Senator KENNEDY. Thank you very much.
Professor Edley.

TESTIMONY OF CHRISTOPHER EDLEY, JR.

Mr. EDLEY. Thank you, Mr. Chairman.

In summary, my central point is this: The Constitution forces the executive and legislative branches to share responsibility for picking Justices, and thereby share influence over the course of constitutional history.

In taking the measure of the nominee, you should look to the whole record and recognize that good character and unimpeached integrity did not prevent *Dred Scott* or *Plessy* or *Lochner*.

In the final analysis, it is not the character of this man that must be at issue, but the character of his record. Yet the heart of the administration's affirmative case is Judge Thomas' personal story and character, in hopes, perhaps, that this strategy will undergird his credibility and present an image strikingly more attractive than the piles of speeches and abstractions.

But that voluminous record raises many grave concerns to which the nominee offers one of three responses:

First, "Although what I said may sound extreme, I was really trying to make a far less controversial point." But repeated so often, this seems to me to lack credibility.

Second, "That was the position I took as a policy official in the executive branch; as a judge, I do not make policy." This argument is wrong. It misconceives the role of the Supreme Court and the process of judging.

Third, "I have an open mind on that subject." When applied to fundamental matters, however, this is almost disqualifying. A well-qualified nominee should at least be able to suggest, however tentatively, the framework for his or her analysis. How else can you discern someone's constitutional vision, which is the key question before you?

You have his documents to analyze, and you have his credibility to assess. But here is what I believe you are left with in two of the more critical dimensions: Civil rights and separation of powers.

First, in civil rights, the close questioning—particularly by Senator Specter—did not demonstrate that the nominee's views fall within the broad bipartisan consensus. If Judge Thomas joins the Court—this Court that gutted *Griggs* in a fit of activism—what grounds are there for confidence that he will dissent from further judicial activism of the same sort—judicial activism to reverse those statutory and constitutional holdings he attacked so forcefully for so many years?

The second critical dimension is broader. Judge Thomas on his record—on his record—is certainly an unlikely congressional pick for referee or partner in the separation of powers structure.

Why so? Well, the pattern of intemperate remarks—Senator Metzenbaum replayed some of them yesterday—the repeated clashes with oversight committees, the cramped and even distorted reading of title VII and of judicial precedents—Senators Specter and Kennedy explored these—the pattern, it seems to me, is compelling.

The fair prediction, I believe, is that Justice Thomas would tilt strongly toward the executive, defer to narrow agency interpretations of statutes, lean against generous interpretations of regulatory laws, including civil rights measures, and probably be uncharitable in appraising the rationality of statutes within the framework of due process or section 5.

The Court's referee role, however, is more critical now than ever. We seem ever more ambitious as a people about what we want to accomplish collectively, through one or another level of government. And divided government—that is to say, the White House and Congress led by different political parties—spawns conflicts which courts must often resolve. These separation of powers tensions are implicit almost everywhere, but statutory interpretation, with an agency arguably hostile to congressional will, is the most common setting.

Let me be plain. When you choose to confirm or reject a nominee, you influence the Supreme Court's jurisprudential view of statutory interpretation and the role of the executive. You influence, perhaps profoundly, the balance of power.

Rust v. *Sullivan,* the abortion gag-rule case, shows the danger of a world where, even if Congress has passed the law, executive agencies can distort it, the Supreme Court can misinterpret it, and when Congress tries to clarify its own intent, the President can veto it.

The design of the Framers seeks to balance factions and ensure that no branch has ideological domination over the others. With that in mind, Mr. Chairman, the lax and deferential standard for confirmation proposed by some makes little sense. Can it be now that the greatest danger to the separation of powers is not the abuse of executive power or an overreaching judiciary, but the unwillingness of Congress—in this instance, the Senate—to wield its power?

If there is a new Thomas standard, it will be by your choice. You will be choosing evasion over candor, conversion over consistency, political scripts over constitutional debate. But I believe you will choose well.

I hope this has been helpful.

[The prepared statement of Mr. Edley follows:]