NOMINATION OF JUDGE CLARENCE THOMAS TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 11, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice at 10:05 a.m., in room 325, Senate Caucus Room, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Present: Senators Biden, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Simon, Kohl, Thurmond, Hatch, Simpson, Grassley, Specter, and Brown.

The CHAIRMAN. The hearing will come to order.

Welcome back, Judge. It is a pleasure to have you back. Let me very, very briefly explain to you, your family, and everyone else the process this morning. I expect that we will have four Senators question before we break for lunch. If I were you, I would probably want to break after 2, but it is up to you. I will go through four Senators until lunchtime unless there is some indication from you or anyone else that you would like to stop and take a break. I will be glad to give you a break to get a cup of coffee or anything else you want.

Now, we need to get started. Do you have a preference, Judge, as to how you would like to proceed? Really, I am not kidding. Any way you want to do it.

Judge THOMAS. We will play it by ear.

The CHAIRMAN. Play it by ear. I agree with you. All right.

Now, we will start this morning's questioning in the same format as before; each Senator will have ½ hour for his questions and your response. We will start this morning with Senator Metzenbaum.

I might add that we do not plan on going beyond 5 o'clock today unless we are very close to finshing. We are going to try to end the hearing today at 5 and we will pick up tomorrow at 10 o'clock no matter what. I expect we will still have questions for the judge if people haven't had their second round.

With that, let me yield the floor to Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

Good morning, Judge Thomas. Nice to see you again. You have an extensive record of speeches and published articles. Judge, I have made no secret of the fact that I have serious concerns with many of the things in your record.

Yesterday I thought we would finally get some answers about your views. Instead of explaining your views, though, you actually ran from them and disavowed them.

Now, in a 1989 article in the Harvard Journal of Law and Public Policy, you wrote, "The higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for just, wise, and constitutional decisions."

Judge you emphasized the word "constitutional" by placing it in italics. By that emphasis, you made it very clear you were talking about the use of higher law in constitutional decisions. But yesterday you said, "I don't see a role for the use of natural law in constitutional adjudication. My interest was purely in the context of political theory."

Then in 1987, in a speech to the ABA, you said, "Economic rights are as protected as any other rights in the Constitution." But yesterday you said, "The Supreme Court cases that decided that economic rights have lesser protection were correctly decided."

In 1987, in a speech at the Heritage Foundation, you said, "Lewis Lehrman's diatribe against the right to choose was a splendid example of applying natural law." But yesterday you said, "I disagree with the article, and I did not endorse it before."

In 1987, you signed on to a White House working group report that criticized as "fatally flawed," a whole line of cases concerned with the right to privacy. But yesterday you said you never read the controversial and highly publicized report, and that you believe the Constitution protects the very right the report criticizes.

In all of your 150-plus speeches and dozens of articles, your only reference to a right to privacy was to criticize a constitutional argument in support of that right. Yesterday you said there is a right to privacy.

Now, Judge Thomas, I am frank to say to you, I want to be fair in arriving at a conclusion, and I feel that I speak for every member of this committee who wants to be fair. Our only way to judge you is by looking at your past statements and your record. And I will be frank; your complete repudiation of your past record makes our job very difficult. We don't know if the Judge Thomas who has been speaking and writing throughout his adult life is the same man up for confirmation before us today. And I must tell you it gives me a great deal of concern.

For example, yesterday, in response to a question from Senator Biden, you said that you support a right to privacy. Frankly, I was surprised to hear you say that. I have not been able to find anything in your many speeches or articles to suggest that you support a right to privacy.

Unfortunately, the committee has learned the hard way that a Supreme Court nominee's support for the right to privacy doesn't automatically mean that he or she supports that fundamental right when it involves a woman's right to abortion. At his confirmation hearing, Judge Kennedy told us he supported the right to privacy. Since he joined the Court, Justice Kennedy has twice voted with Chief Justice Rehnquist in cases that have restricted the right to abortion.

Likewise, Justice Souter told us that he supported the right to privacy, and then when he joined the Court, Justice Souter voted with the majority in *Rust* v. *Sullivan.*

My concern is this—and I know I have been rather lengthy in this first question. Your statement yesterday in support of the right to privacy does not tell us anything about whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy. I fear that you, like other nominees before the committee, could assure us that you support a fundamental right to privacy, but could also decline to find that a woman's right to choose is protected by the Constitution. If that happens soon, there could be nowhere for many women to go for a safe and legal abortion.

I must ask you to tell us here and now whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy, and I am not asking you as to how you would vote in connection with any case before the Court.

Judge THOMAS. Senator, I would like to respond to your opening question first and, if you think it appropriate, to consider each of your questions seriatim.

Yesterday as I spoke about the Framers and our Constitution and the higher law background—and it is background—is that our Framers had a view of the world. They subscribed to the notion of natural law, certainly the Framers of the 13th and 14th amendments.

My point has been that the Framers then reduced to positive law in the Constitution aspects of life principles that they believed in; for example, liberty. But when it is in the Constitution, it is not a natural right; it is a constitutional right. And that is the important point.

But to understand what the Framers meant and what they were trying to do, it is important to go back and attempt to understand what they believed, just as we do when we attempt to interpret a statute that is drafted by this body, to get your understanding. But in constitutional analysis and methodology, as I indicated in my confirmation to the court of appeals, there isn't any direct reference to natural law. The reference is to the Constitution and to using the methods of constitutional adjudication that have been traditionally used. You don't refer to natural law or any other law beyond that document.

What I have attempted to do with respect to my answers yesterday is to be as fair and as open and as candid as I possibly can. I have not spoken on issues such as natural law since my tenure as Chairman of EEOC. At that time it was important to me—it was very important—to find some way to have a common ground underlying our regime and our country on the issue of civil rights. I thought it was a legitimate ground. I wondered. I looked back at Lincoln, saw him here in Washington, DC, surrounded by a pro-slave State yet pro-Union, and a Confederate State. And I asked myself what was it that sustained him in his view that slavery was wrong. And it was through that progress that I came upon the central notion of our regime, All men are created equal, as a basis or as one aspect of trying to fight a battle to bring something positive

and aggressive to civil rights enforcement. And I thought it was a legitimate endeavor.

At no time did I feel nor do I feel now that natural law is anything more than the background to our Constitution. It is not a method of interpreting or a method of adjudicating in the constitutional law area.

With respect to your last question—and I assume for the moment that perhaps you don't want me to address each of the underlying questions or specific questions seriatim. I would say this about them, though: I have written and I have been interviewed quite a bit. I have been candid over my career. My wife said to me that to the extent that Justice Souter was a "stealth nominee," I am "Bigfoot." And I have tried to think through difficult issues without dodging them.

As a judge, though, on the issue of natural law, I have not spoken nor applied that. What I have tried to do is to look at cases, to understand the argument, and to apply the traditional methods of constitutional adjudication as well as statutory construction.

I am afraid, though, on your final question, Senator, that it is important for any of us who are judges, in areas that are very deeply contested, in areas where I think we all understand and are sensitive to both sides of a very difficult debate, that for a judge—and as I said yesterday, for us who are judges, we have to look ourselves in the mirror and say: Are we impartial or will we be perceived to be impartial? I think that to take a position would undermine my ability to be impartial, and I have attempted to avoid that in all areas of my life after I became a judge. And I think it is important.

I can assure you—and I know, I understand your concern that people come here and they might tell you A and then do B. But I have no agenda. I have tried to wrestle with every difficult case that has come before me. I don't have an ideology to take to the Court to do all sorts of things. I am there to take the cases that come before me and to do the fairest, most openminded, decent job that I can as a judge. And I am afraid that to begin to answer questions about what my specific position is in these contested areas would greatly—or leave the impression that I prejudged this issue.

Senator METZENBAUM. Having said that, Judge, I will just repeat the question. Do you believe—I am not asking you to prejudge the case. I am just asking you whether you believe that the Constitution protects a woman's right to choose to terminate her pregnancy.

Judge THOMAS. Senator, as I noted yesterday, and I think we all feel strongly in this country about our privacy—I do—I believe the Constitution protects the right to privacy. And I have no reason or agenda to prejudge the issue or to predispose to rule one way or the other on the issue of abortion, which is a difficult issue.

Senator METZENBAUM. I am not asking you to prejudge it. Just as you can respond—and I will get into some of the questions to which you responded yesterday, both from Senators Thurmond, Hatch, and Biden about matters that might come before the Court. You certainly can express an opinion as to whether or not you believe that a woman has a right to choose to terminate her pregnancy without indicating how you expect to vote in any particular case. And I am asking you to do that.

Judge THOMAS. Senator, I think to do that would seriously compromise my ability to sit on a case of that importance and involving that important issue.

Senator METZENBAUM. Let us proceed. Judge Thomas, in 1990, I chaired a committee hearing on the Freedom of Choice Act, where we heard from women who were maimed by back-alley abortionists. Prior to the *Roe* decision, only wealthy women could be sure of having access to safe abortions. Poor, middle-class women were forced to unsafe back alleys, if they needed an abortion. It was a very heart-rending hearing.

Frankly, I am terrified that if we turn the clock back on legal abortion services, women will once again be forced to resort to brutal and illegal abortions, the kinds of abortions where coathangers are substitutes for surgical instruments.

The consequence of *Roe*'s demise are so horrifying to me and to millions of American women and men, that I want to ask you once again, of appealing to your sense of compassion, whether or not you believe the Constitution protects a woman's right to an abortion.

Judge THOMAS. Senator, the prospect—and I guess as a kid we heard the hushed whispers about illegal abortions and individuals performing them in less than safe environments, but they were whispers. It would, of course, if a woman is subjected to the agony of an environment like that, on a personal level, certainly, I am very, very pained by that. I think any of us would be. I would not want to see people subjected to torture of that nature.

I think it is important to me, though, on the issue, the question that you asked me, as difficult as it is for me to anticipate or to want to see that kind of illegal activity, I think it would undermine my ability to sit in an impartial way on an important case like that.

Senator METZENBAUM. I have some difficulty with that, Judge Thomas, and I am frank to tell you, because yesterday you responded, when Senator Biden asked you if you supported the right to privacy, validated in *Moore* v. *City of East Cleveland*, by agreeing that the Court's rulings supported the notion of family as one of the most private relationships we have in our country. That was one matter that might come before the Court.

You also responded, when Senator Thurmond asked you whether, following the Court's ruling in *Payne* v. *Tennessee*, families victimized by violence should be allowed to participate in criminal cases. You went on to respond by indicating that the Court had recently considered that matter, and you expressed concern that such participation could undermine the validity of the process.

You also responded to Senator Thurmond's questions about the validity of placing limits on appeals in death penalty cases, the fairness of the sentencing guidelines, which was another one of his questions, and the good-faith exception to the exclusionary rule, which was another one of his questions.

Finally, you responded, when Senator Hatch asked you whether you might rely on substantive due process arguments to strike down social programs such as OSHA, food safety laws, child care legislation, and the like, by telling him that "the Court determined

correctly that it was the role of the Congress to make complex decisions about health and safety and work standards."

Now, all of those issues could come before the Court again, just as the *Roe* v. *Wade* matter might come before the Court again. So, my question about whether the Constitution protects the woman's right to choose is, frankly, not one bit different from the types of questions that you willingly answered yesterday from other members of this committee.

So, I have to ask you, how do you distinguish your refusal to answer about a woman's right to choose to terminate her pregnancy with the various other matters that may come before the Supreme Court, to which you have already responded to this committee?

Senator THURMOND. Mr. Chairman, since my distinguished colleague has mentioned my name several times, I would like to make a brief comment here and take it out of my time when I am called on again. I think it is pertinent to just take a little time, if you have no objection.

Senator METZENBAUM. I did not see fit to interrupt my colleague during his line of questioning. After the Judge——

Senator THURMOND. It is right on this point, you have just mentioned my name——

Senator METZENBAUM. But after the Judge responds, then I would——

Senator THURMOND [continuing]. And if I can take it out of my time, I would like to do that.

The CHAIRMAN. I would be delighted to let the Chair do that, but the witness is about to answer the question. Immediately after Judge Thomas has answered the question, then I will yield to the Senator from South Carolina to make his point, whatever the point is.

Judge THOMAS. Senator, I responded to and discussed, I believe, with Senator Thurmond, questions and concerns that he raised about these particular cases that you mentioned. I do not believe—and I have not had an opportunity to review the transcript—I do not believe that I either indicated that I agreed with the outcome in those cases that I raised with him or not. I simply raised the concerns, the discussions, and the Court holdings, and I believe some of the problems that might occur in some considerations in the future. I tried to discuss it openly with him, without reaching a judgment with respect to the outcome.

With respect to the *Lochner* era cases, I thought that my view was that these are cases that were decided in the 1930's or the post-*Lochner* era cases, and that I do not think the Court is going to revisit that area in the very near future. It is certainly not one that, to my knowledge, is——

Senator METZENBAUM. I am sure you are not suggesting that all of those matters about which Senator Thurmond inquired of you were all decided in the 1930's. Many of them are very pertinent and very much within the last few years.

Judge THOMAS. I may not have made myself very clear, Senator. The questions that Senator Thurmond and concerns that he raised about cases, those were recent cases. I do not believe—again, I have not had an opportunity to review the transcript—that I commented

on or that I agreed with or supported or sustained the judgment or the outcome in those cases.

Senator METZENBAUM. That is all I am asking you on this, to do the same kind of response that you gave Senator Thurmond. I am not asking you to speak about how you would vote on the Court. And just as you commented on those cases, what you thought about presentencing guidelines, habeas corpus matters, and various other questions that the Senator asked you, all I am asking you to do is give me the same kind of response with respect to the woman's constitutional right to choose in the same area.

Judge THOMAS. Senator Thurmond, I do not believe asked me whether I agreed or disagreed with the particular outcome. Again, I have not reviewed the transcript. The point that I am making with respect to the *Lochner* cases, the post-*Lochner* era cases, is that they were decided in the 1930's and that I do not think that they will be revisited.

I am not, nor would I have it suggested—and I think this is an important point, Senator—I think that if there were, if I could retain my impartiality and study those cases and think about them, I think that there would be room for comment. I do not believe that a sitting judge, on very difficult and very important issues that could be coming before the Court, can comment on the outcomes, whether he or she agrees with those outcomes as a sitting judge.

I think those of us who have become judges understand that we have to begin to shed the personal opinions that we have. We tend not to express strong opinions, so that we are able to, without the burden or without being burdened by those opinions, rule impartially on cases.

Senator METZENBAUM. I understand that, Judge, but I want to point out the similarity of this matter as compared to the question I am asking you about a woman's right to choose. Senator Thurmond said to you, "In fact, the Court recently used in the case of *Payne* v. *Tennessee* that the use of victim impact statements in death penalty cases does not violate the Constitution." He goes on to say, "In your opinion, should victims play a greater role in the criminal justice system, and, if so, to what extent should a victim be allowed to participate, especially after a finding of guilt against the accused?"

You responded, "Of course, Senator, that is a matter the Court, as you have noted, recently considered." You go on to say, "My concern would be, in a case like that, we don't in a way jeopardize the rights of the victim. Of course, we would like to make sure that the victim is involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process."

Now, I am not questioning your position. Whatever your position is, that is perfectly fine. What I am saying is that if you were able to respond as you did yesterday to questions from Senators Thurmond, Hatch, and Biden with reference to matters in the Supreme Court or may return to the Supreme Court, and why, Judge Thomas, can't you tell us about a woman's right to choose, which is understandably one of the most controversial issues in the country?

I am not asking you as to how you will vote in connection with that issue.

Senator THURMOND. Mr. Chairman, it is on that very point that I would like to make a statement.

The CHAIRMAN. The Senator is recognized, and the time will not come out of the Senator from Ohio's half hour.

Senator THURMOND. I want to say that no question I asked Judge Thomas to answer in any way required him to comment about how he would rule on a case that could come before the Supreme Court.

My distinguished colleague, Senator Metzenbaum, as a lawyer, must know that the questions I asked the nominee were areas where the law is well settled. I strongly believe it is inappropriate to ask the nominee how he would rule in a particular case. Judges must be impartial. For a judge to have preconceived notions about how he would rule in a case would clearly undermine the independence of the judiciary.

Additionally, I specifically told Judge Thomas, and these are words that you can quote, "If I propound any question you consider inappropriate, just speak out, because I strongly believe a nominee should not be compelled to answer how he would rule on any specific case that may come before the Court."

The CHAIRMAN. Thank you very much, Senator.

I point out that the ruling on victim impact statements was, I think, a 6-to-3 decision, and it is far from well-settled. It is still in controversy, both here and in the Court. Now, I will yield back to the Senator from Ohio.

Senator METZENBAUM. And it overruled previous Court decisions, so it still is in controversy.

Let me go on. Yesterday, you were asked about a 1986 report produced by the White House Working Group on the Family. You testified you had not read a section of the report which criticized as fatally flawed a lien of cases upholding the right to privacy in a woman's right to abortion. Two of the cases criticized by the report were *Roe* v. *Wade* and *Planned Parenthood* v. *Danforth*, both of which protect a woman's right to an abortion.

The report also declared that State-imposed restrictions on a woman's right to an abortion should not be challenged by the Supreme Court. Judge Thomas, it appears to me that you were the highest ranking administration official on the White House Task Force, and this report was recommending policy changes that would have a profound and sweeping impact on the lives of millions of American women.

In the months leading up to your confirmation, this report has been the subject of considerable discussion. As a matter of fact, the Chairman of the Commission is also, as I understand it, chairman of the committee to help promote your candidacy.

How is it possible that, until yesterday, you had never read this section of the report and—well, not guess that I would ask that question.

Judge THOMAS. Senator, I think it is important to understand how the domestic policy shop in the White House worked. What it would do is that it would assemble a group of people who had expressed an interest in an area across the administration, and it would, in essence, use that group as a resource.

My interest during the meetings—and I believe there were three, perhaps four meetings, I cannot remember—was in low-income families, families that I believed were at risk in our society. I submitted to that working group, I believe to the head of the working group, who was not myself, a document, a memorandum on low-income families. The group itself did not meet, nor were we called upon to draft the document.

The document itself was, I believe, circulated and final, although I cannot remember exactly the procedure, but it is not uncharacteristic that, after you have participated in a working group or after one participated in a working group with the White House or with the domestic policy branch, that the report itself would not be made available for comment, and that others would simply finalize the report. Again, I cannot remember how that precisely worked.

My interest was limited to low-income families and I was thankful that certain portions of that was included. I did not have an interest in, nor expressed comment on the other portions of the report.

Senator METZENBAUM. Yesterday, the chairman stated that one of the privacy decisions criticized as fatally flawed in the report was *Moore* v. *City of East Cleveland.* The chairman also noted that the report calls for the appointment of new Justices on the Court, to change the result in the *Moore* case in another decision.

In response to the chairman, you stated that, "If I had known that section was in the report before it became final, of course, I would have expressed my concerns." Judge Thomas, if you had known that the report characterizes two abortion cases as fatally flawed and suggests that these decisions can be corrected, directly or indirectly, through the appointment of new judges, would you have objected to that, as well?

Judge THOMAS. Senator, let me respond to that in this way: I thought that the report—and, based on the submissions, I think this underlines that—that the report should have been focused on how do we help existing families, not debating some of the more controversial and difficult issues in our society. I thought that it would be an opportunity and would be an occasion to find ways to take families that are at risk and families that are having difficulties and to help those families in whatever form we find them.

Senator METZENBAUM. I guess my question is—I will repeat the question: Would you have objected, if you had known that language was within the report, as you indicated you would have objected with respect to the langauge in connection with the *East Cleveland* case?

Judge THOMAS. I think I would have, Senator, raised concerns of the nature and with the underpinning that I just gave you, and that is that I thought it would have been appropriate for the report to have focused expressly on families that were at risk and how we could help families in their current conditions nor out of their current conditions.

Senator METZENBAUM. Well, you told Senator Biden you would have objected to the language with reference to the *East Cleveland* case, and so I am only asking you whether you would have objected to the langauge with respect to the abortion cases.

Judge THOMAS. Senator, I believe—again, I have not reviewed the transcript—I believe I indicated that I would have raised concerns, and I believe that those concerns would have been of the same character and the same nature as the concerns that I would raise in this case. I thought that we had a grand opportunity there to focus governmental policy on existing low-income and at-risk families.

I felt that was very important, and it was very important in this context, it was important to me: It was important, because you had I think about one-third or more of the minority kids in our society being under the poverty limit, and I felt that the administration could have addressed that in a policy that was important to the entire administration.

Senator METZENBAUM. My time is up, but, Judge Thomas, I am really asking you specifically yes or no. You indicated you would have objected to the *East Cleveland* decision, had you known that language with reference to the *East Cleveland* decision, had you known it was in there. So, I am asking you if you had known about the abortion case references, would you have objected, and the answer is just yes or no.

Judge THOMAS. Senator, I would have raised concerns for the reasons I have expressed to you.

The CHAIRMAN. Thank you very much, Senator Metzenbaum.

Dr. Hatch——

Senator SIMPSON. Dr. Hatch?

The CHAIRMAN. Excuse me. I am so accustomed to attempting to avoid the Simpson-Metzenbaum skirmish that I guess it was a reflex action. I do apologize. I was so impressed with Senator Hatch's rehabilitation yesterday that I just wanted to hear more. [Laughter.]

Senator HATCH. With Senator Simpson's permission, I would be really happy to pick up with this.

The CHAIRMAN. I apologize, Senator Simpson. I am sorry. Senator Simpson.

Senator SIMPSON. Mr. Chairman, you have often left the Senator from Ohio and I to our own skirmishes, which we certainly enjoy.

The CHAIRMAN. You will understand if both Senator Thurmond and I just reflexively push our chairs back. If you will notice Senator Thurmond has already started back. I am heading back, too, so you can see one another. [Laughter.]

Senator SIMPSON. I want to get a little eye contact with Howard. Get out of the way, Ted.

Well, let me say that you see one of the great pleasures of being on this committee. It is a splendid committee, and we have a splendid chairman. And the members I think have a comity and a nature of dealing with each other which is something I think that no nonlawyer could understand. It is a little tough for my friend from Iowa; sometimes he will say, "What are you guys up to?" But it is part of the practice of law. You whack around on somebody all day long, and then you go off and have dinner together or visit with each other, and that is the best way to legislate.

I have the highest regard for every single member of this committee, and my spirited friend from Ohio and I had one one time where we were both just standing going toe to toe. I think it was

during the Rehnquist hearings. And let me tell you, our neck muscles were bulging in the hall. And Howard said, "Well, smart alec, here they come, here come the media. They have seen what we are up to." And we both said, "Yes, but by the time they get here, we will be smiling and clapping each other on the back." And by the time they made it there, we were chuckling and doing our chicken dance, whatever it is we do. Anyway, it is interesting work.

I want to welcome the family here: The son and the mother and the daughter, Jamal and Ginnie, who I think I knew before she knew you, with the Department of Labor when I was working on immigration issues. Very splendid lady.

I go back to the words of probably our most respected colleague, Jack Danforth. He mentioned that you had a great propensity for laughter and good humor. You display that. I have a propensity to sometimes cross the line between good humor and smart alec. And when I do, I certainly pay for it dearly, and should.

My dear mother taught me that humor was the irreplaceable solvent against the abrasive elements of life, and that remarkable lady, in her ninth decade, will be critiquing whatever I say. And I must be very diligent and clear in saying it.

I think you can already see the hazards of speaking out. Your collected speeches—I heard Dr. Hatch yesterday. The reason the chairman refers to him as "Dr. Hatch," he is the great rehabilitator. He can take broken bodies and stretch them back into proper shape after Kennedy or Howard or whoever have raveled them unyielding. And so that was just a slip there.

But what has happened is you took the collected ramblings of all of us, and we were sitting there, and they said Senator Biden or Senator Metzenbaum or Senator Kennedy or Senator Simpson, do you remember a speech you gave to some institute in Detroit on the night of October 1, 1981? You probably scribbled it on the back of a matchbook. Then you did it, and you either got carried away with the crowd or you didn't, or you took them or you didn't. And to think that you can go back in life and try to put those things together as something that has to do with now is a very difficult thing for me to believe in life. But I am one who believes that if they were putting together the life of Al Simpson at the age of 60, at which I arrived September 2, and the Al Simpson of 17 or 35 or 40 or 45, no one can pass that test. There may be a lot of people here that say they can pass that test, but nobody—nobody—can pass that test.

So you see the hazards of this, and I think it is very important that we heed the warning—I read it as a warning—of Jack Danforth not to pay one bit of attention to snippets and pieces and bits and shards and jagged edges, or whatever you have said in the past, unless you have a little stack of it right there. And every time somebody pulls one out, you just say, "I ask that the entirety of that speech go into the record." We will make that an automatic. I think that is a very important thing because there isn't anything that I have read—and I have read a great deal—and knowing others on this panel, Senator Leahy or Senator Specter, and I know how they burrow in stuff and read extensively everything you probably have done. I think it is critically important that it all be presented. Because, indeed, in looking at the questions that have been

presented and then looking at the speeches, it just doesn't fit, unless, of course, you are just taking the one phrase.

Well, I must comment on the so-called confirmation conversion. That seems to be a bit of a topic of the day. I mentioned in my opening statement that certain special interest groups would go after you in a rich and vigorous way. That is not exactly what I said, but it could be rancorous and it could be contentious. And I said that, and that now is, you know, coming to pass.

And after you explained to us yesterday, I thought rather clearly, on this issue of natural law that you had used it as a basis for political theory but not as a basis for constitutional adjudication. That was your statement. And this issue of natural law, it would be really interesting to know what that is. But since you don't know what it is, it is kind of tough to talk about it I would think.

These are the reasons why I struggled in law school. Little sessions like that used to just leave me huddled in the corner as to what it was that was trying to be developed, losing track of how do you assist a person in extremity, what is a lawyer supposed to do, what is your duty to society, and real life things that have to do with a lawyer-client relationship.

But, anyway, one of the leading spokesmen, or at least one of the continually most vocal spokesmen for some civil rights groups have accused you of a confirmation conversion. Let me read the quotation in one of today's journals. It says, "The Executive Director of the Leadership Conference on Civil Rights said that Judge Thomas was running from his record"—"He seemed to be sprinting from his record," not running from his record. "He seemed to be sprinting from his record." That was the earlier confirmation conversion we have witnessed.

I think that is a bit of an overreaction, but I think that is but a portrayal of a sound bite syndrome that suddenly overcomes some people in that line of work. And I think it is an inaccurate accusation, and I think it is untrue. And I use that word without being light about it. Untrue. An act of desperation, if you will, and that is used often by that group.

Here is their publication of July 17, 1991, of this Leadership Conference on Civil Rights. By the way, the record should disclose that more than several of their membership organizations dropped out of the fight here with you and decided not to join them in denouncing you. That is clearly of record.

Then in July, they didn't know what to do with you. You got them. They are very frustrated about you. And they said that if they decided to oppose you—and, believe me, from my experience with them, I know that they were ready to oppose you on July 17, 1991—but if they decide to oppose you, it will come only after the most serious consideration.

In that same document, they go on to say about what is at stake for them. So far they say, "The right wing of the Court, led by Chief Justice William Rehnquist and Justice Antonin Scalia, have had to compromise on many occasions in order to get their 5–4 and 6–3 majorities. If Justices Rehnquist"—and I emphasize this—"and Scalia get one more like-minded Justice, they will have without question the votes to overturn directly Supreme Court decisions.

Overnight, constitutional and statutory rights Americans have had for decades could vanish."

Now, that is half hysterical stuff there. You only get one vote, as far as I am aware. But here is the part that deserves, I think, the attention of fair-thinking people. Here is what you said to this chairman on February 6, 1990. Everybody had a good look at this. They scoured your record with a brush, a wire brush.

So you said to this chairman and this committee on February 6, when you were nominated to the circuit court, with regard to the issue of natural law—and everybody knows this. Let us try to stay at least basic, in fairness. You said:

> 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.

Now, that is what you said. You made that quite plain 17 months ago, the exact distinction that you were making yesterday. I might ask you, then, to set the record straight: Is it accurate to say that on the day of September 10, 1991, was that the day on which Clarence Thomas changed his views or had a conversion or sprinted from his previous record on natural law? Or were those the views you explained so well and ones that you have held for some period of time?

Judge THOMAS. Senator, I have been consistent on this issue of natural law. As I indicated, my interest in the area resulted from an interest in finding a common theme and finding a theme that could rekindle and strengthen enforcement of civil rights, and ask the basic or answer a basic question of how do you get rid of slavery, how do you end it.

Our Founders, the drafters of the 13th, 14th amendments, abolitionists, believed in natural law, but they reduced it to positive law. The positive law is our Constitution. And when we look at constitutional adjudication, we look to that document. We may want to know, and I think it is important at times to understand what the drafters believed they were doing as a part of our history and tradition in some of the provisions such as the liberty component of the due process clause of the 14th amendment. But we don't make an independent search or an independent reference to some notion or a notion of natural law.

That is the point that I tried to make, and there was no followup question, as I remember it, at my confirmation to the court of appeals. But that has been a consistent point. We look at natural law beliefs of the Founders as a background to our Constitution.

Senator SIMPSON. Have you seen anything come up at this hearing thus far that is really anything different, much different than what happened when we confirmed you for the circuit court, other than the fact that you have remained absolutely silent as those out there decided to distort these issues?

Judge THOMAS. Well, I think the one difference, Senator, of course is that I am a sitting Federal judge now. When I came before this committee the last time, I was a policymaker. I was

someone who had taken policy positions, and those questions and concerns were raised of me as Chairman of EEOC.

Today I am a sitting Federal judge, and I find myself in a much different posture. It is a different role. I have no occasion to make policy speeches, have no occasion to speculate about policy in our Government, or to be a part of that policy debate. And I believe at my last confirmation, much of that debate or those debates were explored in the hearings.

Today I have refrained from it, from those debates, primarily because, as I have said before, engaging in such policy debate, particularly in public, I think undermines the impartiality of a Federal judge. Taking strong positions on issues that are of some controversy in our society when there are viewpoints on both sides undermines your ability.

My Dallas Cowboys, for example, played the Redskins on Monday night, and I am totally convinced that every referee in those games is a Redskins fan. But none would admit to it.

I think that in something as simple as that, even though we have strong views about who should win, something as simple as that, we would want to feel that the referees—and judges are, to a large extent, referees—are fair and impartial, even when we don't agree with the calls.

The CHAIRMAN. Judge, are you for the Dallas Cowboys or the Redskins?

Judge THOMAS. I am a lifetime—I have been a Dallas Cowboys fan for 25 years.

The CHAIRMAN. Thank you very much. [Laughter.]

Senator SIMPSON. That didn't come off of my time, did it?

The CHAIRMAN. No. It doesn't come off your time. I am just curious.

Judge THOMAS. I am certain that that will probably have someone else express his concern about me.

Senator SIMPSON. I think that will create more concern than anything thus far. To have you in this nest of Redskin fans, to be a Dallas Cowboy fan certainly discloses a degree of independence which will serve you very well on the Court. [Laughter.]

Let me ask a couple more. My time is running down. Some have raised a litany of questions about this issue of natural law. I think some of your critics—and I do not say this about the chairman because I know the way he does his research, in a powerful, skilled way, using resources that are available to him. But it seems to me that as I read stuff about, it has been selected as an issue to try to confound people because natural law is an inherently vague concept. And then your detractors can conjecture all kinds of things about you and your philosophies without being taken to task for the obvious inaccuracies and vagueness.

Now, for example—and I love this definition—the commentator in the Legal Times—I didn't get the name, but I love the quote. He recently wrote, he or she—

> Of all the perplexing questions surrounding the Supreme Court nominee, few are more nettlesome than natural law. It is sure to come up at confirmation hearings, but don't expect any clear answers, and don't blame Thomas for being unclear. Natural law philosophy and its adherents live in a world apart, a world that is dense

and combative and, above all, unclear. A journey to the world of natural law is not for the faint of heart.

That is a quote from the Legal Times. In the article, it says:

Tap into the natural law crowd, and you quickly learn that there are factions of adherents who hate each other. There are the East Coast Straussians and the West Coast Straussians, both followers of philosopher Leo Strauss but sharply in disagreement with each other. You are instructed if you talk to Walter Byrnes, a leader of the East Coast faction, you don't mention the name of Harry Jaffa, the West Coast leader, until your conversation is nearly over. And it is true. When asked about Jaffa, Byrnes said, "At one time we were close friends, but ten years ago we parted company."

Yesterday I saw a report in a national publication that had four paragraphs of Jaffa. I don't even know what he has to do with this. As far as I know, he is not going to testify. But if he does, I certainly want to be here. He has got some unique ideas and concepts I would like to ask about.

So it goes on to say, "It goes on like that"—I am quoting from the article—"propelling one on a fairly fruitless search through writings by the likes of St. Thomas Aquinas and Abraham Lincoln in hopes of discovering how Clarence Thomas would carry out natural law precepts. The simple answer, the one that frightens liberals, is that nobody knows."

And then, of course, it was interesting to me—and it was mentioned yesterday—that Laurence Tribe, who I greatly respect and who I know and feel quite certain that when the Democrats wrench the Presidency back to their bosom, he will be exhibit A right here. And I want to talk with him and visit with him and hear his views, but we won't have to look far because he has a ton of opinions that he has written. And I admire his guts. Because there aren't going to be people who are bright and energetic who are ever going to write much more again as long as this committee continues to do what we do. And there is a purpose for what we do, and I am not challenging that. And it is done with fairness.

But, in any event, you were asking about natural law solely on the basis of something that was deep in your craw, and that was slavery. Isn't that correct?

Judge THOMAS. Senator, that is correct. The issue of civil rights has been something that, of course, has affected my entire life, and which I indicated in my opening statement, but for those changes I would not be here.

My concern was how do you, from a standpoint of our political philosophy, how do you end slavery and how do you reinvigorate civil rights enforcement. How do you convince people who may be skeptical of aggressive enforcement that it is actually central to our country?

I think that those who heard me during that time understood how deeply I felt about that and continue to feel about that. And I think that anyone who grew up where I grew up, in the world that I grew up in, would be deeply impassioned about civil rights enforcement. But I was trying to engage not only the passion but the intellect, and it was an effort to help and to add to and to support and sustain that I was looking at the whole area of natural law; not as an effort to undermine or destroy individual freedoms in our society, but to actually support it and to defend it and enhance it.

Senator SIMPSON. Well, I think that that is a very good answer. Obviously I concur with it. But it seems to me that this natural law business, if I can understand it, does have a very clear foundation. And it has been used by anyone of both parties, and I have quotes of members of this committee who have used it to talk about racism in South Africa or what we have done with the disadvantaged in society. Professor Tribe has used it, the other side of it with Judge Bork. Good heavens.

But I think if you asked us what is a natural law, it has to do with things like the right of privacy—and that is a critical right, in my mind, in life, a principle shared by all of us about inalienable rights, the Declaration of Independence itself. That, I gather, is what you were referring to, that we hold these truths to be self-evident, or, rather, natural—if I may interpret it—that all men are created equal, which must have puzzled you greatly from your résumé of life that you have presented to us; that all men are endowed by the Creator with certain inalienable rights, which must have stunned you, too.

So I can hear it from that standpoint, and although I hesitate to use today's trendy jargon, I believe one would have to be terribly insensitive not to hear what you are saying and the way you are saying it and understand your explanation of your exploration of this thing called natural law in an effort to find meaning in a Constitution that apparently permitted slavery in the United States. That must have been a most torturous path to travel, one that I nor any one of us could even conjecture.

So I fear that we lawyers have become fascinated with this new vague theory of law which most of us never heard one whit about in law school. This is like the doctrine of Renvoi. I never tried a case with the doctrine of Renvoi, but it sounded good, and one guy talked about it all day. And he got an A, and I got a D. So I knew he was on the right track.

So I believe this fascination has caused us to elevate this rather peripheral matter to a central issue in the confirmation, kind of a penumbra of stuff floating around, to quote another Justice.

You have told us so clearly that you feel that natural law is not applicable to constitutional adjudication, is the word you used, or interpretation. You testified that you had not considered it in your adjudications on the circuit court and that you hadn't spoken publicly or written on it since you left the EEOC. Now, that seems to me pretty well to cover it, but I don't think it will.

So my final question for you, do you believe that that passage that I just moments ago quoted from the Declaration of Independence has meaning, perhaps the meaning I attached to it? Is the belief that all men are endowed with certain inalienable rights one that you would consider well accepted within the judicial mainstream and consistent with most Americans' values and principles?

Judge THOMAS. Senator, I think that most Americans, when they refer to the Declaration of Independence and its restatement of our inherent equality, believe that. And I believe that our revulsion when we think of policies such as apartheid flow from the acceptance of our inherent equality.

Now, we haven't always lived up to that. And, indeed, principles or concepts such as liberty were added by individuals who believed

that we were all created equal, abolitionists some of them, to the Constitution itself. But once it is in the Constitution, then our rights are set out. It is no longer an ideal. It is a constitutional right—liberty. And once it is in the Constitution, we adjudicate it, we interpret it, understanding what our Founders believed. But adjudicate it, looking at our history and our tradition, not just what their beliefs were when they drafted the document.

Senator SIMPSON. Mr. Chairman, I am going to conclude. I know I have a couple of minutes left, but I would be starting on another approach on issues that I think I would not be able to properly address. I thank you for your courtesy.

The CHAIRMAN. Thank you.

I am going to suggest that we take a 5-minute break, to accommodate the Judge. If I may, Judge, I want to put one notion to rest here.

Number 1, do not count me as one of your detractors, because I ask you tough questions. No. 2, the issue of natural law may confound the people, to use Senator Simpson's phrase, but not a single legal scholar in America. I hope you meet that criteria, or you should not be on the Supreme Court. You must have a knowledge and insight to the Constitution that is better than the average lawyer, and I am sure you do. That is why I am sure you understand what I am about to say.

Not a single legal scholar in America fails to understand the significance of whether or how one applies natural law. Judge Bork devoted a chapter in his book about how those people who want to apply natural law are bad, not bad in a moral sense, but wrong.

There is an entire school of thought with which you are fully familiar. I did not fail to accept your answers yesterday. I just want to make sure we all know what we are talking about here. You and I know, at least, what we are talking about.

There is not a single legal scholar who does not understand that there is a fervent, bright, and aggressive school of thought that wishes to see natural law further inform the Constitution than it does now. The positivists, led by Judge Bork, argue against this school.

Again, that may be lost on all the people, but you know and I know what we are talking about. Now, all I am out to do in my second round is to find out whether you, in fact, do apply natural law, and, if you do, how. You answered that partially yesterday, and yet I am still somewhat confused, so I plan to come back to it. But for the record and for all the press to know, whether someone applies natural law is of phenomenal significance, and there is not a single legal scholar in America who will disagree with this statement.

Now, someone may apply it in a way, like Moore, who leads him in a direction that is liberal. You may apply it in a way that leads you in a direction that is conservative, or you may, like many argue, not apply it at all. Nevertheless, it is a fundamental question that is going to be almost impossible for nonlawyers to grasp and exchange, but you know and I know that it is a big, big deal.

In conclusion, the only reason most of us asked you about natural law, is that is how you gained your reputation. Rightly or wrongly, when you are spoken about by other lawyers or when you

were spoken about in the press, you are spoken about in terms of your speeches on natural law.

Now, I accept for the moment that everybody misunderstood you; let me be precise, that your speeches were just philosophic musings. I accept that for the moment. But, I do not want any Senator to think that your detractors are out there searching for a theory that doesn't have significance.

I, like Senator Simpson, did not do well in law school, probably worse than Senator Simpson.

Senator SIMPSON. I did pretty well. [Laughter.]

The CHAIRMAN. I did very poorly in law school, but I have spent an awful lot of time since law school dealing with this subject. I know and you know that what a judge's view on this issue is of phenomenal consequence to the future of this country.

Again, I need to explore your view further, but if it is, as you have stated, "Senator, whenever I speak of natural law, they are philosophic musings, they in no way impact upon my view on the Court," fine, that answers the question. But please, let no one misunderstand, this question informs every other application of the law and the Constitution. It is that basic, it is that simple. I accept your assertion that it doesn't for you, I accept that. I want to go back and discuss it more. This discussion is less for you than it is for Senator Simpson and others.

Lastly, let me point out that you say a right must be in the Constitution, for example, liberty. Well, you know, liberty means different things to different people. It is in the 14th amendment.

Now, as you well know, some people interpret liberty in terms of natural law. Some people interpret it only in terms of tradition and history, and some people, when they look at history and tradition, interpret it a different way. Scalia says when you look at tradition, you've got to look at it very narrowly. Others say you look at it broadly.

So, it makes a big difference. It is going to be impossible to communicate these ideas to the people, however, at this point, my job is not to communicate to the people. My job is to make sure that we know what your basic philosophic point of view is relative to the Constitution. I am not a detractor asking you these questions. It is not meant in any way, I hope you understand, to be a detraction or distraction. It is tantamount to understanding how you approach constitutional interpretation.

We will recess for 10 minutes.

Senator SIMPSON. Mr. Chairman, may I——

The CHAIRMAN. Excuse me, the Senator wants to make a comment.

Senator SIMPSON. I have 30 seconds at least left.

The CHAIRMAN. You can have any time you want.

Senator SIMPSON. No, I don't. I would just say I think it is very important to make a distinction here between natural law as an academic exercise or discussion or a flight for law review editors and a political confirmation process. Those are two entirely different matters, and I was referring to the latter, and I would just say that to me, in my studies, your life in public is not based on a reputation bogged down in the definition of natural law. I don't know where that came from.

Thank you.

The CHAIRMAN. Well, I will point out later where it came from. I thank you very much. We are going to recess for 10 minutes. [Recess.]

The CHAIRMAN. The committee will resume now.

Judge, I did not give you a chance to say anything. Did you want to say anything after my little discussion with the Senator? I am not asking you to, but did you?

Judge THOMAS. Senator, the one point, and perhaps it is one that you probably already knew, I did not consider you a detractor of me. I think that the dialog on natural law is an important one and it is one that, of course, you indicated we would have, and I welcome the opportunity to explain to you——

The CHAIRMAN. I want to make clear, also, I did not think that you thought I was a detractor, and I am sure that Senator Simpson is not. But all kidding aside, that was really a discussion between Senator Simpson and me on whether or not this issue is of consequence.

Thank you, and let me now yield to the Senator from Arizona, Senator DeConcini.

OPENING STATEMENT OF HON. DENNIS DE CONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you very much.

Members of the committee and Judge Thomas, I regret that I was unable to be here yesterday for the opening testimony. I did read your statement and have heard a lot about it. Indeed, it was a moving statement and I compliment you for your candidness and openness.

As Cochairman of the Helsinki Commission, I had to attend or felt I had to attend the opening of the International Human Rights Conference in Moscow prior to being here today. Our delegation, traveled to the Baltic states and several other republics and had an interesting opening session in Moscow.

As I was traveling through these republics and listening to Gorbachev and others make speeches about human rights in Moscow, I couldn't help but think about the process that we are going through here today. The fundamental rights, the freedoms which Americans have enjoyed for 200 years are just now coming to pass, perhaps, in the Soviet Union. My thoughts kept returning to these hearings and the Founding Fathers, of how they struggled with this and did not do a perfect job. It took a long time before we finally did some of the things we should have done earlier on.

It is our Constitution which these small democrats were looking to for the equality of human beings, and we see how they struggled with it, and your opening statement certainly expresses how you have struggled with that, like no one on this committee could really appreciate.

It is particularly fitting that my first duty upon returning to the country is to consider the confirmation of the successor to a man who has been the champion and in the forefront of the rights of the individuals during his long and distinguished service on the Supreme Court, of course, that is Thurgood Marshall. His legacy will

surely serve as a model for the jurists in these emerging democracies and the justice system, as they seek to protect their hard-fought struggle for individual rights and their freedoms.

It is against this backdrop that I will listen to the responses to some of the questions that I will submit to you and those that have already been asked to you. I hope that I will be able to conclude, Judge Thomas, that your judicial philosophy will first and foremost be dedicated to the protection of the rights of individuals.

Mr. Chairman, I request that the full statement that I would have given yesterday be inserted in the record in the proper place, if I may.

The CHAIRMAN. It will be placed in the record in its entirety.

Senator DECONCINI. Thank you, Mr. Chairman.

[The statement of Senator DeConcini follows:]

STATEMENT OF SENATOR DENNIS DeCONCINI

NOMINATION HEARING OF CLARENCE THOMAS

AS AN ASSOCIATE SUPREME COURT JUSTICE

SEPTEMBER 10, 1991

I AM PLEASED TO JOIN MY COLLEAGUES ON THE COMMITTEE IN WELCOMING JUDGE THOMAS TO HIS CONFIRMATION HEARINGS. AT A TIME WHEN OUR CONSTITUTION IS SERVING AS THE BLUEPRINT FOR DEMOCRATIC REFORM THROUGHOUT THE WORLD, WE BEGIN, TODAY, THE PROCESS OF ONE OF THE MORE INTEGRAL COMPONENTS OF THAT GREAT CHARTER -- THE SENATE'S DUTY OF "ADVICE AND CONSENT" TO THE PRESIDENT ON JUDICIAL NOMINEES.

THE ADVICE AND CONSENT DUTY OF THE SENATE IS ONE OF THIS BODY'S MOST IMPORTANT CONSTITUTIONAL POWERS. BUT THIS PROVISION PROVIDES NO IMMUTABLE STANDARD FOR SENATORS TO LOOK TO WHEN FACED WITH THE RESPONSIBILITY OF VOTING ON A SUPREME COURT JUSTICE. I HAVE OFTEN STATED AND BELIEVE THAT THE SENATE SHOULD GIVE THE PRESIDENT'S NOMINEE THE BENEFIT OF THE DOUBT. BUT THIS IN NO WAY MEANS THAT WE SHOULD CONFIRM A NOMINEE WITHOUT THOROUGHLY EXAMINING HIS OR HER QUALIFICATIONS. AS THE SENATE DOES NOT EXPECT THE PRESIDENT TO RUBBER STAMP ITS LEGISLATION, THE PRESIDENT SHOULD NOT EXPECT CONGRESS TO RUBBER STAMP HIS NOMINEES.

A SUPREME COURT JUSTICE IS NOT A CABINET MEMBER WHOSE JOB IS TO SERVE THE PRESIDENT. IT IS NOT SUFFICIENT THAT THE PRESIDENT AGREES WITH THE VIEWS OF THE NOMINEE. THE SENATE HAS A RIGHT, INDEED A CONSTITUTIONAL OBLIGATION, TO EXAMINE A NOMINEE'S

COMPETENCE, INTEGRITY, EXPERIENCE, AND YES -- HIS OR HER JUDICIAL PHILOSOPHY. FOR THE SUPREME COURT IS UNDENIABLY A POLICYMAKER. OUR FRAMERS DRAFTED THE CONSTITUTION IN BROADLY-WORDED PRINCIPLES THAT WERE INTENDED TO PROTECT AN EVOLVING SOCIETY. CONSTITUTIONAL INTERPRETATION REQUIRES AN EXERCISE OF DISCRETIONARY JUDGMENT. THUS, WE MUST CAREFULLY CHOOSE THE CONSTITUTION'S MOST IMPORTANT INTERPRETERS.

WE HAVE HEARD FROM VARIOUS GROUPS WHO EITHER OPPOSE THE NOMINATION OF JUDGE THOMAS OR HAVE GRAVE CONCERNS IN PLACING HIM ON THE COUNTRY'S HIGHEST COURT, INCLUDING NATIONAL GROUPS REPRESENTING THE INTERESTS OF WOMEN, HISPANICS, AFRICAN-AMERICANS, AND THE ELDERLY. NO ONE DOUBTS THAT JUDGE THOMAS HAS THROUGHOUT HIS CAREER TAKEN ACTIONS OR ANNOUNCED POSITIONS THAT HAVE INVOKED CRITICISM. BUT I BELIEVE THAT JUDGE THOMAS' OPPONENTS HAVE THE BURDEN IN PERSUADING THIS SENATOR THAT JUDGE THOMAS SHOULD NOT BE CONFIRMED. GROUP POSITIONS MUST BE SUPPORTED BY MORE THAN A BOARD VOTE. THE OPPOSITION TO THIS OR ANY NOMINEE MUST SUBSTANTIATE THEIR CASE THAT THE NOMINEE IS COMMITTED TO IMPOSING HIS OR HER OWN EXTREMIST AGENDA UPON THE COURT.

THE COURT IS GOING THROUGH A TRANSITION PERIOD. IN MANY AREAS OF THE LAW I AGREE WITH THE DIRECTION THAT THE CURRENT COURT HAS MOVED. HOWEVER, THERE ARE CERTAIN AREAS IN WHICH I BELIEVE THE COURT HAS BEEN DEAD WRONG. THAT IS WHY I VOTED IN FAVOR OF THE CIVIL RIGHTS BILL LAST CONGRESS. THE EXCESSES OF THE WARREN COURT IN ONE DIRECTION SHOULD NOT BE REPLACED BY EXCESSES IN ANOTHER DIRECTION. THE COURT LOSES ITS LEGITIMACY AS

AN INSTITUTION IF ITS EDICTS ARE SOLELY DEPENDENT UPON ITS PERSONNEL.

IN JUDGE THOMAS, I HOPE TO FIND A CANDIDATE WHO RESPECTS THE COURT AS AN INSTITUTION. AS AN INDIVIDUAL, HE DESERVES PRAISE FOR HIS NUMEROUS ACCOMPLISHMENTS IN A SHORT PROFESSIONAL CAREER. I AM VERY IMPRESSED BY HIS INTELLECT AND LEGAL ACUMEN. HIS PERSONAL STORY IS ONE THAT SHOULD BE TOLD OVER AND OVER AGAIN. HE LEFT ME WITH A POSITIVE IMPRESSION AFTER HIS OFFICE VISIT EARLIER THIS SUMMER. I FOUND HIM TO BE VERY ENGAGING AND PERSONABLE. AND IMPORTANT IN THIS SENATOR'S MIND IS THE STRONG SUPPORT HE HAS FROM MY DISTINGUISHED COLLEAGUE SENATOR DANFORTH, WHO HAS ATTESTED TO JUDGE THOMAS' SKILL AND INTEGRITY.

OVER THE YEARS JUDGE THOMAS HAS WRITTEN ARTICLES, DELIVERED NUMEROUS SPEECHES, DIRECTED A FEDERAL AGENCY, TESTIFIED BEFORE CONGRESS, AND AUTHORED FEDERAL JUDICIAL OPINIONS. HE HAS A RECORD THAT WE CAN ALL EXAMINE. WE HAVE AN AMPLE BODY OF EVIDENCE ON JUDGE THOMAS'S VIEWS ON VARIOUS IMPORTANT AREAS OF THE LAWS AND HIS CRITIQUE ON SOME MOMENTOUS CONSTITUTIONAL CASES. BUT AS HE STATED AT HIS COURT OF APPEALS NOMINATION HEARING, HE HAS YET TO FORMULATE HIS OWN CONSTITUTIONAL PHILOSOPHY.

AFTER THESE HEARINGS CONCLUDE, THE SENATE AND THE AMERICAN PUBLIC SHOULD HAVE A VISION OF CLARENCE THOMAS' CONSTITUTIONAL PHILOSOPHY. I HOPE TO FIND A JURIST WHO IS RESPECTFUL OF PRECEDENT RATHER THAN A JURIST WHO IS ON A MISSION TO IMPOSE HIS PERSONAL BELIEFS OR HIDDEN AGENDA ON THE COUNTRY THROUGH BROAD SWEEPING OPINIONS. IN RESPONSE TO THE JUDICIARY COMMITTEE'S QUESTIONNAIRE, A RECENT SUPREME COURT NOMINEE CHARACTERIZED

JUDICIAL RESTRAINT AS A JUDGE HONORING "THE DISTINCTION BETWEEN PERSONAL AND JUDICIALLY COGNIZABLE VALUES." I NEED TO BE CONFIDENT THAT JUDGE THOMAS CAN FULFILL THIS DEFINITION OF JUDICIAL RESTRAINT.

NO ONE IN THIS BODY WILL EVER BE SATISFIED WITH EVERY RESPONSE OF A NOMINEE; THAT IS IMPOSSIBLE. I KNOW AND EXPECT THAT JUDGE THOMAS AND I WILL DISAGREE ON PARTICULAR ISSUES. WHAT IS IMPORTANT IS THAT AT THE END OF THE DAY, WHEN ALL IS SAID AND DONE, EACH SENATOR MUST ANSWER ONE QUESTION BEFORE VOTING -- DO YOU FEEL SECURE ENTRUSTING THIS NOMINEE WITH THE TREMENDOUS RESPONSIBILITY OF PROTECTING THE RIGHTS -- WHETHER ENUMERATED OR UNENUMERATED -- IN OUR CONSTITUTION?

ONE FINAL NOTE -- AS OCCURRED WITH HIS NOMINATION TO BE A JUDGE ON THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, QUESTIONS HAVE ARISEN, ONCE AGAIN, CONCERNING JUDGE THOMAS' COMMITMENT TO THE LAW. THE CONCERN STEMS FROM JUDGE THOMAS' CONTROVERSIAL TENURE AS CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS WELL AS RECENT REVELATIONS REGARDING HIS ACTIONS AT THE OFFICE OF CIVIL RIGHTS IN THE DEPARTMENT OF EDUCATION.

I HOPE TO EXPLORE THROUGH THESE HEARINGS WHETHER JUDGE THOMAS WAS ACTING WITHIN HIS ADMINISTRATIVE CAPACITY IN CARRYING OUT THE POLICY OF THE ADMINISTRATION OR WHETHER HE WAS UNWILLING TO ENFORCE LAWS THAT CONFLICTED WITH HIS PERSONAL VIEWS.

IN CLOSING, I JOIN MY COLLEAGUES IN EXTENDING A WARM WELCOME TO YOU, JUDGE THOMAS. I LOOK FORWARD TO THE QUESTIONING AND WITNESSES. AND I LOOK FORWARD TO LEARNING MORE ABOUT YOUR

JUDICIAL PHILOSOPHY AND YOUR THOUGHTS ON THE GREAT CONSTITUTIONAL ISSUES OF OUR DAY.

Senator DECONCINI. Judge Thomas, I would like to pursue the equal protection clause, the 14th amendment and how it relates to discrimination. As you so well know, but for purposes of clarity, the 14h amendment prohibits a State from depriving a person of life, liberty, or property, without due process of law or equal protection of those laws.

The equal protection clause provides the primary constitutional protection against laws that discriminate on the basis of gender. And as we also know from previous hearings, there are three tests. There is the rational relationship test, which is the most lenient of those tests, there is the intermediate scrutiny test or a heightened test, which has been used in gender cases, and then there is the scrutiny test, which has been used in race and national origin.

Judge Thomas, there has been much discussion already regarding reliance on natural law. Unfortunately, or maybe fortunately, depending on how you define it, natural law has been invoked historically, and goes back a long time.

For example, in 1873, in the *Bradwell* v. *Illinois* case, the Supreme Court denied a woman a license to practice law, arguing the following:

> Civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. The natural and proper delicacy which belong to the female sex evidently unfits it for many of the occupations of civil life. The paramount destiny and mission of women is to fulfill the noble and benign office of wife and mother. This is the law of the Creator.

Now, I know you went on with Senator Kennedy at some length about your position on natural law, which I did review this morning, and I welcome some clarification that you can give. But with the *Bradwell* case, we see that those Justices applied natural law.

I know that you stated that your duty would be to uphold the Constitution and not a natural law philosophy, but I would like to just clarify for the record, do you disagree with the Justices' decisions that were held back in 1873 in the *Bradwell* case?

Judge THOMAS. Senator, I do.

Senator DECONCINI. Thank you. That is really all I want to know. I want to be very clear, based on your statements to Senator Kennedy, that you do not have any lingering thoughts that stare decisis, when dating back to a clear case where natural law was used, poses any problems to you.

Judge THOMAS. No.

Senator DECONCINI. Thank you.

Judge Thomas, when you were nominated to the court of appeals, because of time constraints and other things that prohibited me from coming to those hearings at any length and waiting my turn to ask you questions, I submitted written questions requesting your comments on the court's approach to the equal protection clause. We also discussed this before these hearings when you were in to see me, where I told you I would address some questions to you and offer some thoughts on it.

In response to my written questions, your partial response was, "Though I do not have a fully developed constitutional philosophy, I have no personal reservations about applying the three standards as an appellate court judge in cases which might come before me."

Now that you have been on the court for 18 months and may soon be making decisions on important equal protection cases on the highest court of the land, let me ask you if you have developed a constitutional philosophy regarding the Court's three-tier approach to the equal protection cases.

Judge THOMAS. Senator, I have no reason and had no reason to question or to disagree with the three-tier approach. Of course, the rational basis test being the least structured or least strict of the tests, the heightened scrutiny test, which has been used in the area of gender and alienage and legitimacy, and the strict scrutiny test, which has been used in the area of fundamental rights and race, Senator, I think that those tests attempt in our society to demonstrate the concern that we have for classifications that could infringe on fundamental rights, and I believe that underlying, when we move away just from the legalese—and I do accept this structure of the three-tier test—when we move away from it, at bottom what we are talking about is are we going to allow people to be treated in arbitrary ways, either because of their gender or because of their race, are we going to defer to classifications based on gender or race, and what the Court is attempting to do in an important way is to say no, we are going to look at those classifications.

Senator DECONCINI. Thank you, Judge Thomas. That is helpful, and I guess it goes without saying, but I am going to say it anyway, you have no agenda or hidden belief or anything else regarding the present position that the Supreme Court has taken with these three tiers on equal protection as they relate to gender or any other minority or class that it may be applied to.

Judge THOMAS. Senator, I think it is important for judges not to have agendas or to have strong ideology or ideological views. That is baggage, I think, that you take to the Court or you take as a judge.

It is important for us, and I believe one of the Justices, whose name I cannot recall right now, spoke about having to strip down, like a runner, to eliminate agendas, to eliminate ideologies, and when one becomes a judge, it is an amazing process, because that is precisely what you start doing. You start putting the speeches away, you start putting the policy statements away. You begin to decline forming opinions in important areas that could come before your court, because you want to be stripped down like a runner. So, I have no agenda, Senator.

Senator DECONCINI. Thank you, Judge Thomas.

Is it fair to say that your philosophical approach, not going to any specific case, is that you would agree with this statement: If the Court were to abandon the heightened scrutiny test as it is applied to sex discrimination, gender cases, et cetera, that it would be turning the clock back on equal protection rights of women?

Judge THOMAS. Senator, I think that would be an appropriate statement, if you said either abandon or ratchet down.

Senator DECONCINI. Thank you very much. Because it concerns me a great deal, if the Court moves in that direction, without touching the issue of abortion or what have you. Having studied it and having posed these questions to a number of nominees here, I really feel the Court has, to the best it can, with the variance of

people that are on there, come to some relatively good conclusions. And though the intermediate scrutiny or heightened scrutiny may not be enough to satisfy the inequities in women's position in jobs and pay and what have you today, at least I am satisfied that it gives a court an opportunity, as the cases come before it, to continue to improve the inequities that I believe women still suffer in our society, and I am pleased with your responses.

They are similar to those responses that Judge Souter gave, and maybe you listened to his testimony, but I am very thankful for your candid approach, and also your comments about an agenda, because I agree with you, Judge Thomas, there is no place on the Court for someone who has an agenda. We all have ideas and we have to express them. We are all raised in a certain way and we all have certain convictions that we have to express and follow through, once we are in a position of making a decision. But indeed, I take that as a very serious statement on your part.

Justice Marshall had his own distinct approach to equal protection claims, as you may recall. Marshall believed that the Court does not apply a three-tier approach to equal protection claims, but, rather, a "spectrum of standing" review. Thus, the more important the constitutional and societal right given to an interest, the greater the scrutiny should be applied.

Do you have any feelings about this distinction that Justice Marshall makes regarding the three-tier system that you clearly said that you support and the spectrum of standing in total society?

Judge THOMAS. Senator, I have not examined Justice Marshall's approach in any detail and not had occasion to employ it in any of my analysis. But I think that what he is attempting to do is precisely what you are attempting to do with the three-tier analysis, and that is to adjust the scrutiny and to make it more exacting, the more significant and more important the right we are protecting. Maybe it would accomplish the same ends or be pretty close to the three-tier analysis, but it seems as though the objective is the same. But I have not had occasion to use——

Senator DECONCINI. Is it fair to say from your comments, then, that if you came across a case regarding sex discrimination—it could fall into the strict scrutiny, if it was such a blatant case that was not unisex toilets or something that is always used in the area of the intermediate scrutiny to show the difference in applying a strict scrutiny, in an effort to all sex cases? Is that a fair statement or can you comment on it?

Judge THOMAS. Senator, I think that discrimination is, as I have said, a cancer on our society. There could be instances where one would want to apply a more exacting standard even than the current heightened scrutiny test. I would be concerned if we were to see a movement down toward the rational basis test. But I think that discrimination and classifications based on race or sex are so damaging to our society, and to individuals in particular, that one could consider and be open to ratcheting up or applying a more exacting standard.

Senator DECONCINI. Thank you, Judge Thomas.

I know yesterday with Senator Kennedy you discussed the 1987 Atlantic Monthly article by Juan Williams—"A Question of Fairness" I believe it is called—which was based on the extensive inter-

view with you. In that article, Williams writes that you stated, among other things, "Blacks and women are generally unprepared to do certain kinds of work by their own choice. It could be that blacks chose not to study chemical engineering and that women chose to have babies instead of going to medical school."

You also discussed with Senator Kennedy your support of the writings of Thomas Sowell. In an article you wrote for the Lincoln Review in 1988 titled "Thomas Sowell and the Heritage of Lincoln," you praised Sowell's analysis of working women. And Sowell contended in a 1984 book that inequities in pay and career advancement stem from women's own behavior and preferences, claiming that women choose jobs and careers with lower pay and greater flexibility to accommodate their roles as wives and mothers. And I agree with you that Mr. Sowell certainly has a right to express his views.

But my question to you is: Do you agree with his conclusions on this particular statement and issues?

Judge THOMAS. Senator, I think as I alluded to yesterday, to say that women brought discrimination on themselves or lower pay on themselves is going too far. The point that I attempted to make yesterday with Senator Kennedy was that you have to begin to disaggregate the numbers. You have to look more at the particular categories. You can't just have the average and say this is the problem. If you are going to address the problems, you have to engage in a process of disaggregation.

There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who employed a significant number of women, I did not find that to be true and made that very clear.

Senator DECONCINI. Sowell also explained pay inequities between the genders by claiming that "Women are typically not educated as often in such highly paid fields of mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields such as construction work, lumberjacking, coal mining and the like."

What are your thoughts about that conclusion?

Judge THOMAS. Well, I can't say whether or not women are attracted or not attracted to those areas. I think that is a normative comment there. But I do think his point that there are not women in some of the higher paying professions begs the question.

Senator DECONCINI. I do, too.

Judge THOMAS. There are reasons why, and some of those reasons could involve discrimination.

Again, my point in saying that his arguments could be an anecdote to the debate is because he attempts to disaggregate and to not simply say all of the reasons are simply discrimination. There could be other reasons. It is not to say that I adopted, as I said yesterday, I believe, to Senator Kennedy, all of his conclusions and his assertions. I simply don't and did not at that time.

Senator DECONCINI. Thank you, Judge Thomas.

Judge Thomas, I want to go into some areas that deal with Hispanic concerns. As a former Chairman of the Equal Employment Opportunity Commission, you weren't responsible for, but I am sure or I hope you are familiar with the 1983 charge study—enti-

tled "Analysis of the EEOC Service by Hispanics in the United States," which was conducted by the EEOC-appointed task force. That task force concluded that the needs of Hispanics were not being adequately addressed by the EEOC.

At the time, the task force indicated a need to improve EEOC's record of investigations of Hispanic charges and to increase outreach and education efforts within the Hispanic community.

Now, as the Commissioner, what programs did you initiate to improve the accessibility of the EEOC within the Hispanic community?

Judge THOMAS. Senator, when I arrived at EEOC, one of the first concerns among many—believe me, there were many—with which I was met was that EEOC was underserving the Hispanic community; for example, in Los Angeles and certainly in your home State.

There were a number of hearings, some of which I participated in, across the country in various major cities discussing the problem and what the probable or possible responses could be. A number of the, I think, concerns were that the national origin charges were low. The problem there, of course, is that not all of the charges which we received from Hispanic employees or Hispanic-Americans are national origin charges. They go across the line. They can involve age; they can involve gender discrimination also.

A number of the things that we did included opening offices in predominantly Hispanic communities, satellite offices. That was a part of our expanded presence program. I made sure that we developed public service announcements that were bilingual. I installed a 1-800 number at EEOC so that the agency could be accessible. We developed posters that were bilingual. We took all of our documents, our brochures, and translated them into Spanish.

The effort was to make sure that we reached out, that we included, and also in areas where we had—there was a significant Hispanic population, we made every effort to see to it that the top managers and the investigators spoke Spanish. Again, the effort, the overall effort was to reach out, and that was consistent with the recommendations.

I might also add that during the major part of my tenure, two of our five commissioners were also Hispanic. So there was considerable interest on my part, on their part, and, indeed, the Commission's part, in being of greater service to Hispanic-Americans.

Senator DECONCINI. How many offices did you open in the Hispanic community.

Judge THOMAS. We opened—that is a good point. I can't remember the satellite offices, the exact number. I know we opened one in east L.A., and we upgraded the office in San Antonio, TX, from a smaller area office to a full-scale district office to better serve that area.

Senator DECONCINI. Did any of these programs include plans to recruit more Hispanics for the agency itself?

Judge THOMAS. We attempted to do that in coordination with various individuals, but that is a more difficult proposition, and also to promote internally and to make sure that we had Hispanics promoted to jobs.

But that can be frustrating. My efforts sometimes were met with individuals after you position them for the senior position, they

find other alternatives and leave the agency, or other difficult personnel actions.

Senator DECONCINI. Judge, an interim result of a study conducted by the National Council of La Raza indicates that since the 1983 task force study, the situation at EEOC with regard to Hispanics has not improved. While the Hispanic population in the United States has grown in the last decade from 6 percent of the total U.S. population in 1980 to over 9 percent of the total population today, the percentage of the EEOC total charge caseloads filed by Hispanics was only 4.15 percent.

Given your efforts to improve the EEOC record with regard to Hispanics since 1983, how do you account for the disproportionate small number of charges filed by Hispanics?

Judge THOMAS. Again, Senator, I have and had the very same concern that we were underserving—or that EEOC during my tenure and when I arrived there was underserving the Hispanic community. I don't know how the numbers were arrived at. To my knowledge, the agency does not keep data in areas that do not involve national origin charges by national origin. So I don't know, for example, whether we are looking at numbers reflecting only the national origin charges as opposed to other areas.

I can say this: That we made every effort during my tenure to change the Commission's accessibility to Hispanic-Americans, to individuals across this country. That was the purpose for our expanded presence program, for our satellite offices, for our educational programs, all of which were started during my tenure. Our outreach efforts were all designed so that we are not sitting in our offices waiting for people to come in, but we actually go to them.

Sometimes it is frustrating because they don't all work, but it certainly was not because of a lack of trying.

Senator DECONCINI. Well, I'm certain it must be frustrating. Judge, another area of concern is the disposition of charges filed by Hispanics. According to the National Council of La Raza report, the percentage of cases which were administratively closed without remedy to the charging party has increased from 45 percent in 1985 to 72 percent in 1990. I realize a little bit of that time you weren't there. But does this figure reflect a weakness in the EEOC effort to pursue complaints filed by Hispanics, or does it suggest that the incidence of discrimination against Hispanics is lower than other protected groups?

Judge THOMAS. Senator, again, I don't have that data, and this is the first I have heard of those numbers. I would not think, particularly with the office heads and the employees who would certainly be interested in the communities in which they investigate those charges, that it is a weakening in EEOC's efforts.

Again, I don't have the data. It certainly does not reflect—not to my way of thinking—a reduction or decline in discrimination.

Senator DECONCINI. Is it your position that you were taking and following the recommendations of the 1983 task force?

Judge THOMAS. We did everything in our power during my tenure to reach out.

Senator DECONCINI. Well, did you, really, Judge? Did you go and meet with the Council of La Raza, the GI Forum, or any of the other national or local Hispanic groups, to see what they would

suggest you do, or to ask for their counsel and suggestions and advice?

Judge THOMAS. Senator, I can't name, again, sitting here, all of the groups that I have met with, but one of our Commissioners in particular was very, very active, and he and I spent a great deal of time together, because he would go, and he would report back on what the perceptions of the problems were and approaches that we could take. Again, he and I were there the entirety of my tenure, with the exception of a few months. And a second Commissioner who was also Hispanic, he and I worked very closely together to begin to address some of these problems. And I am sure both of them were very active and very involved, and I think they would both tell you that I always——

Senator DECONCINI. Judge, I appreciate that, but it doesn't answer my question. What did you do? Did you go out and seek to sit down with some of these national Hispanic groups regarding the problem, or was it kind of your attitude that, look, I've got two Hispanics here; I'll let them take care of that; I am going to take care of other areas that I think are of primary concern to me?

I get a feeling that you did not pay attention yourself to Hispanics—and that doesn't mean I am going to vote against you or for you because of that single issue, because I don't make any decisions that way, but I get a feeling that while you were there that that was not high on your priority list, that you left it to the two Hispanic Commissioners, and you did something else, but yet you were the Chairman.

Judge THOMAS. Senator, I can assure you that I traveled over this country to meet with various groups. I can't tell you precisely right now which groups I met with. I know I met with any number of Hispanic groups in my efforts to change the way that the agency was responding.

I believe that discrimination in this country—whether it is race, gender, national origin, religion, age—that all of it is wrong, and——

Senator DECONCINI. I don't question that, Judge, I don't question that.

Judge THOMAS [continuing]. And what I attempted to do was to equalize treatment at the agency of all the areas. I was outside of the agency to visit with these organizations. I can't tell you which ones. I certainly tried to work with a number of the organizations. Some, I had better relationships with during my tenure than others.

Senator DECONCINI. Well, maybe you could help us—and I don't know if you have time, or somebody could help you to go back over your calendar. I'd like to know whom you did meet with in the Hispanic area. The feeling I have is that you really were not paying attention to Hispanics—maybe not because you didn't like them—I'm sure that isn't the case—maybe it is because you were so busy dealing with women's issues and black discrimination, I don't know. But I get that feeling, and from the opposition that has come forward from the Hispanic community, you certainly didn't leave them with any great impression that you were interested in their problems, Judge.

Judge THOMAS. Well, Senator, I was, and I tried to resolve the problems. As all of us know, when you run an agency as spread out as EEOC, and with the difficult mission that we had, you have your frustrations, and I certainly had my share, but I can assure you that I tried to reach out to all the groups.

Senator DECONCINI. My time is up, Judge. I will come back to this and a couple of other areas later. Thank you, Judge Thomas.

The CHAIRMAN. Thank you very much.

Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I would like to make sure that a letter sent to you and Senator Thurmond from former Attorney General Benjamin Civiletti is introduced in the record, and I would like to note as a statement in that record besides the fact that Mr. Civiletti served the Carter administration, he has testified in support or has asked to testify in support of Judge Thomas, and these are some words he used, "finding his tenacity and strength of character to be positive attributes for the work of the Court." So, I would like to submit that for the record.

The CHAIRMAN. Without objection, and I can assure the Senator that General Civiletti has been invited to testify and we look forward to hearing his testimony.

[The letter referred to follows:]

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September 9, 1991

Honorable Joseph R. Biden, Jr., Chairman
United States Senate
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Re: Clarence Thomas Nomination

Dear Mr. Chairman:

I write in support of the nomination of Clarence Thomas to the Supreme Court and to respectfully request that if time and the calendar permit that I be invited to be a a witness before the Judiciary Committee on this matter.

I support this nomination for many reasons but first because Judge Thomas is qualified by education, training and capacity to be a Supreme Court Justice. Further, I believe that diversity of experience, age, geography, and background is desirable on the Supreme Court, and Judge Thomas' age, background, and upbringing differ from other members of the Court. I also admire greatly Judge Thomas' tenacity and strength of character in the successful pursuit of his legal and public service career, positive attributes for the work of the Court.

On a personal note, one of my partners, for whom I have the greatest respect, was a classmate of Judge Thomas in law school and has kept in touch with him since then, and this partner endorses Judge Thomas without reservation as an outstanding choice for the Supreme Court.

Sincerely,

Benjamin R. Civiletti

BRC:jb
cc: Honorable Strom Thurmond

42-25/BLULIT

Senator GRASSLEY. Judge Thomas, again I want to welcome you, and particularly welcome you and your family, and I admired how patient they have been sitting through all of this. They are to be complimented, and particularly complimented for their support of you during this time of trial, although you tend to be handling the trial very well.

I do not know what your son's career is going to be, but I am sure it is not going to be in law, after he observes what you go through. [Laughter.]

Much of the discussion has focused on natural law, and while I have listened intently to this and have some questions in that area, I would like to pursue what I believe is a related subject, judicial restraint. An understanding of your view on the role of the courts in our democracy will, I really think, give us a better understanding of where natural law fits into your judicial philosophy.

The Founding Fathers, as Alexander Hamilton wrote in the Federalist Paper 78, intended the judiciary to be, in their words, the least dangerous branch of government. Now, in your writings and speeches, you have cited Hamilton's framework for Federal power, power based on the sword, the purse, and the power of reason. Hamilton said the President would hold the power of the sword, the Congress the power of the purse.

The judiciary, having neither power of the purse nor sword, would derive its power and influence from its ability to provide reasoned and persuasive decisions, establishing sound legitimate reasons for every dispute that it decided.

I understand this to mean that judges would have to be fair, unbiased, openminded, devoted to addressing the facts and the law before them, without freedom to apply their own values in reaching a decision. I would like to refer to what Judge Harlan Fiske Stone expressed well, when he wrote—and then this will bring me to a question for you—and this is Justice Stone, "While the unconstitutional exercise of power by the Executive and Legislative Branches of government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint."

Yesterday, you told Senator Hatch that there was no room to apply personal philosophies in one's effort to adjudicate cases. In my first question, I hope that you will reaffirm what you said along this line in your confirmation hearings for the Court of Appeals of the D.C. Circuit. You said, "The ultimate goal should always be to apply the will of Congress, the will of the legislature, I don't think it is ever appropriate for a judge to replace the intent of the legislature with his or her own intent." Is that something you can reaffirm today, after being on the circuit court of appeals?

Judge THOMAS. Senator, when I spoke those words in my confirmation hearing for the court of appeals, of course, I had not been a judge. But now I can reaffirm those words with the experience of having had to be a judge and having had to judge in some difficult cases.

I do not believe that there is room in opinions in our work of judging for the personal predilections, the personal opinions and views of judges. I think in statutory construction, the ultimate goal for us is to determine the will of the legislature, the intent of the

legislature, not what we would have replaced the legislative enactment with, if we were in the legislature, and we have no role in legislating.

Senator GRASSLEY. To continue along the same line, it seems to me your notion of the role of courts is very similar to that of Justice Anthony Kennedy. He cautioned that judges are not to make laws, they are to enforce the laws. He said the courts could not be "the aristocracy of the robe," that is to say black robes of a judge give the individual no special mandate to declare the law. How close would you be to the statement made by Judge Kennedy?

Judge THOMAS. I think, Senator, that we all who have been judges are pretty close to the same statement. We recognize that when we sit to judge cases, one, that we have to be open and we have to think and we recognize our fallibility, as I said yesterday, but we also have to recognize—and this is something that I do before I sit down in each case, and in each of the cases that I sat on on the court of appeals, I ask myself a very simple question, what is the role of a judge in this case. I think that is an important question. It is not so much to determine that we are going to in any way constrain the development of individual rights. Indeed, I am for the robust development of those rights. But, rather, it is a question to restrain judges and to restrain me, so that I have a confined and defined role.

Senator GRASSLEY. I like those responses, but let me now refer to a speech you gave that maybe on my reading of it bothers me, and maybe on your explanation of it, you can clear it up. But I would like to contrast what you said and also what you said in the earlier confirmation hearing for the D.C. Circuit Court of Appeals with a speech at Wake Forest University in 1988, and I do have a copy of the speech, if you want me to give it to you.

There you said, "Once a law passes, the action shifts to the problem of administration, it is up to the courts and the bureaucracy to fill in generalities and sometimes resolve the contradictions of the law."

Now, the reason this concerns me is because it is vaguely like something Justice Souter said in response to some of my questions last year, that the courts—and these are his words—"fill vacuums left by Congress." That statement, of course, troubled me a year ago. He later somewhat qualified it in responses to additional questions the following day.

I guess my question is very basic. How much filling in are you going to do, as a Supreme Court Justice? I hope you can clarify something here. Do you think there is a role for the courts to be activist this way in the terms of filling vacuums or, as you said, filling in the generalities and resolving contradictions of the law?

Maybe, you know, in a wider area, I would want you to explain when is judicial activism legitimate.

Judge THOMAS. I do not think that it is legitimate, Senator, and perhaps let me respond to your specific question.

Senator GRASSLEY. Surely.

Judge THOMAS. The point that I was making there, and it is one that was an important point, is that when an agency, an administrative agency receives a statute, it is called upon to implement that statute, to develop regulations, perhaps internal rulings or

procedures, but it is always called upon to do that consistent with the intent of this body. The statute on its face may be general, it may be ambiguous. The agency has to go through a process, however, of determining in a reasonable way what your intent was.

I think a court does the same thing, that when there is ambiguity in the statute, the court simply goes back to your legislative history and attempts to discern what was Congress' intent. To the extent that we are talking about filling in in that instance, I think it is simply a process of statutory interpretation and development of rulemaking within the agency or the administrative bodies in the executive branch.

Senator GRASSLEY. Judge Scalia testified here, and has practiced it as a Justice, that in looking at history, he is not going to look to the committee reports, he is not going to look to congressional debate, he is going to look at the statute and just determine congressional intent from the language of the statute. Is that where you are going to get congressional intent?

Judge THOMAS. Senator, I don't know how you can resolve ambiguities in statutes, and when we do have ambiguities in statutes, then we look to legislative history, we look to the debates on the floor, of course, we look to committee reports, conference reports, we look to indications, the best indications of what your intent was.

Of course, some legislative history is perhaps more accurate or better than others, but the point is our effort is always to look for your intent, to discern your intent. I don't know how one can go about that process, the process of interpreting ambiguous statutes, without looking to legislative history.

Senator GRASSLEY. Let me go to maybe, along the same line, but to some specific cases you have been involved in, because the docket of the court you now sit on is filled with regulatory cases, and in this position I think a judge could be tempted, with such a big caseload, to direct and manage bureaucracy and, of course, thereby substituting his or her own judgment for that of a more politically accountable administrative agency.

In fact, one of your colleague, Judge Mikva, has written that the court should be on the lookout for—and this is as he termed it—a sudden and profound change in agency policies, as such changes constitute, in his words, danger signals and give license for court intervention in agency action, in his view.

Considering this, I was struck by your opinion in *Citizens* v. *Busey*, and that is the Toledo Airport expansion case. Your opinion expresses some important elements of judicial restraint. You found that the FAA, in reviewing the expansion plans, carried out its lawful authority. The plaintiffs wanted more review of the environmental issues. What did you base your decision on—your opinion, I should say?

Judge THOMAS. First of all, let me say, Senator, that Chief Judge Mikva and I and our other colleagues worked together very well and have very vigorous debate internally on these important issues, and I enjoy sitting with him as a colleague.

In this case, the initial question was this: In determining whether or not or where Burlington-Northern was to place its hub, who makes that initial decision or who determines the objective or the goal of the project. And if the objective or the goal of the project is

determined in a broad way, that is, Burlington-Northern is entitled, the goal is a hub, then the alternative to be explored can be very significant, they can be countless, a hub where in the United States, or is a determination of the goal or objective to be made by the city of Toledo and Burlington, that is, Burlington wants a hub in Toledo, then the question becomes that the alternative is between that specific hub and no project at all.

What we, in essence, found was that the decision should have rested, the goal, the objective of the project rested with the individuals who were applying for the FAA permission to build the hub, rather than this broad expanse of possibilities.

Senator GRASSLEY. Let me quote briefly from that opinion of yours, and I guess not that you need to react, but I want to know if this is good basis for me to judge your opinion of judicial restraint:

Federal judges enforce the statute—

In this case, it was the National Environmental Policy Act—

by insuring that agencies comply with NEPA's procedures, and not by trying to coax agency decision-makers to reach certain results. We are forbidden from taking sides in the debate over the merits of developing the Toledo Express Airport. We are required, instead, only to confirm that the FAA has fulfilled its statutory obligation. Congress wanted the agencies, not the courts, to evaluate plans to reduce environmental damage, but the Federal courts are neither empowered nor competent to micro-manage strategies for saving the Nation's parklands.

That is you.

Judge THOMAS. I think that, Senator, was my view, my opinion as to what the intent of this body was, and my effort was to faithfully apply that in adjudicating in that particular case.

Senator GRASSLEY. There are a lot of other cases like that I would like to go over, but let me just do one more. It is your concurrence in the *Cross Sound Ferry* v. *Interstate Commerce Commission*. The case involved the issue of standing. You agreed with Judge Mikva's result, but just not the reasoning; is that correct?

Judge THOMAS. That is right. I concurred in the result in that case, Senator.

Senator GRASSLEY. I would like to have you elaborate on those differences of views between Judge Mikva on the one hand and your reasoning on the other.

Judge THOMAS. My concurrence, the purpose was really a simple question, one of the challenger. The case involved two ferry companies. One was an established ferry company, and there was a newcomer who wanted to travel back and forth across Long Island Sound. ICC determined that the newcomer was exempted from regulation. As we received the cases, one of the challenges was by the existing ferry company that the ICC should have required of the newcomer a filing or compliance with two environmental regulations, NEPA and the Coastal Zone Management Act.

The question was for me initially the question that I ask in all cases and in all areas: Do we have jurisdiction to consider this? And there is an argument sometimes that when the merits of the case are easy and the jurisdictional component of the case is hard, that it is easy enough to skip over determining jurisdiction and determine the easy-merits portion of the case.

My point in the concurrence was that it was inappropriate to skip over the jurisdiction determination to get to the merits, that

Federal judges had an obligation to determine at each turn whether or not we as judges had any role in that particular case. And my view was that there was no standing to raise the issue on the part of the existing ferry company.

Senator GRASSLEY. One sentence that you said in that decision, "Federal courts are courts of limited jurisdiction. When Federal jurisdiction does not exist, Federal judges have no authority to exercise it, even if everyone—judges, parties, members of the public—wants the dispute resolved." It seemed to me like you set a very narrow role for the courts. And my question then in regard to going to the Supreme Court, you assume that is going to be the same philosophy you start with, on standing and other things?

Judge THOMAS. Senator, I don't think that we as judges should be stingy or crabbed in our review of individuals' access to our judicial system. I think it is important, as I said yesterday, that the courts and our judicial system be available to all, that they have a place where their case can be adjudicated in a fair way.

My concern, however, is that we are judges who are required to determine what our jurisdiction is before we can decide a case, and I see that more as a restraint on us than it is on the individual having access to the court system, although the two, of course, could ultimately be the same thing in some cases. But the jurisdictional determination to me is an important determination.

Senator GRASSLEY. The doctrine of standing is a limitation on the exercise of judicial power. Your opinions to me are good examples of how a judge must restrain himself or herself in exercising power he or she possesses. Has that general approach—maybe you have had it throughout your lifetime as a lawyer, but has this been strengthened in the year or 2 years you have been on the circuit court?

Judge THOMAS. Senator, a couple of points. I think when one becomes a judge, as I have noted earlier, one begins to realize the difficulty of the cases that come before us. You don't have the comfort of your position as an advocate. You don't reinforce your own arguments. You have got to listen to all the arguments. And the arguments can be equally forceful on either side.

So I think that when we recognize our own fallibility and our own humility, we become concerned about what our role is in each of these cases, which is the second point. And we ask ourselves, Do we belong in this case? What is our role? Do we have the authority? And one learns a sense of humility.

So I would say that my view—and one also recognizes, Senator, I might add, that we are the least democratic branch of the Government, and we have to restrain ourselves as judges. And I think that is important. Indeed, I think it is critical so that we do not begin to see ourselves as superlegislators.

Senator GRASSLEY. Right there let me say that what you have just said it seemed to me like is what Judge Scalia described himself and his colleagues on the High Court as: The unelected and life-tenured judges who have been awarded extraordinary undemocratic characteristics. And that was from a concurrence that Scalia wrote in the *Webster* case. And that is your approach. Your approach would be similar to Scalia's, then? I mean, I think you have said the same thing.

Judge THOMAS. I think if his point is, Senator, that we are not elected to make policy, we are not in the position to make the kinds of difficult decisions that the elected, the political branches make, then I think he is right. We are judges, and I don't think that we should stray beyond our role in the undemocratic, the most undemocratic branch of the Government into the political, the authority and the role of the political branches.

Senator GRASSLEY. Well, the political branches, too, have great responsibility to protect our liberties, and since judges are not accountable to the body politic and should not have the responsibility of deciding sensitive and controversial issues of the day, and that is judicial activism, that is legislating, judges trying to do our job from the bench. I guess I need to have you tell Americans what you see as the dangers of judges substituting their ideas for those of the political branches of government.

Judge THOMAS. Senator, I think that, briefly, the danger is inherent in the fact that there are no checks and balances as you have in the political branches for judges. We don't stand for elections. If we do the wrong things, we are not challenged by an opponent, and we don't lose our incumbencies as an elected official. We don't have to go back to our districts and be told that we have done the wrong thing. We are lifetime appointments. And I think that there is a danger with the lack of that check, the lack of that exposure to elections, and the lack of the tensions between the political branches that we could do things as judges that we think are nothing more than a matter of our personal opinions. And I think it would be inappropriate. I think it is a very significant danger.

Senator GRASSLEY. I would ask if you, in just what you have said, if you would be standing behind a 1987 speech that you gave before the Cato Institute. The quote: "When political decisions have been made by judges, they have lacked the moral authority of the majority. When courts have made important political and social decisions in the absence of majority support, they have only exacerbated the controversies." My question, in a sense, is then you are saying leaving the difficult, sometimes contentious decisions to the elected representatives, then there should be no concern or fear among the American people.

Judge THOMAS. I think that, of course, Senator, we always have concerns and fears and different points of views, and there is always debate and give and take. But I think that those political decisions, those policies should be developed and debated and established in and by the legislature; that the judge's role is not to legislate and it is not to set policy, and it is certainly not to engage in political decisionmaking.

Senator GRASSLEY. There may be a trend away from judicial activism, but I don't think we have seen the last of it. I would like to draw your attention to some recent cases in which district judges engaged in judicial activism. The first is a case that arose in a New Jersey Federal court. It was in Morristown. The public library board of trustees issued regulations designed to ensure that the library did not become home to vagrants. The regulations required that patrons use the library as it was intended to be used; that is, "for reading, studying, or using library material." So the court

struck down the library's regulation saying that everyone has a right to receive ideas, and the library cannot restrict access.

There was a New York Federal judge who just this past June found that panhandling might be protected speech under the first amendment, and this was despite the fact of a second circuit ruling to the contrary from last year.

Now, I realize that you are going to be reluctant to comment on the merits of these cases since such issues could come before the Supreme Court. But I hope—and I suppose this is more of a statement than a question—no, I guess I would really want it to be a question. Can you see these as examples of a court's usurping the function of legislative bodies and making rather than applying or interpreting the law?

Judge THOMAS. Senator, unfortunately, I don't know the full facts in those cases, and I think it would be inappropriate for me to try to comment on those particular cases. But let me just simply say this: That I think that we all as judges should be concerned and should be aware, or at least be cautious not to move into areas that are best left to, as I said, the political branches and to the legislature. But those specific cases, I simply don't know the details of them, and I think even if I did, it would be inappropriate to comment on them.

Senator GRASSLEY. OK. Maybe it is, but let me make this point to you to think about, and whether or not those cases might not be inconsistent with the point you made in that 1987 Cato Institute talk, where you stated, "Maximization of rights is perfectly compatible with total government 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. The rhetoric of freedom [license, really] encourages the expansion of bureaucratic government."

My time is up. I just want to leave the subject with a quote from Felix Frankfurter on the role of judges. He found the duty not to enlarge his authority to be one of the greatest challenges of being a judge. He continued, and let me quote probably about 40 words—

> That the court is not the maker of policy but is concerned solely with the question of ultimate power, is a tenet by which all justices have subscribed. But the extent to which they have translated faith into works probably marks the deepest cleavage among the men who have sat on the Supreme Court. The conception of significant achievement on the Supreme Court has been too much identified with largeness of utterness and too little governed by inquiry into the extent to which the judges have fulfilled their professed role in the American constitutional system.

I hope I see your confirmation bringing to the Supreme Court one more person like Felix Frankfurter, who is going to be looking at and inquiring into the extent to which judges have fulfilled their role in the American constitutional system.

Thank you, Mr. Chairman.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you, Senator, and thank you, Judge. We will recess until 2 p.m.

[Whereupon, at 12:40 p.m., the committee recessed, to reconvene at 2 p.m., the same day.]

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Leahy.

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

Judge Thomas, welcome back this afternoon. Judge, I would like to just go over a couple of points prompted by some of your earlier testimony.

A couple of thoughts occur to me. I was looking over the notes of your responses to Senator Kennedy's questions yesterday. You recall that when he talked about the Lewis Lehrman article, "the Declaration of Independence and the Right to Life," he referred to your statement, in which you called the Lehrman article a "splendid example of applying natural law."

I understand your answer was that you were speaking in the Lewis Lehrman Auditorium, with Lewis Lehrman sitting there, referring to Lewis Lehrman's article, and that you intended to make your conservative audience more receptive to natural law principles as it applied to civil rights. Is that a fair restatement of your answer?

Judge THOMAS. I think with the possible exception of "Lew Lehrman sitting there."

Senator LEAHY. Oh, that is my misconception. He was not there, then?

Judge THOMAS. Not to my knowledge.

Senator LEAHY. OK. Was the rest a fair restatement?

Judge THOMAS. Yes.

Senator LEAHY. Thank you. So, granting that it was a strategic remark for the reasons that you stated, did you believe the article was "a splendid example of applying natural law"?

Judge THOMAS. As I indicated yesterday, Senator, that I did not and do not think that natural law can be applied to resolve this particular issue, I think it is a constitutional matter and it has to be resolved under constitutional law, as a matter of constitutional law.

Senator LEAHY. But that is not precisely my question. My question was, did you believe the article was a splendid example of applying natural law? Just on that narrow line: Do you believe the article itself was "a splendid example of applying natural law"?

Judge THOMAS. Let me explain what I was trying to say. What I was trying to say——

Senator LEAHY. You cannot answer that specific question?

Judge THOMAS. What I am trying to say, so I am not misunderstood, Senator——

Senator THURMOND. Mr. Chairman, he has a right to explain his position.

Judge THOMAS. What I was trying to say is here is a good example——

Senator LEAHY. If Senator Thurmond wishes to join him at the witness stand—but go ahead, Judge.

Senator THURMOND. I would be glad to do it, but he has a right to explain his answers.

Senator LEAHY. Go ahead, Judge.

Judge THOMAS. Thank you, Senator.

My point was that here is an example of one of yours using natural law. I was not commenting on the substance of its use, so it was an example, it was a splendid example in the sense that it was a compliment to him and it is a compliment to someone they be-

lieved in, and I would reaffirm what I said yesterday and I have said consistently, and that is that at no time did I adopt or endorse the substance of the article itself.

My interest in that one sentence, I believe, was to get a conservative audience that was skeptical of a concept to be more receptive to that concept in the area that I wanted to use, in the area of civil rights. That speech is on the treatment of blacks by conservatives, treatment of minority issues in the Reagan administration, and a sort of request and a push or a tug to them to be more receptive in this area and to be aggressive in this area. It was not an endorsement of that article.

Senator LEAHY. Do you feel that your answer today is in any way inconsistent with what you said then?

Judge THOMAS. What I said?

Senator LEAHY. At that time?

Judge THOMAS. Yes.

Senator LEAHY. Thank you. And you understand my confusion in the two answers, but you explain that confusion in that the statement then and your answer today are consistent?

Judge THOMAS. I said that they were consistent.

Senator LEAHY. OK. Then you feel your answer today is consistent with what you said back at the time you spoke in the Lewis Lehrman Auditorium?

Judge THOMAS. Senator, my statement today is consistent with what I intended to do and what I did in the Lew Lehrman Auditorium. My interest, as I indicated to you, and I think I repeated a number of times here, it was in civil rights and finding unifying principles in the area of civil rights.

Senator LEAHY. Well, let me make sure that I understand. Is it your testimony here today and yesterday that you do not endorse the Lewis Lehrman article to the extent that it argues under the natural law principles of the Declaration of Independence that a fetus has an inalienable right to life at the moment of conception? Is that your testimony?

Judge THOMAS. I do not—my testimony is that, with respect to those issues, the issues involved or implicated in the issue of abortion, I do not believe that Mr. Lehrman's application of natural law is appropriate.

Senator LEAHY. Had you read that article before you praised it?

Judge THOMAS. I think I skimmed it, Senator. My interest, again, was in the fact that he used the notion or the concept of natural law, and my idea was to import that notion to something that I was very interested in.

Senator LEAHY. Now, you certainly——

The CHAIRMAN. Excuse me, would the Senator yield? I did not understand one answer.

Did you say that you do not believe that Mr. Lehrman's application of natural law in that article was appropriate?

Judge THOMAS. That's right.

The CHAIRMAN. You do not believe it is appropriate?

Judge THOMAS. That's right.

The CHAIRMAN. Thank you.

Judge THOMAS. I said that my testimony has been that that difficult issue is to be resolved as a matter of constitutional law.

The CHAIRMAN. Thank you.

Senator LEAHY. Well, the chairman has anticipated my next question. When you gave the speech, which was in 1987, as I recall the testimony, did you understand that the consequences of Mr. Lehrman's position were not just that *Roe* v. *Wade* should be overturned, but that abortion, even in cases of rape and incest, should be banned in every State of the Union? Did you understand that to be the position that he was taking in that article?

Judge THOMAS. Senator, until recently, in reflecting on it, I did not know, I could not recall the entire content of that article until I read recent articles about it. Again, my interest was very, very limited——

Senator LEAHY. I understand——

Judge THOMAS [continuing]. And the——

Senator LEAHY. You have read the article now, though, now that it has been brought up——

Judge THOMAS. I have not re-read it. I have not re-read it.

Senator LEAHY. You have it?

Judge THOMAS. I have not re-read the article.

Senator LEAHY. Do you have the article?

Judge THOMAS. I do not have it with me.

Senator LEAHY. Does somebody want to just—I want to make sure somebody gives it to you, Judge. Let me say that the article, as written, takes a position not just that *Roe* v. *Wade* should be overturned, but that abortion, even in cases of rape and incest, should be banned in every State of the Union. Assuming that is the thrust or one of the main points of the article, do you agree with that?

Judge THOMAS. Again, Senator, it would be, I think, for me to respond to what my views are on those particular issues would really undermine my ability to be impartial in those cases. I have attempted to respond as candidly and openly as I possibly can, without in any way undermining or compromising my ability to rule on these cases.

Senator LEAHY. Well, let's just go, then, to Mr. Lehrman's positions. Under his theory of natural law, every abortion in this country would be criminalized. Do you understand that to be his position? I am not asking whether it is yours, but do you understand that to be his position in that article?

Judge THOMAS. Again, I would have to re-read the article, Senator. I understand the criticisms that you have of the article, but my point to you here today, as well as in other questioning concerning this article, is that I did not adopt or import anything more from this article than the use of this one notion of natural law.

Senator LEAHY. Might I ask you to do this, then, Judge, because we will have another go-round on this. It would only take about 4 or 5 minutes to read that article sometime between now and the next go-round. Could you please find the time to read it? And if you get crammed with too many things between now and then when I get my next turn around, I will just stop and give you time to read it right then.

Judge THOMAS. OK. Thank you.

Senator LEAHY. Now, Mr. Lehrman drew a parallel between the struggle for liberty by slaves with a struggle "for the inalienable

right to life of the child-in-the-womb—and thus, the right to life of all future generations." Do you understand the parallel of the struggle for liberty by slaves with the struggle for the inalienable right to life of the child in the womb, and thus, the right to life of all future generations? Do you agree with that comparison?

Judge THOMAS. Again, Senator, I have not re-read this article. I would take you up on your offer to go back and re-read it. My interest was on the issue of slavery, Senator, it was an important issue to me. The concept of liberty and life, et cetera, are very general concepts. I would like to just take the time to go back and re-read it——

Senator LEAHY. Fair enough.

Judge THOMAS [continuing]. And be fair in my response to you.

Senator LEAHY. I absolutely agree.

Judge THOMAS. But let me, if I could say this—my interest in this article was as I have testified before this committee, and I think indicated in some of our prior meetings, it was very important to me to convince conservatives that they should openly support and be aggressive in their support of civil rights.

Senator LEAHY. Judge, does a fetus have the constitutional status of a person?

Judge THOMAS. Senator, I cannot think of any cases that have held that. I would have to go back and rethink that. I cannot think of any cases that have held that.

Senator LEAHY. If somebody were to raise that issue in a court, how would a judge go about making a determination of that? I am not asking you to make a determination, but how would a judge do that? Does he or she go to a medical text, a philosophical text, theological treatises? How does one make such a determination?

Judge THOMAS. Senator, I could only offer this, and I have not made that determination and I have not gone through that kind of analysis, but, of course, one would rely in any case in which one is making a difficult determination, one would rely on the adversarial process to sharpen the issues. One would rely on precedent. One would certainly rely on related areas, such as the area of medicine. In the area of *Roe* v. *Wade,* I think there was considerable reliance on medical evidence. Again, I am doing that in a vacuum, and I was—

Senator LEAHY. I understand that. Of course, even in the adversarial process, a judge can oftentimes shape and direct in a most appropriate way. Any judge I have ever appeared before—if he or she felt that the adversaries did not present enough evidence to help the judge decide—would certainly have the right to ask the adversaries for more information.

In an area like this, do you rely on theology? Do you rely on jurisprudence? Do you rely on medical information? Or do you rely on experience?

Judge THOMAS. Senator, again, I would like to just simply say that, of course, one could see where medical, certainly experience and one could see where precedent would be relevant. I do not see at this point where theology would be relevant.

Again, I would like to refrain from further speculation in this very difficult area. The point that I am making to you, and I think it is an important point, is that when a judge is engaged in any

kind of an effort to make difficult decisions in any area, a judge tries to examine the relevant evidence and tries to reach a reasoned conclusion and tries to reach a conclusion, without implicating or without involving his or her personal opinions.

Senator LEAHY. Judge, you were in law school at the time *Roe* v. *Wade* was decided. That was 17 or 18 years ago. You would accept, would you not, that in the last generation, *Roe* v. *Wade* is certainly one of the more important cases to be decided by the U.S. Supreme Court?

Judge THOMAS. I would accept that it has certainly been one of the more important, as well as one that has been one of the more highly publicized and debated cases.

Senator LEAHY. So, it would be safe to assume that when that decision came down—you were in law school, where recent case law is oft discussed—that *Roe* v. *Wade* would have been discussed in the law school while you were there?

Judge THOMAS. The case that I remember being discussed most during my early part of law school was I believe in my small group with Thomas Emerson may have been *Griswold,* since he argued that, and we may have touched on *Roe* v. *Wade* at some point and debated that, but let me add one point to that.

Because I was a married student and I worked, I did not spend a lot of time around the law school doing what the other students enjoyed so much, and that is debating all the current cases and all of the slip opinions. My schedule was such that I went to classes and generally went to work and went home.

Senator LEAHY. Judge Thomas, I was a married law student who also worked, but I also found, at least between classes, that we did discuss some of the law, and I am sure you are not suggesting that there wasn't any discussion at any time of *Roe* v. *Wade?*

Judge THOMAS. Senator, I cannot remember personally engaging in those discussions.

Senator LEAHY. OK.

Judge THOMAS. The groups that I met with at that time during my years in law school were small study groups.

Senator LEAHY. Have you ever had discussion of *Roe* v. *Wade,* other than in this room, in the 17 or 18 years it has been there?

Judge THOMAS. Only, I guess, Senator, in the fact in the most general sense that other individuals express concerns one way or the other, and you listen and you try to be thoughtful. If you are asking me whether or not I have ever debated the contents of it, that answer to that is no, Senator.

Senator LEAHY. Have you ever, in private gatherings or otherwise, stated whether you felt that it was properly decided or not?

Judge THOMAS. Senator, in trying to recall and reflect on that, I don't recollect commenting one way or the other. There were, again, debates about it in various places, but I generally did not participate. I don't remember or recall participating, Senator.

Senator LEAHY. So you don't ever recall stating whether you thought it was properly decided or not?

Judge THOMAS. I can't recall saying one way or the other, Senator.

Senator LEAHY. Well, was it properly decided or not?

Judge THOMAS. Senator, I think that that is where I just have to say what I have said before; that to comment on the holding in that case would compromise my ability to——

Senator LEAHY. Let me ask you this: Have you made any decision in your own mind whether you feel *Roe* v. *Wade* was properly decided or not, without stating what that decision is?

Judge THOMAS. I have not made, Senator, a decision one way or the other with respect to that important decision.

Senator LEAHY. When you came up for confirmation last time for the circuit court of appeals, did you consider your feelings on *Roe* v. *Wade,* in case you would be asked?

Judge THOMAS. I had not—would I have considered, Senator, or did I consider?

Senator LEAHY. Did you consider.

Judge THOMAS. No, Senator.

Senator LEAHY. So you cannot recollect ever taking a position on whether it was properly decided or not properly decided, and you do not have one here that you would share with us today?

Judge THOMAS. I do not have a position to share with you here today on whether or not that case was properly decided. And, Senator, I think that it is appropriate to just simply state that it is—for a judge, that it is late in the day as a judge to begin to decide whether cases are rightly or wrongly decided when one is on the bench. I truly believe that doing that undermines your ability to rule on those cases.

Senator LEAHY. Well, with all due respect, Judge, I have some difficulty with your answer that somehow this case has been so far removed from your discussions or feelings during the years since it was decided while you were in law school. You have participated in a working group that criticized *Roe.* You cited *Roe* in a footnote to your article on the privileges or immunity clause. You have referred to Lewis Lehrman's article on the meaning of the right to life. You specifically referred to abortion in a column in the Chicago Defender. I cannot believe that all of this was done in a vacuum absent some very clear considerations of *Roe* v. *Wade,* and, in fact, twice specifically citing *Roe* v. *Wade.*

Judge THOMAS. Senator, your question to me was did I debate the contents of *Roe* v. *Wade,* the outcome in *Roe* v. *Wade,* do I have this day an opinion, a personal opinion on the outcome in *Roe* v. *Wade;* and my answer to you is that I do not.

Senator LEAHY. Notwithstanding the citing of it in the article on privileges or immunities, notwithstanding the working group that criticized *Roe?*

Judge THOMAS. I would like to have the cite to it. Again, notwithstanding the citation, if there is one, I did not and do not have a position on the outcome.

With respect to the working group, Senator, as I have indicated, the working group did not include the drafting by that working group of the final report. My involvement in that working group was to submit a memorandum, a memorandum that I felt was an important one, on the issue of low-income families. And I thought that that was an important contribution and one that should have been a central part in the report. But with respect to the other comments, I did not participate in those comments.

Senator LEAHY. I will make sure that you have an opportunity to read both the footnote citation and the Lewis Lehrman article before we get another go-round. But am I also correct in characterizing your testimony here today as feeling that as a sitting judge it would be improper even to express an opinion on *Roe* v. *Wade,* if you do have one?

Judge THOMAS. That is right, Senator. I think the important thing for me as a judge, Senator, has been to maintain my impartiality. When one is in the executive branch—and I have been in the executive branch, and I have tried to engage in debate and tried to advance the ball in discussions, tried to be a good advocate for my points of views and listening to other points of views. But when you move to the judiciary, I don't think that you can afford to continue to accumulate opinions in areas that are strongly controverted because those issues will eventually be before the Court in some form or another.

Senator LEAHY. Of course, as Senator Metzenbaum pointed out earlier today, you have spoken about a number of cases, and I understand your differentiation in your answers to his question on that. But I wonder if those cases somehow fit a different category. The expression once was that the Supreme Court reads the newspapers, and I suppose we can update that today to say that Supreme Court nominees read the newspapers and know that this issue is going to be brought up.

But, Judge, other sitting Justices have expressed views on key issues such as—well, take *Roe* v. *Wade.* You know, Justice Scalia has expressed opposition to *Roe.* Does that disqualify him if it comes up? Justice Blackmun not only wrote the decision but has spoken in various forums about why it was a good decision. Is either one of them disqualified from hearing abortion cases as a result?

Judge THOMAS. Senator, I think that each one of them has to determine in his mind at what point do they compromise their impartiality or it is perceived that they have compromised their objectivity or their ability to sit fairly on those cases. And I think for me, shortly after I went on the court of appeals, I remember chatting with a friend just about current events and issues. And I can remember her saying to me, asking me three or four times what my opinion was on a number of issues, and my declining to answer questions that when I was in the executive branch I would have freely answered. And her point was that I was worthless as a conversationalist now because I had no views on these issues. And I told her that I had changed roles and the role that I had was one that did not permit me or did not comport with accumulating points of views.

Senator LEAHY. Well, I might just state parenthetically, I have been both a prosecutor and a defense attorney, and I have been before judges who have expressed very strong views on the idea that when they go on the bench, they do not go into a monastery—they still are part of the populace, able to express views. And I have been there when they have expressed views both for and against a position of a client I might be representing, whether it is the State on the one hand or the defendant on another. But I have also felt secure in knowing that they were fairminded people and

would set their own personal opinions aside, as judges are supposed to and as you have testified one should do in such a case.

Let me ask you this: Would you keep an open mind on cases which concern the question of whether the ninth amendment protected a given right? I would assume you would answer yes.

Judge THOMAS. The ninth amendment, I think the only concern I have expressed with respect to the ninth amendment, Senator, has been a generic one and one that I think that we all would have with the more openended provisions in the Constitution, and that is that a judge who is adjudicating under those openended provisions tether his or her ruling to something other than his or her personal point of view.

Now, the ninth amendment has, to my knowledge, not been used to decide a particular case by a majority of the Supreme Court, and there hasn't been as much written on that as some of the other amendments. That does not mean, however, that there——

Senator LEAHY. That is not what I am——

Judge THOMAS. That does not mean, however, that there couldn't be a case that argues or uses the ninth amendment as a basis for an asserted right that could come before the Court that does not—that the Court or myself, if I am fortunate enough to be confirmed, would not be open to hearing and open to deciding.

Senator LEAHY. You are saying that you would have an open mind on ninth amendment cases?

Judge THOMAS. That is right.

Senator LEAHY. I ask that because you have expressed some very strong views, as you know better than all of us, on the ninth amendment. You had an article that was reprinted in a Cato Institute book on the Reagan years. You refer to Justice Goldberg's "invention," of the ninth amendment in his concurring opinion in *Griswold.* And you said—and let me quote from you. You said, "Far from being a protection, the ninth amendment will likely become an additional weapon for the enemies of freedom." A pretty strong statement. But you would say, would you not, Judge, notwithstanding that strong statement, that if a ninth amendment case came before you, you would have an open mind?

Judge THOMAS. Again, Senator, as I noted, my concern was that I didn't believe that—in such an openended provision as the ninth amendment, it was my view that a judge would have to tether his or her view or his or her interpretation to something other than just their feeling that this right is OK or that right is OK. I believe the approach that Justice Harlan took in *Poe* v. *Ullman* and again reaffirmed in *Griswold* in determining the—or assessing the right of privacy was an appropriate way to go.

Senator LEAHY. That is not really my point. The point I am making is that you expressed very strong views—and you have here, too—about the ninth amendment. My question is: Notwithstanding those very strong views you have expressed about the ninth amendment—pretty adverse views about it—would you have an open mind in a case before you where somebody is relying on the ninth amendment?

Judge THOMAS. The answer to that is, Senator, yes.

Senator LEAHY. But if you were to express similar views regarding the principles and reasoning of *Roe* v. *Wade,* you feel that

somehow it would preclude you from having that same kind of objectivity as the views you have expressed about the ninth amendment?

Judge THOMAS. I don't believe, Senator, that I have expressed any view on the ninth amendment, beyond what I have said in this hearing, after becoming a member of the judiciary. As I pointed out, I think it is important that when one becomes a member of the judiciary that one ceases to accumulate strong viewpoints, and rather begin to, as I noted earlier, to strip down as a runner and to maintain and secure that level of impartiality and objectivity necessary for judging cases.

Senator LEAHY. Does that mean if you were just a nominee, a private citizen as a nominee to the Supreme Court, you could answer the question, but as a judge you cannot?

Judge THOMAS. I think a judge is even more constrained than a nominee, but I also believe that in this process, that if one does not have a formulated view, I don't see that it improves or enhances impartiality to formulate a view, particularly in some of these difficult areas.

Senator LEAHY. Thank you, Mr. Chairman. My time is up, but I am sure the judge realizes that we will probably have to revisit this subject a tad more. Thank you.

The CHAIRMAN. Thank you very much.

The Chair recognizes Senator Kennedy for a moment regarding a clarification of a quote that was used this morning.

Senator KENNEDY. Thank you, Mr. Chairman. I think there was just one area of clarification.

Yesterday I questioned Judge Thomas, and I used these words:

> Mr. Sowell goes on to suggest that employers are justified in believing that married women are less valuable as employees than married men. He says that if a woman is not willing to work overtime as often as some other workers, needs more time off for personal emergencies, that may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

And then the judge went on and gave his response to that question.

In a response to a question earlier this morning from Senator DeConcini, Judge Thomas said, "There were questions on—I think the comment yesterday by Senator Kennedy, I believe, was something to the effect that women who were married weren't as good employees. And as an employer and someone who has employed a significant number of women, I did not find that to be true and made that very clear."

I would just like to ask consent that the record—I understood what Judge Thomas was trying to say this morning, and——

Judge THOMAS. I did not intend to attribute Professor Sowell's quotes to you. [Laughter.]

Senator KENNEDY. So I would just ask consent that the record reflect that modification at the appropriate point.

Senator LEAHY. I thought that was a little out of character there, Ted.

The CHAIRMAN. Without objection, the record will be corrected.

Senator KENNEDY. Thank you.

The CHAIRMAN. The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Thomas, incidentally, last July on a monthly call-in show, there was a lot of interest by people in my State, and some people didn't really understand the process as to what we were doing. And it might be well just to say that when questions are asked, that does not suggest in any way a disagreement with your position, but an effort to draw out how you would function if confirmed as a Supreme Court Justice. In moving beyond your legal qualifications, we are following a practice of going into constitutional law very much as I had said in my opening when Chief Justice Rehnquist, as a lawyer back in 1958, stated the importance of having the Judiciary Committee get into questions of equal protection of the law and due process of law; and that in the thoroughness of our efforts to find out how you would function as a Supreme Court Justice, we do so because of the tremendous importance of the role of a Justice, illustrated by 18 decisions last year by a 5–4 vote. And if you serve as long or to an age of Justice Thurgood Marshall, who is 83, it would put you on the Court for 40 years, or until the year 2031.

So I make those introductory comments, repetitious to some extent of what I said in my opening, to give some parameter as to how I see the confirmation hearings, and the importance of the separation of powers, and the Senate's role in advice and consent. Because under our system of government, the President nominates, the Senate consents or not, and then the Justices on the Supreme Court have the final word in so many issues of such tremendous importance.

Judge Thomas, in my opening yesterday, I outlined the key focus on my concern, and that is on the very fundamental issue as to the Supreme Court's interpreting law and not making law. And there has already been considerable discussion about that subject, and you have articulated your view that the Court should defer to constitutional intent and should interpret law and not make law.

You have dealt, as Chairman of EEOC, with many very important Supreme Court decisions, and there are quite a number that I would like to discuss with you. But I want to start with one for illustrative purposes—and I could pick many—and that involves the case decided by the Supreme Court back in 1987 where a woman had applied for a job as a road dispatcher. There were 238 positions, all held by men. She was competing with a man named Paul Johnson in the transportation system of Santa Clara County, which is the name of the case. Mr. Johnson had a better test score, but as part of an affirmative action program, no quotas but affirmative action, the employer gave the job to the woman.

You had commented about this case in a speech which you made in 1987, and I would like to make available to you two speeches and one article so that you can have them available during the course of my questioning. I agree with Senator Simpson; they all ought to be a part of the record, and I would ask unanimous consent, Mr. Chairman, that they be placed in the record so that the totality of what Judge Thomas had to say in those speeches is apparent.

In the course of the speech in 1987, you said this: "Let me commend to you Justice Scalia's dissent, which I hope will provide guidance for lower courts and a possible majority in future deci-

sions." The comment about guidance for lower courts we will come back to. Perhaps it will be for Senator Simon. He raised that preliminarily yesterday. But the point that I will focus on at the moment is Justice Scalia's dissent as possible guidance for future decisions.

You then said—in the article on "Assessing the Reagan Years" in the compilation by Mr. Boaz, while you did not say that they were enough, you refer to "quick-fix solutions such as the appointment of another Justice with the right views."

You further note in the Boaz article that, "In each case"—and now you refer to a series of them, including the *Johnson* decision—"In each case, Congress could have reinterpreted its legislative intent to rebut the interpretation of Justice Brennan in *Weber*, but, of course, it"—referring to Congress—"demurred."

You have commented very extensively about your view of the Congress. I don't quarrel with your view of the Congress except as it relates—and I don't even quarrel with it then. I just want to find out your views concerning the Supreme Court as to carrying out constitutional intent. And in a speech on April 8, 1988, a copy provided to you, you said, "Congress is no longer primarily a deliberative or even a lawmaking body. There is little deliberation and even less wisdom in the manner in which the legislative branch conducts business." Members act for "their own interests." "Interests of few take precedence over interests of the many."

Now, my question to you is: In a context where you think the *Johnson* case should be overruled, and in the context where you have articulated your regard, such as it is, for Congress, and you have—I really don't quarrel with your view of the Congress. A lot of people have that view of the Congress. I really don't. And I think it is important to back up for just a minute on some fundamentals for a lot of people who were listening, and that is that Congress makes the law, we make public policy, and the Court is supposed to interpret the law. And we all agree on those rules. And there are a lot of illustrations where Congress has overruled what the Supreme Court has done on legislative intent where Congress doesn't like what the Court has done.

And I would ask unanimous consent at this point, Mr. Chairman, that a list of some 23 decisions which Congress overruled between 1982 and 1986 be inserted in the record. And we could talk about those at great length, but the point is that Congress does know how to overrule the Court on matters of constitutional intent.

The CHAIRMAN. They will be included in the record.

[The information follows:]

disrespectful, to treat it as not having yet quite established a settled doctrine for the country."[102]

There is already some evidence that Congress has been less restrained in overruling the pronouncements of the Court. Between 1982 and 1986, Congress overruled at least twenty-three Supreme Court decisions—half within two years of the date of the decision.[103] These enactments cover a wide range of decisions. For example, in three separate instances, Congress directly overruled Court decisions concerning state and local liability under federal acts.[104] In addition, Congress has either passed or is presently considering five bills overruling Court decisions that ease limitations on prosecutions and sentencing.[105] In all, Congress

102. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1848-1858, at 401 (R. Basler ed. 1953).

103. INS v. Phinpathya, 464 U.S. 183 (1984), *overruled by* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3439-40; Block v. North Dakota, 461 U.S. 273 (1983), *overruled by* Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351; United States v. New York Tel. Co., 434 U.S. 159, 166-68 (1977), *overruled by* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 301, 100 Stat. 1848, 1868-72; Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), *overruled by* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845; Smith v. Robinson, 468 U.S. 992 (1984), *overruled by* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377 (1922), *overruled by* Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 633, 637 (1986); California v. Nevada, 447 U.S. 125 (1980), *overruled by* Act of Dec. 23, 1985, Pub. L. No. 99-200, 99 Stat. 1663; Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972), *overruled by* Patent Law Amendments Act of 1984, Pub. L. No. 98-622, 98 Stat. 3383; Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982), and City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), *overruled by* Act of Oct. 24, 1984, Pub. L. No. 98-544, 98 Stat. 2750; Busic v. United States, 446 U.S. 398 (1980), and Simpson v. United States, 435 U.S. 6 (1978), *overruled by* Department of Interior and Related Agencies Appropriations Act, Pub. L. No. 98-473, § 1004, 98 Stat. 1837, 2138-39 (1984); Washington Metro. Area Transit Auth. v. Johnson, 467 U.S. 925 (1984), *overruled by* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 4, 98 Stat. 1639, 1641; Diedrich v. Commissioner, 457 U.S. 191 (1982), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1026, 98 Stat. 494, 1031; United States v. Davis, 370 U.S. 65 (1962), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421, 98 Stat. 494, 793-95; Commissioner v. Standard Life & Accident Ins. Co., 433 U.S. 148 (1977), *overruled by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 211(a), 98 Stat. 494, 740-41; NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984), *overruled by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390-91; Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968), *overruled by* Shipping Act of 1984, Pub. L. No. 98-237, § 7, 98 Stat. 67, 73-74; Rowan Cos. v. United States, 452 U.S. 247 (1981), *overruled by* Social Security Amendments of 1983, Pub. L. No. 98-21, § 327, 97 Stat. 65, 126-27; Standard Oil Co. of Cal. v. Agsalud, 454 U.S. 801 (1981), *overruled by* Act of Jan. 14, 1983, Pub. L. No. 97-473, § 301, 96 Stat. 2605, 2611-12; Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), *overruled by* Act of Dec. 29, 1982, Pub. L. No. 97-393, 96 Stat. 1964; McCarty v. McCarty, 453 U.S. 210 (1981), *overruled by* Department of Defense Authorization Act, Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982); City of Mobile v. Bolden, 446 U.S. 55 (1980), *overruled by* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

104. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

105. *See* H.R. 5269, 101st Cong., 2d Sess. (1990) (Racial Justice Act); 136 CONG. REC. H9001,

overruled more than twice as many decisions in the first four years after President Reagan's first appointment to the Supreme Court than in the entire decade preceding his election.[106] Although there has been no suggestion that the Court's rulings in all these cases were politically motivated, the accelerated pace of overrulings may reflect a dangerous view on the part of Congress that even proper pronouncements of the Court are entitled to less respect.

CONCLUSION

The risks of constitutional quibbling have been recognized for more than a century. In 1883, Justice Harlan complained about the Supreme Court proceeding "upon grounds entirely too narrow and artificial [, sacrificing] the substance and spirit of the . . . amendments of the Constitution . . . by a subtle and ingenious verbal criticism."[107] Around the turn of the century, Dean Roscoe Pound asserted that the laissez-faire judiciary was at grave risk of being cut off from the populace. He stated that the Court, which once stood as a protection to the individual from the Crown and the State, now "really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it."[108] Today, many of these same objections are being directed at the Court: critics complain that the Court's decisions are "needlessly cramped" in order to accomplish other

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H9008 (daily ed. Oct. 5, 1990) (statement of Rep. Harris) (proposing Racial Justice Act to overrule McClesky v. Kemp, 481 U.S. 279 (1987)); S. 1970, 101st Cong., 2d Sess. (1990) (Biden Bill), 136 CONG. REC. S6873, S6875 (daily ed. May 24, 1990) (statement of Sen. Biden) (bill proposed to overrule Stanford v. Kentucky, 492 U.S. 361 (1989), and Penry v. Lynaugh, 492 U.S. 302 (1989), cases permitting the imposition of the death penalty on persons under age 16 or suffering from mental retardation); S. 148, 102d Cong., 1st Sess. (1991), 137 CONG. REC. S579-01 (1991) (Derrick-Hughes amendments to the Omnibus Crime Control Act of 1990) (proposed to overrule McKellar v. Butler, 110 S. Ct. 1212 (1990), and Sawyer v. Smith, 110 S. Ct. 2822 (1990), cases barring courts from applying newly articulated legal principles retroactively to reverse death sentences that became final prior to the ruling).

106. *Compare* note 79 *supra with* 11 cases overruled or modified by Congress between 1970 and 1980: Citizen Publishing Co. v. United States, 394 U.S. 131 (1969), *overruled by* Pub. L. No. 91-353, § 5, 84 Stat. 467 (1970); Alderman v. United States, 394 U.S. 165 (1969), *modified by* Pub. L. No. 91-452, § 702, 84 Stat. 935 (1970); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), *overruled by* Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (1972); Bunte Bros. v. FTC, 312 U.S. 349 (1941), *overruled by* Pub. L. No. 93-637, § 201(a), 88 Stat. 2193 (1975); Administrator, FAA v. Robertson, 422 U.S. 255 (1975), *overruled by* Pub. L. No. 94-409, § 5(b), 90 Stat. 1247 (1976); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), *modified in part by* Pub. L. No. 94-559 § 2, 90 Stat. 2641 (1976); Wingo v. Wedding, 418 U.S. 461 (1974), *overruled by* Pub. L. No. 94-577, § 1, 90 Stat. 2729 (1976); *Ex parte* Peru, 318 U.S. 578 (1943), *overruled by* Pub. L. No. 94-583, § 4(a), 90 Stat. 2892 (1976); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *overruled by* Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978); District of Columbia v. Carter, 409 U.S. 418 (1973) *overruled by* Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1980); Zurcher v. Stanford Daily, 436 U.S. 547 (1978), *modified by* Pub. L. No. 96-440, § 101, 94 Stat. 1879 (1980).

107. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

108. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 403 (1908).

Senator SPECTER. But here you have been explicit in the quick fix of judges who have the right view. You have identified the *Johnson* case as one where you hope that the dissent will provide the basis for a majority when judges are added. You have stated what you think of the Congress. And the question is: What assurances can you give to the Senate that you will follow constitutional intent as opposed to your own public policy views on those cases?

Judge THOMAS. Senator, when one is involved in the midst of a debate in the executive branch and advocating a point of view, as I alluded to earlier, one continues to advocate that point of view as an executive.

When I moved to the judiciary, as I noted earlier, I ceased advocating those points of views. I think that you can have the comfort of your position, and I felt that in those cases that the constitutional intent was one of nondiscrimination that was explicit in the language of the statute and clear in the language of the legislative history. That was my reading of constitutional intent.

Of course, the Court took a different point of view, and those of us who may not have agreed with that point of view simply had to swallow hard and go along.

I might add here that I think—and I feel very strongly—that this matter of disagreeing over what the appropriate remedies are—and this, just parenthetically, does not in any way indicate the depth of my commitment to fighting discrimination. I think it was an important disagreement as to how far you can go with your efforts to move people into the work force that you believe should be in the work force who had been left out, and the effort of trying to also preserve that notion of fairness and nondiscrimination that I thought was central in the statute.

With respect to my disagreements with Congress, I think that those of us who were in the executive branch—and I am certain that those who are in Congress have their disagreements with the members of the executive branch, that there is tension between the two political branches. And certainly I have had a sufficient number of oversight hearings and a sufficient number of battles to know that that tension was alive and well. But when one goes to the judiciary, I think it is important to remain neutral in those policy battles, and that is something that I have certainly attempted to do.

With respect to whether or not a policy point of view or a view that I advocated as a member of the executive branch will undermine my ability to rule on cases as a judge, my answer to you, Senator, is that it will not. I advocated as an advocate, and now I rule as a judge. And I think that that is important. I think it is an important distinction. I think it is a requirement that I be impartial, and I have attempted to do that.

Senator SPECTER. Well, Judge Thomas, I am going to come to the issue of remedies, and I can understand your disagreement on oversight. Both of those are different issues. And I understand your assertion of impartiality, and I do not question it. But where you have repeatedly over such a long period of time expressed a very strong view as to congressional ineptitude—and you did that in the *Fullilove* case: "What can one expect of a Congress that would pass the ethnic set-aside law?" And you have, again in the speech on

April 8, 1988, referred to the extensive policymaking role of the Court: "When they have made important"—referring to the courts—"made important political and social decisions in the absence of majority support, they have only exacerbated the controversies they have pronounced."

If the Court rules in the presence of majority support, does that give the Court any license to act? It suggests that it does.

The problem I have, Judge Thomas, is that if you take a large body of your writings, where you disagree with these cases and you disagree to the core with the congressional function, what assurances will we have that you will respect congressional intent?

Judge THOMAS. Senator, I throughout my writings—and I can't find all the quotes now—made it clear that those difficult policy decisions debating the large issues are precisely the role of Congress. There may be disagreements when one is in the executive branch, but those disagreements cease and policymaking debates cease when one goes to the judiciary.

The difficulties that I have expressed differences, particularly as one who has been involved in the oversight process, but I think I have made it clear that the legislative function of Congress, that the oversight function of Congress are very appropriate. And, again, I can't go back through all the speeches, but my view would be that the Court—it is the Court that cannot legislate, not Congress, and that the Court would be misplaced in attempting to establish policy, not Congress.

Senator SPECTER. Judge Thomas, I am not talking to you about oversight now. That is the second time in response to a question about carrying out congressional intent you have referred to the congressional oversight function. I know you had very severe disagreements, and I hope to have a chance to ask you about that later. But congressional oversight is very different from a clear-cut expression of congressional intent.

We had Justice Scalia before us, and it has already been referred to, the difference and what happens on the bench as opposed to in the nomination process, and that is understandable. Justice Scalia doubts that there is any such thing as congressional intent. And when he writes about the absence of congressional response—and this is enormously important because we have the 1964 Civil Rights Act. And it was interpreted in 1971 by a unanimous Supreme Court in an opinion written by Chief Justice Burger. And Congress was satisfied with that interpretation, left it alone. Then 18 years later, the Supreme Court comes up 5-4 and changes that law and does so with four Supreme Court Justices who put their hands on the Bible in this room, or similar rooms, swore to interpret the law and not to make new law.

Justice Scalia writes in his dissent in the *Johnson* case that when Congress doesn't act, it could be a result of many things, including political cowardice. I think Justice Scalia might have a point, but the major area of congressional or Senate political cowardice perhaps came when we didn't ask him very many questions in his confirmation hearing.

I would be interested in your observation. I won't ask you what you think of Justice Scalia's comment, but I will re-ask the question that Senator Grassley put to you. When Congress doesn't act,

would you agree that that is a sign that Congress doesn't think anything should be done?

Judge THOMAS. Senator, I think that if there is a long-standing interpretation of a congressional legislation——

Senator SPECTER. Is 18 years long enough, like in *Ward's Cove* and *Griggs*?

Judge THOMAS. If there is a longstanding interpretation and Congress does not act, that certainly would seem to be considerable evidence of Congress' intent. And it certainly would be, at least from my way of looking at a statute, evidence that cannot be ignored in revisiting that particular statute.

Senator SPECTER. Two subquestions. No. 1, is 18 years long enough?

Judge THOMAS. Eighteen years is quite a long time. I don't know whether we could put a mathematical or a numerical standard on that, to have that kind of quantification as to whether or not that would be enough not to revisit a statute. But I think that when you have a statute that has been interpreted for that long a period, that is so well known, that Congress is very aware of, that it would be an important consideration in finding that to be the appropriate interpretation, the fact that Congress didn't act for such a long time.

Senator SPECTER. Well, Judge Thomas, I have a problem, and I am not saying any of this is determinative. We are just talking about your approach as a prospective Justice if confirmed. But I have a problem with long enough not being enough in the context of *Griggs* and *Ward's Cove*, and I have a problem with "cannot be ignored," which are your words, as opposed to being determinative. It seems to me, that when a unanimous Supreme Court decision stands for 18 years, that is long enough. Or if it is not, I would like to know what is long enough. And when you talk about "cannot be ignored," I would look for something more there as to a sign of what does establish what the Congress expects the Court to do.

Judge THOMAS. The point I was attempting to make, Senator, was this: That when Congress doesn't act, I think it is more difficult to determine precisely why Congress doesn't act. For example, if Congress takes an explicit action and fails to change a particular statute, then that might be more evidence than simply not doing anything.

But the additional point that I was attempting to make was this, that the fact that Congress did not act for 18 years is an important consideration in determining whether or not the prior ruling or the prior interpretation was the correct interpretation. It would be a part of the calculus of legislative history.

I think it would be going too far to say definitively that definitely 18 years or 15 years or 10 years is the cutoff period, but I understand the point that you are making and I do not think that a judge or a court can simply ignore the fact that Congress has not acted in an important area.

Senator SPECTER. Judge Thomas, in my questioning you on how you handle the cases of *Johnson* and also the predecessors of *Weber* and *Fullilove*, we do not have time to go into all the facts now, I do so for a number of reasons. One is the one we have already examined, and the other is that you had shifted a position on it, that in

1983 you appeared to be in agreement with *Fullilove* and with *Weber*, and then your reconfirmation hearings came and you agreed to abide by them, and they relate to your approach to affirmative action and to your development of your legal thinking as you have taken the problem of discrimination and racism and how you have analyzed affirmative action, and in your career in the early 1980's stated that you favored it, and then appeared to accept the Supreme Court decisions, and then later disagreed with those decisions, although you agreed to abide by them, and still later just absolutely plundered those decisions with the very strong hostile comments about Congress.

In your writing, Judge Thomas, you have made a very strong comment that I agree with. You said that the *Dred Scott* decision upholding slavery and Chief Justice Taney's opinion in that decision provide a basis for the way we think today. You wrote that in 1987, "Racism and discrimination are deeply rooted in the history of the United States." I agree with you about 1987 and 1991.

And then there was the article by Mr. Juan Williams in Atlantic Monthly, which sought to provide an understanding of your philosophy and your approach to programs against discrimination, and quoted you as saying this, and these are the words which he says are yours, "There is nothing you can do to get past black skin. I don't care how educated you are, how good you are at what you do, you'll never know the same contacts or opportunities, you will never be seen as being equal to the whites."

Now, given that very strong statement, black skin, given your very strong statement about things being in 1987 like they were in the 1950's in *Dred Scott*, and given the fact that it is just not possible for the Equal Employment Opportunities Commission to take care of all the cases, one by one, why is it that you come down so strongly against any group action to try to put minorities or African-Americans in the position that they would have been as a group, but for the discrimination?

This is a broad subject, but let's get it started with just a few minutes to go of my time.

Judge THOMAS. Senator, I think that over my years in public life, as well as my adult life, I have made it clear what I think of racism and discrimination. I made it clear during my tenure as the Chairman of EEOC that it had to be eliminated, and I did everything within my power.

I have also, even in the heat of debate, attempted to talk reason, even though I, like perhaps everyone else, was susceptible to the rhetoric in that debate. I think that we all have to do as much as possible to include members of my race, minorities, women, anyone who is excluded into our society. I believe that. I have always believed that, and I have worked to achieve that.

Senator SPECTER. What is the best way to do it?

Judge THOMAS. And that is the question, how best to do it. I think that you have a tension, you want to do that and, at the same time, you don't want to discriminate against others. You want to be fair, at the same time you want to affirmatively include, and there is a real tension there.

I wrestled with that tension and I think others wrestled with that tension. The line that I drew was a line that said that we

shouldn't have preferences or goals or timetables or quotas. I drew that line personally, as a policy matter, argued that, advocated that for reasons that I thought were important.

One, I thought it was true to the underlying value in the statute that would be fair to everyone, and I also drew it because I felt and I have argued over the past 20 years and I felt it important that, whatever we do, we do not undermine the dignity, self-esteem, and self-respect of anybody or any group that we are helping. That has been important to me and it has been central to me.

I think that all of us who are well-intentioned, on either side of the debate, at any given time, wanted to achieve the exact same goal. I would have hoped, if I could revisit the 1980's, that we could have sat down and constructively tried to hammer out a consensus way to solve what I consider a horrible problem.

Senator SPECTER. But the problem I have with that response, if you take a case like Local 28 of the Sheetmetal Workers, where the New York City Human Relations Commission cited them for discriminatory practices in 1964, and EEOC finally brought a lawsuit in 1971, and there was a finding of discrimination in 1975, and there was a court order to correct that discrimination, which there was contempt in 1977 and again in 1982 and contempt again in 1983, and you have written that you are astounded that there is more of a penalty for breaking into a mailbox than for discriminating against a minority or African-Americans, and you have advocated jail sentences and heavy fines for those who are in contempt of court, and you have this kind of outrageous conduct that spans a 20-year period, and then EEOC comes in at the latter stages of this litigation in the 1980's and takes a different position and argues against the court orders to stop the flagrant discriminatory practices and the practices which have been labeled by the courts repeatedly in violation, contempt of court, and you criticize the Supreme Court's decision in trying to do something to deal with proved discrimination, not taking a class which wasn't discriminated against and giving them a boost forward, but in dealing with laborers who were discriminated against, judicial determinations, contempt citations, ignoring by the people who were the discriminators, and you, as Chairman of EEOC come in and oppose it, and then you sharply criticize the decision of the Supreme Court of the United States in upholding that kind of a remedy.

That seems to me to come right within the purview of what you say ought to be done to remedy active discrimination, and yet you take the other side.

Judge THOMAS. With respect to the weight of that case proceeded through the court, Senator, the Commission itself, to my knowledge, did not approve and it was not required to approve that litigation, because the general counsel had already been authorized at the lower courts to pursue that, but the point is well taken.

My view with respect to cases like that has been that, as a policy matter and one that I have stated clearly on the record, is this: I think that, rather than a court attempting to punish these individuals with a quota or preferential treatment, I thought that in this case and in the egregious cases there could be criminal contempt citations, I felt that there should be appropriate roles for heavy fines, I think or I felt that individuals who discriminated against

other individuals should be subject to the same kinds of fines and penalties that are available in some of the antitrust litigation.

I felt that there was an undervaluation of the effects and the damage done by discrimination, and I felt that this kind of a case was very susceptible and appropriately susceptible to criminal contempt citations.

Senator SPECTER. I have been handed a note that my time is up, and we will return to it with my first question being why did EEOC, in your tenure, join with petitioners in trying to upset the contempt citation and taking the position that the discriminators ought not to be held for contempt and ought not to be punished.

Thank you, Judge Thomas.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Judge Heflin. Senator Heflin. Just so everybody does not think it was a slip, you were a judge. Senator Heflin.

Senator HEFLIN. Judge Thomas, I try to approach these hearings on the basis of fairness, fairness to you, fairness to the President, fairness to your opponents, and try to consider all of the evidence before I make up my mind. I tried to follow that procedure in the other confirmation processes, not only of the Supreme Court Justices, but of all appointments to the judiciary.

So, I do not at this time have any firm opinion one way or the other. I have done a good deal of reading and tried to listen to testimony. Of course, it has entered into my mind from your testimony, as opposed to some of the spoken and written words that you have given in the past, an appearance of confirmation conversion.

Now, this term is a term that came from the mouth of my colleague Senator Leahy here in the Bork hearings, which would indicate that the confirmation processes cause one to change his mind or to give answers that will hurt him in regards to seeking the confirmation. But it also can raise issues that can affect the evaluation that members of the committee may give as to integrity and temperament.

Now, in reading some of the articles and reading speeches that you had given beforehand, most of them in about the last 5 years, or at least since you have been on the EEOC, not back when you were 20 years of age or 25 or 30, but fairly recently, there appears to be a conflict on natural law between what you have stated in the past and what you state here at these hearings.

You are stating in these hearings basically that you do not think that natural law ought to be used in constitutional adjudication. Some interpretation—and it depends on how you interpret your written and spoken words beforehand—would lead one to believe that you had previously advocated the use of natural law in constitutional adjudication.

Now, natural law, of course, is a term that is broad and there seem to be at least two schools of thought, and there may be many others, one a liberal school of thought, another a conservative school of thought on the use of natural law. Those who are of the conservative viewpoint indicate that it would be using the ninth amendment, where there is no deprivation of unenumerated rights that a judge could pick an unenumerated right, something that he said was and then defend it under the concept of natural law.

On the other hand, from a political theory viewpoint on possible constitutional adjudication, there are those that advocate that natural law be used as a defense for judicial restraint, as being a defense for limited government and being a defense for economic freedom and certain other freedoms.

As has been pointed out, those that would advocate the use of natural law, and there have been those in the past in the Supreme Court decisions, particularly in the *Lochner* era, who say that the economic right of the freedom to contract should be allowed, without any government restrictions, and, therefore, that minimum wage laws, health laws, job safety-type laws are restrictions against the right to contract and economic freedom, and, therefore, they follow the concept of judicial restraint or follow the concept of limited government.

Now, you have been asked some questions about this issue and you, of course, have very clearly stated that you do not believe that natural law ought to be used toward constitutional adjudication, and you have mentioned that you so testified in your court of appeals hearing, and that was quoted to you from the court of appeals hearing, statements that you made, and this appears—and I want you to have an opportunity later to read it, and you can give a fuller answer after you are thoroughly advised, because it is not my purpose to ambush you or to make any statement, without you having a thorough right to review what you said before.

But here you say:

> But recognizing the natural rights is a philosophical, historical context of the Constitution, is not to say that I have abandoned the methodology of constitutional interpretation as 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 these matters.

That is what was quoted to you.

The next sentence says—and this was your answer then—"and as a lower court judge, I would be bound by the Supreme Court decisions." Now, reading that answer, it is subject to two or more interpretations. One is that you were speaking of natural law as it would apply to your functions as a court of appeals judge, and the other would be whether you would apply it as to the broad general theory of constitutional adjudication.

Now, if you want to read this and read the whole thing, I will do it, or if you want to answer as to where it may have an appearance of either an ambiguity or of being contradictory. Whatever you want to do, if you want to study it and read it and give me an answer later, or if you want to give me an answer now.

Judge THOMAS. Let me comment on what you have said, Senator. My view is that I have been consistent. On natural law, my interest, as Chairman of EEOC, was as I have stated. It was as a part-time political theorist, someone who was looking for a positive way to advance the ball with respect to individual rights in our political debates, as well as on the issue of civil rights.

I have not advocated or suggested that it should be used in consitutional adjudication. Our Founders and our drafters did believe in natural law, in addition to whatever else, philosophies they had, and I think they acted to some extent on those beliefs in drafting

portions of our Constitution, for example, the concept of liberty in the 14th amendment.

I think that knowing what their views are is a context for understanding our Constitution, knowing what they believed in is a context for understanding the separation of powers or perhaps even understanding the notion of limited government and the rights of individuals.

But when the rights are in the Constitution, then one resorts to constitutional adjudication. Now, the beliefs of the Founders could be a part of the history or tradition to which we look, but you do not make an independent search of natural law, and I have not suggested that. I think my writings have made clear that natural law is the background of our Constitution, that it does not move to the front and that it is not positive law. They are two separate things.

Senator HEFLIN. You have indicated that your writings and speeches were directed toward natural law more as a political theory and you have used the illustration dealing with slavery. How is slavery related to a political theory?

Judge THOMAS. Well, the issue there was for Abraham Lincoln, how do you, when the stated ideals of our country are that all men are created equal, how do you end slavery, and what is the underpinning, what does that promote in our country, the notion that all men are created equal.

Once you have the adoption of the 13th and 14th amendments, you have a positive law, but I think it was important to understand what that meant. It is just a notion, for example, of why do we feel strongly that apartheid is wrong, why do we feel strongly that discrimination is wrong, outside of the law.

But my point is very simply that Abraham Lincoln was sitting here, I think at the time I had read "The Battle Cry of Freedom," I wondered how or what gave him the strength to survive the onslaught that he was faced with, and it was then that I began to refer back to his beliefs and the beliefs of the abolitionists as a backdrop to the Constitution, as a background to the Constitution.

Senator HEFLIN. I am going to ask that someone on the staff here hand you two documents. One is a speech to the Federalist Society, an address, University of Virginia, March 5, 1988, and the other being an article that appears in the 1988 Harvard Journal of Law and Public Policy, entitled "Higher Law Background of the Immunity Clause of the Fourth Amendment," if they will hand you that.

Again, if any question that I ask, if you want to have time to read or review those, I would certainly want to do it, because I will have another opportunity to ask you questions, where you can fully understand it.

These two appear to have much relationship. This speech appears to be a speech, and then it appears that it was put in more of a law review form and was published. Is that a correct——

Judge THOMAS. What you do normally with these is that you give a speech and the review edits it and converts it to a law review piece. That is essentially what happens.

Senator HEFLIN. I see. Now, on the speech, on the first page, if you will look, tell us, bearing in mind as to whether or not you at that time were expressing a view that higher law or natural law—

as I understand it, they are used interchangeably—could be used as a part of constitutional adjudication.

Now, on the speech, starting it, you say:

I appreciate this opportunity for a practitioner, the head of a law enforcement agency, to give his opinion on our subject. I do not pretend to be a legal scholar, but I have a strong practical interest in the crucial part of our conference topic, namely, the grounding of our Constitution in higher or natural law. The expression "unenumerated rights" makes conservatives nervous, as it gladdens liberals, for the reasons our previous discussions here have indicated.

I want to take a different approach to this theme, which provides necessary background for the very abstract issue of the privileges or immunity clause today. Briefly put, I argue that the best defense of limited government and the separation of powers and judicial restraints that flow from that commitment to limited government is the higher law political philosophy of the Founding Fathers.

Far from being a license for unlimited government and a roving judiciary, natural rights and higher law arguments are the best defense of liberty and of limited government. Moreover, without recourse to higher law, we abandon our best defense of a court that is active in defending the Constitution, but judicious in its restraint and moderation. Higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges.

Now, in regards to the question of higher law, how do you interpret that? It seems to me that you are advocating or at least it has the appearance—maybe I withdraw saying it appears to me, because I have not made up my mind, but it at least appears that that is an advocation of the use of natural law toward constitutional adjudication.

Judge THOMAS. It is not, Senator. The point there is that, in our regime, if you notice, I speak to the higher law political philosophy of the Founders. Their philosophy was that we were all created equal and that we could be governed only by our consent, and that we ceded to the Government only certain rights, and that, to that extent, the Government had to be and was a limited government.

But beyond that—and the judiciary, of course, was a part of that limited government—but in no sense, and I do not mention here or say higher law should be pointed to in adjudicating cases. It is nothing more than the background, the—I think I say here provides the necessary background, it provides us an understanding of our form and our structure in our Government. It is not a methodology in constitutional analysis. I think it would have been easy enough to have said that directly.

Senator HEFLIN. Well, you use the words "higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges." Now, how can higher law through a political theory serve as a protection against willfulness of run-amuck majorities or run-amuck judges?

Judge THOMAS. The theory would be, Senator, essentially this: That the individual is to be protected, that the individual can only be governed by consent, so that the majority cannot take rights away from the individual that have not been conceded or that have not been consented to be given to the Government by that individual. It is not a notion that in your adjudication you look to this higher law. It is simply an explication or an indication that this is the theme of our underlying background political philosophy and that the Constitution protects these rights.

Senator HEFLIN. All right. If you turn to page 7 and 8 of that speech, you make this statement starting at the beginning of the last sentence on page 7:

> Similarly, an administration inspired by higher law thinking would not have argued on behalf of Bob Jones University. The higher law background of the American Constitution, whether explicitly appealed to or not, provides the only firm basis for a just, wise, and constitutional decision.

I am taking that out of context. If you want to read——

Judge THOMAS. The point there was that I felt that as a policy matter, as a political branch of our Government, that the administration of which I was a part made an inappropriate decision about being involved in the Bob Jones University case; a decision that had it been informed with the notion that we were all created equal or the notion of how important it was not to have discrimination in our society, that it—not the courts but our administration—would not have made as a policy matter. I thought it was a wrong decision.

Senator HEFLIN. All right, sir. Now turn to your law review article. Again, you—by the way, that thing that Senator Leahy was talking about, that footnote, I believe, appears here if you wanted to later, when Senator Leahy returns—it is footnote 2 on the first page.

I think basically the first part of that you use the term "run-amuck majorities" and "run-amuck judges" in that regard. But in the context of economic freedom or the freedom to contract on the concept of higher law, if you were to read it in that context, "Moreover, without recourse to higher law, we abandon our best defense of judicial review, a judiciary active in defending the Constitution but judicious in its restraint and moderation. Rather than being a justification for the worst type of judicial activism, higher law is the only alternative to the willfulness of both run-amuck majorities and run-amuck judges."

Now, in the context of economic freedom, right to contract, and the fact that any governmental restrictions placed upon those freedoms would be, in effect, restrictions and could be looked upon as being run-amuck majorities, do you still maintain that that does not—well, I am just saying it is subject to an interpretation that you are referring to constitutional adjudication there.

Judge THOMAS. I am not in this sentence. Let me make a point about my interest in the economic aspect of this. I was asked on—I did not just simply sit around and spend time just trying to spin theories. I had certain experiences that prompted me to think about some of these issues. And with respect to the issue of having a right to run my grandfather's business, for example, I simply looked at what in theory was his right. After slavery, what was his right or the rights of people who were near me, who lived around me, to just simply use their land and grow their food and be able to eat it or to sell it?

Those were the kinds of examples that I would use. I, for example, remember vividly my grandfather, whom I thought was a strong man—and when you are small, it is a giant of a man, and certainly a man with great pride. He would literally have to get a drink before he went to the licensing bureau in Savannah to get

the license that he needed to drive his oil truck. Those were the kinds of questions I was looking at.

Now, I did not intend, first, to say that this was a basis for constitutional adjudication. I think I could have said that if I had intended that. The second point is that I have said and I believe that the *Lochner* era cases were properly overruled and that the health and safety—the Court does not serve as a superlegislature over this body or the political branches.

Senator HEFLIN. Well, you said you could have stated that. On the other hand, in all of these writings on natural law, you could have made the distinction, could you not, that you were speaking of a theory and not a constitutional adjudicatory process?

Judge THOMAS. I think, Senator, if I were a judge, if I gave some of these speeches after I went to the bench, I would have made that distinction. But at the time, I was not a judge and certainly did not think at that time that it was necessary to draw that distinction when it really at that point wasn't relevant.

I felt, as I stated in my hearings for the court of appeals, that this is political theory. This is not constitutional adjudication or methodology. And I stand by that. I think the distinction is an important one, and it is one that certainly I didn't draw a clear and exacting line sometimes, simply because I wasn't in the judiciary. I didn't say I am not saying this or I am not saying that, but it was not my intent at any point to provide a basis for adjudicating constitutional law cases.

Senator HEFLIN. In this article in the Harvard Journal of Law and Public Policy on page 66, this statement appears:

> To believe that natural rights thinking allows for arbitrary decisionmaking would be to misunderstand constitutional jurisprudence based on higher law.

That appears—it has the appearance of advocating natural law in the field of jurisprudence and decisionmaking on constitutional adjudication.

Judge THOMAS. Senator, no, I still—my point is that—and jurisprudence that I would use there would be in the broadest sense. I still take the position and took the position then that this would serve as a background to understanding what our Constitution was for. I was not speaking as a judge. I was not setting out rules of analysis or adjudication. I was trying to establish a sense among conservatives or among the audience that here is the background to our Constitution.

Now, our Founding Fathers took bits and pieces of what they believed may have been natural law, and they placed that in the Constitution. But once it is in the Constitution, it is no longer required that anyone refer to natural law. It is a part of our positive law. And I think that that is the appropriate distinction. It is the one that I certainly attempted to make there. At no point did I intend to say, look, this is an approach or methodology for constitutional adjudication. And that was the point I attempted to make again in my court of appeals confirmation. It has no role.

I think that if as a judge I had stated here is a new approach for constitutional adjudication, then I think you would be right, that there would be concern. But I was speaking solely as a chairman of

a commission who was interested in this debate and advancing this idea, but not in adjudicating cases.

Senator HEFLIN. The concept that natural law is a political theory, most political theories that are developed involve protections, adjudicatory concepts, or processes. You eliminate as a part of the comprehensiveness of the natural law theory or natural law philosophy the protection of rights or adjudicatory rights.

Now, in most political theories, you would have something, if it is adopted, that would provide for protection, which is judicial decisionmaking. Are you separating from the natural law theory adjudicatory processes?

Judge THOMAS. What I am saying, Senator, is this: That the individuals who drafted our Constitution, let's say our 14th amendment, the abolitionists, for example, believed in natural law. And to the extent that they reduced it to a positive document, it appears in the Constitution. But one need not appeal to whatever they believed beyond the understanding of what they intended to do, that the law—that our rights don't flow from what their beliefs were, but rather from the appearance of those rights in the Constitution.

Senator HEFLIN. Well, if it became positivism or the positive law of the Constitution, then why is natural law being advocated? The concept that if it is constitutional law, if natural law has progressed to the extent that it is positivism, it is a part of the Constitution, then why all the great discussion today on natural law?

Judge THOMAS. Well, for me it was just a matter of discussing and understanding the issue of slavery and the issue of the underlying values and the underlying ideals of our country. I thought it was important. I thought it was a way of discussing an issue that was important to me, rather than simply constantly arguing about goals and timetables and quotas. It was a way of attempting to find a way to—a theme to unify us on this debate and a way to convince individuals whom I felt should be supportive of civil rights. And I am not saying that it worked. I certainly never thought that I would be having this discussion about it. And I did not intend it certainly as a method of adjudication.

Senator HEFLIN. Well, let me ask you this last question. I understand my time is about up. How does natural law as a political theory provide protection for limited government or for judicial restraint if that political theory excludes constitutional adjudication?

Judge THOMAS. I think, Senator, it offers an understanding of why it was necessary or why our Founding Fathers felt that we should have a government that did not infringe on the rights of individuals or a government by consent rather than our rights emanating from that government.

It gives us an understanding of why government ought to be limited, why it ought not to intrude on the individual, why there is a line between the individual and the government. It gives us a sense of why the government shouldn't require that black people live over here or white people live over there. But it doesn't adjudicate it. It gives us an understanding of why slavery was wrong, but it doesn't provide for the manumission of slaves. That had to be done by the Constitution.

Again, it is theory. It was an endeavor that I thought was an appropriate endeavor at that point in my career. I did not intend for it to involve constitutional adjudication.

The CHAIRMAN. Thank you.

Before we take a break, just out of curiosity, you keep talking about the need to get conservatives to be more supportive of civil rights. Does that mean they are not supportive of civil rights?

I am not being facetious, because it goes to the question of your intentions here. Are conservatives supportive of civil rights?

Judge THOMAS. I was giving them reason to be strongly supportive and more aggressively supportive of civil rights. I don't think they were necessarily against civil rights, but I thought that there was a comfort level in being opposed to quotas and affirmative action. And I thought that we should advance the ball, that the issue of race has to be solved in this country and that we have to stop yelling at each other and we have to stop criticizing each other and calling each other names. And I was involved in that debate, and I was a pretty tough debater, too. But at some point we have got to solve these problems out here.

The CHAIRMAN. I think the State Department is the place for you, Judge. [Laughter.]

We will recess, to give you a chance to have a break, for 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Senator Brown?

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, I have heard a number of criticisms of the chairman's style of conducting this hearing. The substance of those criticisms have revolved around the fact that he clearly is too soft on you, has not brought the tough questions out. And I just wanted to serve notice on the chairman that this love-in that he seems to be presiding over will come to an end.

Reflecting on my own children—I have two daughters and a son—it is clear to me that if I want to get the inside information on my son, I ask one of his sisters, and we intend to call your sister as a witness later on, whenever the chairman will allow that measure. I don't know if that is——

The CHAIRMAN. You just scared the living devil out of him. He is not sure whether you are serious. [Laughter.]

See the look on his face. He is only kidding, Judge.

Judge THOMAS. I would be more concerned if he called my brother.

Senator BROWN. I think we can make arrangements for that, too.

Senator SIMPSON. Mr. Chairman, let me correct the record. That is Clarence's sister there and not his daughter. We want to get all this sibling stuff straightened out.

The CHAIRMAN. As far as his sister is concerned, she would rather it not be corrected, she would rather be a daughter.

Senator BROWN. Judge, earlier in this hearing you were asked about the right to privacy, and as I recall your answer, you indicated that you recognized a right of privacy within the Constitution. Since that is one of the cornerstones that leads to decisions in-

volved in *Roe* v. *Wade*, I think that was of some real significance and interest to this committee.

You have been asked specifically about *Roe* v. *Wade*, and you have declined to answer on the grounds that you may well be called upon to rule on those specific issues as a judge of the Court.

I would like to ask a related question that is slightly different. I can understand the reluctance to indicate how you would rule, but I would be interested to know if in your own mind you have come to a decision on the right to terminate a pregnancy. I am not asking what that decision is, but I would like to know within your own mind if you are at a point where you have decided that.

Judge THOMAS. Senator, I think, as I have noted earlier, that for me to begin to state positions, either personal or otherwise, on such an important and controversial area, where there are very, very strong views on both sides, would undermine my impartiality and really compromise my objectivity.

I think that it is most important for me to remain open. I have no agenda. I am open about that important case. I work to be open and impartial on all the cases on which I sit.

I can say on that issue and on those cases I have no agenda. I have an open mind, and I can function strongly as a judge.

Senator BROWN. Well, I thank you. I think that willingness to look at the facts and review them objectively is an important factor for us to look at.

Mr. Chairman, I think it is appropriate here to at least put into the record something that was said by Justice Marshall upon his confirmation. He was asked by a variety of Senators to indicate how he would have ruled on a number of cases. The *Miranda* case was brought up as well as several others.

In the *Miranda* case, or at least in response to the *Miranda* case, Justice Marshall said this, and I quote: "I am not saying whether I disagree with *Miranda* or not because I am going to be called to pass upon it. There is no question about it, Senator. These cases are coming to the Supreme Court."

Justice Marshall remarked at a different stage of the hearings, "My position is—which in every hearing I have gone over is the same—that a person who is up for confirmation for Justice of the Supreme Court deems it inappropriate to comment on matters which will come before him as a Justice." I thought it appropriate to have that in the record. The position you have taken with regard to announcing an opinion in advance of hearing the case is certainly in line with other people who have been advanced to the Supreme Court, and in this case specifically Justice Marshall.

But I must say I do appreciate your answer to my question. I think a critical issue for us here is to know that you are willing to listen to the facts in those cases.

The CHAIRMAN. If the Senator would yield, did you have more than you read that you want to place in the record?

Senator BROWN. I think I would leave it at that, Mr. Chairman.

The CHAIRMAN. Second, did the witness answer your question? I didn't think he answered your question. That is, did he make up his mind? Not what is it, but just has he made up his mind?

Judge THOMAS. I indicated that it would be inappropriate to explain to him or to say whether I did or not.

The CHAIRMAN. Thank you.

Senator BROWN. At least my interpretation—and I appreciate the chairman mentioning this. At least my understanding was that the judge indicated that his mind was—he was willing to listen to the facts on this, and his mind was open in terms of this particular case.

Have I——

Judge THOMAS. That is correct.

Senator BROWN. I am assuming that you have not made a final decision in your own mind on the *Roe* v. *Wade* case?

Judge THOMAS. That is right.

Senator BROWN. Earlier the chairman had brought up I thought some very important questions involving economic rights in the Constitution. I know you commented further on that and answered Senator Hatch's question specifically with regard to several lines of cases that I know our chairman was concerned about. In addition, you had commented with regard to whether or not you would be a disciple of several philosophers that were mentioned, indicating that you would not.

I would like your views, though, on a different aspect of this economic question. As I just glance through the Constitution, we have a variety of provisions in the Constitution that deal specifically with property rights: Articles I, IV, VI; amendments II, III, IV, V, VII, XIII, I suspect many others. These are property rights, economic rights if you will, that are specifically addressed in the Constitution and protection provided.

It has been suggested, I think by the chairman, or at least an observation, perhaps I should say, by the chairman, that in the past some Supreme Court cases have accorded property rights or economic rights a lesser degree of protection than other rights in the Constitution.

My own view of it is that it is very difficult to separate rights. It strikes me that if someone cuts off your salary because you have said something, you may have denied freedom of speech but you have done it through a deprival of economic rights, property rights. At least it occurs to me that if the 13th amendment means anything, it means that you have justifiable property rights in the fruits of your labor. And if you are not going to protect the property rights of your labor, then the 13th amendment doesn't mean much.

Now, I broach this subject because I think it is important. In my mind it is difficult to separate property rights and personal rights. It does appear to me that both are protected in the Constitution, and I guess I would like an indication from you as to whether or not you think property rights deserve a lesser protection in the Constitution, greater protection under the Constitution than other rights, or whether it is a balancing between rights when these questions arise. Would you share with us your view on that?

Judge THOMAS. Senator, my point has been that property rights, of course, deserve some protection, and I think they are, as are our other rights, important rights. The Court in looking at the economic regulations of our economy and our society has attempted to move away from certainly the *Lochner* era cases and not as a superlegislature. And I indicated that that is appropriate, particular-

ly in the area as I have noted—the health and welfare, wage and hour cases.

I think that some of those cases, the area, I think there is some developing in the taking area, and perhaps if I am fortunate enough to be confirmed to the Court, perhaps I would be called upon to rule on those issues. But I would be concerned about the diminishment or the diminishing, diminution of any rights in our society. But that is not to say in any way that I disagree with the standards that the Court applies to protecting those rights today.

Senator BROWN. Thank you. I wanted to address the subject of stare decisis. It has been raised by other members of this committee. I think the distinguished Senator from Ohio has discussed the concern about the overturning of previous decisions and precedents.

As I see the figures, from 1810 through 1953 we had a total of 88 cases that were overruled, where a previous decision of the Court was simply and flatly overruled by the Court. That is 88 cases in 143 years.

Interestingly, I think, in the next 36 years, 37 years, we had 112 cases overruled. Really starting with the Warren Court on, you had a much greater movement on the part of the Court to overrule previous decisions.

I mention that because apparently the modern courts, at least since the Warren Court, have been much more inclined to move in that direction, not less so, in terms of observing stare decisis. But at least I observe those cases as ones that were important landmarks: *Brown* v. *the Board of Education* addressing segregation; *Mapp* v. *Ohio*, an illegal search; the *Gideon* case, involving the right to counsel. These are areas where we have overturned precedent, but I think with a very significant and real reason behind those changes.

I mention all of this because I wish you would share your view with us as to the kind of standards you are going to use in sitting on the Court as to whether or not you will choose to overrule a previous decision of the Court. What kind of standards are you going to be looking to apply?

Judge THOMAS. Senator, I think that the principle of stare decisis, the concept of stare decisis is an important link in our system of deciding cases in our system of judicial jurisprudence. The reason I think it is important is this: We have got to have continuity if there is going to be any reliance, if there is going to be any chain in our case law. I think that the first point in any revisiting of the case is that the case be wrongly decided, that one thing it is incorrect. But more than that is necessary before one can rethink it or attempt to reconsider it. And I think that the burden is on the individual or on the judge or the Justice who thinks that a precedent should be overruled to demonstrate more than its mere incorrectness. And at least one factor that would weigh against overruling a precedent would be the development of institutions as a result of a prior precedent having been in place.

But, again, I think the first step is that the precedent be incorrect, and the second step in the analysis has to be more than the mere incorrectness of that precedent.

Senator BROWN. I am wondering if the standards that you will be applying will vary depending on the constitutional issues involved. Is this the standard you would apply in every area?

Judge THOMAS. I think, Senator, that the standards that I gave you should be as uniform as possible. I don't think, for example, as I have read someplace, that the standard should be less for individual rights than for commercial cases. I did not understand that comment, but it would seem to me that individual rights deserve—or the cases in the individual rights area deserve the greatest protection and should be considered with the application of the highest standards of stare decisis.

Senator BROWN. Thank you.

I want to change subjects on you for a moment and take you back to the EEOC, during that 8-year period that you directed that agency, Commission. My recollection is that in 1983 you changed policy for the Commission, that the Commission adopted a resolution to shift its presumption in favor of rapid charge processing to one of case-by-case investigation.

I wonder if you would be willing to outline for us this policy initiative, and if you would relate what kind of results it achieved or didn't achieve. What kind of changes occurred?

Judge THOMAS. Senator, when I arrived at EEOC in 1982, among the many problems that I incurred—and, indeed, there were many—was that the existence of a rapid charge system, that system was designed to reduce the backlog that had plagued EEOC for so many difficult years. I felt that the system, which in essence brought the charging party who filed the claim of discrimination and the employer together and required them to reach a settlement, without investigating and determining whether or not there was actual discrimination, I felt that that system shortchanged both parties.

The Commission voted in the policy that as an ideal, felt that—or indicated that cases should be investigated as fully as possible before there is any determination. That took quite some time to implement. But the sense of it was this: That if someone—and there were approximately 60,000 charges filed a year. If someone filed a charge, that that person had the right to have it investigated and to have a determination made as to whether or not there was discrimination.

One of the results of this approach is the increased number of cases that were litigated. I think also an important result was that we were more consistent, and I think more faithful to the statute that required us to investigate these charges.

Again, this effort was not without its glitches, but I think it was a very important move in the right direction and brought about the appropriate results for an agency that enforces nondiscrimination laws.

Senator BROWN. One of the changes that at least I have understood that you focused on during that period was an effort to automate the office, adopt computers and computer systems. I wonder if you could summarize what you did and whether or not you thought it was a wise investment.

Judge THOMAS. Again, Senator, we automated in a number of ways. The first area that I was told when I was confirmed that I

had to clean up was the financial management area. The then-chairman of the Labor and Human Resources Committee told me that he would call me on the carpet if that was not done.

We were able to automate that area and as a result achieved savings that we could then use to automate other areas. And then that necessity for automating is quite simply that when you receive 60,000 charges a year in 50 offices across the country, in order to manage and in order to understand your agency and in order to be able to understand the type of discrimination that is taking place in this society, you have to have a database. You have to have a database in each of the offices, and you have to have a national database to manage that national workload from the central office here in Washington, DC.

One of the problems that you have when you don't have that database is simply you don't know what is going on in the agency. You don't know what changes there are, and quite frankly you have no idea what is in your workload except the most general of ideas. Without additional resources and over a period of time, we were able to build a database, to put the automated management systems in the offices across the country, and as well as develop a national database that is so important in managing our workload and actually enforcing the equal employment opportunity laws.

Senator BROWN. Thank you.

Judge, I must say I was shocked at hearing comments that you had made about Congress. Those harsh views are ones, of course, we have never heard before. As one who came to Congress some 11 years ago with the thought that we would balance the budget within a couple of years, the concept that perhaps a $250 billion to $300 billion deficit a year leaves something to be desired I suspect is not new to the American people. But sometimes saying the emperor has no clothes is not always the greatest help for you in the confirmation process.

Be that as it may, I think the underlying question is an appropriate one, and that is: What will your attitude be as a Justice of the Supreme Court in reviewing the constitutionality of legislation in which you find yourself in disagreement with the policy judgments of Congress? Are you going to be able to separate out your objections to congressional policy in making the determination of whether or not that law is judged constitutional?

Judge THOMAS. Senator, I think it is one thing to be in the executive branch and to come back and forth to oversight hearings and budget hearings and to disagree on policy decisions and to argue and debate and advocate for a particular point of view. There is a tension there, and sometimes those of us who have been nominated and needed to be confirmed have deep regret about negative comments about this body or any body, but the appropriate role for a judge totally precludes being a part of that tension and that debate and that advocacy.

A judge must determine what the will of this body is. A judge does not have to agree, a judge does not have to think it is the most wonderful legislation in the world. Indeed, that is irrelevant. The judge's role is, as impartially as possible, to determine what the will of this body is, and that is precisely what I have attempted to do in my current position as a judge on the U.S. Court of Ap-

peals for the D.C. Circuit, and never to supplant my personal views.

As I indicated earlier, when I pick up a case for consideration, the first question I ask myself is what is my role as a judge in this case, and that role never includes bringing personal views or predilections to that case.

Senator BROWN. I appreciate that. I expect that is not the easiest portion of your duties or task. It would not be for me.

You have mentioned several times in the course of these hearings your experiences in dealing with congressional inquiries involved in the various agencies you have either directed or been involved in. It is my understanding that you have appeared and responded some 57 times, in addition to the I guess 5 times you have been up for confirmation. I wonder if you would give us an idea, in those 57 inquiries, how much time was involved, what it involved on your part, your agency's part in terms of staff time, commitment of resources.

Judge THOMAS. Well, Senator, I would have to put that inquiry into two separate categories. The least amount of involvement are the instances in which there is significant cooperation between the staff of a particular committee and the agency. The difficulty arises when there is, in the second category, significant disagreements or where there is significant information or document requests involved.

But as a rule of thumb, when I prepared for a hearing, any of the hearings other than my own confirmation hearings, I would allow, at a minimum, 4 to 8 hours of personal preparation, in addition to whatever staff time it took to gather documents and to address the issues that concern the committee involved.

Senator BROWN. What about the agency itself?

Judge THOMAS. The involvement of the agency, again, depends on the range of the inquiry. There have been instances when the involvement has been quite overwhelming, as a result of the amount of data involved.

Generally, however, the agency's involvement has been sometimes exacting, it has been within manageable ranges.

Senator BROWN. Judge, in the past you have expressed some concerns about racial quotas. If I understand your position as it has been articulated at this hearing, it has been an interest or an advocacy of affirmative action, but an opposition to racial quotas as a method of achieving those advances. I wonder if you could articulate the differences you see and the reasons for them.

Judge THOMAS. As I indicated earlier, Senator, throughout my adult life, I have advocated the inclusion of those who have been excluded. I have been a strong advocate of that. I advocated that in college and I advocated that in my adult life, and I certainly practiced that during my tenure at EEOC.

I felt, for example, that there were many opportunities to include minorities and women and individuals with disabilities in our work force, and I took every occasion to do that in the Senior Executive Service Program, the top level of Government managers, our record is superb on the efforts that I was able to achieve in agreements, scholarships for minorities and women across the country,

colleges and universities programs, internship programs, mentor programs, stay-in-school programs, et cetera.

I think that many of us of good will and many of us who, though we do not necessarily share the same approach, agree with that goal that we have to include individuals who have been left out for so long.

The difficulty comes with how far do you go without being unfair to others who have not discriminated or unfair to the person who is excluded, and at that range I thought—and, again, this was the policy position that I advocated—that it was appropriate to draw the line at preferences and goals and timetables and quotas.

I also felt that those approaches, the objectionable approaches had their own consequences, and that is I felt that they had the tendency of undermining the self-esteem and dignity of the recipients. That is again something that others can debate, but I thought it was a valid point of view, and that those approaches, if we went too far, actually could be harmful to the very individuals whom we all care so much about.

But I am very firmly for programs to include those who have been excluded. That has been a passion of mine throughout my adult life.

Senator BROWN. In describing your views on racial quotas, unless I have missed it, you have not anchored them based on constitutional arguments, but anchored them in your own feelings about what makes sense, what makes the reason.

Yet, I notice the *Plessy* v. *Ferguson* dissent that you have referred to, or at least it has been attributed to you, that you found some interest in Justice Harlan's dissent there in that case includes this quote:

> But in view of the Constitution, in the eye of the law there is in this country no superior dominant ruling class of citizens, there is no cast here, our Constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Now, my recollection is I did finish saying I understand your reluctance to rule on cases in advance, but do you attribute your concern over racial quotas to reading the Constitution, as well?

Judge THOMAS. I think, Senator, in the appropriate circumstances, we all are concerned with the underlying value of fairness that is expressed in our Constitution, as well as in our statutes. But I would like to make one comment with respect to that quote, and I think it is an important comment, that we have to remember that, even though the Constitution is color blind, our society is not, and that we will continue to have that tension.

Senator BROWN. Judge Thomas, I bring this subject up not to cause you personal concern, but because it has become part of the debate over your nomination. I preface it that way, because it is not normally the type of thing that I guess I would bring up at a hearing of this kind.

But one of the charges that has been brought against you in this nominating process is that you benefited by quotas or affirmative action, but do not support them. I guess the question is directly in entry to Yale, were you part of an affirmative action quota, were you part of a racial quota in terms of entering that law school?

Judge THOMAS. Senator, I have not during my adult life or during my academic career been a part of any quota. The effort on the part of Yale during my years there was to reach out and open its doors to minorities whom it felt were qualified, and I took them at their word on that, and I have advocated that very kind of affirmative action and I have done the exact same thing during my tenure at EEOC, and I would continue to advocate that throughout my life.

Senator BROWN. Mr. Chairman, my time is up. I would merely note for the record that the judge was an honors graduate of Holy Cross undergraduate school.

The CHAIRMAN. We will suspend just for a moment.

[Pause.]

I was just conferring with staff about the timing. Just so you have a sense of how much longer you are going to sit there, I think we should go with one more Senator. Today we will hear from the Senator from Illinois, and then we will take up tomorrow morning at 10 o'clock with the Senator from Wisconsin, followed by a second round beginning with me.

The Senator from Illinois, Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge Thomas, I will try to avoid doing what Senator Danforth said we should not do and just read little snippets from what you have written and said. I have read now over 800 pages of Clarence Thomas' speeches and opinions. I have read more of Clarence Thomas than any author I have read this year. I regret to say I do not think you have a best seller in the works. [Laughter.]

But it is important, because when you say you have no agenda or when you say you are not a policymaker, the reality is you become a policymaker on the U.S. Supreme Court. If I may quote from Justice Frankfurter, "It is the Justices who make the meaning," talking about the law and the Constitution. "They read into the neutral language of the Constitution their own economic and social views. Let us face the fact that five Justices of the Supreme Court are molders of policy, rather than the impersonal vehicles of revealed truth."

If, for example, in this committee, my colleagues, Senator Heflin and Senator Hatch, have a disagreement and work out a compromise and the law is not completely clear, then ultimately you may have to decide and make policy. That may be a 5-to-4 decision of the Court.

I mention this, because, generally, while it is not always true, you can usually tell where a Justice of the Court is going to go by looking at his record. For example, Justice Marshall has been talked about here. Generally, we can say there were no great surprises in Thurgood Marshall's record on the Court, because we knew where he had been.

When I look at your writings, I find a somewhat different tone, frankly, than the response to questions here, or a somewhat different tone in the quotes Senator Danforth read—with great respect to my colleagues, Senator Danforth, who gave as strong and eloquent an endorsement as I have ever heard of any candidate. But what I read is somewhat different from the tone of the remarks, the quotes that he made there. And when I read attacks on mini-

mum wage, for example, I would defer to your sister and mother on whether or not we ought to have a minimum wage law rather than to Judge Thomas. Or when I read and when I hear you mention public housing that your mother was able to move to, and then I read your statement—and I have almost—well, I have 16 similar in tone here, but let me read the one that I read in the opening statement:

"I for one don't see how the government can be compassionate. Only people can be compassionate, and then only with their own property, and their own effort, not that of others."

Now, in the case of public housing, my feeling is we are talking about government being compassionate, taking a little of your money, taking a little of Jack Danforth's money, taking a little of my money, but doing something that is very constructive and very needed.

I find an inconsistency there, and I—well, let me just ask you to comment on what I see as inconsistency and maybe you do not see as an inconsistency.

Judge THOMAS. Senator, with respect to—let me just address the minimum wage. The concerns that I raised in a policy debate were something that I felt should have been taken into account. I think we are all for a decent wage. The one factor that I thought should be taken into account is the impact it would have particularly on minority teenage employment, and if that was considered in the calculus, then that was fine. But that was an important consideration. That is a policy decision. It is not one that judges make.

With respect to public housing or comments about compassion, I don't think in all of those that you found one word saying that we shouldn't spend money to help people who are poor or downtrodden.

Senator SIMON. But isn't that what you are——

Judge THOMAS. I think that we have an obligation, an obligation to help those who are down and out. That is what I tried to point to in my opening statement; that as a part of our community, I think it is important for us to be willing to pay taxes so that people have a place to live.

Senator SIMON. And so when you attack, for example, redistribution of wealth—and one statement I read could have been made by an early king of France, very negative on the redistribution of wealth. But, in fact, when we have public housing——

Judge THOMAS. I think that is very important.

Senator SIMON. And that does not offend you?

Judge THOMAS. No.

Senator SIMON. All right.

Judge THOMAS. Senator, let me make one point. I think that it is important that we recognize, whether we have public housing or any other policies, that we make sure that we are doing good for the people who are the beneficiaries or recipients of this. Years ago I think we remember that there were public housing in certain cities that ultimately had to be torn down because they turned out to be more harmful to the inhabitants than they were helpful.

Senator SIMON. One of them in St. Louis that all three of us know about here.

Judge THOMAS. The debates that I requested and would have hoped to have been a part of is, Look, let's reexamine the pros and cons. Let's have a constructive debate about it. The problem is still going to be there.

I called a debate over affirmative action a pointless debate because at the end of the day there are people who are still not a part of our economy. We can agree or disagree all day. It is as though we are fiddling while their chances burn.

So I do think that those efforts are important, Senator.

Senator SIMON. In that connection, affirmation action, Senator Brown just asked you about college programs. One of your successors in the Office of Civil Rights in the Department of Education has criticized setting aside scholarships for minorities. Washington University, headed by a distinguished chancellor, William Danforth, has graduate fellowships for minorities in the field of science and math. Does that offend you in any way?

Judge THOMAS. It is my understanding, Senator, that there may be litigation about that particular policy, but let me answer that in this way:

When I had the opportunity to establish a program at EEOC that provided scholarships for minorities and women, I did. And it is a program that I think now has about $10 million in endowments. When I had an opportunity to establish a program or to participate in the establishment of a program here in Washington for minority interns, I did. I think that it is important for them to be here, to participate in this process, to learn from this process, to grow. I wish that when I was a kid I had had this opportunity also.

So I think that there are steps that need to be taken, but I can't—on that specific policy, I think it would be best that I not comment explicitly on that.

Senator SIMON. That is a perfectly legitimate response.

Again, so that I can get a feel of where you are coming from to judge where you are going to be going, Newsday magazine describes James J. Parker as a mentor and the person who introduced you to the Reagan White House. Is that an accurate description?

Judge THOMAS. Jay Parker has been a friend since I worked here on Capitol Hill. He was not the person who introduced me to the White House.

Senator SIMON. He has been, for many years, a lobbyist for the Government of South Africa. Were you aware of that?

Judge THOMAS. I became aware of that, interestingly, even though he is a friend, I can tell you that I do not question—he is an honest individual, and I didn't question him about his personal activities and his businesses. I became aware that he—through the news media, as you did, about this particular activity.

Senator SIMON. Now, he is quoted at one point as saying he informed you in 1981 about that. You don't recall that.

Judge THOMAS. I don't recall it. I knew he represented some of the homelands in South Africa at some point. I think the Mandela family or some individuals in South Africa. I was not aware, again, of the representation of South Africa itself.

Senator SIMON. He and a fellow named William Keyes, who are both editors of Lincoln Review, which is frequently given a far-

right label—whether it is justified or not, it is frequently given that label. But the two of them over the course of the years received well over $1 million from the Government of South Africa. They also, in editing this publication, have had a number of articles critical of sanctions, antichoice articles, other things. For 10 years you were an editorial adviser to that publication. Did you at any point question whether these articles that, while critical of apartheid, were in agreement with the policies of the Government of South Africa or also the antichoice articles? Did you at any point suggest that those were not proper?

Judge THOMAS. Senator, the role of a member of the advisory board was purely honorary. There were no meetings. There was no review of literature. There were no communications. There was no selection of the material that was included in the journal. Indeed, I don't think that I have read a copy of the Lincoln Review in 2 or 3 years. I haven't received one in the mail in the last 2 or 3 years.

On the issue of South Africa, however, let me make this point: That even as I was aware of Mr. Keyes' involvement with South Africa, I was not aware of Mr. Parker's. But even as they took that position, I took a strong position on the board of trustees of Holy Cross that we divest of stocks in South Africa. That was important to me then, and, of course, that is contrary to a position that they might take. But it is one that I felt strongly about.

Senator SIMON. I was not aware of that, and I think that is significant.

You joined Clarence Pendleton and Steven Rhodes in criticizing those who were protesting at the South Africa Embassy on South African policy. At least the Washington Post reports this. Did you do this on your own? Were you requested by someone to do this? Do you recall this?

Judge THOMAS. I have no recollection of that at all, Senator.

Senator SIMON. Somebody give that to Judge Thomas.

If you can just look at the article and see if you do recall this. [Pause.]

Judge THOMAS. I think the quote that if these were protests about the quality of education black kids in the United States receive, about the high crime rate in black neighborhoods, I would be right out front in that kind of a march. It is probably the kind of statement I would have made.

Senator SIMON. But the three of you did this in a coordinated way. Obviously, you know, it didn't just happen that all three of you said that the same day.

Judge THOMAS. Well, the only way that I think that something like that could happen would be that we were called the same day by the reporter. I had no involvement on that issue within the administration. I would assume that the reporter simply picked up the phone and looked for individuals to get a comment.

Senator SIMON. If on further reflection you or anyone else has any further background on that, when we get around to the second round——

Judge THOMAS. I simply don't remember a coordination. If anything comes to mind or if I can reflect on that, I will certainly apprise you of it.

Senator SIMON. On the question of privacy, you have been critical of the use of the ninth amendment. And when you were asked by Senator Metzenbaum, I believe, about the question of privacy, you referred to the 14th amendment.

There are at least three members of the Supreme Court who have referred to the right of privacy as a fundamental right. The ninth amendment, as I am sure you are aware, grew out of correspondence between Madison and Hamilton, where Hamilton said, "If you have a Bill of Rights, some people will say these are the only rights people have." And so the ninth amendment was added which says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

That amendment is not just in isolation. In the Constitution you also have a provision which states that the Government can't search your home without a search warrant. That is in a sense a right of privacy. The Constitution says you can't have militia quartered in your home. That is in a sense a right of privacy.

When you put that all together, together with the ninth amendment, it seems to me that there is fairly clearly a right of privacy implied.

Now, that becomes significant because if you use the 14th amendment as a basis for the right of privacy, that comes later in our history. It has not been a part of our whole tradition of our country to have a right of privacy.

Do you have any reactions to that, and do you consider the right of privacy a fundamental right?

Judge THOMAS. Senator, to my knowledge, the Supreme Court, no majority has used the ninth amendment to establish as the basis for a right. Of course, it was used by Justice Goldberg and by Justice Douglas in *Griswold.*

With respect to the approach that I indicated that I thought was the better approach, it was Justice Harlan's approach. But with that said, my bottom line was that I felt that there was a right to privacy in the Constitution, and that the marital right to privacy, of course, is at the core of that, and that the marital right to privacy in my view and certainly the view of the Court is that it is a fundamental right.

Senator SIMON. Let me shift to another area, and that is the church-state area where you have not written very much. In fact, the only thing I have is in response to a question about religion in the schools in Policy Review magazine. You say:

> My mother says that when they took God out of the schools, the schools went to hell. She may be right. Religion is certainly a source of positive values, and we need all the positive values in the schools that we can get.

It is the only thing I have found in this whole church-state area.

This is an area where, again and again, during your years on the Court you will be asked to make decisions. Since 1971, the Court has followed a three-part *Lemon* criteria that you may be familiar with. It is Jefferson's wall of separation. It is not quite that clear. When the Methodist church is on fire, you call the fire department. You don't say separation of church and state. We can't put out the fire because of a number of factors.

But the *Lemon* criteria are: No. 1, does it have a secular purpose? No. 2, is its effect to advance or inhibit religion? And, No. 3, does it excessively entangle government and religion?

That is what the Supreme Court has been using since 1971.

I guess I have a twofold question: No. 1, are you familiar with the *Lemon* criteria? And, No. 2, if you are, do you think they are reasonable criteria that should be used in the future?

Judge THOMAS. Yes, Senator, I am aware of the tests enunciated in *Lemon* v. *Kurtzman.* The Court has applied the tests with some degree, I think, of difficulty over the years. I have no personal disagreement with the tests, but I say that recognizing how difficult it has been for the Court to address just the kind of problem that you have pointed out when the church is on fire or when there is this closeness between the activity of the Government and the activity of the church.

I think the wall of separation is an appropriate metaphor. I think we all believe that we would like to keep the Government out of our beliefs, and we would want to keep a separation between our religious lives and the Government.

But the Court has had a great deal of difficulty, and there is some debate on the Court as to how far you should go; whether or not there should be this complete separation; whether or not there should be some accommodation and certain circumstances; or whether or not even there should be a movement as far as just simply to the position where the Government isn't establishing a religion or coercing individuals to be involved in a certain kind of activity.

But I think it is a vibrant debate. I have an open mind with respect to the debate over the application of the *Lemon* v. *Kurtzman* test, and I recognize that the Court has applied it with some degree of difficulty. But at the same time, I am sensitive to our desire in this country to keep government and religion separated, flawed as it may be by that Jeffersonian wall of separation.

Senator SIMON. Let me give you a very specific instance that you are not going to be confronted with, though the issue may be one that you will be confronted with. We have a House colleague by the name of Dan Glickman, a Congressman from Kansas. He told me the story, and I repeat it with his permission.

When he was in—I think it was the fourth grade, they had prayer in the schools in Wichita. He happens to be Jewish. A large majority of this population in Wichita is not. Every morning when he was in the fourth grade, he was excused while they had school prayer, and then he was brought back in. Every morning little Danny Glickman was being told, you are different, and all the other fourth graders were being told he was different.

Does this strike you as something that is offensive in terms of where we have been, and where we ought to go?

Judge THOMAS. Senator, I think that when we engage in conduct such as that, when someone feels that he or she is excluded because of certain practices, such as those religious practices, I think we need to question whether or not government is involved. I think it is wrong.

You know, as you were talking, something came to mind. I remember being excluded from conversations about the war of North-

ern aggression, which for those who don't know about the war of Northern aggression, it is the Civil War. And it is refought, for those who think it ended at some point. But it is a sense of exclusion. And for those of us who have felt that sense of exclusion, I think that we have a strong sense that any policy that endorses that exclusion—and I think Justice O'Connor points that out—should be considered inappropriate.

My concern would be with someone like Danny Glickman that when we consider cases in a constitutional context that we understand the effects of government's perceived endorsement of one religion over another, and that we take that into consideration when we analyze those cases.

Senator SIMON. I don't think since you have been on the appellate court you have had any chance to rule on any of these church-state issues. Have you?

Judge THOMAS. In my way of recollection or in my knowledge, I have not, Senator.

Senator SIMON. If you or anyone—Ken or Fred or anyone, if you have written anything in this field, I would be interested in seeing it.

Judge THOMAS. I think my writings in this area are mercifully minor, if any.

Senator SIMON. My time is just about up, and rather than start the next subject—when you are the last in line, you have to skip from subject to subject, whatever hasn't been covered. I will hold off until the second round.

Thank you very much, Judge. Thank you, Mr. Chairman.

Judge THOMAS. Thank you so much, Senator.

The CHAIRMAN. Senator, all the writings are in the area of natural law. There aren't any on religion.

Senator I understand that you don't mind if we start tomorrow, do you?

Senator KOHL. No.

The CHAIRMAN. Tomorrow we will start at 10 o'clock, Judge. I am going to give you a copy, which you already have, of some of your speeches that occurred post-1984. I believe, almost all of these speeches have been discussed, but I want to make sure you have copies of them, because tomorrow I am going to ask you to help me understand some of them.

If there is no further business, I have been asked to accommodate the President's request to continue to allow district court and circuit court judges to be reported out during this process. In order to honor that request we will have a very brief—which will make no sense to anyone except White House staff that is here and the committee—exec tomorrow to vote on reporting out 13 Federal judges and 4 U.S. attorneys. So as a practical matter, I say to the press that we will begin questioning closer to 10:30 than 10. But the purpose of that is to report out these Federal judges. We might as well just do it right here so we don't have to move around.

But we are going to try to start as close to 10 as we can with you, judge. This exec won't take very long.

With that, if there is no further business coming before the committee this evening, we will adjourn until 10 tomorrow.

[Whereupon, at 5:15 p.m., the committee recessed, to reconvene at 10 a.m., Thursday, September 12, 1991.]