

So, to the extent that we reviewed them to see the extent to which he had spoken to any of the things we were concerned about, we did.

Ms. GREENBERGER. You know, Senator Simpson, it is a very good question. And there is a case that is pending now that Justice Thomas heard as a member of the panel that deals with equal protection and sex discrimination of the laws in the context of the FCC, and it tracks the very same kind of issue that was decided by the Supreme Court last term in the *Metro Broadcasting* case, whether or not it is constitutional to make affirmative efforts to ensure that radio stations have a diversity of ownership.

And the Supreme Court upheld the constitutionality of that policy with respect to minorities. The very same issue is pending in the D.C. Circuit now with respect to women-owned radio stations, and the media and press had, in fact, printed some excerpts of the oral argument and some of the questions that Judge Thomas asked.

It was a case that was argued in January 1991, the end of January. Unfortunately, we haven't seen an opinion. It is surprising because I did look and I know that there has been a lot of pride on the D.C. Court of Appeals for the short turnaround time between the time cases are argued and the time they are decided, and for the last 2 years they have been between 1 and 2, at most 3 months is an average time for a decision, and we have been waiting for this case for 8 months.

Justice Thomas asked some very disturbing questions during that oral argument. Perhaps he would have resolved those questions in a way that would allay our fears if that decision had come down. I am sorry in all this 8 months it hasn't come down.

And I might give you some flavor of the kind of question he asked that caused the concern. And very briefly, he wanted to know what are women's issues.

Senator KENNEDY. Can I just say I think the time of the Senator has expired. But I would hope that I would be the next questioner, and you can use the response on my time.

Ms. GREENBERGER. OK. Thank you.

Senator SIMPSON. I thank you, Mr. Chairman.

Senator KENNEDY. Do you want to—I would just at the outset want to join in welcoming this panel to the committee. I think Marcia Greenberger and Judith Lichtman have over a period of years been in the forefront of the fight for equal opportunity and equal rights from the really extremely important and critical time in the decision of the Supreme Court decision, and all of us, I certainly do, take your comments and your testimony very seriously and we thank you for the thoughtfulness—

Ms. GREENBERGER. Thank you.

Ms. LICHTMAN. Thank you, Senator.

Senator KENNEDY [continuing]. With which the presentation has been made.

Ms. King, we are delighted to have you, a distinguished scholar and thoughtful commentator on many of these same areas.

If you would just continue. As I understand, you are now quoting some of the questions raised by Judge Thomas when the circuit court was considering a particular case involving the FCC and the

role of women in terms of the ability to acquire radio stations, I guess.

Ms. GREENBERGER. That is right. Thank you, Senator Kennedy.

And, as I said, we had really hoped that that decision would come down and, in fairness, to see what the ultimate decision was. Right now what we have are the questions that Senator Thomas—that Judge Thomas rather, asked. But they are questions, and he may have just been probing, but they are questions that reflect concern.

He asked what are women's issues? I am at a lost as to what difference there is. He was referring to having women own stations. He said, "But what difference does it make if a woman owns a station, or if women owned all the stations, other than that they own the station? Does it make a difference in programming? Does it make a difference in content of the points of view? Does it make a difference in the editorials?"

Congress had made a judgment that diversity of ownership does make a difference, but he was challenging that directive by Congress to try to encourage diversity of ownership both, obviously, for the public policy of having those business opportunities open, but also for the advantage of hearing different perspectives and hearing points of view.

So, I am sorry an answer had came up in the context of Senator Simpson's question. I wish we would have had that decision as a way of looking at Judge Thomas on the bench. But so far his cases have been primarily in areas that don't deal with the great constitutional questions before us in the Supreme Court.

Senator KENNEDY. Let me ask you, how—I should know. But how is the timing for the release of the decisions decided? Who makes that decision?

Ms. GREENBERGER. Well, I think probably it is up to the panel to decide at what point, and each of the judges has to decide at what point the decisions are ready for release.

The 1990 statistics were—it is about 1.6 months on average between the time of argument and the time a decision comes down. So, unfortunately, this one has been about 8 months so far.

Senator KENNEDY. Let me ask you, are there other—do you consider significant and important issues that are now working their way to the circuit or the Supreme Court that you believe will be extremely important in terms of equal opportunity for women?

Ms. GREENBERGER. Well, there are several key cases that involve certainly constitutional protections under the equal protection clause. This SEC case is a case in point, certainly, at some point I suspect will work its way up to the Supreme Court, and whether women have the same rights of diversity of ownership of the airwaves as minorities do.

There is the *Virginia Military Institute* case, the *VMI* case that has gotten a lot of publicity. It deals with a school that gets large sums of money from the State of Virginia, but allows no women, and the lower court upheld the exclusion of women from the State sponsored school, and the reasoning of the court really demonstrates what I think is at the heart of our concern. It takes stereotype notions of women, it says that this is a rigorous, in fact, a very punishing kind of atmosphere at VMI, and the women need more

nurturing, and we have to change the whole kind of educational setting, if we allowed women.

That kind of broad-based stereotyping I do not think would sit well with any on this panel here, and I know that the Justice Department is appealing the case. I am hopeful ultimately it will be overturned. But it is that kind of reasoning that we see with Thomas Sowell, it is that kind of stereotyping that we saw, frankly, with Justice Scalia in the opinion that Judge Thomas so praised and said he hoped would form the majority opinion some day on the Court.

When he dealt with the *Johnson v. Santa Clara County* case and said, well, women basically are not interested in these nontraditional jobs, that is why we do not see them there, that is part of Judge Scalia's opinion that Judge Thomas praised.

We have cases coming up where women have been preempted from juries under different standards than men. The Supreme Court decided last term that is unacceptable on the basis of race, but we have different conflicting lower court decisions, so we know that issue is coming up. Women's basic ability to serve on juries is at stake. So, there are really central issues before the Court.

Senator KENNEDY. Let me ask, Ms. Lichtman, if Judge Thomas' views had been the majority views on the Supreme Court in the last 25 years, how would the society be different with regards to women, based upon his writings, speeches, as well, I suppose, as the extent of his testimony here would shed some light?

Ms. LICHTMAN. Well, I think it is just the fragility of our new-found 20-year-old, if you will, constitutional protections that make us most worried. Marsha Greenberger a minute ago talked about the case of Diane Joyce in *Johnson v. Santa Clara County*, a county that had not ever had women in management positions, 258 jobs. What Ms. Joyce wanted was the opportunity to compete, albeit in a non-traditional job, and what Judge Thomas talked about was Justice Scalia's dissent, I fear, really, that that case could have been decided differently.

His criticism of *Roe v. Wade*, of cases like *Griswold* and *Eisenstadt*, albeit some time before this hearing and not making very clear exactly where he was on those decisions at all at this hearing, I fear, as many of you have raised, for the most fundamental rights of privacy, both marital privacy and privacy for single people.

The rights of working women, the rights of family to social security benefits, I could go on and on. When one endorses stereotypic notions, as he has, in endorsing the works of Sowell and even in offhand remarks as serious as I would suggest to you those offhand remarks in the Lehrman piece, cause women's advocates and advocates for working families and working people a great deal of concern, and I fear that there was nothing that he did in the hearing that allayed that concern.

Senator KENNEDY. Let me ask Ms. King, the Judge talked I think really quite eloquently and movingly, when he described the view outside of his courtroom about the young blacks in buses on their way to the court system, and even mentioned that it is only a small difference between where he sat and he might have sat, in terms of his own life's experience. He also talked about those people who were sort of left out and left behind.