

That does not mean that he is incapable of doing so. It simply means that he is untested. But being untested left us with a sense that he was less than our well-qualified rating would indicate.

Senator KENNEDY. Finally, what was the basis of the minority holding?

Mr. OLSON. The minority view, Senator, focused on the criteria of professional competence. The minority of two did not reach any resolution of the other two issues, but they determined that with regard to professional competence, Judge Thomas did not measure up with respect to his track record. He had not had the breadth of experience or the depth of experience to demonstrate in their mind that he is at the top of the profession.

They particularly, I believe I am fair in saying, focused on the mixed writing that we have seen from Judge Thomas. As I have noted earlier, the opinions that he has crafted on the court of appeals have been highly praised. On the other hand, the writings that he has done off the court particularly those published in legal journals, have been generally criticized by a wide range of individuals.

I think it is that unevenness which was of particular concern to the minority of two.

Senator KENNEDY. Just in clarification, the criticism, was that based upon philosophical differences of opinion or based upon some other reason?

Mr. OLSON. It was not based upon philosophy or politics. That is, as far as we are concerned, outside the parameters of our investigation, Senator. With regard to the criticisms, I think they can be summarized very simply. The criticisms of his law journal writing are simply that they were shallow. They were without—the positions he took were not well documented and supported, and he failed to confront and deal with strong arguments on the opposite side of the issue. They simply did not evidence the kind of scholarship that one would like to see on a regular basis, and they did not demonstrate the kind of scholarship that he has shown as a judge on the U.S. court of appeals.

Senator KENNEDY. Thank you very much.

No further questions, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Grassley.

Senator GRASSLEY. I will pass for this round.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. I will pass, Mr. Chairman. Thank you.

The CHAIRMAN. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Just a question or two.

When you refer to scholarship and you talk about the issue of wide experience, how much do you look toward a familiarity with the specific work of the Court as to whether the nominee would be able to move right in, understand the kinds of issues the Supreme Court has, to be able to deal with it as an initial matter?

Mr. OLSON. Let me respond and relate my answer particularly through our examination of Judge Thomas. Judge Thomas has had, as the Senator has indicated, a very wide set of life experiences. We took note of that. We believe that it demonstrates a tremen-

dous potential for personal growth and a background for professional wisdom.

The experience that he has had on the U.S. court of appeals has demonstrated his capacity to craft good judicial opinions where he has dealt with established precedent and applied that in a careful way to the cases before him. He has been very disciplined in his approach to decisionmaking, disciplined in terms of the kinds of issues that he addresses, generally no more than necessary to answer the case before him, and disciplined in the way in which he expresses himself, focusing very carefully on the particular statute or rule at issue.

What this record that we have reviewed does not have in it is the very area that the Senator has raised. We have seen very little of his writing that grapples with the kind of issues that are typically dealt with on the Supreme Court. There have been very few cases on the court of appeals that have raised those fundamental issues. Most of them have been dictated by the precedents already established.

On the U.S. Supreme Court, as the Senator well knows, there are a lot of issues that come around for the first time. He has had very little practice dealing with cases of first impression, at least as far as the written record is concerned. He has had very little practice dealing with the fundamental constitutional principles that govern wide areas of conduct. He has had very little practice reaching out and defining over-arching principles that go across the spectrum of our Constitution.

Those are the kinds of things that I think limited our ability—let me say that differently. Those were the kinds of areas that limited the rating that was given to Judge Thomas. If he had had 10 or 12 years and 200 opinions on the U.S. court of appeals, I suspect he would have had a lot more opportunity to practice in that very basic constitutional area.

Senator SPECTER. I had some other questions in mind, but that answer was so complete that you have already covered them.

Mr. OLSON. Thank you.

Senator SPECTER. Let me turn to one other aspect of the issue, and that is on a comparison to the Court. A nominee for the Supreme Court attracts a lot of attention, obviously. I have had a question about a comparison of the current Court, say the Court with Holmes and Brandeis, are there evaluations made by the scholars in the field—there is a phase of writings I don't know—evaluating the current Court? I ask this in the context of Judge Thomas is going to join a court and his ability to perform may well turn on the balance of the Court. Has there been any distinguished writing comparing this Court to other Supreme Courts like the Holmes-Brandeis court?

Mr. OLSON. There certainly is and it is ongoing on a regular basis, and I am going to turn to my colleague Mr. Best in a moment, but I will refer briefly to one article that was published recently in the Minnesota Law Review, trying to identify the characteristics of the great Justices of the U.S. Supreme Court, trying to identify the characteristics of individuals, and then see if there were central characteristics that carried through.

The one that I remember being above all was character, the individual character of a Justice was more important than any other single factor in identifying greatness on the Court.

I should also say that I think it was Justice Frankfurter who said that the ability to define greatness for a judge is a very uncertain art, and I would agree with that.

Mr. Best I believe may have some further answer to your question.

Mr. BEST. If I may, Senator, I think the same law review article demonstrated an attempt statistically to determine what was the best background for a Supreme Court Justice, demonstrated that there are no hard and fast rules. The character was extremely important, and the only other factor that came out in the analysis and discussion was, of course, the question of background, and to the extent that would be helpful to this committee, it seems that the analysis of those candidates for the Supreme Court who had come up, as it were, the hard way, who had scratched and crawled their way and had made their career for themselves were probably the greatest of the Supreme Court Justices.

So, to the extent that that sort of meager sociological information is helpful, I offer it to you.

Senator SPECTER. Any other references on that subject besides the single Minnesota Law Review article?

Mr. OLSON. Well, I suppose we could go back to Socrates, he had a quote or two, and certainly wrote about what it—

Senator SPECTER. I mean about an evaluation of this Supreme Court.

Mr. OLSON. I don't have any specifically to suggest at this time. We would be happy to supplement the record, if the Senator would like.

I would make one other statement that I think too often tends to get overlooked with respect to our Federal judiciary, and that is the single criteria of integrity. It seems to me it is very easy to take that criteria for granted, and if you look around at this Federal judiciary that we have had for so many years and, in particular, the Supreme Court, there has been very, very few breaths of scandal. It is that integrity that I think in my mind speaks directly to the majesty of the law that Senator Thurmond referred to about half an hour ago, and I think it is something that this committee that you represent and, hopefully, our committee and our work have something to do with, and it strikes me that that has distinguished our judiciary here in the United States from virtually every other judiciary in the world, and it is one that I am very proud of, and I think when you talk about greatness on the courts and consistency, that to me is a criteria that is very, very important.

Senator SPECTER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Heflin.

Senator HEFLIN. How many members are there on the committee?

Mr. OLSON. Fifteen members on our committee.