

Senator THURMOND. I will reserve the rest of my time.

The CHAIRMAN. Senator Kennedy—

Senator THURMOND. And, Judge Thomas, let me just say this, since I think I am through, unless something comes up I don't anticipate. I want to compliment you on the way you have conducted yourself during this hearing. I think you have shown that you are fair, you are open-minded; and you have answered all the questions you could without violating the oath that you will have to take as a judge on cases that might be coming up in the future. We are very pleased with the way the hearings went.

I want to compliment the chairman, Senator Biden, and the other members on this hearing and the way it has been conducted throughout. In my opinion, you deserve to be confirmed on the Supreme Court, and I anticipate you will be.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator.

Senator Kennedy.

Senator KENNEDY. Thank you. Mr. Chairman, if it is agreeable with the other members of the committee, even though I am entitled to the half-hour, Senator DeConcini will be at the Gates hearing on Monday. What I would like to do is just—there were three areas I would like to get into. I would like to divide the half-hour with Senator DeConcini and take 15 minutes, or try even to take less time and give the remaining time to Senator DeConcini and then go back over to the other side. But I would like to be able, at a reasonable hour on Monday, to be able just to finish up those additional areas, if that is agreeable.

The CHAIRMAN. Without objection, you will be.

Senator KENNEDY. Judge, the right to vote is at the very core of our democracy, and the Voting Rights Act has been extremely important in assuring that all Americans can exercise that fundamental right.

In a speech at the Tocqueville Forum in April 1988, you criticized Supreme Court decisions applying the Voting Rights Act. You said, and I quote, "Unfortunately, many of the Court's decisions in the area of voting rights presuppose that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court has regarded the right as protected when the individual racial or ethnic group has sufficient clout."

Do you remember what the Supreme Court decisions on the Voting Rights Act were that you were referring to?

Judge THOMAS. I can't remember precisely, Senator, but I was perhaps referring to the effects test. Again, that has been quite some time.

I do know that I also was critical of the administration for not supporting the Voting Rights Act, and I do treasure it, of course, coming from a background or an area where that right was considered enormously important and difficult to secure.

Senator KENNEDY. Well, prior to the meeting, I think we made available to the Justice Department that we would be talking about the voting rights cases. I gave, I believe, some notice that I would be getting into these because I read through your speeches where you talked about the administration's position on the exten-

sion of the Voting Rights Act. But also in the speeches it has the criticism of the Voting Rights Act, and I think in the speeches, as I mentioned here, you were talking about the ethnic group having sufficient clout, and you were critically generally, as I understand, of many of the Court's decisions. There are only really three important decisions by the Court. You mentioned one. The other two were the *White* decision and the *Thornburgh* decision.

Judge THOMAS. Senator, my only concern would have been that in that context whether or not we were assuming that—for example, if you had an all-black district or an all-white district, whether that would necessarily always be good for black Americans. And I think some of the concerns would be that even now, as I have followed in the newspapers or in other journals, that perhaps some of the black individuals feel that the district, the white district that is left becomes more conservative and offsets the newly created minority district. That would have been the only concern.

I certainly have absolutely nothing but the greatest support for legislation that secures the right to vote.

Senator KENNEDY. Well, of course, the point that you make here is explicitly prohibited by the Voting Rights Act, which says that—the Voting Right Act explicitly says, “No group is entitled to legislative seats in numbers equal to their proportion in the population. The Act simply bans States from taking actions which result in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”

In these two cases, they basically struck down the at-large districts, both in North Carolina and also in Texas, specifically in Dallas, Texas, and San Antonio. And I was wondering if—otherwise, what we can do is come back on Monday to give you a chance to review these, if you would like. That is fine. I thought I had mentioned to the Justice Department that we would get into it.

Judge THOMAS. You did, Senator, and the underlying concern that you have is the same as the one that I have; that minorities have the ability to vote and to have an effective participation in our political processes.

My concerns were not intended to suggest that I was in any way opposed to voting rights or concerned that we have them. I think that they are critical, and I certainly have been most supportive and felt that we should have been more aggressive in stating that position during the Reagan years.

Senator KENNEDY. Well, I understand from reading your speeches that you were in support of the Voting Rights Act. Also in your speeches you talked about the criticisms of the Supreme Court on the voting rights.

Judge THOMAS. Yes.

Senator KENNEDY. And what I was interested in is finding out, you know, what the nature of the criticisms really were. You had said many Supreme Court decisions in voting rights are unfortunate, and I am just trying to find out what aspect of the Voting Rights Act that was decided by the Supreme Court and the major Supreme Court decisions affecting the Voting Rights Act dealt with at-large districts in the areas which I have just outlined.

I was just trying to understand what in particular the Supreme Court decided on voting rights that you found objectionable. That was basically my question.

Judge THOMAS. I think my only concern, Senator, was with the effects test. But it was not—I did not go into detail into the voting rights cases, and that certainly was not my area. But what I am trying to, I guess, communicate to you is that my view is that voting rights should be aggressively protected, and I felt that we should have done that during the Reagan years.

Senator KENNEDY. Well, we all agree.

What was your trouble with the effects test, the holding?

Judge THOMAS. Well, I guess the only point that I was making, Senator, was whether or not it was on—again, this is general—whether or not we could really judge from the number of individuals who held office, for example, how effective a person's voting rights were being implemented or how effective the statute was implemented or how effective the minorities were in participating in the political process. I think it is one measure, and I felt that it was one measure.

But I underscore that by saying this, Senator: I did not study that area in detail. That was simply a concern. And I think that other individuals now are concerned because of the creation of what is perceived as more conservative districts, political districts.

Senator KENNEDY. Well, do I understand you correctly that in two of the major decisions by the Supreme Court that struck down the at-large districts, both in San Antonio and Dallas, also in North Carolina, at-large districts which historically had been in effect for years by individuals that wanted to deny effective rights to vote by minorities, blacks and Hispanics—that in one case, the *White* case decided unanimously by the Supreme Court, that there had been significant diminution of the effectiveness of the right to vote in Dallas as well as in San Antonio. I understand that their requirements that they go to single-member districts is not offensive to you.

Judge THOMAS. Senator, I again would go back and look at those cases, consistent with what you are saying, but I underscore that by saying that that was my general concern. It was not an objection to the aggressive enforcement of the Voting Rights Act.

Senator KENNEDY. Perhaps over the weekend, if you can sort of refresh—

Judge THOMAS. I will try.

Senator KENNEDY [continuing]. Your recollection about what were the particular aspects in the voting rights cases, because this was something that many of us were very much involved in here at the time of the extension.

I have just 5 minutes left of the 15.

In your article in 1989, "The Higher Law Background of the Privileges and Immunities Clause, the Fourteenth Amendment," one of the arguments you made for using the natural law to interpret the Constitution was that it is, and I quote, "The only alternative to the willfulness of both run-amuck majorities and run-amuck judges." I think those words have been used at other times in the hearing.

Are you willing to name any judge whom you considered to be a run-amuck judge? [Laughter.]

Judge THOMAS. Senator, I thought about it when I looked at that language again, and I couldn't name any particular judge.

Senator KENNEDY. Well, was Oliver Wendell Holmes a run-amuck judge?

Judge THOMAS. He was a great judge. Of course, we all, when you have opportunities to study them, we might disagree here and there. But I had occasion to read a recent biography of him, and obviously now he is a giant in our judicial system.

Senator KENNEDY. Because in your speech on how to talk about civil rights, you called Justice Holmes a nihilist who, and I quote, "sought to destroy the notion that justice, natural rights, and natural law were objective." And you went on to say about Holmes, and I quote, "No man who has ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach."

Judge THOMAS. I think that was a quote from someone else, Senator.

Senator KENNEDY. Well, I will—

Judge THOMAS. I may be wrong on that, but I think it was a quote from someone else.

Senator KENNEDY. I will provide that for you over the weekend. Maybe you can get a look at it.

Whatever time is left I will yield to Senator DeConcini.

Senator DECONCINI. Senator Kennedy, thank you very much. I am sorry to impose on you and the committee, but I do intend to be at the Gates hearing.

I only have a few follow-up questions. I may not even take 15 minutes, Judge Thomas. Yesterday, when I was asking you some questions on judicial activism, I made reference to *Missouri v. Jenkins*, which is a current case of 1990, and, as you may recall, it was a case where the Court imposed an increase in taxes.

The only question that I did not quite get an answer from you, although perhaps it is because of my own inadequacies, is do you believe that taxation is within the Federal power of the Federal bench, or is taxation power exclusively that of the legislative branch of government?

Judge THOMAS. Senator, I think that is explicit in the Constitution that the legislative branch imposes taxes.

Senator DECONCINI. So, without talking specifically about this case, which, who knows, might come up again, although I rather doubt it, do you feel that it would be judicial activism, if the court does impose taxes?

Judge THOMAS. I think, just in the abstract, I think it would be, and I do not know that it would be tolerated.

Senator DECONCINI. Thank you, judge.

Let me just touch on another area, a little bit of concern of mine, and you may have answered this and I might have missed it, and that deals with the Equal Protection Clause. You have taken a very strong position on the case of *Brown v. Board of Education*. Its companion case is the *Bolling v. Sharpe* case. Are you familiar with that case?

Judge THOMAS. Yes, sir.