

entitled to that, but I think that is an issue which will bear some scrutiny.

I have noted in your writings, Judge Thomas, your conclusion that the *Dred Scott* decision, which upheld slavery, and the opinion of Chief Justice Taney put a backdrop of racism and discrimination, which are deeply rooted in the history of the United States and remain even to the present time, which is a very strong statement. Unfortunately, I agree with you. I think it is an accurate statement about racism and discrimination.

I noted your comment in a fairly recent writing about you in the *Atlantic Monthly*, by Mr. Juan Williams, "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 have the same contacts and opportunities, you will never be seen as being equal to whites." That again is a very strong statement and raises the question in my mind as to whether we should be promoting affirmative action, and I think our discussion here will move far beyond the surface labels of what are quotas, which we hear to much about today, and what affirmative action really means.

I know that there are some who are critical of any person who takes the benefit of affirmative action and then rejects it for others. I have read the newspaper accounts, and I don't know first-hand whether you were the beneficiary of affirmative action. But even if you were, you may be the best witness on the subject to really delve into this issue which is on the cutting edge of one of the most important issues facing our society today, and that is equality of employment opportunity.

Beyond these issues, Judge Thomas, there are many, many other questions which we are going to have to go into. As Senator Grassley commented, the war powers issue is a big one. We just went through a heated debate just a few months ago which involves the question of Congress' authority to declare war versus the Commander-in-Chief's authority, the President's authority, as Commander-in-Chief, very big issues on freedom of speech, freedom of religion, the exercise clause, the establishment clause, so I think we will have subjects of real great importance, and I approach this hearing totally with an open mind.

Speaking for myself and others who disagree and have already announced positions, I believe that separation of powers calls for independence of the Senate, repeating what I have already said, with deference to the President's views. But I think we ought to listen to you carefully, in a very friendly way, in a very constructive way, and clear out the other witnesses before coming to a judgment of the case.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.
Senator Simon.

**OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator SIMON. Thank you, Mr. Chairman.

Judge Thomas, I join in welcoming you and your family here.

No responsibility this committee faces is heavier than the decision on a nominee for the Supreme Court. That is always true, but its truth is underscored when the retiring Justice is 83 and the nominee is 43. There are nominees for high positions, such as a Cabinet member, to which all of us in the Senate resolve limited doubts in favor of the President. Doubts in the case of a Supreme Court nominee must be resolved in favor of protecting the public.

While there are some who are looking for an outstanding legal scholar for the nomination, such nominations have been rare in the history of the Court, though when that has happened the Nation benefited.

The American Bar Association rating of the nominee is not high, but among those who have developed into superior Justices are people whose legal background cannot be characterized as stellar. My conclusion is that the nominee has the basic ability to make a good Justice. And the fact that he is an African-American brings diversity to the Court. That is a plus.

But I have unanswered questions that these hearings should clarify. What is Judge Thomas' understanding of the role of the Court? In criticizing a 6-to-3 Supreme Court decision, *Johnson v. Transportation Agency*, on the employment rights of women, the nominee applauded Justice Scalia's dissent, which he has every right to do, but then said he hoped the dissent—I am quoting—"would provide guidance for lower courts." What did he mean by that? Does he believe the lower courts need not follow the lead of a majority on the Supreme Court?

A fundamental question the committee must weigh is: Are we destabilizing the law by creating a Supreme Court that swings back and forth, depending on the whims of an administration?

While the history of the Supreme Court appointments often reflects the political philosophy of the President making the nomination, Presidents have also considered the stability of the law in making appointments. And so Herbert Hoover named Justice Benjamin Cardozo, Dwight Eisenhower selected Justices Earl Warren and William Brennan, Richard Nixon nominated Justice Harry Blackmun, and Gerald Ford nominated Justice John Paul Stevens. And Democratic Presidents appointed conservative Court members. John F. Kennedy named Justice Byron White, and Harry Truman named a Republican Senator, Justice Harold Burton.

In each case, the President, at least once, nominated people who were of a differing political philosophy. At least eight times in this century, Presidents have nominated Justices who were of a different political party than the President. The law has been well-served through this balance, but in recent years, this sense of balance has diminished. Will the current nominee add to a balance or an imbalance? The law should not be a pendulum, swinging back and forth, depending on the philosophy of a President.

I am concerned that the Court is shifting from its role of being the champion of the less fortunate. It is easy for any government to become too cozy with the wealthy and powerful. Once on the Court, Justices do not rub shoulders with society's unsuccessful at Washington cocktail parties and dinners. But the test of whether we are a civilized society is not whether we treat the elite well, but how

responsive we are to those who do not have the political or financial reins of power, the least fortunate among us.

The nominee has, to his great credit, overcome major obstacles to be where he is today. But what about those who have been less fortunate or less able in overcoming obstacles? What does he mean, when he writes—and I quote—“I do not see how the government can be compassionate; only people can be compassionate and then only with their own money, their own property or their own effort, not that of others.”

I join Judge Thomas in lauding self-help, but not to the exclusion of Government's proper role. Does Judge Thomas mean that we should not have student aid programs, a Head Start Program? Does that suggest there is something unconstitutional or morally wrong with Government seeing to it that no one falls through the cracks in our health care delivery system?

Was Government not compassionate when we passed Federal legislation outlawing segregation? Yes, it affected the property rights of hotel and restaurant owners and many others, but does anyone really believe that this Government action was morally wrong? Was this comment of the nominee a throw-away line, or does it suggest a philosophical mindset?

Aside from the natural laws that have been referred to here, do the nominee's views differ in any marked respect from those of Judge Robert Bork, whom this committee rejected by a 9-to-5 vote?

I am also concerned with the erosion of basic liberties that is taking place on the present Court. The *Rust v. Sullivan* decision is potentially the most significant assault on our basic liberties since the Supreme Court, during World War II, approved the Federal Government taking from their homes Japanese-Americans who had committed no crime.

If the logic of the *Rust* decision is upheld, that the Federal Government can restrict speech if it provides financial support, then libraries that receive Federal support can be told what books they may have, and universities can be told what they may teach. This decision will be revisited both by the Congress and the Court. I do not expect the nominee to tell me how he would rule on *Rust v. Sullivan*, but I want to sense the philosophical moorings that will shape how he votes.

A Thomas address that comments on the ninth amendment, was it a casual speech, like Senators too often make, or does it accurately reflect his thinking?

The Court will soon make decisions on sensitive church-State issues. Where does the nominee stand on these traditions? Freedom is much easier to give away than to preserve. I want a nominee who understands not only the letter of our Constitution, but also the spirit of it.

What does Judge Thomas sense is his mission on the Court? That is the fundamental question we need answered to make our decision.

Judge Thomas, in my opening statement for the Souter nomination, I used these words to that nominee that are just as appropriate today: I want someone to whom every American can look and say, “There is a champion of my liberty.” That should be true of men and women, the old and the young, the able and the disabled,

for people of every religion and color and national background and station in life. This is an extremely high standard, but it is an extremely high court to which you aspire.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.
Senator Brown.

**OPENING STATEMENT OF HON. HANK BROWN, A U.S. SENATOR
FROM THE STATE OF COLORADO**

Senator BROWN. Thank you, Mr. Chairman.

Judge Thomas, it is a pleasure for me to join with others on this committee to welcome you here, along with your beautiful family. I don't know how this committee will resolve the question before it as to your judicial competence, but in terms of your ability to be an excellent listener, I think you have already passed the test. I suspect a further trial is ahead of you, though, in that regard.

You have perhaps enjoyed so much your other four Senate confirmation process that you have been anxious to go ahead with a fifth. You have come here before us a husband, as a father, as a son, and a brother. I only hope at the end of this deliberation that your family feels that you have had a full and a fair opportunity to present your viewpoint. I think that is important for us to make the right kind of decision.

Mr. Chairman, as we consider Judge Thomas for the position of the 106th Justice of our Supreme Court, we fulfill an important constitutional duty. Over the course of the next several weeks, the American people will have an opportunity to witness the three branches of our Government coming together to fulfill those duties and to chart the course for our judicial history in the future of this Nation.

I think it is important that we gather and do this job in a thorough manner that has been laid out. We judge not only the nominee, but I think in some measure we judge ourselves as well.

The American people are unique in the history of mankind. We are unique in our commitment to individual and personal rights. It is perhaps a phenomenon that the Constitution and its amendments deal as much with preserving individual freedom from the powers of Government as they deal with establishing the very framework of that Government itself. That approach, that uniqueness, says a great deal about us as Americans, and I think says a great deal about what has made us so extraordinarily successful.

I am one of those that believes it is appropriate for this committee to inquire into the judicial philosophy of the nominee. Mr. Chairman, your own op-ed piece that appeared in the Washington Post I thought was not only a very thoughtful work but one that set forth many of the important questions that we ought to be dealing with. But I also believe for us to request specific answers to potential cases before the Court would be a great disservice to the American people. It would be a disservice because I think all of us would feel how wrong it would be to have a judge sit in judgment of us when he has already made up his mind or pronounced a decision. A willingness to have an objective review of the facts in any