charles Kessler's "Keeping the Tablets"—

and here you quoted Mr. Burns—

> "No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach what a people needs in order to govern itself."

End of quote of Burns.

And then you continued, "Or as constitutional scholar Robert Falkner put it"—and here you quoted Mr. Falkner—"What John Marshall had raised, Holmes had sought to destroy" That's the end of the quote of Falkner.

And you continued:

> And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they exist at all apart from willfulness, whether of individuals or officials.

So I think it is quite clear from the full quotation, Judge Thomas, that you were harshly critical of Justice Holmes for what you described as his nihilism in his effort to destroy your view of natural law. It doesn't sound to me like you thought he was a great judge in 1988.

Judge THOMAS. I guess, Senator, much of that perhaps resulted from the concern about some statements in cases like *Buck* v. *Bell* of Justice Holmes'.

Senator KENNEDY. Well, which is Judge Thomas' opinion of Justice Holmes: the one you gave on last Friday or the one you gave in 1988?

Judge THOMAS. Well, as I indicated, Senator, I have concerns about statements like "three generations of imbeciles is enough or sufficient." I think that we certainly would find problems with that. What I indicated to you was that I did take the time to go back and re-read about him. Even though I may have had disagreements, that was not the end of the inquiry. I spent a considerable amount of time going back and trying to understand him more during my tenure on the bench.

Senator KENNEDY. Well, that was then and last Friday is now?

Judge THOMAS. No. Last Friday, as I indicated, I had gone back recently and read a biography of him subsequent to the speech. That was the point.

Senator KENNEDY. Well, as I understand—and we will leave it at this—your view last Friday is your current view, and your statements that you said in 1988 was your view of Justice Holmes in 1988.

Judge THOMAS. Well, my point that I was making, notwithstanding criticisms, the point that I made last Friday is that he was a great Justice, whether we agree or whether I agree with him or not or whether others agree or disagree with him. The point that I am making now is that even though I might have had a point of view in 1988 that was critical, that did not stop me from going back and reading and learning more about him. I think that the important point that I am trying to make is merely having a point of view is not the end of the process for me. It is, indeed, the beginning of the process of learning and growing and attempting to change if there is evidence there.

Senator KENNEDY. Let me go on to the voting rights. We talked briefly about it last Friday. You made some comments earlier in the course of the hearing this morning. In 1988 you stated:

> Unfortunately, many of the Court's decisions in the area of voting rights have presupposed 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's race or ethnic group has sufficient clout.

In reviewing the Supreme Court decisions, the principal decisions decided on the voting rights case, *White* v. *Register* and the *Thornburgh* case—there is the *Allen* case as well, but that deals with preclearance provisions. But on basically that very issue, these, as I understand it, are the principal cases, and both on their very face rejected the bloc voting:

In *White* v. *Register*, we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion with voting. The plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and elections were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political process and elect legislators of their choice.

We are talking here about how State legislatures in Texas and North Carolina had at-large elections, allegedly, and I think supported by the evidence considered in both of these cases decided by the Supreme Court, that the at-large elections rather than the single-member district elections were being used to diminish and undermine the effectiveness of the rights to vote of individuals, the blacks in Dallas, Hispanics in San Antonio, blacks in the *Thornburgh* case, similar statements in the *Thornburgh* case, I think even stronger.

Those and the *Allen* case were the three, as I understand it, the major guiding beacons in terms of the Supreme Court's upholding the importance of the right to vote, certainly in judging the actions of legislatures, which in many instances, particularly in the Texas Legislature, had a history of supporting segregation activities at that time.

And we have seen subsequent to those decisions the changes in the membership in those particular districts rather dramatically, I might mention.

Well, what were you so critical of in terms of those cases, the principal cases?

Judge THOMAS. The comment wasn't about the *Thornburgh* case, Senator. The concern that I raised, I think the word I used was "presupposed" bloc voting, and that had to do with—and as I noted, I think, on Friday, I was not engaging in an exegesis of the voting rights cases. The comments were made in a speech that was about individual rights and the concern for individual rights and what would happen to individuals versus—when you considered groups versus individuals. And I simply used as an example and referred to, I think in one paragraph, maybe two, the Voting Rights Act as one of the examples, and then I moved on.

The point that I was trying to make was that—and it was my—there was a school of thought. There was thinking, I remember, involving—being involved or reading about the debates in the early 1980's about the Voting Rights Act that felt that the early cases that presupposed or would lead to proportional representation. It was that kind of mentality that I felt presupposed that blacks would vote a particular way, that there was the stereotypes. And throughout all my speeches, I argued against the use of stereo-

types. I think there was even some debate up to and immediately prior to the amendments to the Voting Rights Act in 1982 concerning proportional representation. But I was not, as I indicated, going through any cases and specifically saying here is the precise language in that case, but rather to that general school of thought that interpreted those cases to require proportional representation.

I think that was also a concern, as I remember—and, again, I was not directly involved in the debates over the Voting Rights Act. But I think that there was some concern even then with the legislation that came from the House of Representatives that it might lead to—the results test might lead to proportional representation. The language, of course, in the Voting Rights Act, in the amendments, preclude that. And, of course, the *Thornburgh* case makes it clear that you don't presuppose now that there is bloc voting, but rather it has to be proven.

So what I was talking about was this general assumption about had to do with the school of thought with respect to proportional representation and the presupposition that minorities all voted the same way or thought the same way or acted the same way.

Senator KENNEDY. Well, I am interested in your view of the legislative history because Senator Mathias and I were the principal sponsors of the extension of the Voting Rights Act, very much involved in the debate, and the legislation specifically includes in title II, explicitly says that no group is entitled to legislative seats in numbers equal to their proportion of the population. At least among those that were very much involved in the legislative history as well as the Supreme Court——

Judge THOMAS. That is where——

Senator KENNEDY. The only point I raise is when you mention here many of the Court's decisions, I was just trying in my own mind—and recognizing the importance of voting rights, to find in my own mind what were the areas of the Supreme Court decisions in voting rights that you are most critical of. But I understand now—and I would like to move on—that with regards to *White* and *Thornburgh* that you support certainly their——

Judge THOMAS. I absolutely support the aggressive enforcement of voting rights laws and certainly support the results in those cases. I think I said that or attempted to say that last Friday.

Senator KENNEDY. Let me move on to another area that was touched on during the course of the hearings but which I would like to just clarify. Judge Thomas, in your exchange with Senator DeConcini yesterday, you talked about your role in *Adams* v. *Bell*. The Secretary of Education, Terrel Bell, was the defendant in that lawsuit. Back in 1977 the Court had ordered the Office of Civil Rights in the Department to process discrimination complaints more properly and conduct compliance reviews within specific timeframes. And you arrived as the head of the Office of Civil Rights in May of 1981. So we have the Court going back to 1977, you arrive in 1981. You were the official responsible for compliances with the court order. Your agency was accused of ignoring the court-ordered timeframes to act on race discrimination complaints, sex discrimination complaints, and other discrimination complaints in a timely manner.

The plaintiffs in the case petitioned the Court to hold you in contempt for violating the court order, and the Court held a hearing on the petition in March 1982, which is 9 months after you had taken office. You told Senator DeConcini the judge did not hold you in contempt or take any other steps. You said, and I quote, "I think ultimately what the judge realized was that we were doing all that we could, that it was impossible for us to comply with it"—meaning the order, and that is the end of the quote.

That, as I understand it, is not quite right. I would like to quote from the contempt hearing on March 15, 1982. The judge concluded that instead of enforcing the civil rights laws, you were dragging your heels, carrying them out in your own way and according to your own schedule, instead of complying with the timetable ordered by the Court. Here is what the judge said, and I quote:

I would like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly are going to make a good-faith effort to comply.

It is true that the judge did not take the extreme step of actually holding you in contempt of court, but this is what the judge went on to say, and I quote the judge:

We do find, though, that the court order has been violated in many important respects and that we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court.

So the judge said very clearly that you violated the court order in many important respects, used the word "violated." He was concerned that you were still not making the good-faith efforts to comply. He was clearly threatening you with contempt. He was obviously pretty upset with you.

What do you think he meant when he said he might have to use the coercive power of the court to get you to comply with the court order?

Judge THOMAS. Senator, when I responded to Senator DeConcini, I think I also noted—and I did not go back and review the transcript—that I had not had an opportunity to review the entirety of the record or any orders by the court. It has been, again, now about 10 years.

With respect to what the court was doing, the petition that was filed with the court was filed prior to my going to the Office of Civil Rights. I went to the Office of Civil Rights, I believe, in May of 1981. That was filed sometime, I believe, in February or March. I can't remember exactly when.

The office had never been able to comply with those timeframes under the consent decree, and, indeed, we improved—in the brief time that I was there, I actually became Assistant Secretary in July. Even though I was there before, I was actually sworn in in July of 1981. During that brief period, we were able to improve the performance and to comply with the timeframes, certainly did better than the individuals prior to us, but still were not able to comply. And we devoted 95 percent of our resources in an attempt to comply.

What I suggested to Senator DeConcini is perhaps that I did not—I should have gone back and perhaps looked at some additional steps in communications with the court in order to prevent the

matter from reaching the point where it could be suggested that I was in any way not acting in good faith or in defiance of the court order.

Senator KENNEDY. Well, didn't the judge draw some conclusion in terms of your performance and the previous official's performance?

Judge THOMAS. Again, I have not reviewed the record, Senator. It has been quite some time ago.

Senator KENNEDY. I believe it did, but you can correct the record and take a look at it and comment on it.

The judge may not have taken the harsh step of holding you in contempt, but he did take other steps. Contrary to what you told Senator DeConcini, he set a deadline for the completion of a study that you had told the court you needed prior to taking any action. He set a deadline for both parties to consider the results of the study to agree on the revisions of the court-ordered timeframes, if any were necessary.

Also, you had told the court—you told the committee this week that you had expedited the study when you arrived at the Office of Civil Rights. In both instances, you cited this as an example that you were making your best effort to comply with the court order. I would not say the judge thought you were making the best effort. In a March 1982 hearing your lawyer commented that you had told the court you expected the study to be completed within the next month or two, the judge responded, "I think he kind of hedged on that prediction. I think if we were going to leave it up to Mr. Thomas, you might not get it this year." That is what the judge said. He sounds pretty skeptical that you were going to comply with the order.

Judge THOMAS. As I indicated, Senator, the study that we were referring to was begun prior to my arriving at the Office for Civil Rights. And as I remember—again, it has been quite some time—it had been scheduled for completion at one point, and I expedited the schedule so that we could have that study in place so that we could make the appropriate changes consistent with that study.

Senator KENNEDY. This is what the judge stated in reference to your predecessor, Mr. Tattle:

I contrasted Mr. Tattle on the one hand, who was sitting in the same position Mr. Thomas was 4½ years ago. Mr. Thomas and I contrasted Ms. Chong and Mr. Rigau. It seems the difference between these two people is the difference between day and night. Now, Rigau admitted that they were behind in their work as far as the Office of Federal Contract Compliance was concerned, but he manifested an active interest in improving the machinery. Things weren't getting any worse. I think they were probably better. And while things weren't completely in accordance with the time frames, Mr. Tattle went out of office in the fall of 1978 or 1979.

This was the fall of 1979.

Things were on their way to being improved; whereas, at the time he took over, things were in bad shape. That is my basic problem. I don't like to hold people in contempt. On the other hand, I like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly are going to make a good-faith effort to comply.

Judge THOMAS. He was not——

Senator KENNEDY. You can put in the record, whenever you get a chance to examine the transcript——

Judge THOMAS. But he was not my immediate predecessor. My immediate predecessor was Cindy Brown.

The difficulty that we faced, Senator, that I did not allude to—and it is one that the office continued to labor under, and I think it was an important difficulty—is that when the Department of Education was created out of HEW, to my knowledge the Department of Education Office for Civil Rights had about 80 percent of the work and 60 percent of the staff and was inundated. I think it was in a much different position from the HEW staff. But that is something that is a part of what you inherit when you move into a department, and it was a very difficult problem.

The assurance that I made and that I make here—and it is a very firm one—is that we attempted to do all we could to dig ourselves out from under the workload. That is quite a bit different in terms of accomplishing than it was, say, at EEOC where I was not a part of a larger department that controlled decisions over the deployment of personnel and budgets.

Senator KENNEDY. Well, did you complain about the staff and the resources?

Judge THOMAS. Absolutely. In fact, internally I complained, as my successors complained, but there were competing interests. As you remember, at that time the Department of Education itself, the full Department, was undergoing a RIF. And though the OCR did not have the same budgetary constraints, it was held to the same standards and not permitted, for example, to hire staff.

Senator KENNEDY. Let me move on to another area. During your opening statement, you praised civil rights leaders for having changed society, and you stated, "I have benefited greatly from your efforts. But for them there would have been no road to travel." But in the past you have condemned those same civil rights leaders in five different speeches. In 1985, for example, you denounced, and I quote, "a civil rights community wallowing in self-delusion and pulling the public with it." You omitted that phrase from only two speeches during this period, the two speeches you gave to predominantly black audiences.

What did you mean when you said that the civil rights community was wallowing in self-delusion and pulling the public with it?

Judge THOMAS. Well, let me make two points there, Senator. I have many other speeches in which I extensively praised the civil rights community and its efforts, and speeches on Martin Luther King's speeches with respect to the NAACP and many organizations, and I have always given credit concerning the efforts and the major, major contributions of the civil rights movement and the civil rights groups in our society.

The difficulties that we had during the 1980's was an important difficulty, and that was this, that there was, to my way of thinking, a need to begin to debate anew some old problems and to begin to look at them with fresh ideas.

What you see in those speeches are my frustration or is my frustration that that debate never took place. Instead, you see a similar frustration expressed to the conservatives in the Heritage Foundation speech. Rather than ultimately sitting down and beginning to try to work out the problems, we were spending our time yelling across the table at each other.

I had hoped that would not have been the case during the 1980's. As we all know, much to our chagrin, and I think to the chagrin of anyone who is involved, that that did not occur.

Senator KENNEDY. Then, in a 1987 interview with Reason magazine, you were asked whether there were any areas where the NAACP and the civil rights establishment were doing good, and you interrupted the question to respond no. When the interviewer asked, "None?" you said, "None that I can think of."

In at least three speeches, you said, "Members of the civil rights movement had given in to the cult mentality and childish obedience"—this is your quote—"which hypnotizes blacks into a mindless political trance."

Again in 1988, here is a quote, "We must now not merely be critical of the many blunders and follies that have occurred in the practice of civil rights, we must show how our reliance on American principle produces better results than those of our enemies." That is pretty powerful stuff, calling leaders in the civil rights movement "the results of those of our enemies," and then in 1987, you publicly castigated civil rights leaders who, "bitch, bitch, bitch, moan and moan and whine."

Judge THOMAS. I think that was made before, Senator.

Senator KENNEDY. The point that appears of the kind of debate you were trying to begin, I remember the time also as most of those leaders very much involved with working with Congress on the extension of the Voting Rights Act of 1982, when we had initial opposition. William French Smith, right before this committee, expressed his opposition, and he was going to recommend that President Reagan veto it.

I can remember the work that was done by the civil rights groups in 1984, 1985, and 1986, when we were trying to overrule the *Grove City* case, which affected all Federal funding, whether they could be used in terms of discriminatory purposes.

I remember the work that many have done in terms of the sanctions against South Africa. I know you have a different opinion from many of the civil rights leaders, although that opinion was different evidently from what you had at Holy Cross, where you supported disengagement and the economic sanctions. They were very much involved in overriding a Presidential veto.

And I remember the civil rights leadership in 1987 and 1988, when for the first time we worked out fair housing legislation, which had been basically stalemated in the Congress. These are major kinds of proposals that they are very, very much involved in, and what we find is a series of extremely critical comments about all.

Then the time is moving on and you had in the 1987 interview, you stated, "That I find exasperating and incomprehensible the assault on the Bicentennial, the founding of the Constitution itself by Justice Thurgood Marshall, his indictment of the Framers alienates all Americans, not just black Americans." That is a strong attack on Justice Marshall. He was criticizing the original Constitution for accepting slavery.

I will give you——

Judge THOMAS. Thank you, Senator.

Let me go back and I will try to cast this generally. I will not attempt to go through each one of those seriatim, unless you would want me to.

I think in the interview, my point was that I was the wrong person to ask with respect to comments about the existing civil rights community, because of the manner in which the civil rights community had treated me and that I am no more or less human than anyone else, that there was serious disagreement, and I do not think that the disagreements were at the level that they should have been, and I suggested that.

I attempted to conduct myself in a way that we could have a constructive debate, and I reiterate the point that I have major speeches throughout my tenure that are very, very supportive and very strongly indicate my allegiance to the civil rights community and to the civil rights movement, but I do not think that allegiance and that support should undermine the ability to disagree.

And the comment that I made with respect to the unanimity, the homogeneity of our points of views I think are important. I think that there is a need for debate. I have said from my early speeches in 1981 that it is important, these issues are so difficult, and the problems are so bad, that we need all of the talent, that we needed all of the ideas possible, not just one point of view.

I did not feel that that opportunity ever occurred or that we had the chance or I had the chance personally to engage in that debate, and I thought it was a lost opportunity, and I said it on both sides of the aisle with respect to the civil rights community, as well as with respect to the Reagan administration.

Senator KENNEDY. Well, it would appear, and the record will show, whether these are expressions of disagreement or strong negative statements.

Judge THOMAS. Yes.

Senator KENNEDY. Judge Thomas, I continue to have serious concerns about your nomination. In your speeches and articles, you have taken many strong positions, but again and again you have asked this committee to ignore the record you have compiled over a decade.

On natural law, despite your previous clear advocacy of using natural law in construing the Constitution, you now tell us that you do not see a role for the use of natural law in constitutional adjudication.

On the right to privacy, you have walked away from your record and statements. You now say that you support a right to privacy, but you refuse to comment on its controversial applications.

On abortion, you have explained away your strong praise for Lewis Lehrman's extreme article supporting the right-to-life position, and said you just mentioned the article in the hope that the rightwing audience would be more inclined to support enforcement of civil rights.

You ask us to believe that an intelligent and outspoken person like yourself has never discussed *Roe* v. *Wade* with another human being.

You ask us to be confident that you will enforce a woman's right to be free from gender discrimination, despite your prior stereotype statements about women and work.

You have abandoned your previous statements that business rights are as important as individual rights or any other right. You now claim you are satisfied with the Supreme Court decisions that give less importance to business rights and greater importance to individual rights.

You have criticized Supreme Court decisions protecting voting rights and sustaining the power of Congress to appoint independent prosecutors, to investigate wrong-doing in the executive branch, now you seem to be supporting those positions.

You have trashed the leaders of the civil rights movement in many speeches, but now you emphasize your debt to them. You have trashed Oliver Wendell Holmes in one of your speeches, but last Friday you called him a giant in the law.

You have harshly criticized Congress, and, as an executive branch official in the Department of Education, you were on the verge of being held in contempt of a Federal court for failing to enforce civil rights laws.

You urge lower courts to follow a Supreme Court dissenting opinion restricting job opportunities for women, instead of the Court's majority opinion expanding those opportunities.

The vanishing views of Judge Thomas have become a major issue in these hearings. If nominees can blithely disavow controversial positions taken in the past, nominees can say those positions are merely philosophical musings or policy views or advocacy. If we permit them to dismiss views full of sound and fury as signifying nothing, we are abdicating our constitutional role in the advise-and-consent process.

Some say that the Senate should consider only the nominee's qualifications and not his ideological views, but the Constitution gives the Senate a shared role with the President in the appointment of Justices to the Federal courts, and for very good reason.

The Supreme Court thrives on the diversity of views of nine Justices who comprise it. It is our system of checks and balances. The role of the Senate is one of the most important checks on the power of the President to pack the Court with appointees who share a single one-dimensional view of the Constitution.

When ideology is the paramount consideration of the President selecting a nominee, the Senate is entitled to take ideology into account in the confirmation process and reject any nominee whose views are too extreme or outside the mainstream.

As we move to the next stage of these hearings, I continue to have major concerns about your nomination and about your commitment to the fundamental rights and liberties at the heart of the Constitution and our democracy. This is no time to turn back.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Now, where we are at this moment is that all Republican Senators have had a third round and we should be just going down the row here, but Senator Grassley, who did not complete a third round last week, apparently has a couple of minutes he would like to use now, is that correct?

Senator GRASSLEY. Yes, at least not more than 5.

The CHAIRMAN. OK. Well, if it is all right with the Senator from Vermont, if we yield to the Senator from Iowa. Everybody will

have more time if they want it on the Republican side. Senator Brown is entitled to any time he wants and we will do that. I just wanted to make sure that people who have had a chance to ask three times already yield to those who have only asked twice. Senator Brown has only asked twice, so he will get another chance.

At any rate, after all of that, why don't I just yield to the Senator from Iowa for whatever questions he has, and then we will go to the Senator from Vermont.

Senator SIMON. Are we going to be breaking for lunch?

Senator GRASSLEY. Mr. Chairman, my point——

The CHAIRMAN. Excuse me, Senator. I have been asked a question, are we going to be breaking for lunch. I think that is going to be inescapable. The question is whether we break immediately after the Senator from Vermont, and I think that depends on how long the Senator from Iowa goes, and he has as right to go long if he wants, or whether we break after the Senator from Alabama. That being the case, we would be down to very few minutes after that, but we are probably going to have to break for lunch, and we will do a very short break, meaning an hour, not an hour and a half, when that time comes. But let us see how far we get right now.

Senator GRASSLEY. Mr. Chairman, I take some time now just for further clarification, more than anything else. I had previously discussed for the committee's benefit, more so than to question the Judge, about the *Adams* v. *Bell* matter, and I thought maybe it would be closed, but it is apparent that it is not closed.

Last week, I had asked that the transcript of the proceedings be printed in the record, and you said it would be made available, and at the time I thought that would be sufficient, but now I think it is only fair that the transcript on the Judge's order in which Judge Thomas was not held in contempt be printed in the public record, and I think that it should be clear that Judge Thomas, as I said previously and as I laid out in a factual record, only inherited a very difficult situation and in no way intentionally violated the law, so I would like to have that printed in the record, if I could, Mr. Chairman.

The CHAIRMAN. Without objection, it will be printed in the record.

[The information referred to follows:]

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE COURT: Well, as Mr. Tatal in his letter of yesterday -- counsel have copies -- correctly surmised, we are reluctant to find the defendants in contempt for a variety of reasons, not the least of which is that they arrived on the scene relatively late and the motion to hold them in contempt was filed within a matter of just a few months after they came aboard.

We do find, though, that the order has been violated in many important respects and we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the Court. We are not going to discharge the rule to show cause; we are not going to hold them in contempt at this time.

We shall give the Government until June 1, which is roughly 45 days -- a little longer than that -- or 75 days, two months and a half, within which to complete the study to which Mr. Clarence Thomas referred and to supply copies to all of the parties.

By the 15th of August, which is five months from now, we shall expect the parties on the basis of the completed study to arrive at a consent order which will either (1) reimpose the present guidelines, or (2) make modification of these guidelines in view of the changed circumstances to which Mr. Levie made reference, which guidelines would presumably

take into account the change in the mix of cases, any increases in the complexity and difficulty of cases, and any related considerations. But it is my intention that the order that the parties will submit will cover all of these contingencies so far as they are able to anticipate. On the other hand, if they are not able to enter into an order by consent, I shall expect that on, or before, the 15th of August, each of the parties will present his own order and at that time, we will again get into the question of what coercion will be necessary to insure the compliance with this order, absent the consent of the parties.

Let me say further that all of us have noted the game of "Musical Chairs" that the Department of HEW and now, apparently, the Department of Education is going through. I read in the papers that we may not have a Department of Education too much longer. I do not know what department of the Government will take over those functions. But I would think that any consent order should bear on its face the signatures, not only of the lawyers who are negotiating the settlement, but also the cabinet secretaries and department heads who are going to bear the burden of compliance.

Now having said this, I want to say that this subject, I think, has been very fully aired and I think all sides have been very competently represented. I am sorry that we have to delay further this matter of seeing what happens to the order

we entered in December of 1977.

Is there anything further, gentlemen?

MR. LICHTMAN: No, Your Honor.

THE COURT: Mr. Levie?

MR. LEVIE: No, Your Honor.

THE COURT: Stand recessed until further call.

(Whereupon, the Court's Findings and Conclusions were concluded at 3:11 p.m.)

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CERTIFICATE OF REPORTER

The above and foregoing typewritten record is hereby certified by the undersigned as the official transcript of the proceedings in the above-captioned matter.

VERNELL A. MARSHALL
Official Court Reporter

Senator GRASSLEY. I would also like to correct what seems to be a wrong impression here regarding Judge Thomas' relationship with civil rights groups and leaders.

In an October 23, 1982, speech before the Maryland Conference of the NAACP, as the then newly installed Chairman of the EEOC, here is something that I thought Judge Thomas said well that expresses his working relationship:

I would like to talk with you about why I believe that you are the group that can truly make a difference for blacks in this country, what I think of the challenges will be in the future, and what we are doing at the Federal level to address the problems of discrimination. The pervasive problem of racial discrimination and prejudice has defied short-term solution. The struggle against discrimination is more a marathon that short sprint.

Political parties have come and gone, leaving behind them the failures of their quick fixes. Promises have been made and broken, but one group, the NAACP, has remained steadfast in the fight against this awful social cancer called racial discrimination. The NAACP has a history of which we can all be proud. From its inception in 1809 until today, the work this organization has done in the area of civil rights is unmatched by any other such group. At each turn in the development of blacks in this country, the NAACP has been there to meet the challenges.

Judge Thomas has often acknowledged the significant role of civil rights movements and how he personally has benefited from it. In volume 21 of the "Integrated Education" publication in 1983, Judge Thomas wrote, "Many of us have walked through doors opened by civil rights leaders, and now you must see that others do the same.

In a January 18, 1983, speech at the Wharton School of Business, in Philadelphia, Judge Thomas said, "As a child growing up in the rural South during the 1950's, I felt the pain of racial discrimination. I will never forget that pain. Coming of age in the 1960's, I also experienced the progress brought about as a result of the civil rights movement. Without that movement and the laws it inspired, I am certain that I would not be here tonight."

An October 21, 1982, speech to the Third Annual Metropolitan Washington Board of Trade, EEO Conference, Judge Thomas described himself as "a beneficiary of the civil rights movement."

An April 7, 1984, speech at the Yale Law School, Black Law Students Association Conference, Judge Thomas noted the freedom movement of black Americans was not a sudden development, but "had been like a flame smoldering in the brush, igniting here, catching there, burning for a long, long time before someone had finally shouted fire."

He asked, in effect, who was responsible for this. Then Judge Thomas went through a litany of people and events that helped fan the flames of black freedom. He asked in part whether it was—

* * * the founders of the NAACP or the surge of pride which black folks felt, as they huddled around their ghetto radios to hear Joe Louis preaching equality with his fists, or hear Jesse Owens humbling Hitler with his feet, was it A. Philip Randolph mobilizing 100,000 blacks ready to march on Washington in 1941, and FDR hurriedly signing Executive Order 8802, banning discrimination in war industries and apprenticeship programs, or the 99th Pursuit Squad, trained in segregated units at Tuskegee, flying like demons in the death struggle high over Italy, was it Rosa Parks, who said no, she wouldn't move, and Daisy Banks, who said yes, black children would go to Central High School, of the three men who had been the black man's embodiment of Blitzkreig, the most phenomenal legal brains ever combined in one century for the onslaught against injustice, Charles Houston, William Hasty, Thurgood Marshall, or a group of students who said we have had enough, I mean

what is so sacred about a sandwich, Jack, or men named Warren, Frankfurter, Black, Douglas, who read the Bill of Rights and believed.

I realize, Judge Thomas and for members of this committee, it may seem more newsworthy to report the judge's remarks only when they have been critical of traditional civil rights leadership, and I realize some of his critics who object to his expressed views against reverse discrimination and preference wish to make him look ungrateful, but it is a false portrait of character being drawn.

So, Judge Thomas, I think you have a lot to be proud of in not only your statements, but your actions in support of efforts of others in the civil rights community who carry the ball and run with it, and I think you have adequately recognized their contribution, and I thank you for it.

That is the end of the time that I will use now, Mr. Chairman.

The CHAIRMAN. Well, I want to thank you, Senator.

After conferring with Judge Thomas' spokespersons in the break here, it seems appropriate we will take a break for lunch now.

Now, let me just give everyone a heads up on where we are going to go from here. We will go to Senator Leahy next, unless Senator Metzenbaum comes back and claims his 15 minutes. Then what we will do I hope, as I count the time, we should be able to finish everything by 4 o'clock today with Judge Thomas.

We will then move to the ABA today, and they will probably move to the first panel of witnesses. We will move at least to one other panel, maybe two, and tonight we will go with the public witnesses until sometime close to 6:30, to try to move this along, because we are going to end early tomorrow night and we will not be in session on Wednesday, so we will see how much we can move along and catch up with the other end here.

Now, we will break for lunch until 1:30, at which time, in all probability, we will resume with, if it is convenient for Senator Leahy, with Senator Leahy——

Senator LEAHY. I will be prepared to start my questioning right at 1:30, if that is what the Chair wants.

The CHAIRMAN. Yes, we will start at 1:30. We will recess until 1:30.

[Whereupon, at 12:17 p.m., the committee was recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

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

The Chair recognizes the Senator from Ohio, Senator Metzenbaum.

Senator METZENBAUM. Thank you very much, Mr. Chairman.

Judge Thomas, before the break this morning, I was inquiring about the EEOC's failure for 6 years to process sex discrimination charges involving fetal protection policies. I am frank to say that I regret that I missed your ensuing discussion of this issue with Senator Hatch and, as has been publicly stated, I missed it only because I am also sitting on the Gates nomination hearings which are going on at the same time.

But as I am informed by my staff, you agreed with Senator Hatch's statement that "women were not prejudiced by the EEOC's

failure to act on this issue for over 6 years while you were Chairman."

Judge Thomas, I simply cannot accept the idea that women were not harmed by the agency's default on this issue. The women who lost their jobs due to sex discrimination were certainly harmed. Some of them didn't get their jobs back for 10 years, and some of them never got their jobs back at all.

Had you acted in a timely manner to resolve their charges, they surely would have been spared much of this harm. And had the EEOC declared fetal protection policies to be illegal in 1982, as it did in 1991 after your departure, the women who were forced to undergo sterilization in order to keep their jobs might have been spared that terrible outcome.

Judge Thomas, you pointed out that women were free to file their own lawsuits challenging fetal protection policies. The women who lost their jobs, that were sterilized as a result of fetal protection policies, were blue collar women working at an hourly wage. These women came to the EEOC, because they could not afford to file their own cases or they needed assistance with the complex issues involved.

These women sought the help of the EEOC in fighting for their rights. That is why the agency is there. But under your direction, it didn't hear the cases, it turned its back on these women.

My question is do you really believe that these women did not have their rights prejudiced at all, simply because they retain their right to bring a private lawsuit?

Judge THOMAS. Senator, the point that I thought Senator Hatch was making was that the right to bring a lawsuit or to engage in litigation continued to exist and did not expire. I do not think either one of us intended to suggest that individuals who have to wait for long periods of time to resolve these issues aren't in some way and to some extent prejudiced to that degree.

The point with respect to what we did during my tenure I think has to be refocused in this way: In thinking about this issue, where we eventually arrived in developing a policy, I believe the BFOQ approach was originally rejected prior to my going to EEOC, and there was significant debate about that.

We attempted to resolve the issue in what I think was an appropriate way. It didn't happen as fast as most of us would like it, but it was a very, very difficult issue and it was one the rulemaking and the final resolution that you are talking about or that you commented on was one that was developed during my tenure, although finalized after my tenure.

It again was something that in these difficult areas you would hope to have been able to done a lot quicker or done in a more expeditious way, but this was one of the most difficult issues we wrestled with.

Senator METZENBAUM. Well, before the break this morning, you stated in response to my question that it took 6 years for the EEOC to take action on charges involving fetal protection policies, because you were faced with difficult issues outside its area of expertise. However, Judge Thomas, even if these charges did present difficult issues, that would hardly justify taking no action on them for so many years.

In addition, although some of the charges may have turned on complex scientific issues, many others represented clear violations of title VII. For example, in one case, a female job applicant was denied a job requiring exposure to lead due to fetal health risks which might arise if she became pregnant. The employer's personnel manager told her that she wouldn't like plant work, anyway, that plant work would be too dirty for her and that he could use a pretty face in his office.

The applicant, understandably, filed a discrimination charge in 1981. The Commission investigated the charge, but took no action to resolve it for 8 years. In 1989, the commission closed the case, because it was unable to locate the charging party.

Now, some charges filed with the Commission languished, even though the employer had offered no evidence at all to back up its discriminatory assumptions regarding the health risks posed by the hazard in question. In other cases involving x-ray technicians, the commission had already issued their decision prior to your tenure, finding violation based on parallel facts. I do not dispute that some of these issues may have raised difficult issues, but do you really believe that that justifies the EEOC's total inaction for 6 years? One has to say why did it take so long for any action at all to occur.

Judge THOMAS. Senator, as I have indicated, I think that the agency during my tenure could not be said not to have been taking any action. The results may not have occurred in a way that we would have liked it to have occurred, as expeditious as possible, but to say that we took no action is incorrect, I believe.

The agency, the Commissioners, including myself, attempted to review this particular policy in a professional way and a way that would protect the rights of women. We recognized—and there was disagreement among staff, as well as Commissioners, and I think even within the Government—we recognized that this was a difficult issue that involved scientific, as well as health problems or health concerns, and we attempted to resolve it in a way that took those factors into consideration.

Senator METZENBAUM. Judge Thomas, I must also take issue with Senator Hatch's suggestion that, in the *Johnson Controls* decision, the Supreme Court "adopted basically your ideas on fetal protection and carried them a little further." As Senator Hatch pointed out, your position in the EEOC's 1988 policy guidance was that, where a substantial risk to a fetus or potential fetus existed, employers could use fetal protection policies which applied only to women.

What Senator Hatch did not mention is that your 1988 policy allowed women to be excluded from jobs, even if those women were fully able to perform their jobs, but the Supreme Court expressly rejected that position in *Johnson Controls*, holding that these policies could never be justified by reference to the well-being of a fetus or potential fetus. In short, it took the EEOC 6 years under your tenure to develop a position that the Supreme Court rejected out of hand.

Judge THOMAS. I could be—if my recollection serves me right, Senator, I think Senator Hatch must have been referring to I think the 1990 policy. Again, I do not have that in front of me, but I

think the 1990 policy was consistent with the Supreme Court decision. I would have to go back and look at that. Again, I am operating just off memory.

Senator METZENBAUM. Judge Thomas, the facts actually speak for themselves. This was an issue of great significance to women in the workplace. According to the Bureau of National Affairs, as many as 15 to 20 million jobs may involved reproductive hazards, and thus could have been affected by exclusionary fetal protection policies.

Given the fact, it is not surprising that one Federal judge said that the *Johnson Controls* case was "likely to be the most important sex discrimination case since the enactment of title VII."

You were sworn to protect the rights of the millions of working women in this country against employment practices that completely barred them from high-paying industrial jobs. Frankly, Judge Thomas, based upon the facts, not on opinion, but based upon the facts, it would appear that, instead of protecting these women, you abandoned them. For most of the 1980's, you refused to resolve over 100 discrimination charges that had accumulated at Commission headquarters.

In addition, when you finally began to act, you sold women short by allowing employers to adopt facially discriminatory policies that excluded women who were fully capable of performing their jobs.

In this year's *Johnson Controls* decision, the Rehnquist Supreme Court concluded that employers have no business depriving women of their jobs in the name of protecting non-existent future fetuses. The Court expressly held that "decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them, rather than to the employers who hire those parents." That is the Court's language.

Three months ago, the EEOC finally took the position that "policies that exclude members of one sex from a workplace for the purpose of protecting fetuses cannot be justified under title VII." The EEOC conceivably, probably should have reached that conclusion 10 years ago. You had an opportunity to make it occur. You didn't.

The EEOC's failure to protect women apparently at your direction gives me and millions of American women and men cause for concern, because it appears on the basis of the facts that you didn't protect their rights, when it was your sworn responsibility to do so, and I am very worried that you won't protect their rights as a member of the Supreme Court.

Judge Thomas, as I reflected on our last 4 days of hearings and as I reflect back on your answers to my questions this morning, I feel compelled to repeat a point I have made to you. I am struck and can't figure out a reason, I can't comprehend the number of times in which you suggest that this committee should discount past statements which you have made.

For example, you gave speeches to lawyers and wrote articles in law journals advocating the use of natural law, a subject to which the chairman has addressed himself quite extensively, but now you say that you never meant to suggest that natural law should be used in deciding cases.

You have condemned aggressive legislative oversight, characterized Congress as unprincipled and out of control, and commended

Justice Scalia's narrow vision of congressional power under the separation of powers clause, but now you say that those remarks were just part of the normal tension and give-and-take between Congress and the executive branch.

And other issues such as economic rights, the minimum wage, and affirmative action, there is a conflict between your testimony to the committee and statements which you have made in the past.

But in the area of abortion, one of the most important issues facing this Nation, one that has been discussed and about which you have been asked at great length, it is in that area that you have most seriously sought to distance yourself from your past record.

To the millions of American women who are wondering where you stand on that critical issue, your answer is "trust me, my mind is open, I don't have a position or even an opinion on the issue of abortion." Judge Thomas, that is just incredulous. It is difficult for millions of Americans, whether they are pro-choice or pro-right-to-life, to accept.

You have a record in this area. You simply don't want us to take account of it. You are asking us to believe that you didn't really mean it, when you said Lehrman's antichoice polemic was splendid. You are asking us to believe that you didn't really mean it, when you signed onto a report that criticized *Roe* and other pro-choice decisions.

You are asking us not to worry that you criticized the key constitutional argument supporting a woman's right to choose. You are asking us not to worry that you were on the editorial board of a journal that has only published articles on the abortion issue which vehemently attacked a woman's right to choose. You are asking us to ignore the fact that your nomination is championed by antiabortion groups and that you were selected by a President who has pledged to appoint Justices who will overturn *Roe*. And you are asking us not to be concerned that you, like other nominees have gone onto the Court and undermined the right to choose, have singled out this particular subject for silence.

Judge, I cannot ignore your past statements on the abortion issue and on other critical legal issues and policy issues. I cannot accept the idea that we should give little weight to what you said or did before going on the bench. I reject the notion that what you said or did about certain issues becoming a judge bears no relation whatsoever to what you will do with respect to those issues once you are on the bench.

And I cannot accept your suggestion that we should discount some of your most controversial statements, such as your praise of the Lehrman article or your condemnation of the *Morrison* case, on the grounds that you didn't endorse or agree with what you were saying. That explanation only raises more questions than it answers.

The bottom line is this, Judge: You have a record and I believe this committee and the Senate must evaluate your nomination based upon that record and based upon the way in which you have discussed that record with this committee.

Thank you, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Brown would be next, if he were here, but I yield to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Judge Thomas, I am told that, at least for your testimony, the end is near—a matter that I was going to say you probably see with mixed emotions, but I doubt that would be a fair statement. You are probably happy to have it end. I hope you and your family had a pleasant weekend.

I must admit, while I was up in Vermont this weekend with my family, I heard more discussion about you than I have heard—well, ever since your nomination. Many people came up to me in grocery stores and at gas stations and on the street, virtually every place I was—in fact. And I believe that all but one person I talked with during the weekend mentioned you, and their views either for or against your confirmation.

I told them what I have told others here; that I have been here for virtually all of your testimony. I have done this so that I might know you better. I am one who spends the time here with you. For many of those who will speak either for or against you, I will read their statements, but they are not the ones about to be voted on one way or the other. You are. And so I have been here to get to know you better.

I want to know how you think, what you consider most important in the law or cases, what kind of Justice you would be if confirmed, how qualified you are. In many ways I don't really have those answers. I probably never will, even at the time you finish testifying today. Apparently the judgment has been made, either by you or your advisers or in conjunction with each other—I don't know—not to answer many questions, for whatever reason. And you have stated in a number of instances—when people suggested you weren't answering the questions—you have stated your reasons why. So I will re-read the transcript to see if a better view of you develops.

One of your advisers, Senator Danforth, feels he knows you very well. I am sure he does. He has had years and years of getting to know you, and all of us on both sides of the aisle have the greatest respect for Senator Danforth. But we haven't had that experience with you, so every Senator has had to make up his or her mind based on what you said or have not said here.

I said to somebody this noon that I wanted to look into the window of your soul, if I could, although I find the shade down quite a ways. And that may be me. That may be ineptitude on my part. That may be design on yours. That may be the ships in the night. I don't know.

Let me ask you a few more questions. While I could ask dozens and dozens more beyond the ones I will ask, I suspect that I might not know any more than I do now if I were to ask them. So let me just take a few.

Even though you have been asked a number of questions on natural law, I find that I still get asked a lot of questions about that. Again, when I was home in Vermont, people would ask just exactly what is meant by natural law, or what you mean by it. You have testified here that natural law plays no role in constitutional adju-

dication. You told Senator Hatch on Tuesday, I believe it was, that a constitutional amendment was required to outlaw slavery. Does that mean that you believe that the *Dred Scott* case, which was decided before the 13th and 14th and 15th amendments were enacted, was correctly decided?

Judge THOMAS. I don't think I——

Senator LEAHY. At the time it was decided.

Judge THOMAS. No, I don't think I have suggested that and didn't analyze it in that way. But I believe the question there was whether or not—since he was not an escaped slave, the question was whether or not he enjoyed the privileges and immunities of a citizen, and I think it would have been analyzed a bit differently. But my own reaction to that is that it was not correctly decided, and I have not gone back and redecided it.

Senator LEAHY. Have you not argued that Justice Taney failed to take into consideration the natural law principles in the Declaration of Independence, particularly those that all men are created equal?

Judge THOMAS. I don't have that before me, and I don't have the analysis before me, Senator. But I think that I could be wrong on this. I think that was a privileges and immunities case.

Senator LEAHY. But did you argue that Justice Taney failed to take into account natural law principles in the Declaration of Independence?

Judge THOMAS. No, I think I—and, again, I don't have that before me, but I think the reference was to the Founders' understanding of natural law and what they were including in the Constitution.

Senator LEAHY. Did you tell Senator Hatch that a constitutional amendment was required to outlaw slavery?

Judge THOMAS. I did. But the issue there was a different issue. I think the issue was a black individual who had been taken to a nonslave territory rather than having escaped to that territory. That would have been the similar arguments that were made by individuals who were free blacks and what their rights were.

Senator LEAHY. Should Justice Taney have used natural law in the *Dred Scott* case?

Judge THOMAS. I think he should have, again, read the Constitution and attempted to discern what the Founders meant in drafting the Constitution.

Senator LEAHY. But if he did that before the 13th, 14th and 15th amendments, would he not have had to uphold slavery? I mean, slavery was allowed at the time the Constitution was drafted.

Judge THOMAS. I think the separate issue is, the individual and complicating issue is if you are in a State that does not have slavery or in which slavery is outlawed.

Senator LEAHY. Judge, let me quote from a couple of your speeches. At Wake Forest in April 1988, you said, "I thought that Ollie North did a most effective job of exposing congressional irresponsibility. It forced their hand, revealed the extent to which their public persona is fake." You said then a year later, "Lieutenant Colonel Oliver North made perfectly clear last summer that it is Congress that is out of control."

Now, I don't want to debate the issue of how you felt and what you said at those times, but I take those particular statements because last year, as a judge on the court of appeals, you ruled in favor of Colonel North in his criminal case. You voted, in effect, to sustain the opinion of the panel which had overturned his conviction on the ground that it was tainted by the use of congressionally immunized testimony.

Now, the reason I mention your vote in that case in which you were with a substantial 8–2 majority, as well as your earlier statements, is because I have heard you say over and over again, during your testimony, that you were concerned that in giving us an answer you might affect your judicial impartiality. You said, in effect, that you did not want to recuse yourself from cases that might come before the Supreme Court because of what you said here.

Did you ever consider disqualifying yourself from sitting in judgment on Colonel North's case on the grounds of either the strong support that you expressed for him in 1988 or your criticism of the Iran-Contra congressional hearings?

Judge THOMAS. Senator, first of all, let me address the statement itself. As I have indicated, my statement was in reference to something that happens sometimes with respect to oversight hearings, or I guess in the political environment, and that is that hearings, substantive hearings become overly publicized or over politicized. And in this instance, I indicated—and this is the way I felt in giving that speech. Colonel North exploited that to his own advantage. I at no time expressed—and, in fact, in reflecting on my feelings toward him during that time, my own view was that if he lied to Congress or if he had engaged in any kind of unlawful conduct, then he should suffer the consequences. At no time did I condone that.

On the court of appeals, the issue was a rehearing petition, whether or not that case should be reheard en banc. And I didn't feel that I was in any way less—in any way or anything other than impartial in considering that.

Senator LEAHY. So the answer to my question is "no."

Judge THOMAS. I did not. I felt that I had not expressed any opinion on his culpability or on his criminal conduct.

Senator LEAHY. I want to make sure I understand the answer. The answer to my question is "no"?

Judge THOMAS. That is right.

Senator LEAHY. Do you think that there is a core of political speech that is entitled to greater constitutional protection than other forms of speech?

Judge THOMAS. I think that, Senator, the value that we place on speech, whether it is freedom of the press or whether it is freedom to engage in discussions about politics or whether it expressive conduct, we see those as—and the Court has treated those as—fundamental rights and has protected those accordingly.

Senator LEAHY. Is all speech the same, though? Is all speech given exactly the same constitutional protection?

Judge THOMAS. Well, I think that the Court, of course, has not accorded the same protection of speech to commercial speech, for example. But the issues that have faced the Court have usually in-

volved whether or not—the difficult issues have involved expressive conduct as opposed to pure speech. And——

Senator LEAHY. What about—I am sorry.

Judge THOMAS. And the exercise that the Court has gone through has, in essence, been whether or not the Government or the State can in any way regulate that expressive conduct and under what circumstances, in cases, for example, like *O'Brien* or the cases such as *Texas* v. *Johnson*, the flag-burning case.

Senator LEAHY. You are not saying, then, by any stretch, that only political speech is protected? I mean, there is a lot of other speech beyond political speech that is protected by the first amendment.

I realize what you said about the expressive forms of speech.

Judge THOMAS. Senator, I have not analyzed every single speech case, but my own value would be to protect the entire amendment in all of its fullness and not to find ways to creatively read out that protection. I think it is important that we protect all of the amendment.

Senator LEAHY. Now, for example, if you had non-political speech, like say a scientific debate, that would be protected by the first amendment? I am not trying to get you to a specific case. You understand, Judge. I just want to make sure we differentiate between the types of speech. But a scientific debate, first amendment protections?

Judge THOMAS. Well, I think that speech, we value all of our speech. What I am trying to say is I don't limit and see no reason and haven't seen the Court limit our freedom of speech to whether or not we are talking about science or whether we are talking about politics. Certainly the Court has attempted to accord protection to speech such as, for example, the most recent case being *Texas* v. *Johnson*, the flag-burning case.

Senator LEAHY. Now, in that case, that was a 5–4 decision, as I recall. The Court refused to uphold a conviction on the basis that flag burning was a political statement. Is that a fair shorthand——

Judge THOMAS. No. It was expressive conduct.

Senator LEAHY. Expressive conduct?

Judge THOMAS. Expressive conduct, that the individual was making a statement, a political statement in burning the flag, and that was protected by the first amendment. And the analysis normally is whether or not the Government can in some way control the conduct or regulate the conduct; whether the Government, if it is expressive conduct, has a compelling interest in regulating that conduct.

Senator LEAHY. Do you agree with the *Johnson* case?

Judge THOMAS. Again, Senator, I have not—I think it is inappropriate for me to express agreement or disagreement, but I agree that we certainly should—that expressive conduct should be protected by the first amendment. And I think that the difficulty for the Court has been to what extent can it be regulated, not whether or not it should be protected.

Senator LEAHY. Would it be safe to say you would draw the line at certain kinds of expressive conduct? Suppose somebody says, "I am going to make a political statement by driving 95 miles an hour

down Constitution Avenue." Might you say that that might stretch the first amendment guarantees a tad far?

Judge THOMAS. I think the analysis would be along the lines of whether or not the Government has an interest, a compelling interest in regulating this conduct. And I think that we would probably both—and that is an extreme example. We would both have some difficulty with the Government not regulating someone speeding down Pennsylvania Avenue at 95 miles an hour, although at times you feel in some cabs that you are going 95 miles an hour along Pennsylvania Avenue.

Senator LEAHY. In *New York Times* v. *Sullivan*, which I think we would all agree is the benchmark libel case, the Court held that a public official could not recover damages unless he could prove that the defamatory information was made with actual malice. Does that standard provide sufficient protection for public figures in your mind?

Judge THOMAS. I guess I haven't looked at it from that standpoint. You know, I think all of us who have found our names occasionally in the newspaper would like to feel that we have——

Senator LEAHY. Never happened to you, has it, Judge?

Judge THOMAS. Well—but as I was telling my wife during this process, no matter how badly it turned out as far as the publicity, I think that the freedom of the press is essential to a free society. And she sort of looked at me, because we were going through the midst of it, sort of, Are you out of your mind? But I believe that, and I believe that even as I was going through it and even as I am going through it.

But I think what the Court was attempting to do there was, of course, to balance the first amendment rights, the freedom of the press as we know it, and to not have that in a way impeded by one's abilities to sue the media or to intimidate the media, and applied a standard of actual malice and struck a balance by protecting the rights of the individual with the standard of actual malice.

That is something, of course, that one could debate, but I think it is demonstration, a clear demonstration on the Court's part that the freedom of the press is important in our society, is critical in our society, even though individuals may at times be hurt by the use of that right.

Senator LEAHY. Do you see any need to change that standard?

Judge THOMAS. I at this moment certainly have not thought about changing that standard and have no agenda to change that standard. I think the Court is—my view, as I have attempted to express here, is that we should protect our first amendment freedoms as much as possible.

Senator LEAHY. When you were at the EEOC, you spoke often about preparing our young people for the high-technology jobs of the future. You mentioned especially minorities. I totally agree with you, and I would hope that more and more Government officials would continue to say the same thing and that more and more people in the private sector would say it, because I don't believe we are doing anywhere near enough.

I also know that as new technologies come along, we need to look at some of the civil liberties questions they bring up. One scholar even suggested a 27th amendment to explicitly extend civil liber-

ties, including freedom of speech, privacy, and protection against unreasonable search and seizure, and apply it to these new technologies. I am not endorsing that proposal, but it raises the questions that come up all the time about how we interpret the Constitution in light of technologies that were totally inconceivable at the time the Constitution was written, and some that were inconceivable even 50 years ago.

Do you have any comment on the adequacy of constitutional protection for computer and new telecommunications technologies?

Judge THOMAS. Senator, I think perhaps some of the same questions were raised with respect to search and seizure and certainly addressed by the Court when telephonic communication became an important part of our way of life, and I am certain many of the cases or many issues will arise as to tapping in the computer data bases, as well as issues involving such things as caller ID.

I have not explored all of those issues. I certainly have seen our laws, particularly our constitutional laws, moving and developing, as those technologies move and develop. It certainly has done that in the past, and I would have no reason to believe it won't have that capacity in the future.

Senator LEAHY. We have talked to you about specific issues here, on civil rights, on relations between the Federal Government and States, *Roe* v. *Wade*, and a number of others. On some of those specific issues, you have said that you did not want to discuss them or you had certain parameters beyond which you would not discuss them, because they might come up again.

Let me ask you, then, in the abstract, about your basic sense of stare decisis. Say a case comes before you, you have to make a judgment in deciding whether you should overrule a decision. You feel that the case law that might otherwise control was wrongly decided. The new case you have now is perhaps on all fours, and you have to decide whether to overrule the earlier decision.

Tell me the kind of weight that you would give to these various points. How much weight would you give to the Supreme Court's acceptance of the basic principles of the case—subsequent acceptance—after the Court had decided the earlier case, which you happen to think was wrongly decided?

Judge THOMAS. Senator, it is hard to say exactly and precisely how much weight you would, in judging a case, I give to a particular component. I think, though, that when you have a precedent that has been relied on in the development of subsequent Supreme Court law, it is not one that was simply there and has never been relied on by the Court, but I think that you would give significant weight to repeated use of that precedent and repeated reliance on that precedent. I think that is very important.

Senator LEAHY. Do you give weight also to changed circumstances? Suppose we have changed substantially, as a country even, since the earlier case was decided. Is that something that can at least be considered or should be considered?

Judge THOMAS. I think what the Court does, and it depends on a particular case, Senator, is if a precedent or a rule becomes unworkable, the circumstances change to a point that it is no longer a useful precedent and it is one that is not applicable—I can't think

of one off the top of my head right now, but I think the Court could revisit a precedent when it becomes unworkable.

Senator LEAHY. What about the importance of stability, and adverse consequences that might result from overturning a case that people had relied on up to that point?

Judge THOMAS. I think what is critical there, Senator, is this, that one of the reasons in our case-by-case system of adjudication for having stare decisis is to provide for that continuity, and I think that continuity is a basis for the stability of our system. It is certainly a basis around which institutions can develop, it is a basis around which people can develop some sense of predictability in our system, it is a basis upon which I think people can react in a positive way to our system. I think that the continuity and the stability is important.

Again, let me just add and underscore the factors that you are isolating here, by saying that I think the burden is on those who would change a precedent to show more than simply that they disagree with the underlying opinion. I think there is that additional burden, which would include an analysis or would certainly include the factors that you set out here.

Senator LEAHY. Absent changed circumstances, does the lapse of a significant amount of time weigh heavily in such thinking, or should it?

Judge THOMAS. I think that to this extent and perhaps in this way, I think that in two ways, at least, that the passing of time will certainly have some relationship to the manner, maybe not directly, but the way that the Supreme Court has used that precedent, whether it has cited that precedent over a long period, whether it has built a body of case law around that precedent.

The other point is that, over time, an important precedent could be a basis upon which or around which institutions develop and grow, expectations develop and grow, and I think that those would certainly be taken into consideration, so in that sense I think time is important. But I add this, though, that there have been precedents in our time, for example, *Plessy*, which was overruled, which had been around for quite some time, and certainly I don't think there is any argument that that should not have been revisited, notwithstanding the significant time that it had been around, but I only use that as a caveat.

Senator LEAHY. But in *Plessy* v. *Ferguson*, there were, of course, at least to some extent in our society, changed circumstances, or were there?

Judge THOMAS. Well, society had changed somewhat, not totally. I think that sometimes we think that it changed more than it actually had and we hope that——

Senator LEAHY. Some might ask if it has changed all that much since then.

Judge THOMAS. Well, some do ask rhetorically.

Senator LEAHY. How do you feel?

Judge THOMAS. Senator, the fact that I am sitting here engaged in a discussion with you at a confirmation hearing for the Supreme Court of the United States indicates that there is some change, but throughout there has been much discussion about my speeches and interviews, but you would find a common theme running through-

out them, and that is this, that there may have been changes, but there is still so much yet to change.

There are so many individuals who are left out of our society who deserve and should have a central role or full participation in our society and all that it has to offer, and that is something that I believe in, it is heartfelt, it is something that I have reiterated over the years, and, notwithstanding the changes, there needs to be more.

Senator LEAHY. Let's go through all the different things we have talked about: Changed circumstances and what you said about that; the length of time the case has been on the books, weight to be given to what a change or overruling a case might do to practice that may or may not have become accepted practice.

What if, after you have gone through all of that analysis, in your heart you look at that decision and you say "I don't like it. I read that decision, I disagree with it." Preceding from all the questions of changed circumstances, the affect of time on society, acceptance, et cetera, you Judge Thomas sit there—if you have been confirmed as a Supreme Court Justice, you sit there as Justice Thomas—and you say "I don't like that case, I disagree with that case in my heart, morally, politically, emotionally, legally, whatever the reason is, I disagree with it." What weight does that carry, as compared to all the other things we have talked about?

Judge THOMAS. Senator, there is Justice Marshall's dissent in *Payne* v. *Tennessee*, I think is a very important admonition, and that is that you cannot simply, because you have the votes, begin to change rules, to change precedent. That is not a basis for doing it. I think it is a very stern and necessary admonition to everyone, all of us who are judges.

On a personal level, as a judge, I at the end of the day, if I made a decision in a case that way, that willfully, I could not say to myself in the mirror that I have acted consistent with my oath and the way that I see my obligations as a judge. I do not think that it is appropriate to just simply say, as a judge, this is the way I feel and that overrides everything else. I don't see where we have order to our system, and I certainly don't see where that is consistent with the discharge of my obligations under my oath as a judge.

Senator LEAHY. Thank you.

Mr. Chairman, I thank you. I have many, many more questions, that I do not anticipate going through.

Judge I commend you for being here and I hope you won't think it inappropriate if I also commend your wife and the rest of your family who have been here. I mentioned to your son last week that I admire his aplomb and his ability to stay there, and you would be pleased in his response of why he was willing to do that for you. Thank you, Judge.

Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you.

We will break for 10 minutes.

[Recess.]

The CHAIRMAN. The Chair recognizes the Senator from Alabama, Senator Heflin.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge Thomas, your explanation of the——

The CHAIRMAN. Excuse me, Senator. I am sorry. I apologize for interrupting. I was told by staff that Senator Brown, in fact, had no questions. I misunderstood. I guess you wish to make a statement. Is that correct, Senator Brown?

Senator BROWN. Thank you, Mr. Chairman. I think I can complete this within——

The CHAIRMAN. Take your time. I am sorry. I just was told you had no questions or nothing to say. Senator Brown. I apologize to my friend from Alabama.

Senator BROWN. I thank the chairman. I simply wanted to make an observation that I think is important to appear in the record.

There is a lot riding on this consideration, and I don't think any of our members have made statements that they intentionally meant to be misleading. But as I review the record, one thing, at least in my mind, is quite clear. Judge Thomas' remarks with regard to how he would use natural law in my view are very clear and very consistent. He stated before this committee that he would not use natural law in the interpretation of the Constitution if he sat as a Justice of the Supreme Court.

In viewing the consistency of that, I have looked back at the 1½ years of his tenure on the circuit court of appeals, and also at a very similar question that was asked of him when he came before this committee for confirmation to the circuit.

The transcript of what he said at that time is virtually identical to what he said before us. And the suggestion by some that there is some sort of a change in his commitment to not use natural law to interpret the Constitution I think simply is not borne out by the facts. I wanted that observation as part of the record.

I will yield back, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Alabama.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge Thomas, your explanation of the apparent inconsistency in your evaluation of Justice Oliver Wendell Holmes, from a speech in 1988 to the explanation that you give today, troubles me. Let me read this again, the speech at the Pacific Research Institute civil rights task force, which I will read shortly. But as I understand your explanation, it is that when you made this speech you were not as familiar with the work and the opinions and the writings of Oliver Wendell Holmes as you are today; and that when you made this speech, you didn't realize as much as you do today about Holmes; and that since making this speech, you have read books on Holmes and you have changed your opinion.

Now, is that a correct statement of your explanation?

Judge THOMAS. No, I don't think so, Senator, and it is probably because I didn't make myself clear. What I was attempting to say was that I did make the statement, and the concerns that I did have were expressed there. But I said that I did not stop there in my development; that he was someone that I continued to look at, and after going on the bench I decided to go back and to read more about him and to look at him as a person. There was a recent biography of him, "The Honorable Justice," which I read. And it didn't necessarily mean that I didn't—that what I said there is what I believed at that time, but rather that I didn't stop with just that

point of view. I wanted to know more about him and that clearly he is a great Justice, but that doesn't mean that we can't disagree with him.

Senator HEFLIN. Well, basically you are saying, as I understand you, that you read a biography, you studied his writings, his opinions, his life, and you came to a conclusion he was a great Justice.

Judge THOMAS. With the—no. I came to the conclusion that I had differences of opinion with him, but, you know, I think it is one thing to read about a judge or a Justice, I think, when you are on the outside. It is another thing to read about him when you are sitting on the bench also. And I think know more about him now, but I still have that disagreement, as I said, with him that I expressed in that speech.

Senator HEFLIN. Well, in that speech, you basically are expressing a disagreement with Justice Holmes about natural law. Are you not?

Judge THOMAS. Well, no. The disagreement, I think the overall disagreement was one in which I felt that he did not look back to the Declaration that is the backdrop of our regime, not to use it to interpret the Constitution, but rather to not think that there is anything back there at all. As I indicated, our Founding Fathers believed in natural law, and not to recognize that——

Senator HEFLIN. I don't see anything in here about Founding Fathers and looking back—let me read to you the statement that has caused this criticism.

The homage to natural right inscribed on the Justice Department building should be treated with more reverence than the many busts or paintings of Justice Oliver Wendell Holmes in the Department of Justice. You will recall Holmes as one who scoffed at natural law, that "brooding omnipresence in the sky." If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes. As Walter Burns put it in his essay on Holmes, most recently reprinted in William F. Buckley and Charles Kessler's "Keeping the Tablets," "No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach what a people needs in order to govern itself well."

As constitutional scholar Robert Falkner put it, "What Marshall—

Meaning John Marshall—

had raised, Holmes sought to destroy." And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they existed at all apart from willfulness, whether of individuals or officials.

Now, that is the quote.

Now, from reading this, it would appear that in your scholarship prior to this speech that you had read Walter Burns' essay on Holmes and you agreed what constitutional scholar Robert Falkner said about him. But for you to attack with words like this in a speech a Justice of the Supreme Court, as well as one who is generally regarded as one of the giants of the Supreme Court, raises some question in my mind.

First, what was your scholarship in determining at that time before making those statements about Holmes? How much had you read about him at that time?

Judge THOMAS. I think I had read what I cited there, and, Senator, as I noted earlier, one of the points that I had felt that, you know, his statement in *Buck* v. *Bell* was troublesome to me. My point was not so much that he did not use natural law or anything; it was a matter of my attempting to understand natural law at

that time as a backdrop to our Constitution, not as a method of adjudication.

What I was saying recently to Senator Kennedy here with respect to Holmes is that, as a judge, I decided that—I knew I had read Mr. Kessler and some of the others. As a judge, I decided that, look, I want to go back, and I want to learn more about Oliver Wendell Holmes. I want to know more about Warren Burger. I want to know more about all of our judges and Justices. And as a judge, as I indicated, in my readings my point was that even though I may have had in that context, in pulling together my own political theory and trying to develop my own way of looking at our country, my own philosophy, I wanted to look at him from the posture of a judge. And that was a comment that I was trying to make to Senator Kennedy earlier this morning.

I think that it is totally different, at least it has been for me. I have heard comments here that it doesn't make any difference. You don't change when you become a judge. And, of course, you have been a judge. But for me, becoming a judge, as opposed to being in the executive branch, was a dramatic change. And it is one that certainly required me to take a step back and to look at the responsibilities of the job and to look at the difficulty of deciding cases. It also gave me a different appreciation of the role of a judge, one that I could not have had when I was on the outside talking about how we govern our country as opposed to how we adjudicate our cases.

And I think that any of us who became judges or who have become judges look to someone like an Oliver Wendell Holmes, whether we would agree with him from a political theory standpoint or not. My job, my effort has been as a judge to learn from everyone. That is what I was attempting to do, and that is why I indicated to Senator Kennedy—I was trying to suggest a sense of humility that one learns when one sees the daunting task of being a judge.

Senator HEFLIN. Well, now, reading this from your speech, it appears to me—well, it is certainly subject to an interpretation, but it is a very strong interpretation that you are criticizing Holmes because Holmes takes the position that natural law should not be used in constitutional adjudication.

Judge THOMAS. That was not my intention there, Senator. My intention was solely to indicate that I didn't believe that he had an understanding of what it meant to our regime, as a teacher or as a political theorist. I think it would have been easy enough to say that he should have used it in constitutional adjudication. I have not said that.

My effort was solely to look in that speech and the speeches that I have given, to solely look at how our Constitution and how our form of government relates to the Declaration and our Founding Fathers, et cetera. I think I have tried to say that throughout these hearings.

I in no sense considered myself a jurist or considered myself someone who felt that the role of natural law was to be a part of constitutional adjudication. I did not feel that. And I have indicated—attempted to indicate that.

Senator HEFLIN. Well, I read this part of that toward the end of your speech. These are your words: "And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they existed at all apart from the willfulness, whether of individuals or officials."

Earlier in the speech, you say, "You will recall Holmes as one who scoffed at natural law, that brooding omnipresence in the sky."

Now, this language isn't talking about Holmes the political theorist, but it is speaking about Holmes the jurist.

Now, explain—this leaves me that you at this particular time are criticizing Holmes because he said and believed that natural law is not to be used as a means of constitutional adjudication.

Judge THOMAS. Well, I think my criticism perhaps was a bit broader than that, Senator. Certainly—I know I am repeating myself. I did not then nor do I now see a role for natural law in constitutional adjudication except to the extent that I have noted, and that is as the Founding Fathers saw it.

What I was attempting, the point that I was attempting to make in my speeches, in this speech, was that you couldn't just simply ignore it and say it doesn't exist at all, it didn't exist, it had no role in our regime, it had no role with the Founding Fathers.

The Founding Fathers did believe in that. It did have a role in our Declaration, and it did in some significant ways influence the kind of government that was established in our country. But at no point—at no point—did I suggest that it had a role in constitutional adjudication.

Senator HEFLIN. All right, sir. Now, let me ask you about the *Sears & Roebuck* case. This was a case that EEOC was the plaintiff and brought against Sears & Roebuck, largely based on a reliance upon—almost entirely I would say, a reliance upon statistics to prove disparate impact. And I think that you were not the head when this suit was filed.

Judge THOMAS. That is right.

Senator HEFLIN. But as the suit went along, you personally authorized the increase of money for statistical studies in that case. On March 30, 1983, you authorized an increase of $135,000. In May 1983, you again authorized the increase of another $534,000. On August 10, 1984, you authorized another payment of $315,896. Now, close to $1 million was authorized to you, as I understand it, for statistical studies as the case went along.

Then in the case, as the case was proceeding and had not come to any judgment, you made the speech in which you criticized, relying on statistics, and basically said that the agency had relied too heavily on statistics and investigations initiated by the Commission itself and in its review of complaints filed by individuals. And in that statement, you said, "For example, he said a case filed by the Commission in 1979 against Sears & Roebuck Company, still pending in the Federal court, relies almost exclusively on statistics to show discrimination against women."

I am not arguing statistics or whether it is proper or not, but with the investment that had been made in that case, isn't it unusual for a head of an agency to, in effect, cut the feet out from

under the agency's lawyers by making such a statement pending the litigation?

Judge THOMAS. Senator, I believe that that statement occurred once in an interview in 1984. The circumstances of the interview I will not get into. It was not in a speech, and it wasn't in prepared remarks. Not that that excuses it.

There had been an ongoing debate about the use of statistics, not statistics alone but the use of statistics. And I felt that in specific cases in the agency that we had used broad statistical comparisons or broad statistical disparities. I think we discussed it a little earlier in my testimony before this committee. We used those broad disparities as a basis for deciding whether or not discrimination occurred, and it didn't necessarily always show that. I have expressed that concern, and we made changes in the way that we operated at EEOC to address that concern and to solve that problem.

With respect to this case, I indicated immediately after I made that statement—it was an inadvertent statement and it was an unfortunate statement, and I said precisely that. And I think I said that in my last confirmation hearing or in the interview that I had—I can't remember—that it was an unfortunate statement. I do not believe that it either undermined the case or impeded the prosecution of the case. It was, again, an unfortunate statement, nor did it in any way undermine my commitment to pushing that case and financing that case.

We pushed to the point of having to choose between furloughing employees and financing that case. Although it didn't come to that, we had chosen or decided—I decided that we would furlough employees rather than underfinance that particular case.

Senator HEFLIN. Now, the age discrimination problem and the fact that Congress had to come in twice to pass laws to give people who had lapsed claims the right to pursue them causes some concern that has been gone into, basically because there was a charge against you, and it was made at your court of appeals hearing, too, at that time. First there were some 78 cases that had lapsed; later, continuing to grow, one figure was 900 and then 1,608 and then finally somebody came up with the idea of 13,000 of the cases. Your explanation, as I recall, was that you didn't know how the 13,000 came along and that you, as head of the agency, after Congress gave them the right to continue to sue, passed laws in effect eliminating the hurdle of the statute of limitations. You all sent out letters to those—over 2,000 letters went out pertaining to it.

In your explanation in the court of appeals—I don't believe I have heard it here—you raised the issue that there were two statutes of limitations and that there was confusion as to which one would apply; that there was a 2-year statute and there was a 3-year statute. And then came along the case of *TWA* v. *Thurston* that, in effect, strictly construed the 3-year statute. The 3-year statute was based on willfulness.

Now, there was some misunderstanding and confusion, not only in your office but in the district offices, the State and the local offices, pertaining to this. The statutes of limitations are always in the minds of a practicing lawyer. He gets a lawsuit, and he investigates, and he has got real fears that if the statute of limitations ran against him. His client couldn't pursue in court because of the

statute of limitations, and he would be subject to malpractice suits as well as losing for his client outright. And it is a thing that practicing lawyers sometimes wake up in the middle of the night in horror and dream of something like that. All practicing attorneys develop a methodology in order to prevent the statute of limitations from running on any case that is in their office. You try to develop it where you will be sure that it doesn't happen.

Now, in this case, let me ask you, was the issue of the statute of limitation an issue that was involved in the interpretation of this as to why these claims lapsed?

Judge THOMAS. It was early on. When I arrived at the EEOC, Senator, it was commonly felt that the agency had basically conflated the two statutes and considered the statute that really limited it to be the 3-year statute.

After *TWA* v. *Thurston*, there was certainly concern that you could no longer do this. The agency had interpreted willfulness to mean basically that if a company knew that it was covered by the Age Act, then any violation during that period was a willful violation. That is a generalization. That was basically the agency's view. So the agency simply responded to the 3-year statute. After *TWA* v. *Thurston*, the agency had to take a look at and be concerned about the 2-year statute.

Your view of the response to statutes of limitation is my view. I think I noted earlier in the hearings that I have made that midnight run to the office of the attorney general, to the attorney general's office. I wasn't in private practice, but you wake up in a cold sweat and you throw something over your pajamas and you run down to the office to make sure that you haven't missed the date for filing a notice of appeal or responding to interrogatories or what have you.

I felt that everyone responded when you heard "statute of limitations." You responded with fear or apprehension, et cetera.

That was not the case, however. The response wasn't always that way. It depended on the individuals in the particular offices, and that is not a criticism of all the individuals. But some individuals responded the way you and I responded. Some individuals did not respond. Indeed, some individuals said that the statutes were missed because it was a management decision, which horrified me that anyone could feel that way.

But we did eventually put in—some managers had their manual tickler system to show when the statute was running. What we had to do in headquarters was to help to develop an automated tickler system in the computer so that there was absolutely no reason why anyone could say that he or she didn't know that the statute of limitations was approaching.

But I would not pass off the change in the *TWA* v. *Thurston* ruling in the way that we viewed the statute of limitations as a reason for missing those statutes. It was a complicating factor. It was one of the many factors. But I don't think that there is any excuse for missing a statute of limitations. Indeed, when this whole matter came up, I offered none.

Senator HEFLIN. Well, in order to clarify a distinction between two statutes of limitation, isn't it from an administrative viewpoint, since this involved primarily an issue of whether or not you

or somebody can proceed to sue, whether you sue on behalf of them, whether the EEOC sues on behalf of, or whether they allow them to sue?

Now, it seems to me that any uncertainty would have called for a managerial approach to try to at least take the thinking don't take a chance on the third-year statute, you had better work on the 2-year statute if there is any question at all about it. Was there any activity on the part of you or your lawyers in the EEOC to so advise all people that were handling such claims on behalf of the EEOC?

Judge THOMAS. That was certainly my response, Senator. I didn't think that it made sense to rely on the 3-year statute of limitations. That may have been a secondary approach, but it certainly should not have been our primary approach.

We did, as I have indicated, I think in discussions with Senator Metzenbaum, that when I arrived at the agency, the agency didn't attempt to investigate most of the age charges. I don't know what the percentage is, but it was a small fraction of the charges that were actually investigated. Unlike title VII, the Age Discrimination in Employment Act does not require that there be an investigation. There were normally some attempts made at conciliating or reaching the employer, and the case was closed out by the agency in about 60 days, and the charging party was told to find a lawyer and pursue your case in court.

When I arrived at the agency, what we attempted to do as Commissioners was to recognize that we should put the age cases from an administrative standpoint on parity with our other cases; that is, we had an obligation to investigate them. Actually investigating them, however, took more time.

We realized that, and we attempted to inform our managers and to instruct them, cajole them, put it in their performance agreements, to get them to realize that the inventory had to be managed with this consideration in mind that there is a 2-year statute of limitations that must be taken into consideration, not just the first-in, first-out approach that had been used in the past.

That worked in many instances. In a number of instances, however, it did not work. We followed that up, again through performance agreements with management directives, as well as with requirements that they take into account age cases that are approaching the statute of limitations, that they move those to the head of the line. We did all those things.

The problem, however, was that in some offices there simply wasn't a response, an appropriate response. Hence, we missed the statute of limitations in a number of cases.

Senator HEFLIN. I believe my time is up.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge let me just add, your family deserves some kind of a special medal for patience, sitting through all of this, and we appreciate their doing that.

If I may get back to a question that you declined to answer, for reasons I understand, and that is the *Rust* v. *Sullivan* decision. But

what is involved there is something very basic, and that is whether the Federal Government can restrict speech if we fund something.

Let me take some hypothetical cases that you will not be faced with. The Federal Government funds libraries through the Library Services and Construction Act; just a small amount, but we provide some funding.

Would it be constitutional for the Federal Government to decide there are certain books—let's just say back when we viewed communism as an immediate threat, if the Federal Government decided you can't have any books by Karl Marx in the library because we provide funding. Would that be constitutional?

Judge THOMAS. Senator, I think that we could take an example like that, and I could offer an opinion on it and say that that would not be—that was a problem, a violation of the first amendment. But I think that the difficulty would be in offering an opinion on those kinds of examples would lead me back to *Rust* v. *Sullivan.* But let me make this point: I would be concerned by any effort—and I think that we all should be concerned that when the Government can, especially with the Government being involved in more and more parts of our lives every day, we should be concerned that if the Government funds or attaches strings that limits fundamental rights merely because of the receipt of those funds. I would be concerned about it, and I think as I noted earlier, I certainly would be concerned in this case that there would be some condition on the exercise of first amendment rights.

Senator SIMON. And I am not suggesting that—obviously you have not had a chance to look at anything in depth here. But to get a feel for where you stand, a little more of a feel than the generality that you just gave us, your off-the-top-of-your-head instinct, would the Government have the right to restrict what books they can have in a library?

Judge THOMAS. Without committing myself, Senator, could I——

Senator SIMON. Without committing yourself——

Judge THOMAS. I might——

Senator SIMON. I don't want you to commit yourself to doing certain things: I don't want you to be on the bench and think, well, I told the Senate committee this or that. But I am interested in knowing what your feeling is on the first amendment.

Judge THOMAS. Well, I would hope that the Government can't do that. I would have grave concerns if the Government can, through simply providing funding, undermine fundamental rights. It would be my hope that that could not happen.

Senator SIMON. All right. I have some other examples, but let me get to a more specific example that you were involved in at the EEOC. There was a man named Frank Quinn who was in charge of the San Francisco district. He was the district director. In 9 months he was going to retire. He had high ratings. He was asked by Newsweek magazine to comment, and he gave a comment that was not complimentary to the Washington office of the EEOC. And then he was transferred to the Birmingham office—meaning no disrespect to Birmingham here now. I may get in trouble with my colleague. He was transferred to the Birmingham office where they had had a vacancy for a full year.

He went into court, and a judge appointed by President Nixon, Judge Schnackey, in upholding Frank Quinn's right not to be transferred, said,

> We have, I think, an overly outraged reaction to the initial publication demonstrating at the very least deep anger at the temerity of anyone in Mr. Quinn's position to make the statement that he did. On the evidence before me, I can find absolutely no rational basis for the agency's conduct. All of the evidence tends to support Mr. Quinn's view that this was a deliberate, arbitrary, and capricious desire to punish him. I haven't the slightest doubt Quinn was transferred as punishment for the exercise of his First Amendment right.

Now, you may want to comment on the case. But the more fundamental question is: How do you view first amendment rights for Government employees?

Judge THOMAS. Senator, I fundamentally disagree with that statement. And I did then and I do now. When I arrived at EEOC, I established a policy and made it clear to all district directors, who are members of the Senior Executive Service, that they would be rotated. I had rotated some into headquarters from the field offices—in fact, one from Birmingham—and intended to rotate the others across the field.

The indication that this was in response to an article, I do not believe I have seen the statement in the article, and certainly it had no bearing whatsoever on my decision to move Mr. Quinn. I have stated that and would continue to state that. And if I did, I think it is inappropriate.

My own view is that individuals—I would hope that individuals who worked for me wouldn't feel the need to criticize me publicly, but I think they have the right to do so.

Senator SIMON. And they have the right to do that without being transferred or anything like that?

Judge THOMAS. I think so. But this case was not that point. Others have criticized me, and there certainly were no efforts against them. I think that this was confused in this case with a policy that I thought was important to the development of EEOC as an agency. When I arrived at the agency, the agency was stagnant. The agency needed some stimulation, and I believe that the agency needed to have the managers moved around, sort of stir up the waters somewhat. And I made that clear, and we did rotate managers and continue to rotate managers.

Senator SIMON. You can understand the judge's assumption, because it happened only a few days after the Newsweek article appeared, that he was transferred because of that.

Judge THOMAS. That has been quite some time, but I think that that had been in the works prior to the Newsweek article. I had made a number of decisions early on in my tenure and simply began to implement them. That had, from my standpoint, no relationship whatsoever. And I don't think—I don't remember that what he said was particularly offensive anyway.

Senator SIMON. You gave a talk to the Kansas City Bar Association in which you refer to the Newsweek article. You were unhappy with the Newsweek article, obviously. Do you happen to remember——

Judge THOMAS. But not the Quinn—I don't think I referred to Mr. Quinn. I thought that the article was off base, but I didn't refer to him, I don't think.

Senator SIMON. I don't have that here. I don't know. But in terms of basic freedom of speech, if an employee of any Federal agency speaks—and obviously some things are confidential, some things are classified. There are some limitations. But just because something would be embarrassing to an agency is not cause for restricting freedom of speech for a Government employee?

Judge THOMAS. It certainly wasn't from my standpoint, and I would be concerned if as an employee my speech was in some way impeded.

Senator SIMON. In an area where you have expressed your opinion here to the committee, on the death penalty—where I happen to be in the minority on this committee—two realities are a part of the imposition of the death penalty in our country. One is it is a penalty we reserve for people of limited means. If you have enough money, you hire the best attorneys; you never get the death penalty. The second reality is that it is much more likely to be applied to minorities. If you are black, Hispanic or Asian, you are more likely to get the death penalty.

We have executed in this country literally hundreds of blacks for killing whites. So far as I have been able to determine, my staff has been able to determine, only two whites have ever in the history of the country been executed for killing blacks.

If you were on the Court and the circumstances were such that you felt that economic circumstances dictated a lack of qualified counsel for someone who received the death penalty, or you were persuaded that the fact that a person was a minority was a factor in receiving the death penalty, what would your attitude be?

Judge THOMAS. Senator, it would be similar to the attitude I have now and that I expressed here. I don't know of any judge who could look out the back window of our courthouse and see busload after busload of young black males and not be worried and not be concerned and not be troubled. I think it is only exacerbated by the fact that it is the death penalty.

As I have noted earlier in these hearings, one of the reasons that it is so troubling is that it is a very fine line between my sitting here and being on that bus. And I think that any judge who has that obligation and that responsibility of adjudicating those cases and has that responsibility of reviewing those cases should be concerned if the death penalty is imposed based on socioeconomic status and certainly imposed on the basis or at least to a large extent disproportionately on the basis of race. It is certainly something that I am concerned about at this point and would continue to be concerned about as a judge.

Senator SIMON. And it would be something that you would have to weigh as a member of the Supreme Court. Am I reading you correctly?

Judge THOMAS. It is something that I certainly go there with in my mind and in my calculus when I think about these issues.

Senator SIMON. But it is not just that you go there with that in your mind. If you were convinced someone received the death penalty because he or she did not have adequate counsel, for example,

because of economic circumstances, would that be a factor that you would weigh, among others?

Judge THOMAS. I think it would be important for me to take that into account, Senator.

Senator SIMON. OK. Let me shift to a couple of loose strings. The Jay Parker/South Africa issue we have talked about. We have received one additional phone call from someone who verified that there was a staff meeting. We talked about it; you did not recall. Do you recall this any further upon reflection, or has anyone reminded you or anything at all?

Judge THOMAS. Senator, I have attempted to reflect on it. My recollection is as I have told you. I have attempted to try to understand where the confusion could come from. And I knew that Jay Parker, for example, represented one of the homelands. That could be a source of confusion as to whether or not he represented South Africa. I also knew that a colleague and friend of mine who worked with me here in the Senate and went on to other endeavors, as well as worked with me during the Reagan administration, represented South Africa. That was a matter of public knowledge.

I don't think—I do not remember or recall Jay Parker's involvement being a matter of public knowledge prior to my nomination. I certainly was not aware of it until the last few months.

The only confusion that I could think of, based on my own recollection, would be that he has had significant dealings in South Africa, and someone may have felt—or I may have imprecisely stated that, and they may have felt that he was representing South Africa. But I simply didn't know. I don't recall knowing, and I don't recall such a meeting.

Senator SIMON. Do you now or have you ever had any financial dealings with Jay Parker?

Judge THOMAS. No. We had no financial dealings. He is a friend of mine.

Senator SIMON. And, again, on recollection, you were not aware prior to your nomination and the publicity that came with it of any involvement on his part with the Government of South Africa other than the homelands?

Judge THOMAS. No, I was not. My recollection was that, again, a mutual friend of ours, a Bill Keyes, was representing—and that was public knowledge. He represented South Africa.

I was not aware of Mr. Parker's involvement, and I do not recall the meeting that you indicated. Again, there may have been confusion, as I have indicated, but I did not—I was in no way aware of that.

Senator SIMON. Thank you very much, Judge.

I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman.

I would like to commend you on your patience and open-mindedness during this hearing, particularly under circumstances which were at times trying.

Judge Thomas, I would like to give you one more opportunity to talk about what many of us are concerned about, and that is the

possibility that you have a philosophy that tends to change with your audience.

I would like to quote for you a part of a column that appeared this morning in the New York Times and then ask you if you wouldn't think about it for a moment and then comment on it, hopefully to enlighten us.

The most striking aspect of Judge Thomas' testimony was his disavowal of just about everything that he said in speeches made while he was Chairman of the EEOC. The strident right-wing message was appropriate to his role in a right-wing administration, he suggested, but he donned a new skin of impartiality when he became a judge. Indeed, Judge Thomas went further in his disavowal. He implied that he had made some of his conservative comments partly to please conservative audiences. That was his explanation for his praise for the extreme anti-abortion position of Lewis Lehrman. But if he tailored his philosophy to please his audiences in the past, might he not be doing so at this time in the Senate Caucus Room?

Judge THOMAS. Senator, there is much that has been said, but I don't think that I said that I tailored my message to please an audience. In fact, the Heritage speech was precisely the opposite of that, it was to make the audience uncomfortable. My explanation with respect to the Lew Lehrman reference was simply to convince the audience to re-look and revisit the issue of civil rights. The bulk of that speech, the first part of that speech is a criticism of conservatives as well as the Republican administration.

The second point I would like to make, Senator, is that I do think it is important to have be a member of the judiciary, as opposed to being a member of the executive branch. There is a significant difference, and I have not through my history at EEOC or on the bench or any place else attempted merely to please individuals. That has not been a suggestion of mine.

I was a member of the executive branch and I think I conducted myself as a member of the executive branch. I am a judge now, and I think I conduct myself as a judge.

Senator KOHL. But you said that there was a difference—and you said that consistently—between being a member of the executive branch and being a member of the judiciary. And certainly there is a difference, it is a simple fact. But you are being considered here to become a member of the Supreme Court, because of whatever your philosophy is—and we are attempting to get at that.

Now, are you saying that that philosophy has changed, as you moved from the executive branch to the judicial branch, or are you saying that you had a philosophy in the executive branch, but you come now to judiciary with no philosophy?

Judge THOMAS. I said that, I think I have indicated I engaged in ideological and political debates and discussions. I participated in debates and policymaking, I participated in debates between the two political branches. As a member of the judiciary, I do not think that ideology is important and I do not engage in those political or policymaking battles or discussions.

Senator KOHL. Just one more question and then we move on. I don't differentiate perhaps as much as you might between ideology and philosophy. I think that what we are saying here is we are asking ourselves and asking you whether the philosophy that you expressed when you were in the executive branch is the same philosophy that you have today.

Judge THOMAS. I am the same person, my outlook, I believe in our country, I believe in trying to look at a problem and solve that specific problem, to look at a statute or a case and be true to my obligations with respect to that statute or that case.

I do not believe, however, that there is a role in judging for the expressions of the kinds of personal views or the policymaking or the personal opinions that you have in the executive branch.

Senator KOHL. That is all right, but would you say that I can assume that, in general, the kinds of philosophies that you had expressed, however we interpret those, when you were in the executive branch, are not that dissimilar from the kinds of philosophies that you carry today?

Judge THOMAS. I am the same person. I think the role, again, the judicial philosophy versus being a policymaker is different. I think that there is an indication of the kind of person I am when I was in the executive branch and my outlook on life.

The only point that I am making is that, to the extent that those are political statements or policymaking statements, I don't think they are relevant in my role as a judge.

Senator KOHL. Thank you very much, Judge Thomas. I don't suppose I will be speaking to you again, at least not in this capacity. I found you to be an intelligent, bright, and humorous person.

With respect to the process itself, Mr. Chairman, I think that one of the things that has come out of this confirmation hearing is that we need to do as much as we can to ensure that the hearings in the future leave us all, at least most of us, with a little more definite feeling about what kind of a person, in terms of philosophy, we are voting on.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I have questions. It is my turn to come around. What I will do is I will ask a few of them and then I will yield to the Senator from Pennsylvania who has questions on his last round, and then I will conclude.

Judge I would like to go right back to methodology, if I may, without any preamble. I would like to talk to you about the *Michael H.* case, and famous footnote 6, if I may. I don't want to bore the listening public with the esoteric underpinnings of that debate, but let me just simply ask you: Do you concur with the rationale offered by Justice Scalia as to how one is to determine whether or not an interest asserted by a person before the court, an interest asserted that there is a fundamental right that that person has, whether or not you must go back and look at the most specific level of that interest as asserted, like he suggests, or as has historically or traditionally been viewed, a broader look back at the more general interest asserted, as Justice Kennedy and Justice O'Connor indicated, notwithstanding the fact they concurred in the opinion with Justice Scalia in the *Michael H.* case? Would you speak with me a little bit about that?

Judge THOMAS. Senator, again, that is a very recent case and I am in the position of not wanting to comment on that specifically, but I am very skeptical——

The CHAIRMAN. I am not asking you to comment on the case. I am asking you to comment on the footnote.

Judge THOMAS. I am skeptical, when one looks at tradition and history, to narrow the focus to the most specific tradition. I think that the effort should be to determine the appropriate tradition or the tradition that is most relevant to our inquiry, and to not take a cramped approach or narrow approach that could actually limit fundamental rights.

I think that Justice Kennedy's reference to *Loving* v. *Virginia* was a very catching reference in his reference and one——

The CHAIRMAN. Excuse me, Justice Kennedy's reference to *Loving* v. *Virginia?*

Judge THOMAS [continuing]. Was a very telling reference and one that certainly caught my attention. But I think that I would be skeptical of that kind of an approach, Senator, very skeptical of——

The CHAIRMAN. The Kennedy kind of approach?

Judge THOMAS. The Scalia approach.

The CHAIRMAN. I hope so. Justice Kennedy's references to *Loving* I think are—and there are other cases we could point to and not just *Loving*—as to whether or not we go back and look in history as to determine whether or not there is a protected fundamental right. In the case of *Michael H.*, the issue there, as you know as well or better than I do, was whether or not a father who, in fact, was the father by blood of the young person in question, whether or not he had any rights to visitation, notwithstanding the fact that the child was born at the time when the mother was married to another man. Justice Kennedy asserts that—Justice Scalia asserts that when you go back to determine whether or not there is a personal right to privacy of a father to be able to visit his child, that you go back and not look at whether or not fathers have those rights, but whether illegitimate fathers have those rights, and he concludes, as you well know, that nowhere in our English jurisprudential tradition are illegitimate fathers treated the way that "fathers are treated."

When you narrow the scope to look that way, you can come out with the ability to suggest that there is no historical background or tradition that protects illegitimate fathers, ergo, in *Loving* v. *Virginia,* as you know better than I, it was a case that ended miscegenation in this country, at least in Virginia and the country, and if you apply the Scalia method, you would go back and say is the right of marriage, one that we always look to, and Scalia says no, no, you don't look at marriage, you look at whether or not the miscegenation laws were legitimate, they have always been viewed as that in our unfortunate background, therefore. So, that is why it is so important, as you well know, and, as I understand it, you are not taken with the Scalia approach.

Judge THOMAS. Skeptical.

The CHAIRMAN. I hope you are more than skeptical, Judge.

Judge THOMAS. Well——

The CHAIRMAN. At any rate, let me move on, if I may, for a moment now to the issue of separation of powers, if I may, and go back to *Morrison* v. *Olson,* if I may. I won't bother you with the quotation. We have talked about it before, which is the quotation about *Morrison* being the most important case since the *Brown* v. *Board of Education.* We have talked about this passage several

times, and you talked about it with Senator Leahy, and I want to ask you why you thought the independent counsel case was the most important since *Brown*.

Your answer, if I understood it when we spoke about it the last time, was that you were addressing an audience for whom the topic of separation of powers would seem, to quote you, "obscure" or a topic that "doesn't excite people in the audience." Now, is that correct?

Judge THOMAS. And also it dealt with any case that dealt with the structure of our Government. For example, *INS* v. *Chadha* deals with the structure of our Government and the congressional veto. I think those are important cases, because I think the Supreme Court has very few cases directly addressing the structure of our Government.

The CHAIRMAN. I can understand the need, we all do in each of our businesses, you when you were in the executive branch and us in the legislative branch, trying to get the attention of an audience that may not want to pay attention to an esoteric subject. It never happens in these hearings, but it occasionally happens in other places, so I understand the technique, and I don't say that critically, I mean that sincerely.

I never did get around to asking you whether you actually do consider *Morrison* v. *Olson* the most important case since *Brown* v. *Board of Education*.

Judge THOMAS. I think it is one of the most important cases. I think it is among the important cases. Of course, I say that because I think the cases that deal with the structure of our Government are important cases.

The CHAIRMAN. Well, I am sure you know why I was drawn to this quote and comment, and it wasn't so much because it had a darn thing to do with *Brown* v. *Board of Education* and looking whether you thought something else was as important or the most important since then.

As you know, there is a group of people beyond yourself who consider the independent counsel case very important and maybe even the most important case since *Brown*, and I am thinking of the libertarians who are devotees of Mr. Epstein and others, those people who have two major items on their agenda and they state them very forthrightly. One is to use the takings clause of the fifth amendment to limit the power of society to regulate. You and I have talked about that. And the other is to limit the power of society to regulate by revitalizing the doctrine of separation of powers.

Now, when you gave that speech at the Pacific Research Institute, did you realize the significance of the independent counsel cases for the people with what I will characterize as with these views?

Judge THOMAS. This is the first I have heard of that. I have heard of the takings argument, but I haven't heard of the separation of powers argument.

The CHAIRMAN. Well, the reason why again it was brought to my attention, I am reading Solicitor General Fried's book, as we mentioned in another context, and Solicitor General Fried and I have had our little disagreements before this committee and he has

never been accused, at least in the circles I travel in, of being a liberal.

In the book he wrote about his years as Solicitor General in the Reagan administration, he refers to a group of executive branch employees, primarily in the Justice Department, whom he refers to as "Reagan revolutionaries." Professor Fried writes of the so-called revolutionaries and what they thought about the Independent Counsel case and why they thought it was such an outrage, such a horrible decision, that is, upholding the Independent Counsel.

But they also thought something else, he said. They thought that if they could get the Court to strike down the Independent Counsel statute, they would have a basis for striking down all independent agencies, because the rationale that allows the Independent Counsel case to be struck down would allow the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission, the Federal Reserve Board—which is one of their primary targets—to be struck down.

According to General Fried, this group wanted all of these agencies placed under the thumb of the President, rather than continuing to operate with a modicum of independence from the day-to-day political influence, and I quote from his book, on page 154, "Order and Law."

He says, "To the revolutionaries of the Reagan administration, the independence of the independent regulatory commissions, for instance, the ICC, the FTC, the FCC, the SEC, and, most importantly, the Federal Reserve Board, was on a fence against the principle of the unitary Executive and of the separation of powers."

"So," he goes on to say, "that is why *Morrison* was such a big deal to so many people, and still is to so many people, bright, attractive and energetic people who would like very much, nothing wrong about it, but would like very much to change the regulatory process in agencies of this country."

If Justice Scalia's opinion, the lone dissent that you found so remarkable—and that is your word, remarkable—in the *Morrison* case, had been the majority opinion, all of these agencies would be unconstitutional, if Scalia's dissent were the majority opinion, including the Federal Reserve Board, an independent agency that has served this country extraordinarily well in recent years, most might suggest, because the rationale of Scalia's opinion does not stop at the Independent Counsel statute, it would outlaw all independent agencies.

Now, Judge, do you believe that the separation of powers requires the abolition of independent agencies in the Federal Government?

Judge THOMAS. Senator, I have not thought that. In fact, I was on the other side of that debate, but let me just walk through it a second.

The CHAIRMAN. Please.

Judge THOMAS. EEOC was one of the rare independent regulatory agencies in the executive branch.

The CHAIRMAN. If I could stop you there, as you know, there was a debate at the outset as to whether or not EEOC was, in fact, truly an independent agency and designed to be one, unlike the FCC and others which clearly unequivocally were meant to have

independence in that the President could not dismiss without cause.

Judge THOMAS. Well, that debate about EEOC was, for all practical purposes, conceded in the Reorganization Act of 1978. My argument, as the Chairman of EEOC, was that EEOC needed to be independent, that it was enormously difficult, as one of my Commissioners put it, we had the worst of both worlds. We were one of the few independent agencies or commissions that had to have its regulations cleared through the Office of Management and Budget and engage in a process that the other executive branch agencies had to engage in, and there were problems with that, so I advocated just the opposite, that it be truly independent.

I was aware of the academic debate years ago, particularly after the New Deal era, concerning administrative agencies. I did not participate in that debate during my chairmanship of EEOC, and I really just thought it was nothing more than the debate that you would place next to the gold standard debate.

The CHAIRMAN. It is alive and well, I must tell you. [Laughter.]

Judge THOMAS. There are some limits to the things that I can spend my time on, but I was not involved in that debate and was not aware that there was a relationship or there was a second agenda to *Morrison* v. *Olson.* This is news to me, as you explain it today.

The CHAIRMAN. Well, Judge, in light of what you know now, you do understand why this is such an important issue to question you on, don't you? If you look again at the dissent in Justice Scalia's dissent—and he has been consistent, by the way, this is not a new notion for Justice Scalia—he takes separation literally and, as you well know, he is in a position where he suggests that articles I, II, and III set out the parameters for each of the branches and they do it very precisely, and that any branch that in any way, voluntarily or involuntarily, treads on the prerogative of another, in this case if there is any executive capacity or judicial capacity that any of these agencies possess, then, in fact, they have gone beyond what is legitimately authorized in the Constitution under the separation of powers doctrine, doctrine, I might add, that is not anywhere mentioned explicitly in the Constitution.

So, this is a big deal, and if there were five Justice Scalias on the bench, we would find ourselves with a radically different means by which we would be able to have this Government function. I am not being pejorative, when I say that. For argument purposes, he may be right, but it would radically change it.

The FCC has judicial functions as well as legislative functions, it has rulemaking capacity. He argues, no, no, rulemaking capacity, that's legislative, it can't be done. In *Morrison,* he argues, wait a minute, you still have the—you put, in effect, the executive branch in the position where it has to assign a special counsel, so notwithstanding the fact you allegedly give independence, whether or not to determine whether or not such counsel exists, you have already stepped over the line, therefore, it is unconstitutional, because the legislature is taking on some executive function.

I am not being facetious when I say this, but do you understand why his dissent is so significant, if it were to be the majority view of the Court, or do you disagree with my assessment of his dissent?

Judge THOMAS. Well, in the context that you explain, I can understand your concern. My quote and my reference in the speech was that with respect to the individual rights that were affected in this particular case, but——

The CHAIRMAN. I will accept that on its face, because I believe you mean that and, believe it or not, I am delighted to hear that is the case, and not the larger case, because it is a—when I say agenda, I don't mean it again to sound so pejorative, when I talk about an agenda out there unrelated to you, but I think we should understand that there is a good deal of intellectual ferment.

I must admit, one of the reasons why the right has been so successful is there is much more intellectual ferment on the right than there is on the left today. I think the left has fallen back on its laurels in many ways. It finds there is no need to come up with new methods and means by which to promote its objectives, but that is not lacking on the right and there is an explicit desire, not at all denied by any of the young intellectuals who wish to see a change, that the way to deal with too much Government bureaucracy and regulation is to eliminate the regulatory bodies that exist, thereby giving the Executive total control over those elements of regulation, as opposed to the legislative bodies.

I won't bore you with that. I accept your answer for what it is to be the truth, and I will at this moment, unless you would like to add anything, I will yield to my colleague in a moment.

Judge THOMAS. No.

The CHAIRMAN. I suggest we break and give you a break, unless you have a comment to make on what I said, and then I will yield to my colleague when we come back, Senator Specter, and we will have you question then, Senator.

We will recess, to give the witness time to stretch his legs a little bit, about 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Thomas, in my last round of questions, I was discussing with you the topic of the revisionist court, which is a name that I affix to our current Court because it is not a conservative court; it is a revisionist court, as I see it. And I want to discuss with you two cases which are illustrative of its being a revisionist court because they are two 1971 opinions by a unanimous Supreme Court, with the opinions being written by Chief Justice Burger in a very conservative thrust.

One of the cases is *Swann* versus the school districts, and I ask you about this case because you had written on the subject in the Boaz edition of "Assessing the Reagan Years." And you complained about "*Brown* not only ended segregation but required school integration."

My first question to you is: If you end segregation, doesn't it necessarily mean that you are requiring school integration?

Judge THOMAS. Well, I guess semantically the reference, my own reference to those different terms would have been that desegregation would be the ability to simply not be barred from certain ac-

tivity and integration would be more positive; that is, you are required to have a certain percentage or certain number.

Senator SPECTER. Judge Thomas, does your criticism of the *Swann* case signify another one of the illustrations of your advocacy from the executive branch, or is this something you really think should be changed and something you would try to change if confirmed for the Supreme Court?

Judge THOMAS. Senator, the answer to the second portion of your question is the same as I have said in other areas. I have no agenda to change existing case law. That is not my predisposition, and it is not the way that I approach my job.

The concern that a number of us raise with respect to just as individuals in this society, as individuals who have watched the changes in our country, was simply that if we could demonstrate that the educational opportunities were improving for minorities, then whether it is busing or any other technique, then use it, but make sure that we are helping these young kids. That was totally out of the legal context. That just simply would have been a preference that I expressed as a citizen.

I have not reviewed, gone back and looked at *Swann* or the other cases and made any determination that would undermine my ability to look at those cases impartially. And I certainly don't have a predisposition that precludes me in any way from looking at those cases in an objective manner.

Senator SPECTER. Judge Thomas, let me pick up the second unanimous opinion, again written by Chief Justice Burger in 1971, which I know you have reviewed, and that is *Griggs,* which has been an enormous source of controversy. It has occupied a tremendous amount of time by the Members of Congress, by the President. It has occupied almost as much time for Senator Danforth as your confirmation hearings have occupied.

This is a case which I have commented on when we have considered legislation to change the *Ward's Cove* decision because I think it is a very serious matter when you have a statute enacted, as the Civil Rights Act was in 1964, and you have a 1971 unanimous Supreme Court decision written by the Chief Justice, handling many issues, two of which are the definition of business necessity and the second of which is the burden of proof. And then 18 years later, by a 5-to-4 decision, as I read *Ward's Cove,* that law has changed. Not interpreted but changed. And four of the five Justices who voted in *Ward's Cove* to change the law put their hands on their Bible in the confirmation hearings in the course of the past decade and swore not to change the law but to interpret the law. And I think if there is any principle which is rock-bed we all agree to among the 14 of us here and the 100 in the Senate, it is that the Supreme Court ought to interpret the law and not make law.

The Court in *Griggs* said that the touchstone is business necessity, and in *Ward's Cove,* the Court said that there is "no requirement that the challenged practice be 'essential' or 'indispensible.' "

Now, this is shortcutting a very extensive amount of complicated discussion, but the essence of a defense was business necessity in *Griggs* and in *Ward's Cover* they say it need not be essential, which is about as direct as you can have on a change in language.

When you testified before the Judiciary Committee on your confirmation for the District of Columbia, I had asked you about a series of cases, and you had said, in part, "There is a definite change in the burdens under *Ward's Cove.*"

Is there any doubt, Judge Thomas, that *Ward's Cove* overruled the *Griggs* case?

Judge THOMAS. Senator, I think that if the Court had intended to overrule it, I would hope that it would have done so explicitly. When I was Chairman of EEOC and, as you indicate, when I appeared before this committee the last time, you asked me about this case. Our response at EEOC, when we were initially involved in this, was that we should have simply—the Supreme Court case should only have involved whether or not there was a prima facie case. That was EEOC's official response.

Our reaction to the ruling—and I was at EEOC only a short time after the ruling—was that there was a change in the business necessity test. That was our reaction. I was not there long enough to determine precisely the extent to which there was this change, but that was our reaction at the time. And I have not since I have been a judge, of course, revisited those questions.

Senator SPECTER. Well, that is one of the two questions that I told you in our brief meeting on August 1, that I would ask you, only two, the questions about Korea and the question about *Ward's Cove* reversing the *Griggs* case. And I would agree with you that it would be preferable in the sense if it is explicit, but I think the way this case has come down, it is a very plain conclusion.

My question to you is: Do you think that it is appropriate for the Supreme Court, given the underlying premise that the Court is to interpret law rather than make law, where the Congress has passed a law like the Civil Rights Act in 1964, and a unanimous Supreme Court interprets it in *Griggs,* and Congress leaves that law unchanged, and in *Ward's Cove* the law is changed? Is that appropriate?

Judge THOMAS. Well, as I indicated, Senator, my concern would be that in those instances in which there is an interpretation on the books or in case law and Congress has not seen fit to readdress that in a statutory change or statutory amendment, then it seems as though that there should be less of an inclination to want to revisit those issues, as compared, of course, or contrasted with constitutional issues.

I can't say—and I don't think it is appropriate for me to place a normative judgment on whether or not it is appropriate or not. I would be, as a judge, concerned about changing, as I have said in my discussions of stare decisis, existing interpretation that has been long standing, that has been——

Senator SPECTER. What do you mean by "normative," Judge Thomas?

Judge THOMAS. Appropriate or putting a value judgment of some sort on it.

My concern would be that in making those kinds of changes that we are not paying sufficient heed to the principle of stare decisis.

Senator SPECTER. Well, I think that this is one of the central issues which has been raised in your confirmation hearings. I accept your statement about your previous comments as to the lack

of wisdom in the Congress, but your commitment to interpret the law and not make new law. And it seems to me that this is a classical illustration of the Court changing the law and making law, as opposed to its function to interpret the law.

I was pleased to hear your comment about the dissenting opinion by Justice Marshall in the *Payne* case, which involved the decision last term which overturned two very recent U.S. Supreme Court decisions when, as I heard you say, Justice Marshall's decision was a "stern admonishment." Were those the words you used?

Judge THOMAS. I think "stern admonition."

Senator SPECTER. "Stern admonition." Do you agree with Justice Marshall's dissent?

Judge THOMAS. I would like to—I think it would be inappropriate for me, Senator, to agree or disagree with it.

Senator SPECTER. Why?

Judge THOMAS. I was certainly affected by it. I agree with his statements concerning stare decisis to the extent that I suggested here. I think that judges should be very concerned that their personal opinions are not the basis or their clout is not the basis for making decisions.

Senator SPECTER. Well, do you agree with Justice Marshall's assertion that "Power, not reason, is the new currency of this Court's decisionmaking," his opening statement in *Payne*?

Judge THOMAS. I would, Senator, refrain from agreeing or disagreeing with that. I agree that we should be concerned and be aware of the principle of stare decisis and that we should guard against making decisions as judges based on the number of votes we have.

Senator SPECTER. Well, I won't press you further on it then. But let me ask you if you agree that property and contract rights have no higher status than personal liberties because the majority opinion put property rights, contract rights on a higher level, saying that stare decisis should be followed—that is, a precedent should be followed, and more attention should be changed to not make the modification if there were property rights or contract rights contrasted with personal liberties. Would you at least put personal liberties on the same level with property and contract rights in following precedents?

Judge THOMAS. The answer to your question, Senator, is yes. I don't understand the quote. It makes no—the statement in, I think, Justice Rehnquist's opinion? It makes no sense to me. But I would—my answer to your question would be yes.

Senator SPECTER. Thank you.

Let me move, and very briefly because there is not a great deal of time, to a very complicated subject and just ask one question about it. That is the subject of federalism, and it is this: Does our modern Constitution, as it has been interpreted, place any restriction on Federal power vis-a-vis the States? Or is the political answer by Congress now the measure of the constitutional power issue?

Judge THOMAS. Senator, I don't know whether we know what the limits are. I think we realize that there is much more involvement on the part of the National Government in our day-to-day affairs,

certainly through the 14th amendment and through the commerce clause.

I think that that issue and similar issues come into focus in cases such as the *Garcia* case, and I think that that is something that will continue to be explored and debated in the judicial arena, as well as, I am sure, in this body and at State government level.

Senator SPECTER. So, you think the commerce clause might not have the full sweep of enabling the Congress to do what it chooses in the field of commerce and regulatory and legislative power?

Judge THOMAS. I don't question the current development of the commerce clause, Senator. As I have noted earlier, my point is that I don't think that any of us know precisely what the limits are now, with the advances in communications, with the increased role of the Federal Government, with the increased involvement of the Federal Government in our day-to-day lives. I think that is something that certainly was at least to some extent a concern in the *Garcia* case.

Senator SPECTER. Judge Thomas, there were two major cases decided relatively recently on the equal protection clause, *Metro* v. *Federal Communications Commission*, which was congressional action, and *Richmond* v. *Crawson* which was a city council action. My question to you is, in applying the equal protection clause, does it make any difference whether the legislative enactment comes from the Congress, as opposed to a city council?

Judge THOMAS. Senator, I think that *Metro Broadcasting,* of course, used the equal protection analysis, but it was a fifth amendment case. The Court has made a distinction in *Crawson,* as well as in *Metro*, that when the race- or gender-based policy, I think race-based policy in these cases, were as a result of Congress' effort, the level of scrutiny is lower than it is if it is on a policy that is developed by a State or local government.

Senator SPECTER. Well, the fifth amendment due process clause, of course, picks up the equal protection clause of the 14th amendment——

Judge THOMAS. That's right.

Senator SPECTER [continuing]. So the analysis would be the same as the equal protection.

Judge THOMAS. That's right.

Senator SPECTER. So, you would accord greater strength or latitude to a congressional enactment, as opposed to a city council enactment?

Judge THOMAS. That's right, that is under existing case law, that's the approach.

Senator SPECTER. Let me cut through quite a lot of discussion with, again, a very direct question, without getting into the undergirdings of the opinion in *Metro Broadcasting*, would you agree with this succinct statement from Justice Stevens' concurring opinion, at the very start, in *Metro*: "Today, the Court squarely rejects the proposition that a government decision that rests on a racial classification is never permissible, except as a remedy for a past wrong."

Judge THOMAS. That's the state of the law.

Senator SPECTER. You agree with that state of the law?

Judge THOMAS. I have no reason to disagree with it.

Senator SPECTER. All right. That is a very important point and I am glad to hear you say that, because this really goes right to a core of a good bit of your writing.

Judge THOMAS. Well, it doesn't, as I mean that as a judge, Senator. I have had no basis as a judge to disagree with it.

Senator SPECTER. No, no, I am referring to the writings prior to the time you became a judge.

Judge THOMAS. Well, that is a policymaking function, and I——

Senator SPECTER. So, that was a different lifetime than all of this——

Judge THOMAS. Well, I have to adjudicate these as a judge and I know that is a distinction that some seem to think is troublesome, but it is a very, very important distinction for me.

The CHAIRMAN. Will the Senator yield on that point?

Senator SPECTER. Yes.

The CHAIRMAN. Not the case law, but the point about a judge. Judge, you are going to be the judge, you are going to be a judge who is not bound by stare decisis, has nothing at all that would bind you other than your conscience. And so I am a little bit edgy when you give an answer and you say, well, that's the policy, as if you are still going to be a circuit court of appeals judge, which means you have to follow that policy.

You are going to take a philosophy to the Court with you, as well, and you are not limited, as I understand it, in any way, including the methodology you have indicated you would apply to great questions of the day, from reaching a conclusion different than that which the Court has reached thus far. So I don't know why you can't tell us with a little more certainty in the case the Senator just laid out as the state of the law, because it is a big deal, whether you agree with it or not.

Judge THOMAS. Well, I understand that, Mr. Chairman, but what I have attempted to do is to not agree or disagree with existing cases.

The CHAIRMAN. You are doing very well at that.

Judge THOMAS. The point that I am making or I have tried to make is that I do not approach these cases with any desire to change them, and I have tried to indicate that, to the extent that individuals feel, well, I am foreclosed from a——

The CHAIRMAN. If you had a desire to change it, would you tell us?

Judge THOMAS. I don't think so. That would be—— [Laughter.]

The CHAIRMAN. That is what worries me, Judge.

Judge THOMAS. But the——

Senator SPECTER. Was that an "I don't think so"?

Judge THOMAS. I think the point that I am trying to make, Mr. Chairman and Senator Specter, is that when I say I don't have an agenda, I mean I don't have an agenda. I operate that way as a court of appeals judge and that's the way I will function if I am fortunate enough to be confirmed as a member of the Supreme Court.

The CHAIRMAN. Thank you, Senator.

Senator SPECTER. Senator Biden, let me amplify Judge Thomas' answer for you.

The CHAIRMAN. I would appreciate it.

Senator SPECTER. He is testifying that he is not going to make policy as a Supreme Court Justice, if confirmed. He has written extensively that the courts have been thrust into a policymaking position and that the courts have made policy. He has disagreed with the policy and has stated that he would change a lot of law from an advocate's position on policy, saying, for example, in *Johnson* v. *Santa Clara*, that the dissent by Justice Scalia was preferable and saying, in another context, although not totally approving it, that one quick fix is to appoint new Justices to change the approach.

He is saying in these hearings, as I understand it, that all of that policy consideration that you were commenting about in those many speeches is a thing of the past, and you talked about that solely as an advocate.

The CHAIRMAN. Senator, you understand what concerns me. If I were a judge——

Senator SPECTER. Let me finish for him, Senator.

The CHAIRMAN. I leave those usually for Senator Hatch.

Senator SPECTER. I object. [Laughter.]

The CHAIRMAN. If he were employing me as a judge, in good faith, to change the position of the law, because he felt in good faith it was in my power to do so as a judge, and then he became a judge and didn't follow his own advice as to what he in good faith was giving me that was within my power to do, I would wonder about that. But that is my confusion and I will have to resolve that, but I would be delighted to hear more of your explanation, if you would like to give it.

Senator SPECTER. Well, to finish my question for you, Judge Thomas, which is really an understanding of mine as to what you are saying here, you are saying you are going to do your level best not to make policy. You are making a commitment not to make policy, you don't think that is a judge's function, and it is an about-face from a lot of what you have written.

Senator Metzenbaum earlier made a comment that he is disturbed by the position you have taken in disavowing much of what you have spoken about in your tenure as Chairman of EEOC, contrasted with your background and your roots, and I think that is something that this committee has to consider and the Senate has to consider. I am not so sure but what your roots are not more important in trying to predict what you will do, if confirmed, than your writings. Your writings and your answers are at loggerheads, they are inconsistent with what has been said.

You had written earlier in your career that you thought flexible goals and timetables were appropriate, and you changed that. Judge Thomas, isn't it entirely possible you could change your mind again and find that timetable and goals are the preferable course?

Judge THOMAS. Senator, what I have attempted to do here is to demonstrate that, in any number of areas, certainly the transition from policymaker to judge is an important transition. In specific areas, I have attempted to demonstrate, even when I have in the policymaking area strongly held views, that I have always looked to expand and to grow and to understand the counterarguments, not to simply reinforce my own.

There is always a possibility that someone who is open to argument, who thinks about issues, who is receptive to different points of views, there is not only a possibility, but a hope that person would grow and develop, and I hope that, in a positive way, that I would continue as a person to grow and develop.

Senator SPECTER. Judge Thomas, we have seen lots of changes of positions in the course of the hearings in the 10 or 11 years that I have been here, and I don't know any way to stop the Supreme Court of the United States from functioning as a superlegislature, regardless of what is said here, so we have to make an assessment of the whole man. But I understand what your statement is, that you agree with a very critical aspect as to what Justice Stevens defines on the *Metro* case. It is a very core issue and you don't have any intent at the moment to change it. More than that, what can be said.

Let me pick up with one other aspect of what Senator Metzenbaum had questioned you about. He had referred to a speech you made in San Bernardino, on April 25, 1988, and picked out—and this is illustrative of much of what you have written, and when I say picked out, I don't mean extracted out of context—"Increasingly, they are being used by demagogues who hope to harness the anger of the so-called underclass for the purpose of utilizing it as a weapon in their political agenda."

I had made an abbreviated comment last week about your status as a role model and the fact that politics is involved at many levels of the confirmation proceeding, and at most of those levels I think it is appropriate. And one of the items which concerns me that I raise in a positive sense when I was talking about Professor Carter, is that you would be serving as a role model. You will be serving as a role model for young African-Americans who would look to the success you have achieved in terms of doing it entirely on your own, and that might not be something that many of the traditional African-American leaders want to hear.

Your speeches are full of comments about their being pro-Government and wanting the Government to have a larger role. But I think it is a very healthy thing, whether you are right or whether you are wrong, to have that other ideas put into the marketplace.

I had commented, and somebody didn't understand what I was saying when I had called you, after I read a speech you made after the 1984 election, that African-Americans were not as active in the Republican Party as they should be, entirely appropriate at that time. You weren't a judge. We sat down and talked about it, and I think it would be a very healthy thing for my State, for the city of Philadelphia, to have a two-party system, and to the extent there is a role model here and you have said that, given a chance, blacks would come to the conservative cause. That is not the element for my decision, I repeat, but that is a lurking undercurrent which I think is worthwhile to put squarely on top of the green-felt table here today.

A final roundup, Judge Thomas, as my time is almost up and I know your answers to these questions, because we have discussed them at your confirmation hearing on the court of appeals, but I think they are very important, and that is rockbed on *Marbury* v.

Madison, that the Supreme Court has the last word, no doubt in your mind about that.

Judge THOMAS. No doubt, Senator.

Senator SPECTER. You are not going to revisit that question.

The other one which I consider to be very important is the issue of court stripping. During my tenure in the U.S. Senate, there have been efforts to take away the jurisdiction of the Federal court on constitutional issues, and I just want to be sure that, if confirmed, you would not countenance that kind of a major change in our constitutional government.

Judge THOMAS. I think we discussed that the last time, and I think that my position is the same, that I would not.

Senator SPECTER. Thank you very much, Judge Thomas. I think about these hearings and the kinds of questioning, I think about the old case of *Ashcraft* v. *Tennessee*, which ruled unconstitutional relay questioning. You certainly had to do a lot of that here today, and I commend you for your stamina and I thank you for your answers.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Does anyone on this side of the aisle have any further questions at all for the judge?

[No response.]

The CHAIRMAN. I am sure the judge appreciates that.

I yield to my colleague from South Carolina, Senator Thurmond.

Senator THURMOND. Judge, I just want to ask you one question. There has been a lot of talk here about making policy. Under the Constitution, the Congress makes the law. The executive branch, headed by the President, administers the law, and executes the law. The judicial branch interprets the law. This should not be a question of courts making laws. Courts have done that, but they should not have done it. This should not be a question of making policy. A judge's job is to construe and to interpret the law. Judge Thomas, is that the way you see your responsibility?

Judge THOMAS. That is the way I see it, Senator.

Senator THURMOND. That is a good answer, and that is the correct answer. [Laughter.]

Now, Judge, we are about through here. We are going to wind up.

Mr. Chairman, yesterday the Washington Post ran an editorial which I ask unanimous consent be placed in the record. Briefly, I would like to quote from it. It states: "[Judge Thomas] will have a clearer sense of discrimination and its remedies that any other member of the Court * * * on the strength of the hearings so far, we think he should be confirmed."

The CHAIRMAN. Without objection, it will be placed in the record.

[The article follows:]

C6 SUNDAY, SEPTEMBER 15, 1991

The Washington Post

AN INDEPENDENT NEWSPAPER

The Thomas Hearings

ONE OF the truly unsettled questions in American politics is how a prospective justice of the Supreme Court should be interrogated and judged by those members of the U.S. Senate most responsible for his confirmation. If you doubt this, only recall the hearings held and the arguments generated when the last several nominees were up for consideration. It is still pretty widely accepted that a president has a right to choose justices who reflect his own philosophical predisposition and that if the nominee is to be rejected it should be on some other grounds, grounds of moral, mental or professional disqualification. It is also held, and we think rightly, that the nominee should not be required to tip his or her hand on specific decisions likely to be made in the future. These are the givens. The problem is that there are those who a) don't accept them but b) rarely say so, rarely assert that they just will not vote for someone whose political philosophy they disagree with; so they oppose in other ways.

They try to marginalize, caricature or morally discredit the nominee. Neither political party has a monopoly on this approach—it just depends which is making the nomination and which is called upon to approve it. What ensues are often essentially trick questions, which generate trick answers. Everyone on all sides becomes surpassingly cagey, figuring how the issue or exchange, is going to play, what the public relations traps are and so on. Also across the political spectrum, everyone has gotten pretty practiced and good at all this, which is what accounts for the very gamelike quality of the procedure. It's nobody's fault and everybody's fault, and it has been very much apparent in the Clarence Thomas hearings and the arguments they have inspired in the press and among lobbying groups in the past week, just as it was in the hearings of his recent predecessors.

We don't want to be too hard on the procedure; it is true that in the past week there were some interesting, even illuminating exchanges and that some things became clearer, not murkier as a result. But there was also much adjustment of perspective in keeping with the two sides' new imperatives. It was, for example, said by critics of Judge Thomas that he and his supporters dwelt at far too great length on his personal background, his experience of discrimination and poverty and struggle, as a qualification for the job—as distinct from the requisite legal experience. His supporters, naturally, challenged this complaint. The last time around, they were on opposite sides: the critics of New Hampshire's bookish bachelor, David Souter, had much to say about how his limited life experience would likely inhibit, even deform, his ability to understand the cases before him, never mind the extent of his judicial background—while the Souter supporters took the other line.

Did Judge Thomas modulate, trim, bob and weave during the questioning? Well of course he did. From time to time, it seemed to us he dodged excessively, even though you could construct a defense of his extreme defensiveness in light of some of the traplike questioning. We think the charge of total and instantaneous conversion is not fair, however. For example, some of the things Judge Thomas said on the agitated matter of natural law had been said to this same committee by him at his hearing in February of 1990, when he was appointed to the U.S. Court of Appeals. Specifically he had told the senators: "But recognizing that natural rights is a philosophical, historical context of the Constitution is not to say that I have abandoned the methodology of constitutional interpretation used by the Supreme Court. In applying the Constitution, I think I would have to resort to the approaches that the Supreme Court has used. I would have to look at the texture of the Constitution, the structure. I would have to look at the prior Supreme Court precedents on those matters."

Our own sense, on the strength of what we know of his record and the testimony given so far, is that Clarence Thomas is qualified to sit on the court. He is surely not the most eminent jurist who could have been selected, but neither have many of his predecessors been. His views, particularly on what are called broad remedies in civil rights cases, are conservative. An administration whose views are also conservative in this area is unlikely to produce any other kind of nominee. It is not clear to us that in every respect these views are wrong or that Judge Thomas's mind is closed, and in any case, in its episodic resistance, the Judiciary Committee has cleared with scant attention or dissent nominees, now justices, whose similar views on the subject are equally strong or stronger.

Nor do we think Judge Thomas comes to the court or this point in his life with a malign or distorted agenda. Quite the contrary. There has perhaps been too much talk about how he beat the odds and rose out of poverty and segregation in rural Georgia 40 years ago. Maybe not even he can be sure of all the effects this had on him. But one thing is sure: He will have a clearer sense of discrimination and its remedies than any other member of the court, any other nominee this administration is likely to send up—and any of the members of the Judiciary Committee now judging him. There seems also to be a streak of individualism in him, a turn of mind that will not easily accede to the prejudices and popular passions that sweep the day. On the strength of the hearings so far, we think he should be confirmed.

Senator THURMOND. Briefly I would like to just quote two sentences. Here it is speaking of Judge Thomas. It states Judge Thomas "will have a clearer sense of discrimination and its remedies than any other member of the Court." In another place in the editorial, in the last sentence, "On the strength of the hearings so far, we think he should be confirmed."

I just wanted to put that editorial in the record. That is coming from the Washington Post, Mr. Chairman. [Laughter.]

The CHAIRMAN. I say to my colleague, I am certain the Post is delighted that you are praising them.

Senator THURMOND. It isn't so often I agree with them. I want to give them credit when they deserve it.

Mr. Chairman, I ask unanimous consent that several articles here, just three of them, one is in the Washington Post of August 6, 1991, "The NAACP is Wrong on Thomas," by Margaret Bush Wilson. Another one is the Washington Post, July 16, 1991, "The Clarence Thomas I Know," by Allen Moore. Another one is from the Washington Post of July 17, 1991, "Talking with Thomas for 10 Years," by Constance Berry Newman.

I ask unanimous consent these appear in the record.

The CHAIRMAN. Without objection, they will all appear in the record.

[The three articles follow:]

7-16-91

THE WASHINGTON POST
7/16/91

Allen Moore

The Clarence Thomas I Know

I have been reading and hearing a lot about Clarence Thomas these days. Some of it makes me wonder: Can this be the same Clarence Thomas who worked for me in Jack Danforth's office 12 years ago and has been my friend ever since?

The man I read about has been called an "arch-conservative" who has "forgotten where he came from," who believes "affirmative action is like heroin," whose seven years as chairman of the Equal Employment Opportunity Commission were "the most retrograde in its history," whose first marriage ended in a "messy divorce that deserves scrutiny," whose "opposition to abortion is well-known," whose "allegiance to the pope" should be examined, whose actions are "guided by political calculation," and who is "harshly judgmental and self-righteous rather than compassionate and empathetic."

The Clarence Thomas I know is a caring, decent, honest, bright, good-humored, modest and thoughtful father, husband and public servant who has already come farther in 43 years than most of us will in a lifetime.

The president did his nominee no favor when he said race was not a factor in the nomination. Of course it was, and Thomas readily admits it, just as he acknowledges that race played a role in his selection for other jobs along the way. He has never denied his indebtedness to, or admiration for, those, such as Justice Thurgood Marshall, who helped open such doors. He does not blindly oppose the notion of taking race into consideration for hiring, promotion or admissions decisions. What he does oppose are rigid numerical goals and quotas, which he considers divisive and unfair.

When he gets a chance to fully explain his views in Senate hearings, he will challenge his listeners to think beyond platitudes and conventional orthodoxy. Clarence Thomas has always supported the idea of giving preferential treatment to the truly disadvantaged, especially minorities, rather than to those from middle- or upper middle-class backgrounds who happen to be members of a targeted minority group. To do otherwise risks stigmatizing those favored—to make it appear as if they are incapable of competing fairly. It also can put the unprepared in situations where they are destined to fail. "God helps those who help themselves," Clarence might say, encouraging self-help and self-reliance. Martin Luther King Jr., Malcolm X and Jesse Jackson have stressed such themes.

Regarding his feelings about the pope, I believe Clarence stopped being a practicing Catholic when he left the seminary almost 25 years ago. In recent years, he has attended a Methodist church, a Christian church and, most recently, an Episcopal church.

I don't know how he feels about abortion, but I would be very surprised if he didn't have an open mind on *Roe v. Wade*. Many liberals and conservatives on both sides of the abortion issue acknowledge the vulnerability of that decision on purely legal grounds, but I personally wouldn't bet the ranch on how he would come down on the issue.

I know something about Thomas's first marriage because I spent many hours talking with him as it broke apart. He was tormented both about breaking his wedding vows and about the impact of the divorce on his young son. He sought me out for advice because I was a divorced father with two well-adjusted children. His divorce was handled amicably, with Clarence given undisputed primary custody of his son. Both parents have played a major role in his upbringing, and all parties have great respect for each other.

Clarence's record as EEOC chairman deserves close scrutiny, just as it did when he was renominated and reconfirmed for a second term

as chairman, and just as it did when he was nominated and confirmed to his seat on the D.C. Circuit Court of Appeals. The record will speak for itself, but someone should also look inside the agency to find out how people feel about Thomas the man and the leader.

Evan Kemp, his successor as chairman, marvels at what Thomas did with a historically underfunded agency that saw its budget cut nine out of 10 times in the 1980s. (Usually Congress cut the president's request, then beats up the agency for its budget-related shortcomings.) Clarence Thomas inherited a poorly managed, dispirited agency whose employees were embarrassed to admit where they worked. His legacy, according to Kemp, is that employees are now proud to work at the EEOC and even named the new headquarters building after him. Nonetheless, says Kemp, "Clarence won't get the credit that is his due; I will." People throughout the agency sing Thomas's praises—his dedication, his professional standards, his extraordinary sensitivity to and support of the "little people," and his inspiration to employees at all levels.

The suggestion that his actions have been politically motivated is laughable. This is not a political animal. His passionate, behind-the-scenes battles with the White House and Justice Department conservatives during the Reagan years were hardly politic. In addition, several times through the years, I strongly advised him to approach his detractors both on and off the Hill. "They attacked me without knowing the facts," he would say, "and it would be hypocritical to approach them." This is a man who advanced in a political environment in spite of, not because of, his political skills.

Perhaps the most absurd charge leveled at Thomas is that "he forgot where he came from." Thomas's professional and personal life, not to mention his conscience, wouldn't permit him to forget his roots if he wanted to. Neither would the world around him. After lunch a few weeks ago, he and I were strolling around downtown Washington. He suddenly realized he was late for an appointment and asked me (I'm white) to hail him a cab.

"I have trouble getting a cab downtown, and it's virtually impossible in Georgetown," he said, jumping into the taxi I had flagged down as the driver mouthed an obscenity in my direction.

The writer was principal policy adviser to Sen. John C. Danforth (R-Mo.) for 11 years.

THE WASHINGTON POST 7/17/91

Constance Berry Newman

Talking With Thomas for 10 Years

In nominating Judge Clarence Thomas to serve as associate justice of the U.S. Supreme Court, President Bush has chosen an individual who has both the intellect and the intellectual honesty for the job. He nominated a person who will be fair and sensitive to the struggles of all Americans—black, brown, white, red and yellow.

Judge Thomas would not let people's religion or station in life affect the way they thought about their rights. He has a special understanding of those poor striving for political and economic empowerment.

And he is willing to listen to others with whom he is not supposed to agree. I know. I am one of those people. For almost a decade Judge Thomas and I have discussed many issues, but most often our discussions were about inequities in this nation and approaches to ensuring equal opportunity for all. We agreed, we disagreed, and we have both changed our minds some.

The discussion and the debate about Judge Thomas's qualifications are confusing, and not all who have participated have been fair. What disturbs me is that much of the discussion is not even relevant. In order to be fair and relevant we must ask, What does the Constitution require? Article II, Section 2, provides that the president by and with the advice and consent of the Senate shall appoint judges of the Supreme Court. The Constitution does not set specific requirements such as an examination or even citizenship. It is up to the advise-and-consent process to determine the qualifications.

Through the years the questions asked the nominees have changed because the issues have changed. What has not changed significantly are the basic value judgments made about the nominees. I will set out what I believe to be the most important of those values.

It is important that a justice of the U.S. Supreme Court be competent. Even though the Constitution does not require that they be lawyers, all 105 justices have had legal training, with more than half having served on the bench. The American Bar Association has had uneven influence in the process through various administrations, looking at such factors as judicial temperament, character, intelligence and trial experience.

I will not second-guess the ABA. However with regard to Judge Thomas's competence, fairness requires recognition of the following points: Judge Thomas graduated from Holy Cross College with honors and from Yale Law School. He was assistant attorney general of Missouri from 1974 to 1977. He was counsel to Monsanto Co. and legislative assistant to Sen. John Danforth. He has been confirmed by the Senate on four separate occasions. The most relevant confirmation was in 1989 as a U.S. Court of Appeals Judge for the District of Columbia. Since confirmation he has participated in more than 140 decisions.

BY RAY LUSTIG—THE WASHINGTON POST

A justice of the court must have an open, inquiring mind—a willingness to listen and be sensitive to the struggles evidenced by the issues before the court. At the time of confirmation, the Senate cannot know of the issues the justice will face. What is important is that the nominees have no preconceived notions of how they will decide specific cases. They must be prepared to review complicated briefs with an open mind and to listen to the arguments, inquiring and then deciding.

When Earl Warren was nominated to be chief justice in 1953, there should not have been and was not a way for the Senate to know how he would decide the landmark case *Brown v. Board of Education* in 1954. It was important to the Senate that Warren be competent and fair, inquiring about the struggles evidenced by the issues in the case. And he was just that. We would have that in Judge Thomas, an independent thinker who is fair and who will listen. Judge Thomas has read and quoted many people of varying points of view. That type of inquiring mind is needed on the court.

A justice of the court must have integrity, particularly intellectual honesty. We entrust a great deal to the nine on the Supreme Court. They must honestly call the cases as they see them. An independent thinker, Judge Thomas will have no problem adapting to the culture of the Supreme Court.

I trust the president's judgment in nominating Judge Thomas, but I can go further. After almost 10 years of discussions with him, I am comfortable with the idea that he will be one of the nine people deciding the issues that come before the Supreme Court during my lifetime and afterward.

The writer is director of the U.S. Office of Personnel Management.

Margaret Bush Wilson

The NAACP Is Wrong on Thomas

The young man standing at my door that summer day in 1974 looked like an African prince. "Hello, I'm Clarence Thomas," he said. "I know," I replied. "I've been expecting you." And so began a friendship with someone I think of fondly as a second son.

I first heard of young Thomas (then almost 26) from his employer-to-be, Sen. John Danforth (R-Mo.), who was attorney general of Missouri at the time. Mr. Danforth told me he had just hired a bright young law graduate from Yale and asked if I knew of a place the young man could live for the summer while studying for the Missouri bar. My own son, Robert, was then a law student with plans to work that summer in Washington. I invited young Clarence to stay in my son's empty room.

I don't recall seeing another young person as disciplined as Clarence Thomas. First thing, every day, he would exercise with my son's weights and then be off to his studies. I asked of him only one thing: I would prepare dinner, and he would show up on time. We would eat together every night, often with one or two friends or relatives and talk about any and all of the problems of the world.

We didn't always agree (Clarence was "conservative" even then), but I was impressed continually with one so young whose reasoning was so sound. I must also admit that his arguments, both legal and logical, forced me to rethink some of my own views. I know I sometimes made him see things differently, too, because Clarence Thomas knew how to listen as well as talk.

Across the years, I have kept in touch with Judge Thomas, and to this day I respect his integrity, his legal mind and his determination. Even when we disagree, I have found him to be a sensitive and compassionate person trying to do what is right, working to make the world a better place.

Back then I sensed that he would one day be in a position to have a larger impact, but I had no way of knowing that this determined young man might one day have the chance to tackle some of our country's problems on this nation's highest court.

Recently, the NAACP National Board took action opposing Judge Thomas's nomination. I wish it had withheld judgment until after the hearings, because the Clarence Thomas I have been reading about often bears little resemblance to the thoughtful and caring man I have know over these years.

Judge Thomas reflects the diversity and complexity of African-American thinking, but his views are not nearly as radical as his critics suggest. He has pushed for a new frontier in civil rights, and heaven knows we need one when one-third of African Americans are still in poverty as we approach the 21st century. He seeks a climate where African Americans and other minorities feel empowered to compete equally with their counterparts of other races, with rational support from government programs.

Some have said that despite his chairmanship of the Equal Employment Opportunity Commission for eight years, he has not been a champion of civil rights. Those people obviously don't know Judge Thomas or the real facts about his tenure with the EEOC. His record will speak for itself and will impress those willing to listen and look beyond misinformed rhetoric. On a personal level, he knows the struggle and hardship blacks and the impoverished of every race grapple with daily—not to mention the plight of most families, since in my judgment the central issue of our time is that some 82 percent of the families in these United States have no discretionary income after bills and taxes are paid.

We didn't talk much about Judge Thomas's background that summer 17 years ago, so it is only recently that I have learned about his humble beginnings. The cramped house with no plumbing in rural Georgia, his wise but not learned grandparents, the Catholic nuns and the rest have only recently come into full view for me. To rise above the dual curses of poverty and discrimination requires tremendous individual effort from a special kind of person, help from others and luck. All these have been present in Judge Thomas's career.

Throughout the history of the U.S. Supreme Court, I don't believe any other nominee can claim to have come so far. In point of fact, Judge Thomas's unique perspective belongs not only on the Supreme Court but in the legislature, in the work place, at city hall and on our campuses.

No one can deny that Judge Thomas would differ with Justice Thurgood Marshall on some issues. I don't always agree with the justice myself. I do believe that both men show a common, fundamental belief in the inherent worth and rights of the individual. At one of his four previous Senate confirmation hearings, Judge Thomas said, "The reason I became a lawyer was to make sure that minorities, individuals who did not have access to this society, gained access. . . . I may differ with others on how best to do that, but the objective has always been to include those who have been excluded."

As young Clarence Thomas left my home at the end of the summer, he asked how much he owed for his stay. I told him that he owed me nothing, but I did want a promise from him. I asked him to promise that if he were ever in a position to reach out and help others that he would do it, just as some had done for me and as I had done for him.

He promised he would, and Judge Thomas has been keeping his word ever since, looking out for the vulnerable and victimized on the job, in the community and at the court. I know that as a Supreme Court justice Clarence Thomas will continue to defend and protect the rights of the needy. He does not permit anyone to think for him, and he is intellectually honest.

When the history of these times is written, it will be interesting to see how historians view the position of the National Board of the NAACP—an organization committed to advancing colored people, which is opposed, on ideological grounds, to this nomination of a black man to the U.S. Supreme Court.

Let the record show that the NAACP's former national board chair respectfully disagrees with its position.

The writer, an attorney in St. Louis, chaired the National Board of Directors of the National Association for the Advancement of Colored People from 1975 to 1984.

Senator THURMOND. Now, Mr. Chairman, I am not going to take time to give all these groups here a chance to just—several law enforcement organizations recently met with me to express their strong support of Judge Thomas' nomination, several groups such as the National Sheriffs Association, International Association of Chiefs of Police, Federal Investigative Association, National Law Enforcement Council, National Society of Former Agents of the FBI, National District Attorneys Association, and Citizens for Law and Order, a victims rights group. They all endorse Judge Thomas for a position on the Nation's High Court. I ask unanimous consent that certain documents of support from these organizations be placed in the record.

The CHAIRMAN. Without objection.

[The information of Senator Thurmond follows:]

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
1033 NORTH FAIRFAX STREET, SUITE 200, ALEXANDRIA, VIRGINIA 22314
(703) 549-9222

RESOLUTION

WHEREAS, President George Bush has nominated Judge Clarence Thomas to fill the United States Supreme Court vacancy created by the retirement of Justice Thurgood Marshall; and

WHEREAS, the Board of Directors of the National District Attorneys Association has reviewed the qualifications of Judge Thomas and found him exceptionally well qualified for that important Supreme Court seat; and now

THEREFORE, BE IT RESOLVED that the National District Attorneys Association urges the Senate Judiciary Committee and the United States Senate to confirm without delay President Bush's nomination of Judge Clarence Thomas to the United States Supreme Court.

Done this 14th day of July 1991 at Tucson, Arizona.

ATTEST:
JACK E. YELVERTON
Executive Director
National District Attorneys Association

GRAND LODGE
FRATERNAL ORDER OF POLICE
320 SOUTH HIGH STREET, SUITE 203 • COLUMBUS, OHIO 43215-5685 • (614) 221-0180 • FAX (614) 221-0815

DEWEY R. STOKES
NATIONAL PRESIDENT

September 6, 1991

The President
The White House
Washington, DC 20500

Dear Mr. President:

On August 14, 1991 during our recent National Fraternal Order of Police Conference, we were honored to have you address our delegates attending the conference regarding several legislative matters and other issues of concern to law enforcement. At that time, you asked for our support for Judge Clarence Thomas, your nominee to the U.S. Supreme Court. As a result of your request, our delegates passed a resolution instructing me to investigate Judge Thomas' judicial background and report my findings and recommendations to our Board of Directors.

Mr. President, I am pleased to inform you that after submitting my report, the Board of Directors of the Fraternal Order of Police (representing 226,000 member law enforcement officers in forty-one [41] states) have agreed with you and voted to support Judge Thomas' nomination to the Supreme Court of the United States.

Please be assured, that the entire board of the Fraternal Order of Police and I are available to assist you in whatever way possible to insure the approval of Judge Clarence Thomas' nomination.

Respectfully,

Dewey R. Stokes

Dewey R. Stokes
National President

DRS:cch

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To HOWARD HAY	From DEWEY STOKES
Co.	Co. NAT'L. F.O.P.
Dept.	Phone #
Fax # 202-514-2504	Fax # 614-221 0815

NATIONAL HEADQUARTERS

NATIONAL TROOPERS COALITION
112 STATE STREET, SUITE 1212, ALBANY, N.Y. 12207 518-463-7448

September 5, 1991

NATIONAL TROOPERS COALITION

RESOLUTION

Endorsing the nomination of Judge Clarence Thomas for Associate Justice of the United States Supreme Court.

Whereas, President George Bush has chosen to nominate Judge Clarence Thomas for Associate Justice of the United States Supreme Court, it is the sense of this assembled body to extend our most stringent support of that nomination, and...

Whereas, the National Troopers Coalition recognizes that the office of Associate Justice demands integrity, intellectual skills, and dedication to the principal of equal justice, and...

Whereas, the office also requires unbending dedication to principal, basic fairness, human decency, and justice under law, and...

Whereas, the record of Judge Thomas impressively demonstrated these qualities from his days as Assistant Attorney general in the State of Missouri to his term as Chairman of the Equal Employment Opportunity Commission, to his latest office as a member of the United States Court of Appeals for the District of Columbia, and...

Whereas, the National Troopers Coalition firmly believes there must be a fair and equitable balancing of protecting the right of society to enforce its laws on the one hand; and the constitutional rights of the accused on the other, and...

Whereas, be it resolved that this assembly body of Troopers, which represents over 45,000 Troopers and protects more than 200 million Americans, seize upon this great opportunity to most stringently support the nomination of Judge Clarence Thomas to Associate Justice of the United States Supreme Court.

Now be it further resolved, that a copy of this resolution be sent to the honorable members of the United States Senate.

Adopted this 5th day of September, 1991 at the National Troopers Coalition Conference, Portland, Maine.

Richard J. Darling
Chairman
National Troopers Coalition

CITIZENS FOR LAW AND ORDER, INC.
"dedicated to law and order with justice for all"

Address all inquiries to:
Jack Collins
Eastern Regional Director
Citizens for Law and Order
Phone: (703) 569-8574

RESOLUTION SUPPORTING THE CONFIRMATION OF JUDGE CLARENCE THOMAS AS AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Citizens for Law and Order (CLO) is a grassroots organization of citizens committed to a reduction of violent crime and the achievement of a truly balanced and fair criminal justice system. We are proud of our two decade record of advocacy and accomplishment. As an umbrella group, we represent over forty thousand (40,000) individuals nationwide who are active in criminal law issues.

The U.S. Supreme Court plays an absolutely critical role in assuring the maintenance of a healthy, fair and balanced criminal justice system. Its decisions on criminal law issues impact both on individual litigants and on the Federal and State court systems for years to come. Given this importance of the Court and its individual justices, CLO commissioned Barbara K. Bracher, a litigation attorney for a major Washington, D.C. law firm, to prepare a report on the judicial philosophy of Judge Clarence Thomas as it is reflected in his criminal law and procedure opinions on the United States Court of Appeals for the D.C. Circuit.

Our own research and our reading of Ms. Bracher's report lead us to the conviction that Judge Thomas will bring to the Court a voice of reason, fairness, and balance in the area of criminal justice. He promises to be equally as forthright in protecting the rights and concerns of victims and the community at large as those of criminal defendants. A thoughtful jurist with both a keen intellect and a restrained judicial temperament, he will very likely bring certainty and predictability to this area of the law. He has demonstrated a common sense approach to questions of criminal law and procedure, consistently recognizing the practical problems faced by law enforcement officials on the street. And, very importantly, he sees his charter as construing and interpreting the law, and not shaping it to fit his own personal predilections or private agenda.

Considering these positive judicial attributes, and noting as well the fine qualities reflected in Judge Thomas' background, personal history, and career to data, Citizens for Law and Order (CLO) is

BOX 1[illegible]8 OAKLAND, CALIFORNIA 94661 (415) 531-4664 FAX (415) 531-1861
NON-PROFIT TAX-EXEMPT NON-PARTISAN

pleased to endorse Judge Clarence Thomas' nomination to the United States Supreme Court.

As an all volunteer, strictly non-partisan organization, we have not given this endorsement lightly. As an organization, however, with a special concern for victims, it is given in the conviction that Judge Thomas, by virtue of the attributes cited above, will effectively balance the scales of justice by insuring for victims true equality before the law.

A copy of Ms. Bracher's report is appended.

Phyllis M. Calles

Phyllis M Calles
President

September 4, 1991

IACP NEWS

INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE / 1110 N. Glebe Road, Suite 200 / Arlington, Virginia 22201 / (703) 243-6500

For Immediate Release
Wednesday, August 28, 1991

Contact: Dan Rosenblatt
Sara Johnson
(703) 243-6500

IACP ENDORSES THOMAS NOMINATION FOR SUPREME COURT

ARLINGTON, VA -- The International Association of Chiefs of Police today announced its endorsement of President Bush's nomination of Judge Clarence Thomas to the United States Supreme Court.

IACP's governing body made the decision after carefully reviewing the background and professional record of Judge Thomas at one of its regular meetings on August 10 in New York. It was determined that Judge Thomas is a well-qualified, tough, anti-crime judge who has recognized the problems that law enforcement officers face in combatting crime.

The U.S. Senate has already confirmed Judge Thomas four separate times: as Assistant Secretary for Civil Rights at the Department of Education in 1981, twice as Chairman of the EEOC in 1982 and 1986, and most recently as U.S. Court of Appeals Judge for the District Columbia in 1990. He graduated from Holy Cross College with honors in 1971 and Yale Law School in 1974.

Judge Thomas has resisted efforts to impose unreasonably

(MORE)

(2)

burdensome requirements on the police and prosecutors or to overturn criminal convictions on technicalities not required by the Constitution, while guarding against infringements of the fundamental rights of criminal defendants.

Among his noteworthy decisions:

-- In United States v. Long, Judge Thomas rejected arguments that a trial judge erred in admitting police testimony during a search of a defendant's apartment, which tended to show that the defendant was dealing in narcotics. Similarly, in United States v. Rogers, he upheld the admission at trial of evidence of a defendant's prior drug-dealing activity.

-- Judge Thomas ruled against a defendant who argued that, at his trial, the judge had improperly instructed the jury as to his entrapment defense. In so holding, Judge Thomas observed that "the government [had] introduced overwhelming evidence of [defendant's] eagerness to sell crack, enough, we are certain, for the government to have carried the burden of proof it needed to defeat [defendant's] entrapment defense." (United States v. Whoie)

The International Association of Chiefs of Police is the world's oldest and largest non-profit organization of police executives. Established in 1893, the IACP currently has approximately 12,500 members in 65 nations around the world.

Further information is available from the IACP at 1110 N. Glebe Road, Suite 200, Arlington, Virginia 22201; 703/243-6500.

1110 North Glebe Road
Suite 200
Arlington, Virginia 22201
Phone (703) 243-6500
Cable Address IACPOLICE

September 5, 1991

The Honorable Strom Thurmond
United States Senate
217 Senate Russell Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

The International Association of Chiefs of Police (IACP) wishes to go on record urging a favorable recommendation by the Senate Judiciary Committee regarding the nomination of Judge Clarence Thomas to the United States Supreme Court.

After careful review of the personal and professional background of Judge Thomas, the governing body of the IACP has determined that Judge Thomas will prove himself to be a worthy Supreme Court Justice. His judicial temperament, breadth of perspective and professional experience indicate he will serve the country well on the Supreme Court.

Specifically, his record as a judge leads the IACP to believe that he will serve the cause of law enforcement well. The views of Judge Thomas in United States v. Long, United States v. Rogers and United States v. Whoie are indicative of efforts on behalf of law enforcement concerns.

The IACP strongly supports quick action by the Judiciary Committee and the Senate to confirm Judge Thomas.

Sincerely,

Daniel N. Rosenblatt
Executive Director

Alabama Sheriffs Association

514 Washington Avenue
Montgomery, Alabama 36104-3810
Phone (205) 264-STAR
1-800-622-STAR
FAX (205) 269-5368

ROBERT D. "HOBBY" TIMMONS
EXECUTIVE DIRECTOR

MIKE BLAKELY, President
SHERIFF OF LIMESTONE COUNTY

September 5, 1991

The Honorable Howell Heflin
United States Senate
728 Hart Building
Washington, D.C. 20510

Dear Senator Heflin:

On behalf of the Alabama Sheriffs Association, I would like to ask you to vote to confirm Judge Clarence Thomas to the United States Supreme Court.

At a recent meeting, the Sheriffs of Alabama voted unanimously to support Judge Thomas's nomination to the United States Supreme Court. A resolution was passed by the Alabama Sheriffs Association directing me to write a letter requesting your support of Judge Thomas's nomination.

After careful consideration of Judge Thomas's record and views in the areas of law enforcement, we feel that Judge Thomas would be an excellent candidate to serve on our Nation's highest court. We hope that you share our views and will make a strong stand to assure Judge Thomas's appointment as a United States Supreme Court Justice.

We appreciate your support in the past on matters of concern to the Sheriffs of Alabama. Thank you for considering this request.

Sincerely,

Mike Blakely
President
Alabama Sheriffs Association

"No Sheriff Shall Stand Alone"

Senator THURMOND. Mr. Chairman, I ask unanimous consent that a list of approximately 100 groups and individuals who have strongly endorsed Judge Thomas be placed in the record.

The CHAIRMAN. Without objection.

Senator THURMOND. I won't take the time. It would take an hour or two to read all this stuff. But I want the public to know about it. I want the public to know these people all endorse this man. This is coming from the people.

I ask unanimous consent that a list of approximately 100 groups and individuals who have strongly endorsed Judge Thomas be placed in the record.

[The information of Senator Thurmond follows:]

LIST OF GROUPS IN STRONG SUPPORT

1. South Carolina Greenville County Council
2. V.O.C.A.L., Victims of Crime and Leniency
3. Mississippi Harrison County Republican Executive Committee
4. Veterans in Community Service
5. U.S. Hispanic Chamber of Commerce
6. Traditional Values Coalition
7. Council of 100, an Organization of Black Republicans
8. The National Tax-Limitation Committee
9. Department of Home Missions, Brotherhood Pensions and Relief
10. Polish American Congress
11. West Virginians for Religious Freedom
12. Professional Bail Agents of the United States
13. American Road & Transportation Builders Association
14. The Associated General Contractors of America
15. Knights of Columbus
16. African American Committee
17. Family Research Council
18. National Small Business United
19. National Traditionalist Caucus
20. U.S.- Mexico Foundation
21. Association of Christian Schools International
22. National Sheriff's Association
23. International Association of Chiefs of Police
24. Federal Investigators Association
25. National Law Enforcement Council
26. National Society Former Agents of the FBI

27. National District Attorneys Association
28. Citizens for Law and Order
29. Iowa Jima Black Veterans Group
30. Agudath Israel of America
31. Asian American Voters Coalition
32. Board of Directors of Catholic Golden Age
33. Citizens for a Sound Economy
34. Congress for Racial Equality
35. The Cuban American National Foundation
36. D.C. Black Police Caucus
37. The Improved Benevolent and Protective Order of the Elks of the World
38. Indian American Forum for Political Education
39. International Mass Retail Association
40. National Black Nurses' Association
41. National Council of Young Israel
42. National Family Foundation
43. National Jewish Coalition
44. U.S. Chamber of Commerce
45. Zeta Phi Beta Sorority, State of Georgia
46. Alabama Attorneys to Confirm Clarence Thomas

INDIVIDUALS IN STRONG SUPPORT

1. James Harkins, Maryland House of Delegates
2. Timothy F. Ireland, Florida House of Representatives
3. Debby P. Sanderson, Florida House of Representatives
4. Gwendolyn T. Bronson, State of Vermont House of Representatives
5. Roger F. Wicker, Mississippi State Senate
6. William H. Harbor, Iowa House of Representatives
7. David G. Walchak, Chief of Police, City of Concord, New Hampshire
8. Jimmy Evans, Attorney General, State of Alabama
9. Michael B. Cronin, Chief Executive Officer, St. Joseph Hospital
10. Betty Southard Murphy, Baker & Hostetler
11. Henry McKoy, Deputy Secretary for Programs with the North Carolina Department of Administration
12. Father Jack Rainaldo, Marquette University
13. J. Shelby Sharpe, Sharpe Bates & Spurlock
14. Mr. Frederick Dent, Mayfair Mills, Inc.
15. Mr. James L. Denson, C.E.O., Allpoints International, Ltd
16. LeRoy C. Zignego, Zignego Company
17. Michael O'Laughlin, United States Chauffeurs Training Academy
18. Royce Fessenden, Fessenden Technologies
19. Renne Oliver, Executive Secretary, Teach Michigan
20. Stephen Strang, President, Strang Communications Co.
21. Mr. Michael O'Neil, President & C.E.O., TransTac
22. Morris J. Crump, Southern States Lumber Company
23. Pastor David T. Harvey, Covenant Fellowship of Philadelphia

24. Armstrong Williams, The Graham Williams Group

25. Van Cook, Hill County Telephone Cooperative, Inc.

26. C.E. Falkenstein, M.J. Ruddy & Son, Inc.

27. D. Joe Smith, Jenner & Block

28. Dean Rodney K. Smith, Capital University

29. Jerald Hill, The Landmark Legal Foundation

30. Norman Smith, Constable, LeFlore County, Mississippi

31. Richard A. Delgaudio, The Legal Affairs Council

32. Beverly LaHaye, Concerned Women for America

33. Clay Claiborne, National Director, Black Silent Majority Committee

34. Professor Cortus T. Koehler, California State University, Sacramento.

35. Arizona State Senator Carole Springer

36. State Representative Jim Froelker, 110th District Missouri House of Representatives

37. Mr. Camden R. Fine, President/CEO, Missouri Independent Bank

38. Ms. Carol A. Chapman, Assistant Editor, Charisma

39. Ms. Jane Dee Hull, Speaker of the Arizona House of Representatives

40. State Senator Carol McBride Pirsch, Nebraska State Legislature

41. C.D. Coleman, Senior Bishop, Christian Methodist Episcopal Church

42. Joseph Morris, President, Lincoln Legal Foundation

43. Evelyn Bryant, President, Liberty County NAACP

44. Dewey Clover, President, National Association of Truck Stop Operators

45. Representative William B. Vernon, Massachusetts House of Representatives

46. Representative Anna Mowery, Texas House of Representatives

47. Dean Ronald F. Phillips, Pepperdine University School of Law

48. Mr. Doyle Logan, President, Alabama State Lodge Fraternal Order of Police

49. Mr. Willie Willis, President, Alabama State Troopers Association

Senator THURMOND. Mr. Chairman, a bipartisan group of approximately 35 black attorneys, business people, and community and religious leaders from South Carolina traveled to Washington in August and met with me to discuss Judge Thomas. That was in August when we were in recess. Most of you were at home, but I was here. They indicated their overwhelming support for Judge Thomas.

Mr. Larkin Campbell, an attorney from Columbia, who is a member of the NAACP, endorsed Judge Thomas' nomination and stated, "Clarence Thomas is a man who would bring integrity, wisdom, and foresight to the Supreme Court."

Mr. Fletcher Smith, a Democrat, an attorney, member of the Greenville County Council, and a member of the NAACP, presented me with a resolution passed by the Greenville, SC, County Council in support of Judge Thomas.

Several other individuals spoke to me about their strong support for Judge Thomas. To name just two or three, Ms. Jean Burkins, a very prominent woman in Columbia, an attorney, and a member of the NAACP; Rev. Norman Pearson, vice president of Fuller Enterprises, also a member of the NAACP; and Mr. James Moore, a civil rights activist and founder of the Committee for the Betterment of Poor People. All these people endorsed Judge Thomas.

I ask unanimous consent that appear in the record.

The CHAIRMAN. Without objection. I hope there wasn't a reason you weren't able to go home in August. You were welcome, I assume.

You are not paying attention. [Laughter.]

Senator THURMOND. What do you think?

[The information of Senator Thurmond follows:]

Mr. Chairman, a bi-partisan group of approximately 35 Black attorneys, business people and community and religious leaders from South Carolina traveled to Washington in August and met with me to discuss Judge Thomas. They indicated their overwhelming support for Judge Thomas.

Mr. Larkin Campbell, an attorney from Columbia who is a member of the NAACP, endorsed Judge Thomas' nomination and stated, "Clarence Thomas is a man who would bring integrity, wisdom and foresight to the Supreme Court". Mr. Fletcher Smith, a Democrat, attorney, member of the Greenville County, and a member of the NAACP, presented me with a resolution passed by the Greenville, South Carolina, County Council in support of Judge Thomas. Several other individuals spoke to me about their strong support for Judge Thomas; to name a few: Ms. Jean Burkins, an attorney in Columbia who is member of the NAACP; Reverend Norman Pearson, vice-president of Fuller Enterprises, also a member of the NAACP; and Mr. James Moore, a civil rights activist and founder of the Committee for the Betterment of Poor People.

Senator THURMOND. Judge Thomas, we are just about through. I just want to make two or three remarks to wind up here.

First, I want to commend you for the outstanding job you have done during your 5 days of testimony. There have been efforts to try to get you to express yourself about decisions and about what position you would take on the Supreme Court maybe. You have had the courage and the resolution and the good judgment not to fall for that.

You have answered many difficult questions with clear, thoughtful answers. You have shown that you have the intellectual capacity to sit on the Supreme Court. You made a good record at Holy

Cross where you graduated and also at Yale Law School, and that stood you well today.

The many difficult circumstances you have overcome in your life have given you common sense to go along with your formal education. As Chairman of the EEOC, you showed that you had the practical experience to handle a difficult position in an exemplary fashion. You did a fine job there in spite of some criticism that was unjustified. You did a good job, too, at the Civil Rights Education Department.

Your testimony has also shown that you have the appropriate judicial temperament and the sensitivity to do well on the Supreme Court. I believe you will be fair and open-minded and will understand the vast impact your judicial decisions will have on the people affected by them.

While you have discussed natural law, you have made it clear that you will exercise judicial restraint, following the Constitution and relevant statutory intent. Your record on the D.C. Circuit I think shows that you have done just that.

Regarding crime, you have made it clear that you will be sensitive to the rights of victims who must have a say in our criminal justice system, and that is important, and that you will also be fair to defendants in hearing their cases.

In my opening statement, I stated certain characteristics I look for in a Supreme Court nominee. In my 37 years in the Senate here, I have had the pleasure of acting on hundreds and hundreds of judges. And these are the qualities that I think we have to consider: Integrity, courage, compassion, competence, judicial temperament, and an understanding of the majesty of our system of government, which a lot of people don't seem to understand.

Judge Thomas, I believe you have exhibited these qualities throughout your life and during your testimony this week. I am confident that you will make an excellent member of the Supreme Court of the United States, and I commend you for the fine job that you have done for this committee. Good luck and God bless you.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Judge I have some additional questions on expressive conduct, but observing the expressive conduct of the people behind you, what I will do is I will submit those to you in writing in the interest of time and to accommodate the witnesses we have to come after. They will not take a great deal of your time. We will not be finished with the public witnesses until the end of this week, so there is plenty of time to answer the questions. There are only about three or four of them, and I do want to talk about the *Barnes* case and a few others that involve expressive conduct. I would appreciate your answering them for me.

Judge, I appreciate very much your willingness to accept the President's nomination, and I hope that as imperfect as the process is—and there is none that I know that is perfect—that you appreciate our responsibility. I thank you for the courtesy you have shown to this committee, and we will hear from public witnesses who are both for you, against you, and some who just want to come and express their concern.

It has been the history of this committee, at least of late, of the last several decades, to allow groups and individuals of standing to do just that, and we will finish this hearing, God willing and the creek not rising, sometime before this week is out. I have no intention of carrying it over into next week with the public witnesses.

Then within the next couple of weeks, we will as a committee act on your nomination, and it will then be sent to the floor of the Senate for the Senate as a whole to act on the nomination.

So I appreciate, again, your cooperation during this process. I thank Senator Danforth and I thank the White House, with whom you have been working for cooperating in the process. And I most importantly want to thank your wife, who has sat through all of this, and your sister, but even more importantly, Mom. It has been a long, long time to sit there, and this is—a lot of what we talked about, Mom, is boring, I know. But I appreciate your graciousness to the committee, and it is obvious your loyalty and devotion to your son is deep and is real. So I want to thank all of you.

Judge do you have any closing comment you wish to make to the committee or to the public or to anyone?

Judge THOMAS. Just a word or two, Mr. Chairman.

Mr. Chairman, Senator Thurmond, I would like to thank you for the courtesy and the fairness that you have shown me through this process. I am one of those who believes that this process is critical, and the longer I am a judge, the more important I think this process is.

I would like to thank my family for being so patient and so supportive, and Senator Danforth who said when I was nominated that we would spend a lot of time together and who has been so wonderful to me. And, of course, I would like to thank the President for nominating me.

I have been honored to participate in this process. It has been one of the high points—indeed, it is the high point from a lifetime of work, a lifetime of effort on behalf of so many people. This is the high point.

Whatever your determination is, I would like to reiterate that I have been treated fairly, that I have been honored, deeply honored to participate here. And I am reminded of my reaction in Kennebunkport when the President nominated me to the highest court in the land. It always gives me goose bumps to say "the highest court in the land." Only in America could this have been possible. Thank you all so much for your courtesy.

The CHAIRMAN. Judge, let me close your participation by suggesting to you, some have asked why we have not asked certain questions. Any question that I have failed to ask is only because I believed it was not relevant to whether or not you could or should sit on the Supreme Court of the United States of America. And so I have asked you all that I think is relevant. And you have answered some, you have not answered some, and you have made your judgments about what you should answer. Again, I thank you for your cooperation.

What we will do now, because I know as soon as we break we are not going to have much order in this room for a moment, so if you will sit with me so I can announce who comes next so that everyone will know, we will move from here immediately upon a little

bit of order being restored to the caucus room, when it occurs that you leave, to the American Bar Association which has been traditional under Democratic and Republican leadership in the Senate. They are the first public witnesses we hear from.

Then we will hear from a panel of legal scholars who support your nomination, and we will see how far along we are this evening. But, again, it is my intention to finish the public witnesses by Friday. So I want everyone to know that.

Again, thank you all. Thank you and your family for your cooperation. We will recess for 5 minutes.

[Recess.]

The CHAIRMAN. The hearing will resume.

Our first panel is a panel of distinguished members of the American Bar Association, and I would like to welcome them all: Mr. Ronald Olson, Mr. Best, and Mr. Watkins, all of whom are here to do as the ABA has done in the past, I don't know for how many years, give us their best judgment as to the qualification of the nominee, as they have with all nominees, to the Supreme Court.

Mr. Olson, I understand you are speaking for the committee, and I would ask you to keep your statement to 10 minutes or less, and then the panel of Senators will have questions for you all.

Again, welcome and thank you for being here.

STATEMENT OF RONALD L. OLSON, CHAIR, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY JUDAH BEST, DISTRICT OF COLUMBIA CIRCUIT REPRESENTATIVE, AND ROBERT P. WATKINS, FEDERAL CIRCUIT REPRESENTATIVE

Mr. OLSON. Thank you, Mr. Chairman, Senator Thurmond, honorable members of the Judiciary Committee; I will meet that 10 minutes.

I would first like to elaborate a little bit on our introduction. My name is Ron Olson. I am a practicing lawyer in Los Angeles, CA, and since August of this year, I have been the chairman of the ABA's standing committee on the Federal judiciary.

I am accompanied today by two of my colleagues: Mr. Judah Best on my left, and Mr. Robert Watkins on my right. Both are practicing lawyers here in Washington, DC. Because of their location, they were the primary investigators on behalf of the committee insofar as the investigation of the Honorable Clarence Thomas is concerned.

The three of us are here in a representative capacity on behalf of the American Bar Association committee, and further our committee on behalf of the legal profession as a whole. I would like to say, Senator, at the outset that it is a high honor to be here and be able to participate in this proceeding, and we would like to express our appreciation for the work of this committee, not only with regard to this very important nomination, but every nomination to every Federal court in the land.

Second, I would like to say that it has been a distinct privilege for all of us on this committee to revisit the professional credentials of the Honorable Clarence Thomas. With regard to our investigation, we were requested by the Attorney General of the United