

We are going to try our best, Judge, to see if we can hear from two more Senators, and hopefully three before we finish. Again, Judge Thomas, it is a long time for you to sit there, from 10 in the morning, even with a break at lunch. Everyone should understand that it is one thing to sit at a hearing on this side, where we only have to be at the top of our form for one-half hour, and then we get to rest. You have got to be at the top of your form the entire time, so it is a tough job.

Let me now yield to our colleague from Arizona, Senator DeConcini, and then we will go to Senator Grassley.

Senator DECONCINI. Thank you, Mr. Chairman.

Good afternoon, Judge.

Judge THOMAS. Good afternoon, Senator.

Senator DECONCINI. I want to just finish up on yesterday's discussion of issues and complaints that have been brought to this Senator's attention from different Hispanic groups.

Let me first say that I have received a number of Hispanic complaints about your handling of EEOC. However, I would like the record to show and to reflect that my office was also contacted by Fred Alvarez, who was a Hispanic Commissioner at the EEOC during your tenure, Judge, and Mr. Alvarez indicated to us that the EEOC, under Clarence Thomas, and these were his words—"under Clarence Thomas' direction, we attempted to reach out and assist Hispanics more than any other time in the EEOC's history." I don't want the record to be left that no one person or any group in the Hispanic community thinks you did not do a fine job, and perhaps you did.

My concern is that these problems have been raised to me. Yesterday, we touched upon them and your record as the Chairman of the Equal Employment Opportunity Commission. My understanding is that the EEOC is charged with the protection of the employment rights of many unrepresented groups, including blacks and women, the elderly and the handicapped. You and I have had some differences during your last confirmation hearing about what I perceived was some callous approach or, let us say, difference of opinion on how it should be approached as it was to the elderly.

But you did answer my questions that I submitted to you and you did so in comprehensive responses that, though I did not agree, I must say that you laid your case out, and that is all I can ask of a nominee, not that they have to agree with me, but that they are prepared to give me their reasons for their decisions and then I can ask nothing more of them.

So, I want to make that perfectly clear, because I don't want anyone to think that I am only concerned here with the Hispanic issues, because Senator Metzenbaum has dealt with the elderly issues, and I dealt with the elderly issues that I felt were necessary during your last hearing. But I do have a couple of questions.

Yesterday, you listed a number of examples to illustrate your attempts to make the agency more accessible, including the initiation of the 1-800 number, translating materials into Spanish, and public service announcements. But let me get back to the National Council of La Raza recent report on the EEOC, which I understand has been made available to the White House prior to these hearings.

If NLRs' figures are correct, the fact remains that, over the past 10 years, the rate of charges filed by Hispanics lag significantly behind that of any other protected group. Now, as Chairman, do you feel, quite frankly, if you conclude, as I do, that La Raza has done I think an impartial job here, and maybe you disagree with that statement, but do you feel you did everything you could to see that Hispanic charges and claims were filed and Hispanics were educated on the system, or do you think you could have done more?

Judge THOMAS. Senator, first of all, let me just say that I am not going to quibble with the numbers, because I haven't had a chance to go back and look, but let's assume that they are accurate, and I think that is the point you are making.

With that assumption, I think that, on revisiting my tenure of EEOC over the years, in the area that Senator Metzenbaum has touched on a number of times and what you are talking about, in retrospect and with the benefit of hindsight, the wisdom of hindsight, perhaps there would have been some approaches I felt that would have worked better than others.

I thought at the time, as Chairman of the EEOC, that I was doing all I could. I tried to meet with organizations. I met with MALDEF. In fact, one of the early concerns raised about the litigation and litigation not being available to individuals who didn't have large cases, that is, EEOC was not litigating the individual cases, if my recollection serves me right, it was an early meeting with MALDEF. But I feel, in retrospect, that there could have been some things that perhaps, with the benefit of hindsight, that I would have done differently, but at that time I think I did all I could.

Senator DECONCINI. Well, based on that, Judge—and I appreciate that observation, because I think that is a very honest approach. I think we all feel in hindsight sometimes in our life we could have done better on something that we thought we were doing pretty well at the time, and I take that as a strength of yours.

The information that was given to us after my questioning last night from the White House indicates that, within the first year, you as Chairman conducted one-on-one personal meetings with MALDEF and with LULAC and with the National Hispanic Bar and the Cuban-American Men & Women and the Personnel Management Association of ESLON and Los Angeles County Affirmative Action.

First I'd like to compliment you, I am glad to have that for the record, I think it is important. My question is did you have continuous meetings with these people? Did you meet any other times with them and can you give us any background?

Judge THOMAS. The group that I know I have attended functions, I believe, and—again, I would have to go back and do a more thorough search of my calendar, but my recollection, if it serves me correctly, I did continue, but not in retrospect perhaps at a level that would have been more appropriate.

I had meetings from time to time with organizations such as MALDEF. As I indicated, I gave speeches at some of the organizations and I would go to some of their functions. I cannot sit down and tell you explicitly all of the meetings that I had or the routine

meetings that I had. I worked with individuals, some of whom are listed here, over the years in an informal basis, but not the routine sit-down month-to-month sort of meetings.

Senator DECONCINI. Judge, the reason I raise this is that if you are confirmed and you become what is the 106th Supreme Court Justice, you would have, in my judgment, based on your background, your educational background, your family background and who you are, every reason to have a greater sensitivity than anybody here. I really believe that. I would hate to see that sensitivity not directed toward Hispanic and other minority groups. That is why I raised this, in hopes that it might make a small impression that some minority groups are fearful that, yes, you may stand up for minorities that are black, and you have a record of doing that, in my judgment, but what about us.

I can't make you do that and I can't tell you to do that, but I can express a deep feeling of at least Hispanics in my State and outside of my State. I am surprised that they would not be coming forward in support of your nomination, quite frankly, because I would think that they would feel comfortable, and yet they don't, at least as they have expressed to me.

In a speech to the League of United Latin-American Citizens, LULAC, in July 1983, you expressed concern that speaking Spanish in the workplace appears to be a source of increasing tension in the area of discrimination based on national origin, and you mentioned that EEOC had received a favorable decision in a case involving a group of women who had been fired for speaking Spanish in the workplace. Can you elaborate at all, Judge, on the EEOC's position under your tenure with regard to English-only policies? Did you have any policy in the EEOC that you remember, or do you personally have any?

Judge THOMAS. We did have a policy that certainly made sure that—yes, you can sort of flatly that the English-only policy was inappropriate and could violate title VII. I have not had an opportunity to review that policy in preparation for these hearings. I would certainly do that. But we did challenge employers who maintained English-only policies in the workplace.

Senator DECONCINI. You did do that?

Judge THOMAS. We did do that.

Senator DECONCINI. Was that your policy that you established or the Commission policy while you were there?

Judge THOMAS. It was the Commission policy while I was there. I can't tell you—Senator, during my tenure, we continued to redraft and upgrade our compliance manual sections, as well as our procedures. The English-only, the national origin area was one of those areas, so I could provide you with or have it provided to you.

Senator DECONCINI. Would you mind doing that?

Judge THOMAS. I would be more than happy to do that.

Senator DECONCINI. Without too much burden, or maybe somebody could help put it together. I realize that you have got a lot—

Judge THOMAS. I would like to go back to one point, because something came to mind when you mentioned sensitivity, if you don't mind.

Senator DECONCINI. Yes, sir.

Judge THOMAS. When you mentioned that, it brought to mind my trip to Pan American University in Texas, in order to deliver and to participate in events to provide a quarter of a million dollar endowment for student scholarships at Pan American University.

What was so interesting and so warm about that and so good about it is that I remember the tuition per student was less than \$1,000 a year, and that a very large number of students, for the first time who were attending college, Hispanic students, were going to have the tuition made available to them as a result of that.

I thought that was important, and it is not listed here. I might add also that I was not in the habit of keeping a running list of the sorts or things that I did. I think that one should do them automatically, rather than as a plan.

The other university that I thought was making an important contribution in a similar way was Native American University, D-Q University in California, where we made a similar grant. It was an effort, as I remember it, to reestablish some of the native American traditions that were being lost, and they were starting a university in an old military facility, and I remember spending a day with them and just how warm they were and how receptive they were to the interest that we were showing in their efforts to develop and restore and renew significant parts and important parts of the native American culture.

Those are just two that happened to come to mind while you and I were talking. But it is important to me, even in my current job, we as judges have a tendency to be isolated—and I was in the seminary, so I know how isolation feels—but it is important to me to always keep contact with the rest of the world, to talk with the real people who are out here every day.

One of the good things that I have seen from some of the articles—I have stopped reading the news accounts recently, and that is not a reflection on my feelings about the first amendment, it is just simply that when one is the object, one has to stay away from—

Senator DECONCINI. You don't have to read the papers.

Judge THOMAS. But one of the things that really made me feel good was that the people in the building where I have spent the last year and a half, the sorts of wonderful things that they have said that suggest that there was some human contact between us, but those two items that I mentioned, of course, were just items that came to mind while you were speaking.

Senator DECONCINI. Thank you, Judge Thomas, for that clarification and expansion. One last question in this area. Would you extend the prohibition of English-only policies in other areas, such as education, and voting, to public service and that sort of thing?

Judge THOMAS. Senator, again, I don't know the answer to that. I would be concerned that there is discrimination, and I think to the extent that it does amount to discrimination, I think as a matter of policy, that we should eliminate it. Again, I cannot predict how the court cases—

Senator DECONCINI. I am not asking for a court case. I just wonder how your feelings are about prohibiting English-only in the area of education. Do you think there is a benefit of bilingual edu-

cation programs? I am not talking about a substitute one, I am talking about a bilingual one, for citizens who can't understand always the English language and may feel that reading a long referendum doesn't give them the same access to information. What are your feelings on that, or do you have any?

Judge THOMAS. Well, we were sensitive to that at EEOC. I think we went so far as to even include our brochures in Chinese, because of the significant population in San Francisco, I believe. I think it is important that this country, as I have said before, be accessible to everyone. I don't think that the language barrier should prevent people or the erection of a language barrier should prevent individuals from enjoying all the benefits of this country. That is my sensitivity to the issue.

Of course, I feel that way in other areas. I have said that with respect to disabilities. You know, as I said, I had a friend in a wheelchair, a quadriplegic, 6 inches, it may as well have been the Berlin Wall to him. There was just no way he could get across that curb. We have tried to make our agency accessible at EEOC, so I think that those barriers, those unnecessary barriers could be discriminatory.

Senator DECONCINI. You would equate English-only as simply one of those barriers—

Judge THOMAS. One of those unnecessary barriers.

Senator DECONCINI [continuing]. That would prevent a citizen to have full enjoyment?

Judge THOMAS. That is right.

Senator DECONCINI. Thank you. Judge, let me turn to a question that there has been a lot of writing on. I do this partly because I think it is fair for you to get an opportunity to explain it. I was not here for everybody's questioning, and if someone went into this I apologize, although I am told that nobody has. I want to talk about when you were head of the Office of Civil Rights at the Department of Education in 1981 and 1982. As I remember, the issue was not addressed during the hearings of your nomination to the circuit court, and so I hope I am not beating anything that has already been discussed.

But while you were at OCR, the agency was under a court order, as you well remember, based on the articles that have been written in the 1970's, the so-called *Adams v. Bell* litigation that specified time limits in processing complaints and taking other enforcement actions with respect to discrimination in education. The order was imposed, because of previous delays in a "general and calculated default" in civil rights enforcement in education, so the court said.

Now, while you were head of the OCR in 1982, a court hearing was held concerning charges that the OCR was violating the court order, and under oath you admitted to violating the court order's requirements. Now, I understand that some of the problem in complying with the time delays predates even your tenure there and that you were not the one that entered into that agreement or consent, if that is what it was called.

However, you admitted in court that you were violating the court order rather egregiously, and the court found that the order was being violated in many important aspects. I think you can imagine what the questions are, Judge Thomas. Were you defying the court

order, because you personally disagreed with the *Adams* decision, or were you trying to substitute your own judgment on the policy of the *Adams* timetable? Can you give us an explanation?

Judge THOMAS. Well, let me say that I was absolutely not defying the court order.

Senator DECONCINI. Explain that, would you, please?

Judge THOMAS. And then I will explain. The court order in the *Adams* case involved a consent decree in which there were fairly rigid timeframes in which to investigate the cases that came to OCR. The action I believe that you are mentioning started before I became Assistant Secretary, and even the proceedings that I became involved in and the reopening of that started before I became an Assistant Secretary, I believe early in 1981.

OCR had never been able to meet those timeframes, and indeed we devoted, as I remember in reviewing some of the documents, we devoted about 95 percent of our staff at that time to attempting to comply with the court order and were still—to the timeframes, not the court order, the timeframes, and were unable to do that.

When I was asked in court, are you complying with the timeframe, I think there was a series of questions, my response was no, no, no, and I think ultimately the question was are you in violation of the court order, obviously, as a result of missing the timeframes, and my response was an honest yes, and I believe there was as follow-up question—and I don't have the record in front of me—can you violate the court order, with impunity, and my response was no.

The problem was that we were attempting, as I remember, and that is now about 10 years ago, we were attempting to develop a study so that we could propose new timeframes that were more consistent with the way that we operate. Subsequent, of course, to all of this, the order itself, the case itself was dismissed by the court. But I can say unconditionally there that I was responding truthfully to the question asked and was not defying the court order, and I did everything within my power and the agency expended 95 percent of its resources to attempt to comply with that order.

Senator DECONCINI. Let me make it very clear, Judge, I don't question or challenge your administrative skills, and I understand that the case was reversed, so you turned out to be right, in the sense that it was an unreasonable order or an impractical order.

What troubles me about it is, when I practiced law and even though I don't practice law now, an injunction or a court order is pretty powerful stuff, and if you violate it, you can go to jail, if the court so decides that they want to impose that. Also, if I disagreed with it, as I did, particularly when I was a prosecuting attorney, I would immediately file some sort of action to try to get relief in another court, if I had to, whether it was a Federal court or another superior court, instead of violating the court order, like it appears you said I am violating it and that is it, I can't say anything, judge, but I am violating it.

Judge THOMAS. Well, that certainly wasn't my attitude, Senator.

Senator DECONCINI. No, I understand, you have explained that, but I believe that is how it is perceived. You have explained that was not your attitude, and I accept that that was not your attitude.

Why didn't you first go to the court and request that the order either be changed or suspended, while you had a chance to come forward with all the reasons and justifications that you now have pointed out, which are: that you had exhausted all the capabilities of your staff, you couldn't comply, and that your predecessor had the same problems? Maybe you did that, but that is not in the history that I know about.

Judge THOMAS. Senator, I have not gone back and looked at all the documents during my OCR days. I was represented, as the agency was, by attorneys from the Civil Division of the Justice Department, as I remember it. And the communications with the courts were handled through those attorneys.

I can't remember prior to this particular hearing that you were talking about to what extent we had communications with the Court and with the other parties. We were attempting, as I indicated to you—and perhaps we were too slow, and I had expedited a study that was taking place prior to my going to the agency to determine what the timeframe should be. I do not remember, however, to what extent we communicated our efforts to the Court.

Again, that has been some 10 years ago.

Senator DECONCINI. Yes, I realize that, Judge Thomas. But don't you agree that if you had anything filed or pending before the Court, or even if you were prepared to file something you probably should have raised it when the judge said you are violating the court order. Rather you should have said, Yes, I am, but, your Honor, I would like to tell you that we are preparing a suit right now? You don't recall that there was any such action on your part, is what you are saying? There might have been, but you don't know.

Judge THOMAS. I just don't know. That has been so long ago. I did go on—I think there is further discussion in that case about our efforts in trying to provide or to expedite the study that was in place prior to my going to OCR.

Senator DECONCINI. What would you do as a judge today if a person appeared before you and you had written an order to do something, and that person appearing before you said, "I am not going to do it," and you said, "Aren't you violating a court order?" And they said, "Yep, I am violating a court order," and they didn't come up with any plausible other litigation or other solution? How would you treat that as a judge? How would you think about that defendant or that person before you?

Judge THOMAS. Well, first of all, Senator, I would hope that is not the perception of what I did because we did everything we could to comply with that court order. And I think ultimately what the judge realized is that we were doing all that we could, that it was impossible for us to comply with it.

But if someone did come before a judge and refused to comply with the court order, I think the judge would, of course, have to take whatever steps he or she could with respect to—

Senator DECONCINI. To get them to comply.

Judge THOMAS. That is right.

Senator DECONCINI. And there were no steps taken, is that right?

Judge THOMAS. From the court?

Senator DECONCINI. Yes.

Judge THOMAS. I don't remember the outcome, but there were no steps taken, and I think the judge understood that we were doing all we could. That is my estimation. Again, I have not gone back and reviewed the order.

Senator DECONCINI. I raise it because I think it is important for two reasons: One is I think it is important that you get to explain your views and your actions. I really do. Secondly, Judge Thomas, it really surprises me, but, you know, I was a young lawyer once, and certainly I made some decisions before a court that perhaps I wouldn't want to have to explain right now if somebody asked me. But it is of concern to me when someone is going to be in the position that you very likely will be in as a Supreme Court Justice, having had a period of time even as a young green lawyer where you did not, at least on the record there, explain the problems as you have today and just admitted that you were violating the court. I was fearful of saying that to a judge.

Judge THOMAS. I was, too.

Senator DECONCINI. I would have all kinds of reasons that I would propound why I had to violate it. As a county attorney, I remember having to argue that I couldn't comply with a judge's order, but I hopefully always did make enough of a plea to him that he wouldn't hold me in contempt.

Judge THOMAS. Well, I can assure you, I was at that time, I think, 33 years old, and I was scared to death. I had only been at OCR for a very brief time, and there were a lot of decisions, very difficult decisions to make during that period, and this was one of the difficult, difficult problems that I inherited.

Senator DECONCINI. What would you say, Judge Thomas, you learned from that experience?

Judge THOMAS. Again, with the benefit of hindsight and the benefit of more years under my belt—and it is a much bigger belt now—

Senator DECONCINI. That is true of a lot of us on this committee, the chairman being the exception, of course.

Judge THOMAS. I think that I would have perhaps made more efforts along the lines of what you indicated and certainly made sure it was in the record and to give fuller explanations.

Senator DECONCINI. Thank you, Judge Thomas.

Let me turn to a subject that has been touched on here, and that is judicial activism. Over 20 years ago, the *Miranda v. Arizona* decision defined the parameters of police conduct for interrogating suspects in custody. I am sure you are more aware of it than I am today, having served on the bench.

As you know, over the years the Court has redefined various elements of the *Miranda* test, a redefining that many describe as chipping away of the *Miranda* rule. *Miranda* is a preventive rule imposed by the Court in order to enforce constitutional guarantees.

My initial question to you on these types of issues is not your opinion of those two rulings such as that, but rather do you believe that it is within the Court's role to be imposing rules such as *Miranda* or, say, the exclusionary rule? Is that, as you have quoted before, considered judges running amuck? Have they gone too far, in your opinion?

Judge THOMAS. Senator, I think that what the Court was attempting to do is to set out some guidelines to prevent, as you have noted, constitutional violations and certainly to deter law enforcement officials in the case of the exclusionary rule from benefiting from improperly or unconstitutionally seized evidence.

Senator DECONCINI. Do you consider that judicial activism?

Judge THOMAS. I do not consider it judicial activism. I see it as the Court trying to take some very pragmatic steps to prevent constitutional violations.

Senator DECONCINI. What do you think judicial activism is? Well, before you answer that, what about the famous tax case where a court, not the Supreme Court, imposed on a local school district to raise the taxes? You were an assistant attorney general in Missouri handling tax issues at one time. Would you consider that case judicial activism?

Judge THOMAS. I think there are some who certainly would. I don't know—

Senator DECONCINI. Your good friend and mine sitting behind you does, and I happen to agree with him.

Judge THOMAS. I think there are some who would because of the extent of the remedy. But I couldn't say because I have not reviewed that case and I haven't studied the record in that case. I think any of us would be concerned in the area of judicial activism when we conclude that a judge is imposing his policy decisions or her policy decisions instead of the law.

Senator DECONCINI. Is that your interpretation or definition of judicial activism?

Judge THOMAS. I think that is one such definition.

Senator DECONCINI. Can you give me any other one? Then I will wind up here.

Judge THOMAS. I wish I had some off the top of my head. I just think that when judges move away from interpreting the law and applying the law as written or interpreting the Constitution in an appropriate way and begins to read his or her views into those documents, I think we are venturing into an area of judicial activism.

Senator DECONCINI. You think, Judge, that you can refrain from that as a Supreme Court Justice?

Judge THOMAS. Oh, I certainly can, Senator.

Senator DECONCINI. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Now we will go to Senator Grassley of Iowa.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Thomas, I think maybe just for the record I will go through some of the issues with *Adams v. Bell*. I don't know whether there is a necessity for you to answer any questions or not, but just to make the record clear. I think that first of all we need to make clear that not only has this issue been brought up at this hearing, but it was also a basis for some special interest to find fault and try to prevent your appointment and confirmation to the Supreme Court.

You took over as head of the Department of Education on July 3, 1981. You were appointed in May of 1981. The contempt motion that is part of the discussion here was actually filed on April 21,