

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

to, if I could, start out with the issue of the role of government in our society.

In several of your speeches and articles you have taken a broad view of business rights, of an employer's interest in being free—

The CHAIRMAN. Would the Senator hold for a second?

Would you close that door, please? Tell people in the hall to come in or stay out for a while. OK? The Senator cannot be heard.

Thank you very much. Excuse me.

Senator KENNEDY. I thank the Chair. Right.

Well, in a number of speeches and articles you have taken a broad view of business rights, of an employer's interest in being free of government regulation. If confirmed, you will be called upon to interpret the Federal, State and local laws protecting employees and regulating workplaces. And, if you were hostile to these efforts and construed them narrowly as a result, you could seriously undermine our efforts to correct unsafe and unhealthy conditions that endanger millions of working men and women across the country, and I would like to ask you about some of your statements on this important issue.

In a 1987 interview with a publication called Reason you question the need for many important Federal agencies. You said, and I quote: "Why do you need a Department of Labor? Why do you need a Department of Agriculture? Why do you need a Department of Commerce? You can go down the whole list, you don't need any of them really."

You were quoted correctly, were you not?

Judge THOMAS. Senator, I again don't know the context of that quote. I don't know what I said before or after. Of course, I think all of us would certainly be in favor of, and I certainly count myself among those Americans who are for safe working environments and who are strongly for protections from abuses and exploitation from individuals who have more clout and more power.

I am for a safe working environment and I am for the standards that protect workers. And I am certainly, as I have made clear during my tenure at EEOC, strongly in favor of laws that prevent employers from discriminating against individuals.

Senator KENNEDY. Well, I will put the full interview in the record. You were asked about various departments and agencies and the necessity for your own agency, I believe, as a matter of fact, and the response to the—do you remember at all the interview? I have it and I will put it in the record.

The inquiry is "Should I suspect that we might think that the EEOC ought not to exist. Why do you think that this agency should exist in a free society?"

"While in a free"—this is your answer—"free society I don't think there would be a need for it to exist. Had we lived up to our Constitution, had we lived up to the principles that we espouse there would certainly be no need. There would have been no need. Unfortunately, the reality was that for politics reasons or whatever there was a need to enforce antidiscrimination laws, or at least there was a perceived need to do that. Why do you need a Department of Labor? Why do you need a Department of Agriculture? Why do you need a Department of Commerce? You can go down the whole list, you don't need any of them."

Judge THOMAS. From that quote, Senator, I think the point that I was trying to make, there are certain individuals who think you don't need any government involvement, who felt that EEOC should not exist, for example. Well, in a perfect world you don't need EEOC. But this is not a perfect world. In a perfect world you probably wouldn't need a Department of Labor or Department of Agriculture. This is not a perfect world.

Senator KENNEDY. Well, why—if you take Department of Labor with enforcement of, say, OSHA regulations, or Department of Agriculture trying to deal with food inspection, Department of Commerce trying to ensure that American workers are going to be competing on the fair playing field, I just wondered even why you might suggest that those agencies as well as others.

Judge THOMAS. Well, let me explain I think the point that I was trying to make. I believe, and I would have to go back and look at the entire question, but the point is this. There are some individuals who say: "Well, we don't need any government." "You don't need EEOC." "Why should there be an EEOC?"

Well, if there were no discrimination in the world, I don't think you and I would think that there was a need for EEOC. The reality is, though, that there is discrimination in the world.

You could ask rhetorically what is the need for other departments if this were a perfect world. The answer is this is not a perfect world. If this were a perfect world, you wouldn't have to enforce health and safety laws. But the answer is that there are some people who violate health and safety laws, and you and I, and I think many others, think that people should be protected from those sorts of individuals.

Senator KENNEDY. Well, don't statements like these suggest hostility on your part to attempts by Government to help people that can't help themselves?

Judge THOMAS. No, Senator. I think I was actually defending the effort in instances where there is a need for the Government to participate and for the Government to have a role. There were many individuals—I remember sitting down with an individual early in my tenure at EEOC, and his first words were to me, in a very pleasant way but firm, "You know, I don't think this agency should exist." But I spend a considerable amount of time defending the need for this agency and defending the need a specific role of the Government in certain areas.

And I think that was the point I was trying to make there.

Senator KENNEDY. Just to read these final words of yours, after you said you don't need any of them, "I think though if I had to look at the role of Government and what it does in people's lives I see the EEOC as having much more legitimacy than the others if properly run. Now you run the risk that the authority can be abused when EEOC or any organization start dictating to people. I think they go far beyond anything that should be tolerated in this society."

Well, now in a speech at the Pacific Research Institute, in 1987, you criticized entitlement programs. This is what you said: "The attack on freedom and rights had to be accompanied by their redefinition. In the socialist view the new freedom was thus only another name for the old demand for an equal distribution of wealth.

The new freedom meant freedom from necessity and it was a short road to what we call today entitlements. Before a right meant the freedom to do something. Now a right has come to mean, at least in some unfortunately growing circles, the legal claim to receive and demand something."

Which entitlements were you referring to as socialism—Social Security or Medicare or unemployment insurance?

Judge THOMAS. I don't think I referred to any of them specifically, Senator. I think I was trying to make the distinction between what we traditionally consider rights and freedoms versus programs that are specifically implemented or initiated by the government.

I don't think that my comment there was one where I was looking at a specific governmental program and saying that this is an entitlement program that I think is bad or good. I think there is a comparison, there is a debate, and I thought it was a vibrant debate, about what our rights and what our freedoms were.

Senator KENNEDY. Well, what is your view about entitlements?

Judge THOMAS. I think that I have said in speeches and I think that it is appropriate that many of us—

Senator KENNEDY. Excuse me. I didn't understand.

Judge THOMAS. I think that I have said in speeches and I think that programs, there are certain programs in our society that have helped. I remember visiting my mother in Fellwood Homes, which is a Federal housing project in Savannah, GA. Fellwood Homes was seen as what? It was seen—we lived in a tenement. She moved to a lane, a dirt street and a move up in the world. A steppingstone was Fellwood Homes before she could then move to something better. I thought that those programs were good.

I think we all though in a pluralistic society are concerned that sometimes when we do something that we hope is good that it may on some occasions have a negative impact, and I think that it is not illegitimate to say that some of these programs, or at least some of the ramifications, may not be what we expected and some of the consequences may be unintended consequences.

But I certainly believe that the efforts on behalf of providing public housing to my mother or the efforts of providing relief to individuals who could not receive jobs, et cetera, in my neighborhood were very, very good efforts.

Senator KENNEDY. Well, of course, as you know, there are certain programs which are entitlements and other programs which are not, and I think all of us understand some, various programs work well, others do not. And I am sure we as an institution don't do as well as we should in sorting out the ones that do not.

But entitlements have a special position. They certainly do from a budgetary position, and they have been selected by the Congress basically in a bipartisan way because they have a certain relevancy, because they have had an evaluation, and when you mention something like Social Security, student loan programs, various—crop insurance programs, some of the other half a dozen or so, because there is only that many, some of the particular programs for children, those are considered entitlements. And I didn't know—your bunching those together within the same paragraph that is talking about the socialist view, the need freedom, was that thus

only another name for the old demand for equal distribution, effectively entitlements?

Judge THOMAS. Well, certainly I again don't remember the full context of that, but let me just say this, Senator. I was not speaking in a budgetary sense or a more technical sense. I think I was comparing two views of what rights are today and I thought it was, as I said, an important discussion and an important debate.

Senator KENNEDY. In a 1988 article you stated that, and I quote, "Our current explosion of rights, welfare rights, animal rights, children's rights, and so on, goes on to the point of trivializing them."

You know, which children's rights do you object to?

Judge THOMAS. I guess I don't object to rights. I was just—the only point I was making, Senator, and it wasn't in any way undermining the need to be concerned about these problems in our society. I certainly have been involved with organizations to make sure that kids are not abused, and I certainly spend my time trying to make sure that kids are given guidance and help. I think that is very, very important in our society.

But my point was that when we talk about rights, rights that we consider basic or fundamental or freedoms, that when you begin to attach the word "right" to a particular effort or cause or a program that you believe in that then the notion of rights becomes one that is commonly used, as opposed to reserve for these very, very important rights that we believe in.

Again, that is not putting, not in any way saying that there is no problem, but simply saying that it becomes a common experience to simply, say, declare a particular right.

Senator KENNEDY. Well, the reason I am pursuing this line of questioning is to get some kind of sense about your view about various statutes that will be approved by the Congress to address what the Congress believes are areas of need, and whether from these statements that it is fair to draw any implications of some hostility to statutes which would be drafted by the Congress to try and focus in the areas of particular needs or protections, for example, the OSHA for protecting the workplace, or whether it is the food inspections, or whether it is in terms of trade, or whether it is in terms of even parental leave, which you have expressed some degree of hostility to in your statements.

The real question is whether we can—we draw any conclusion as to the degree of hostility that you might have by yourself in interpreting statutes given these kinds of statements when perhaps there is an approach to trying to deal with these kinds of conditions that you may or may not agree with.

Judge THOMAS. Well, Senator, I think that when one is in a policymaking function, just as if I were in this body, I could debate with you on, and I think quite legitimately, about my concerns in particular areas. I think you have a sort of role, or at least a part of your function would be an advocate for a particular point of view.

But when you make a decision, when you write a statute, when this body deliberates and concludes, whether I agreed or not in the policymaking function, when I operate as a judge or when I decide a case and look at it as a judge, I am no longer an advocate for

that policy point of view. My job is to interpret your intent, not to second-guess your intent. It is not to second-guess what you think is the appropriate policy. It is not to second-guess whether or not you are right, not to second-guess whether I think it would be better to have 10 more rules as opposed to the 5 that you have, but simply to determine what you felt was right, what you felt was correct, and what your intent was and to apply that. And that is the way I see my role now as a judge.

Senator KENNEDY. Well, it is helpful because many of the decisions that are going to be made by the Court over the period of these next years are going to reflect the basic tension that exists between an executive and the Congress in the development of legislation and what the Court is going to say on many of these matters that are increasingly de facto at the present time. So your view about how you approach this is I think very important, and particularly in light of these earlier comments.

Let me move to another subject area, and this is referring to an article about you in the Atlantic Monthly in 1987. You said that hiring disparities could be due to cultural differences between men and women. This is the article "A Question of Fairness," by Juan Williams.

That article states that you said that it could be that women are generally unprepared to do certain kinds of work by their own choice, it could be that women choose to have babies instead of going to medical school. Do you still think that that explains the underrepresentation of women in so many jobs in our economy today?

Judge THOMAS. I think, and I think it is important to state this unequivocally, and I have said this unequivocally in speech after speech. There is discrimination. There is sex discrimination in our society. My only point in discussing statistics is that I don't think any of us can say that we have all the answers as to why there are statistical disparities.

For example, if I sit here and I were to look at the statistics in this city, say with the example of number of blacks, I couldn't—and compare the number of blacks that are on that side of the table, for example. I cannot automatically conclude that that is a result of discrimination. There could be other reasons that should be explored that aren't necessarily discriminatory reasons.

I am not justifying discrimination, nor would I shy away from it. But when we use statistics I think that we need to be careful with those disparities.

Senator KENNEDY. Very little I could differ with you on the comment. But I was really driving at a different point, and that is whether you consider women are generally unprepared to do certain kinds of work by their own choice; it could be that women choose babies instead of going to medical school.

Let me just move on to your comments about Thomas Sowell, an author whose work you respect and many—whose ideas you have stated that you agree with. Mr. Sowell wrote a book called the Civil Rights Rhetoric: A Reality. You reviewed that book for the Lincoln Review in 1988 as part of a review of the works of Thomas Sowell, and in particular you praised Mr. Sowell's discussion, chapter 5 of his book entitled "A Special Case of Women," and you called it a

much needed anecdote to cliches about women's earnings and professional status.

Mr. Sowell explains that women are paid 59 percent of what men receive for the same work by saying that women are typically not educated as often in such highly paid fields as mathematics, science, and engineering, nor attracted to physically taxing and well-paid fields, such as construction work, lumberjacking, and coal mining, and the like.

As a matter of fact, there were no women employed in the coal mine industry in 1973. In 1980, after the Federal Government had begun an effort to enforce antidiscrimination laws, that 3,300 women are working in coal mines.

Does that surprise you at all?

Judge THOMAS. If there is discrimination, it doesn't surprise me. There were lots of places I think in our society. You know, I used to when I—I can remember in my own classrooms looking around and realizing that 7 or 8 of the top 10 students in my classroom in grammar school were the smartest students and wondering at that age, If 8 of the 10 of them are the brightest, then why aren't there women doctors and why aren't there women lawyers.

But the point that I was making with respect to Professor Sowell again is a statistical one. There is a difference between the problem that, say, a 16-year-old or 18-year-old minority kid, female, in this city or in Savannah or across the country, who is about to—who has dropped out of high school, there is a difference between the problems of that child or that student than there is for someone who has a Ph.D. or someone who has a college degree.

And I thought that it would be more appropriate, again referring back to the programs that you talked about, that we talked about earlier, in looking at how to solve these problems that you disaggregate the problems and you be more specific instead of lumping it all into one set of statistics.

Senator KENNEDY. 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 or needs more time off for personal emergencies, then they may make her less valuable as an employee or less promotable to jobs with heavier responsibilities.

He says the physical consequences of pregnancy, childbirth alone are enough to limit a woman's economic option, and then he reaches some troubling conclusions about women in the workplace based on stereotyped gender roles. Yet you call those descriptions of women workers a much needed antidote to cliches.

Aren't those views the very cliches that women have been trying to escape for so long?

Judge THOMAS. Senator, I think that someone like a Tom Sowell is certainly one who is good at engaging a debate, and I think it is important that there be individuals who look at statistics in his way.

I did not indicate that, first of all, that I agreed with his conclusions. But I think this is an important point. I had during my tenure, I think, the majority of the members of my own personal staff and the—were women, and the conclusion, for example, about

married women I found certainly not supported by my experience with married women on my staff. That was not the point.

The point is that I think sometimes that we can be involved in debate and make generalizations, and it is always good to have someone who has a different point of view and have some facts to debate that.

Senator KENNEDY. Well, the reason I raise this is because with regards to this particular description of women you described that chapter as a much needed antidote to cliches, and I think many women would read his description, particularly in that chapter, as being really a description of the stereotype which—attitude which has really kept them back in too many instances.

I am sure you are commendable for what you have done and that is a powerful factor in relationship, obviously, with other statements or speeches. But nonetheless, that chapter really stands out and that is why I wanted to bring this up.

Judge THOMAS. Well, I think that—again, Senator, I think it is important that in our society and as a policymaker that you have debate. I don't think that Professor Sowell or others are in any way sexist or in any way people who would discriminate. I made it a point, it was very important to me during my tenure at EEOC and it has been very important to me during my life, to make sure that these arbitrary stereotypes or these arbitrary discriminatory barriers were knocked down, and I think you can simply look at my record in promoting women to the Senior Executive Service. I think it is second to none in the Federal Government. Similarly, with respect to my personal staff.

I think it is important. I do think that discrimination exists and I think it needs to be eradicated. But at the same time, when we do have approaches in our society, I think that reasonable people can disagree, and reasonable people of good will can disagree, without being characterized in a negative way.

Senator KENNEDY. In my final area of questioning, I would like to come back to just an area that was raised by Chairman Biden in the concluding part of his questions, and that was with regard to the Lehrman essay.

In the speech in 1987, called *Why Black Americans Should Look to Conservative Policies*, you spoke about natural law, you said, Heritage Foundation Trust, Lew Lehrman's recent essay, "An American Spectator," on the Declaration of Independence and the meaning of the right to life, is a splendid example of applying natural law.

The title of the Lehrman article you endorsed is "The Declaration of Independence and the Right to Life: One Leads Unmistakably From the Other." The article makes only one argument and it is about only one subject, that natural law protects the right to life and that, as a result, the Constitution must be interpreted to protect the right to life.

So, Lehrman's basic position is that abortion violates the constitutional right to life, and he argues that when the Supreme Court decided *Roe v. Wade*, it simply conjured up a right of abortion, and he calls it a spurious right borne exclusively of judicial supremacy, with not a single trace of lawful authority. He also draws a parallel between those who support abortion and those who supported slav-

ery. He says the decision to protect a woman's right to abortion has resulted in a holocaust.

These extreme statements about a woman's right to choose were all expressed in that article, and you called that article splendid, is that correct?

Judge THOMAS. Senator, again, I did not endorse the article, but I would like to make this point, and it is very important and perhaps it is one that was missed earlier. My interest toward the end of the Reagan administration was an important interest to me, and that was that I had spent almost a decade of my life battling with individuals who were conservative, and I felt that they should not be antagonistic to civil rights, and I felt that, in fact, they should be very aggressive on civil rights.

In exploring, on a part-time basis during my busy work day, a unifying theme on civil rights and on the issue of race, I was looking for a way to unify and find a way to talk about slavery and civil rights, the way that the abolitionists used, the very same approach that was used and offered in the *Brown v. Board of Education* brief, authored, among others, by my predecessor, by Justice Marshall, whose seat I am nominated to fill.

My point was that I figured or I concluded that conservatives would be skeptical about the notion of natural law, but one of their own had endorsed it, and I simply wanted to give some authenticity to my approach, so that I could then move on and get them to consider being more aggressive on the issue of civil rights. That was very, very important to me.

Senator KENNEDY. Well, have you ever publicly stated that you disagree with the article?

Judge THOMAS. I have never been called on, it has never been raised as an issue. It was considered, I think by many, as a throw-away line. I saw it as that, as something to convince my audience and it has never really come up.

As I indicated, I don't think that you can use natural law as a basis for constitutional adjudication, except to the extent that it is the background in our Declaration, it is a part of the history and tradition of our country, and it is certainly something that informed some of the early litigation, I guess, with respect to the 14th amendment, but it is certainly something that has formed our Constitution, but I don't think that it has an appropriate role directly in constitutional adjudication.

Senator KENNEDY. Well, do you disagree with the article now?

Judge THOMAS. I do disagree with the article and I did not endorse it before. My point was simply—and I think it was an important point—that I endorse natural law, but I use natural law to make the point that conservatives should aggressively enforce civil rights.

Senator KENNEDY. Well, do I understand now that you do disagree with the article?

Judge THOMAS. I disagree in the manner that he used it, yes. I disagree with the article, yes.

Senator KENNEDY. Can you elaborate on what—

Judge THOMAS. Well, to the extent that he uses natural law to make a constitutional adjudication, in that sense, or to provide a moral code of some sort, I disagree with it.

Senator KENNEDY. But with regards to the other features of the article?

Judge THOMAS. I don't know all the other features of the article. My interest was a very single-minded interest, Senator, and that was in trying to convince a conservative audience in the Lew Lehrman Auditorium of the Heritage Foundation, with a concept that Lew Lehrman adopted, to make my point, and it was an important point to me.

I did not endorse, nor do I now endorse other portions of his article.

Senator KENNEDY. Did you mention in that speech, did you say anything else about Lew Lehrman, I mean he is a trustee of the Heritage Foundation, or the work that he has done? Did you say anything else, other than endorsing this—like most of us in these kinds of circumstances, you know, perhaps looking about gilding the lily or so, but there are different ways of doing it, and I am just asking whether you talked about his work as a trustee of the Heritage Foundation or other work that he has done, or was the only reference to Mr. Lehrman about this article?

Judge THOMAS. His use of natural law was the only reference. Again, Senator, this has not been something that has come up in a way that required explication. The important point for me was a very simple point, and that was that I was attempting to convince conservatives, individuals whom I thought would be skeptical about the notion of natural law and skeptical about aggressive enforcement of civil rights the way that I believe that civil rights should be endorsed, that here was a basis on which they could be aggressive, and I think it was an important speech, and I saw it, the manner in which it was quoted prior to my nomination to this Court was one in which I was criticizing the administration and criticizing conservatives.

Senator KENNEDY. Well, I did not find any reference to civil rights in the Lehrman article.

Judge THOMAS. But throughout my speech there is reference.

Senator KENNEDY. I have read that. Finally, did you agree with any parts of the article, the Lehrman article?

Judge THOMAS. My only interest, again, was in the notion that he used natural law. I do not think that natural law can be used to adjudicate the issue that he adjudicated.

Senator KENNEDY. My time is up, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Hatch, and then we will end today's hearing.

Senator HATCH. Thank you, Mr. Chairman.

In all due respect, let me just start with the Chairman's excerpt that he cited to you earlier. That excerpt from the Pacific Research Institute speech is, in my view, completely out of context, and let me just read it to you, starting on page 16 of the speech:

"I find attractive the arguments of scholars such as Stephen Macedo, who defend an activist Supreme Court which would strike down laws restricting property rights." You immediately take on that statement. "But the libertarian argument overlooks the place of the Supreme Court in the scheme of separation of powers. One does not strengthen self-government and the rule of law by having the nondemocratic branch of the government make policy."