

were at risk in the society and how we should approach resolving those families. I do not remember there being any discussion of the final draft.

The CHAIRMAN. Well, I have much more to ask you, Judge. We are going to go back, when I get a chance again, to the Macedo quote, the ABA speech, and the Lehrman speech, and this report. But, quite frankly, at this point you leave me with more questions than answers, but let me yield to my distinguished colleague, Senator Thurmond.

Senator METZENBAUM. Mr. Chairman, before proceeding forward—and I don't wish to interrupt my colleague, Senator Thurmond—would you be good enough to ask the Judge to read that report in order that we might inquire further of him tomorrow in our questioning period?

The CHAIRMAN. Well, if you plan on inquiring of him, I will make sure he has a copy available, and he can decide whether he wishes to read it or not.

Senator METZENBAUM. I do intend to inquire of him.

The CHAIRMAN. I will see to it that he has a copy, and he can make the judgment whether he wishes to read it.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Now, Judge, I think we can move right along. I have about 30 minutes here, and I have approximately 14 questions. I think we can finish them if you will just make your answers fairly brief.

Judge Thomas, the Constitution of the United States is now over 200 years old. Many Americans have expressed their views about the endurance of this great document. With the events in the Soviet Union, this document takes on an even greater significance as the foundation of our domestic form of government. Would you please share with the committee your opinion as to the success of our Constitution and its distinction as the oldest existing Constitution in the world today?

Judge THOMAS. Senator, I think it should be clear to all—

Senator THURMOND. Speak in the microphone. Speak out so we can all hear you.

Judge THOMAS. Senator, I think it should be clear to all of us that our Constitution, as it has endured, is one of the greatest documents, not only in our lifetimes, but certainly in the history of the world. It protects our freedoms as well as provides us with a structure of government that is certainly the freest government in the world, and it has certainly been a model for other countries.

Senator THURMOND. Second question: Judge Thomas, *Marbury v. Madison* is a famous Supreme Court decision. It provides the basis of the Supreme Court's authority to interpret the Constitution and issue decisions which are binding on both the executive and legislative branches. Would you briefly discuss your views on this authority?

Judge THOMAS. Senator, I think it is important to recognize—and we all do recognize—that *Marbury v. Madison* is the underpinning of our current judicial system, that the courts do decide and do the cases in the constitutional area, and it is certainly an approach that we have grown accustomed to and around which our institutions, our legal institutions have grown up.

Senator THURMOND. Judge Thomas, the 10th amendment to the Constitution provides that all powers are reserved to the States or the people if not specifically delegated to the Federal Government. What is your general view about the proper relationship between the Federal and State governments, and do you believe that there has been an substantial increase in Federal authority over the last few decades?

Judge THOMAS. Senator, I think that it is clear that our country has grown and expanded in very important ways. Through the commerce clause, for example, there has been growth in the national scope of our Government. Through the 14th amendment, there has been application of our Bill of Rights, or portions, to the State governments. Through the growth in communications and travel, of course, we are more nationalized than we were in the past.

I think what the Court has attempted to do is to preserve in a way as best it possibly could the autonomy of the State governments, but at the same time recognize the growth and expansion and the natural growth and expansion of our National Government.

Senator THURMOND. Judge Thomas, some have discussed your tenure as Chairman of the Equal Employment Opportunity Commission since your nomination to the Supreme Court. Although this committee thoroughly reviewed the issues raised about the EEOC when you were nominated for the D.C. Circuit Court, would you tell the committee what are the problems you encountered at the EEOC and the steps you took to resolve them? And if you care to discuss any major accomplishments now, I would be glad to have you do so.

Judge THOMAS. Senator, EEOC, of course, was a significant portion of my career in government. It was a most important part. When I arrived at EEOC in 1982, of course, we had some very, very difficult problems. We had problems with respect to the infrastructure of the agency. I felt that we should investigate more cases and that we should litigate more cases. We were immediately faced with problems of just managing our own money in the agency.

Over time, we were able to solve those problems. Over time, we were able to correct the infrastructure and to develop it and ultimately to improve our enforcement. We litigated more cases than ever in the history of the agency. We have been able to investigate cases, and we were able to do more with less in the agency with fewer resources. So I am very proud of my tenure at EEOC. I think we made great accomplishments. I think we made great strides. I think there was a lot to do after I left, and I felt that the agency was headed in a very positive direction.

Senator THURMOND. Judge Thomas, the Supreme Court has ruled that the death penalty is constitutional. There are hundreds of inmates under death sentences across the country. Many have been on death row for several years as a result of the endless appeals process. Recently the Senate passed legislation which would reduce the number of unnecessary appeals by giving greater deference to State decisions. Additionally, the Supreme Court has ruled in certain cases that there should be limits to the endless filing of habeas petitions, especially in death penalty cases.

Would you give the committee your views on the validity of placing some reasonable limitations on the number of post-trial appeals in death penalty cases?

Judge THOMAS. Senator, generally I think that there would be a concern among all of us. The death penalty is the harshest penalty that can be imposed, and it is certainly one that is unchangeable. And we should be most concerned about providing all the rights and all the due process that can be provided and should be provided to individuals who may face that kind of a consequence.

I would be concerned, of course, that we would move too fast, that if we eliminate some of the protections that perhaps we may deprive that individual of his life without due process. So I would be in favor of reasonable restrictions on procedures, but not to the point that individuals—or I believe that there should be reasonable restrictions at some point, but not to the point that an individual is deprived of his constitutional protections.

Senator THURMOND. Judge Thomas, I believe that tough sentences should be imposed in criminal cases, especially when the crime committed is one of violence. Over the years, I have favored tough criminal sanctions. Too often, unfortunately, victims of crime have not played a prominent enough role in the criminal justice system. However, recently the number of victims who participate in the prosecution of criminal cases has increased. In fact, the Court recently rules in the case of *Payne v. Tennessee* that the use of victim-impact statements in death penalty cases does not violate the Constitution.

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 an accused?

Judge THOMAS. Of course, Senator, that is a matter that the Court has, as you have noted, recently considered. My concern would be in a case like that that we don't in a way jeopardize the rights of the victim. Of course, we would like to make sure that the victims are involved in the process, but we should be very careful, in my view, that we don't somehow undermine the validity of the process; that an individual who is a criminal defendant is in some way harmed by that other than just simply getting it right and making sure that the total impact of the conduct is known.

I think that there are concerns on both sides. From the standpoint of the victims, that is important. But there are also the constitutional rights of the criminal defendant.

Senator THURMOND. Judge, if I propound any question you consider inappropriate, just speak out and tell me.

Judge, Congress established the U.S. Sentencing Commission in 1984. Its function is to promulgate sentencing guidelines for Federal judges to ensure uniform and predictable prison sentences. The Supreme Court ruled in the case of *United States v. Mistretta* that the sentencing guidelines are constitutional.

Judge Thomas, from your experience, do you believe that uniform sentencing is more fair to those individuals who commit similar crimes and in the long run that sentencing guidelines will create better competence in the criminal justice system?

Judge THOMAS. Senator, I think that the problem, the concern that many individuals had in the sentencing of criminal defendants was the apparent unfairness and the disparity of sentences. The approach and the effort, the purpose of the uniform guidelines, one of the purposes was to simply provide some sense or to eliminate that disparity and that sense of unfairness. To the extent that it has done that in eliminating that disparity, I think it has brought a sense of fairness to the process.

The concern, of course, of anyone who is involved in the criminal justice system is that we do not sacrifice justice or fairness for uniformity or for rigidity. But I think that most judges would agree that the guidelines have eliminated the disparity in sentencing.

Senator THURMOND. Judge Thomas, you are currently serving as a member of the U.S. Court of Appeals for the District of Columbia Circuit. You have participated in some 140 decisions. How beneficial, in your opinion, will your prior judicial experience be to you if confirmed to serve on the Supreme Court?

Judge THOMAS. Senator, I think that in my own career I have had the opportunity to work in a variety of positions. I have had an opportunity to work in the Federal Government, to be engaged in appellate work there, to represent agencies, as well as in the legislative and executive branches of the National Government. What has been important to me in those processes is that I have had the opportunity to grow, to learn, to expand, to mature, to make hard decisions, and to, I think, become a better person and to become certainly advanced as someone who is capable of deciding tough cases or making tough decisions.

When one moves to the—when I moved to the judiciary, I felt that I had matured rapidly. But when one goes to the judiciary, one puts on those robes and realizes the immense responsibility of being a judge; that at the end of a decision, something is going to happen. Perhaps a person may stay in prison longer or a person may leave prison. There may be some economic effects. There may be a change in a company. Somebody wins or someone loses. So one becomes more serious and one again matures greatly.

I think it is also important because one has to—a judge has to become accustomed to not having views, formed views on issues that may come before him or her. You become impartial or neutral. You begin to look at problems in a different way, and you recognize your fallibility.

I think that my tenure on the court of appeals has been of tremendous benefit to me, and it certainly provided me with an occasion to mature more rapidly and to a larger extent than even my process of maturation in my previous jobs.

Senator THURMOND. Judge Thomas, the doctrine of stare decisis is a concept well recognized in our legal system and the concept that virtually all judges have in mind when making decisions, especially in difficult cases. I am sure that the issue of prior authority has been a factor which you have considered while on the bench. Would you please briefly state your general view of stare decisis and under what circumstances you would consider it appropriate to overrule a prior procedure?

Judge THOMAS. I think overruling a case or reconsidering a case, Senator, is a very serious matter. Certainly, the case would have to

be—you would have to be of the view that a case is incorrectly decided, but I think even that is not adequate.

There are some cases that you may not agree with that should not be overruled. *Stare decisis* provides continuity to our system, it provides predictability, and in our process of case-by-case decision-making, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case indirect, but that it would be appropriate, in view of *stare decisis*, to make that additional step of overruling that case.

Senator THURMOND. Judge Thomas, under our Constitution, we have three very distinct branches of government. The role of the judiciary is to interpret the law. However, there have been times when judges have gone beyond their responsibility of interpreting the law and, instead, have exercised their individual will as judicial activists. Would you please briefly describe your views on the topic of judicial activism?

Judge THOMAS. I think, Senator, that the role of a judge is a limited one. It is to interpret the intent of Congress, the legislation of Congress, to apply that in specific cases, and to interpret the Constitution, where called upon, but at no point to impose his or her will or his or her opinion in that process, but, rather, to go to the traditional tools of constitutional interpretation or adjudication, as well as to statutory construction, but not, again, to impose his or her own point of view or his or her predilections or preconceptions.

Senator THURMOND. Judge Thomas, the exclusionary rule is well known in criminal law. At times, it is applied when there was no misconduct on the part of law enforcement. For this reason, the Supreme Court recognized a good-faith exception to the exclusionary rule in the case of *United States v. Leon*, applying it to only searches made pursuant to a warrant. Judge Thomas, would you discuss the effect of the exclusionary rule in preventing police misconduct, and whether or not there is a varied basis for good-faith exception, especially when there is a search warrant.

Judge THOMAS. I think in the case of *United States v. Leon*, of course, the Court did find the good-faith exception, but the approach that the Court took and the concern was this, that the warrant and the requirement is to make sure that the law enforcement officials are deterred from pursuing in an unlawful way or obtaining evidence in an unlawful way, it will not be used in the process.

In *United States v. Leon*, as I remember it, the magistrate had issued a warrant and the police officers or the law enforcement officials had relied on that warrant in good faith. The Court is simply saying that it would serve no purpose of deterrence, by precluding the use of a warrant that was issued by a magistrate, perhaps by mistake, but relied on, then, in good faith by the law enforcement officials.

Of course, there are exceptions to that, but I think that the Court and the law enforcement community have come to accept the use of the exclusionary rule up to a point, and the Court is looking for ways to make sure that the purposes of the exclusion-

ary rule are advanced, as opposed to simply being used in a way that is rote.

Senator THURMOND. Judge, concerns have been raised about the high costs and sometimes lengthy delays to resolve cases in the Federal courts. Last year, Congress passed legislation that I introduced, along with Senator Biden, that requires each Federal district to prepare a proposal to reduce delay and costs in the Federal civil litigation process. In your view, is there a need to expedite civil cases and reduce costs, to insure that individuals have confidence in the courts to resolve disputes? And what would you recommend to improve handling of civil cases in the Federal courts?

Judge THOMAS. Senator, I think that the concern that any of us would have when the court has a crowded docket is that there would be individuals who most need the access to our judicial system who would be squeezed out of that system, and we would also be concerned that if the costs of civil litigation were to increase, once again, the individuals who most need access to our judicial system would be eliminated from that system.

I think that there have been some proposals by the Vice President, there have been approaches that involve dispute resolution in order to speed up the process. There have even been private individuals who have established ways to adjudicate cases.

My concern with the later approach, of course, would be that we would have separate judicial systems for those who can afford it, the private system, and for those who cannot, they would have to wait in line for a crowded governmental system.

But I think that there are some proposals. Of course, there is some discussion and I think that all times the judicial system should be open to all of our citizens. It is one common aspect that we all have the same judiciary.

Senator THURMOND. Judge Thomas, in an opinion written last year by Justice Scalia concerning the first amendment's freedom of religion, the Supreme Court ruled in *Employment Division v. Smith* that a law which is otherwise valid does not violate the first amendment if it incidentally affects religious practices. Would you please briefly discuss the impact this decision has on the compelling State interest test established in *Sherbert v. Verner* in 1963?

Judge THOMAS. Of course, Justice Scalia's decision was, in essence, that since the general criminal statutes outlaw the use of peyote, I think, in that case, that one could not claim that it was a violation of their first amendment right to exercise their religious beliefs, that this preclusion by statute had occurred or that you could not use it in a religious exercise of any sort or religious celebration.

What Justice Scalia did was actually use a different test than had been used in the past. He avoided using the *Sherbert* test. Justice O'Connor used the compelling interest test. She used the *Sherbert* test and reached the same result, if I remember the case right.

I think it is an important departure from prior approaches and it is one that anyone who approaches these cases should be concerned about or at least be watchful for.

Senator THURMOND. Judge Thomas, the issue of capital punishment is a controversial topic, with strongly held views on both sides. Now that the Supreme Court has ruled that the death penal-

ty is a constitutional form of punishment and provided steps to insure that it is not imposed as unfettered discretion, certainly there are judges who are personally opposed to the death penalty. Since the Supreme Court has ruled that the death penalty is constitutional, what role, if any, should the personal opinion of a judge play in decisions he or she may render in case such as the death penalty?

Judge THOMAS. Senator, I think as I have indicated, I do not think that a judge's personal opinions should play a role in deciding cases, and certainly if a judge has strongly held views to a point that he or she cannot be impartial or objective, then I think that judge should consider recusal.

I think, of course, that some judges believe that the death penalty per se may be violative of constitutional rights, and that is one form of analysis or approach. But I think that if your personal views are so strong in any area, you should consider recusal.

Senator THURMOND. Judge Thomas, there have been complaints by Federal and State judges regarding the inferior quality of advocacy before the courts. During your service on the bench, have you found that legal representation in the courts was adequate? And what in your opinion should be done to insure that individuals get quality representation in the courts?

Judge THOMAS. Senator, during my own law school years, I thought it was important that I be involved, as a law student, in providing some representation for individuals who could not afford lawyers. I think we would all agree, in our judicial process and in this complex world, that it is difficult to represent one's self. While I was in the Attorney General's office, as well as at the Monsanto Co., I attempted to provide services to individuals who needed assistance.

I think that the level of representation or the level of advocacy by the lawyers who have appeared before the court on which I currently sit has been very, very high. The lawyers' involvement in the process help us to sharpen the arguments, to understand the arguments, and certainly to sharpen our inquiry and our analysis of very, very difficult legal issues.

I think it is important not only from the standpoint, and I think it is critical that individuals be represented, but I think it is not only important from that standpoint, but also from the standpoint of judges being able to get the cases right.

Senator THURMOND. Judge Thomas, prison overcrowding is a major problem facing Federal and State institutions today. Several State systems are currently under Federal prisoner cap orders which limits committing additional inmates to certain prisons. At a time when violent crime and drug offenses are such a problem, what other alternatives are available to insure that prison space is available for those sentenced to serve time?

Judge THOMAS. That is a difficult question, Senator. I do not think that those of us in the judiciary have the ability to know exactly how to solve all of the prison overcrowding issues. That, of course, is a problem that is facing virtually all areas. There have been efforts to move individuals to areas other than where they are convicted, to areas where they have additional space, and there

have been efforts to use other facilities, perhaps military bases, et cetera.

But I think it is a problem that is worthy of reconsideration and it is one that, with the current prison population, has to currently be reexamined, not only by this body or similar bodies, but also law enforcement officials, as well as members of the judiciary.

Senator THURMOND. Judge Thomas, as you are aware, public liability cases often involve very complex issues, with large sums of money at stake. Many argue that Congress should pass reform legislation to modify the burden of proof in certain types of cases and to limit the amount of damages that jurists would be allowed to award.

Based on your experience as a judge, what is your opinion of the ability of a judge in such complicated trials to comprehend these intricate issues and award damages reasonably related to the injuries suffered by the plaintiff? And if juries grant unwarranted awards, can appellate courts correct them?

Judge THOMAS. Senator, those cases are very difficult cases. I think that when juries and when judges attempt to adjudicate those cases, they have to sort out a complex set of issues, as well as determine in difficult circumstances what the appropriate relief would be.

At the appellate level, our job is not simply to go back and impose our views on the trier of fact in those cases, but, rather, to assure that the appropriate standards of law were employed.

Senator THURMOND. Judge Thomas, many people have supported the enactment of alternative dispute resolution measures such as arbitration in products liability lawsuits. Do you believe that these alternative dispute resolution measures will work in a fair manner and be helpful in resolving complicated issues that are usually considered by a jury, as well as helping to expedite the handling of such cases?

Judge THOMAS. We used, Senator, the alternative dispute resolution process. We began during my tenure at EEOC to begin to take a look at those sorts of approaches to resolving very difficult problems, and I believe that they should be explored. In our own court, we have explored the use of that process in resolving some of the appellate cases.

Again, I think is necessary to make sure that the cases that are allowed to go through that process are those that are susceptible to resolution in that manner. I would be concerned that any individual is deprived of his or her day in court, by using mechanisms that are not directly in the judicial process.

Senator THURMOND. Judge Thomas, the Sentencing Commission is considering whether current Federal criminal sentences are adequate. In fact, the Commission has promulgated new guidelines for white collar and corporate offenses. Congress has also seen fit to increase the term of imprisonment for various white collar crimes, including those involves financial institutions.

From your experience, have penalties for white collar crime and corporate defendants been sufficient, and do you anticipate tougher penalties for white collar criminals in the future, as a result of the recent savings and loan offenses and securities related crimes?

Judge THOMAS. Senator, certainly I have not sat as a trial judge imposing those sentences. I think that the sentences under our guidelines in the areas in which I have been involved certainly seem to be adequate. I would be concerned that there would be significant differences between serious crimes in one area and serious crimes in another area, and I think that this body, as well as individuals who have studied this area, have attempted to reduce the disparity in those sentences and I think that is an important project and endeavor.

Senator THURMOND. Judge Thomas, the caseload of the Supreme Court has grown rapidly over the past several decades. Part of this increase is a result of more cases being filed in the lower courts. Cases today are more complex, as our laws have become far more numerous and intricately fashioned. Would you please give the committee your thoughts on the current caseload of the Supreme Court and comment briefly on any innovative methods which could be utilized at the Federal level for handling this increased caseload?

Judge THOMAS. I certainly could not, Senator, as much as I probably would like to advise the Supreme Court on its workload. I think that the judges on my court, and I would assume that Justices on the Supreme Court, are working at a level that is very, very significant. I know that our own investment of time on our court usually involves 6 or 7 days a week. Of course, we do not have the option of screening the cases, as the Supreme Court does.

I think the Supreme Court has the awesome task of making some of the most difficult decisions in our Nation, and certainly the most difficult decisions in our judicial system, and it is important that they control their workload, I think, in a way that they can make these decisions in an appropriate manner.

Senator THURMOND. Judge, the light is red and my time is up. Thank you very much.

The CHAIRMAN. Judge, you have been sitting there a long time. I am going to try to get finished by 5:30, so why don't we come back at 20 after. We will recess until 20 after.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Chair recognizes Senator Kennedy.

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

First of all, Judge Thomas, I want to commend you for an extremely moving description about your early years, your relationship with your family, your grandfather, and really describing a situation which has existed for far too many people in our society. And I found it extremely moving and a very fair characterization in terms of your own integrity and fairness.

And I commend my colleague and friend, John Danforth. I had the good opportunity to serve in the Senate for many years and I have heard many of the Senate introduce nominees for various positions and I have never heard one that has been more eloquent or heartfelt than Senator Danforth's statement. For those of us who have respect for him and for his values, I want to say how much I certainly appreciate it.

As you understand, we have questions of you or about your views of the Constitution and the role of Government, and I would like