

Judge THOMAS. Well, in the context that you explain, I can understand your concern. My quote and my reference in the speech was that with respect to the individual rights that were affected in this particular case, but—

The CHAIRMAN. I will accept that on its face, because I believe you mean that and, believe it or not, I am delighted to hear that is the case, and not the larger case, because it is a—when I say agenda, I don't mean it again to sound so pejorative, when I talk about an agenda out there unrelated to you, but I think we should understand that there is a good deal of intellectual ferment.

I must admit, one of the reasons why the right has been so successful is there is much more intellectual ferment on the right than there is on the left today. I think the left has fallen back on its laurels in many ways. It finds there is no need to come up with new methods and means by which to promote its objectives, but that is not lacking on the right and there is an explicit desire, not at all denied by any of the young intellectuals who wish to see a change, that the way to deal with too much Government bureaucracy and regulation is to eliminate the regulatory bodies that exist, thereby giving the Executive total control over those elements of regulation, as opposed to the legislative bodies.

I won't bore you with that. I accept your answer for what it is to be the truth, and I will at this moment, unless you would like to add anything, I will yield to my colleague in a moment.

Judge THOMAS. No.

The CHAIRMAN. I suggest we break and give you a break, unless you have a comment to make on what I said, and then I will yield to my colleague when we come back, Senator Specter, and we will have you question then, Senator.

We will recess, to give the witness time to stretch his legs a little bit, about 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Thomas, in my last round of questions, I was discussing with you the topic of the revisionist court, which is a name that I affix to our current Court because it is not a conservative court; it is a revisionist court, as I see it. And I want to discuss with you two cases which are illustrative of its being a revisionist court because they are two 1971 opinions by a unanimous Supreme Court, with the opinions being written by Chief Justice Burger in a very conservative thrust.

One of the cases is *Swann* versus the school districts, and I ask you about this case because you had written on the subject in the Boaz edition of "Assessing the Reagan Years." And you complained about "*Brown* not only ended segregation but required school integration."

My first question to you is: If you end segregation, doesn't it necessarily mean that you are requiring school integration?

Judge THOMAS. Well, I guess semantically the reference, my own reference to those different terms would have been that desegregation would be the ability to simply not be barred from certain ac-

tivity and integration would be more positive; that is, you are required to have a certain percentage or certain number.

Senator SPECTER. Judge Thomas, does your criticism of the *Swann* case signify another one of the illustrations of your advocacy from the executive branch, or is this something you really think should be changed and something you would try to change if confirmed for the Supreme Court?

Judge THOMAS. Senator, the answer to the second portion of your question is the same as I have said in other areas. I have no agenda to change existing case law. That is not my predisposition, and it is not the way that I approach my job.

The concern that a number of us raise with respect to just as individuals in this society, as individuals who have watched the changes in our country, was simply that if we could demonstrate that the educational opportunities were improving for minorities, then whether it is busing or any other technique, then use it, but make sure that we are helping these young kids. That was totally out of the legal context. That just simply would have been a preference that I expressed as a citizen.

I have not reviewed, gone back and looked at *Swann* or the other cases and made any determination that would undermine my ability to look at those cases impartially. And I certainly don't have a predisposition that precludes me in any way from looking at those cases in an objective manner.

Senator SPECTER. Judge Thomas, let me pick up the second unanimous opinion, again written by Chief Justice Burger in 1971, which I know you have reviewed, and that is *Griggs*, which has been an enormous source of controversy. It has occupied a tremendous amount of time by the Members of Congress, by the President. It has occupied almost as much time for Senator Danforth as your confirmation hearings have occupied.

This is a case which I have commented on when we have considered legislation to change the *Ward's Cove* decision because I think it is a very serious matter when you have a statute enacted, as the Civil Rights Act was in 1964, and you have a 1971 unanimous Supreme Court decision written by the Chief Justice, handling many issues, two of which are the definition of business necessity and the second of which is the burden of proof. And then 18 years later, by a 5-to-4 decision, as I read *Ward's Cove*, that law has changed. Not interpreted but changed. And four of the five Justices who voted in *Ward's Cove* to change the law put their hands on their Bible in the confirmation hearings in the course of the past decade and swore not to change the law but to interpret the law. And I think if there is any principle which is rock-bed we all agree to among the 14 of us here and the 100 in the Senate, it is that the Supreme Court ought to interpret the law and not make law.

The Court in *Griggs* said that the touchstone is business necessity, and in *Ward's Cove*, the Court said that there is "no requirement that the challenged practice be 'essential' or 'indispensible.'"

Now, this is shortcutting a very extensive amount of complicated discussion, but the essence of a defense was business necessity in *Griggs* and in *Ward's Cover* they say it need not be essential, which is about as direct as you can have on a change in language.

When you testified before the Judiciary Committee on your confirmation for the District of Columbia, I had asked you about a series of cases, and you had said, in part, "There is a definite change in the burdens under *Ward's Cove*."

Is there any doubt, Judge Thomas, that *Ward's Cove* overruled the *Griggs* case?

Judge THOMAS. Senator, I think that if the Court had intended to overrule it, I would hope that it would have done so explicitly. When I was Chairman of EEOC and, as you indicate, when I appeared before this committee the last time, you asked me about this case. Our response at EEOC, when we were initially involved in this, was that we should have simply—the Supreme Court case should only have involved whether or not there was a prima facie case. That was EEOC's official response.

Our reaction to the ruling—and I was at EEOC only a short time after the ruling—was that there was a change in the business necessity test. That was our reaction. I was not there long enough to determine precisely the extent to which there was this change, but that was our reaction at the time. And I have not since I have been a judge, of course, revisited those questions.

Senator SPECTER. Well, that is one of the two questions that I told you in our brief meeting on August 1, that I would ask you, only two, the questions about Korea and the question about *Ward's Cove* reversing the *Griggs* case. And I would agree with you that it would be preferable in the sense if it is explicit, but I think the way this case has come down, it is a very plain conclusion.

My question to you is: Do you think that it is appropriate for the Supreme Court, given the underlying premise that the Court is to interpret law rather than make law, where the Congress has passed a law like the Civil Rights Act in 1964, and a unanimous Supreme Court interprets it in *Griggs*, and Congress leaves that law unchanged, and in *Ward's Cove* the law is changed? Is that appropriate?

Judge THOMAS. Well, as I indicated, Senator, my concern would be that in those instances in which there is an interpretation on the books or in case law and Congress has not seen fit to readdress that in a statutory change or statutory amendment, then it seems as though that there should be less of an inclination to want to revisit those issues, as compared, of course, or contrasted with constitutional issues.

I can't say—and I don't think it is appropriate for me to place a normative judgment on whether or not it is appropriate or not. I would be, as a judge, concerned about changing, as I have said in my discussions of stare decisis, existing interpretation that has been long standing, that has been—

Senator SPECTER. What do you mean by "normative," Judge Thomas?

Judge THOMAS. Appropriate or putting a value judgment of some sort on it.

My concern would be that in making those kinds of changes that we are not paying sufficient heed to the principle of stare decisis.

Senator SPECTER. Well, I think that this is one of the central issues which has been raised in your confirmation hearings. I accept your statement about your previous comments as to the lack

of wisdom in the Congress, but your commitment to interpret the law and not make new law. And it seems to me that this is a classical illustration of the Court changing the law and making law, as opposed to its function to interpret the law.

I was pleased to hear your comment about the dissenting opinion by Justice Marshall in the *Payne* case, which involved the decision last term which overturned two very recent U.S. Supreme Court decisions when, as I heard you say, Justice Marshall's decision was a "stern admonishment." Were those the words you used?

Judge THOMAS. I think "stern admonition."

Senator SPECTER. "Stern admonition." Do you agree with Justice Marshall's dissent?

Judge THOMAS. I would like to—I think it would be inappropriate for me, Senator, to agree or disagree with it.

Senator SPECTER. Why?

Judge THOMAS. I was certainly affected by it. I agree with his statements concerning *stare decisis* to the extent that I suggested here. I think that judges should be very concerned that their personal opinions are not the basis or their clout is not the basis for making decisions.

Senator SPECTER. Well, do you agree with Justice Marshall's assertion that "Power, not reason, is the new currency of this Court's decisionmaking," his opening statement in *Payne*?

Judge THOMAS. I would, Senator, refrain from agreeing or disagreeing with that. I agree that we should be concerned and be aware of the principle of *stare decisis* and that we should guard against making decisions as judges based on the number of votes we have.

Senator SPECTER. Well, I won't press you further on it then. But let me ask you if you agree that property and contract rights have no higher status than personal liberties because the majority opinion put property rights, contract rights on a higher level, saying that *stare decisis* should be followed—that is, a precedent should be followed, and more attention should be changed to not make the modification if there were property rights or contract rights contrasted with personal liberties. Would you at least put personal liberties on the same level with property and contract rights in following precedents?

Judge THOMAS. The answer to your question, Senator, is yes. I don't understand the quote. It makes no—the statement in, I think, Justice Rehnquist's opinion? It makes no sense to me. But I would—my answer to your question would be yes.

Senator SPECTER. Thank you.

Let me move, and very briefly because there is not a great deal of time, to a very complicated subject and just ask one question about it. That is the subject of federalism, and it is this: Does our modern Constitution, as it has been interpreted, place any restriction on Federal power vis-a-vis the States? Or is the political answer by Congress now the measure of the constitutional power issue?

Judge THOMAS. Senator, I don't know whether we know what the limits are. I think we realize that there is much more involvement on the part of the National Government in our day-to-day affairs,

certainly through the 14th amendment and through the commerce clause.

I think that that issue and similar issues come into focus in cases such as the *Garcia* case, and I think that that is something that will continue to be explored and debated in the judicial arena, as well as, I am sure, in this body and at State government level.

Senator SPECTER. So, you think the commerce clause might not have the full sweep of enabling the Congress to do what it chooses in the field of commerce and regulatory and legislative power?

Judge THOMAS. I don't question the current development of the commerce clause, Senator. As I have noted earlier, my point is that I don't think that any of us know precisely what the limits are now, with the advances in communications, with the increased role of the Federal Government, with the increased involvement of the Federal Government in our day-to-day lives. I think that is something that certainly was at least to some extent a concern in the *Garcia* case.

Senator SPECTER. Judge Thomas, there were two major cases decided relatively recently on the equal protection clause, *Metro v. Federal Communications Commission*, which was congressional action, and *Richmond v. Crawson* which was a city council action. My question to you is, in applying the equal protection clause, does it make any difference whether the legislative enactment comes from the Congress, as opposed to a city council?

Judge THOMAS. Senator, I think that *Metro Broadcasting*, of course, used the equal protection analysis, but it was a fifth amendment case. The Court has made a distinction in *Crawson*, as well as in *Metro*, that when the race- or gender-based policy, I think race-based policy in these cases, were as a result of Congress' effort, the level of scrutiny is lower than it is if it is on a policy that is developed by a State or local government.

Senator SPECTER. Well, the fifth amendment due process clause, of course, picks up the equal protection clause of the 14th amendment—

Judge THOMAS. That's right.

Senator SPECTER [continuing]. So the analysis would be the same as the equal protection.

Judge THOMAS. That's right.

Senator SPECTER. So, you would accord greater strength or latitude to a congressional enactment, as opposed to a city council enactment?

Judge THOMAS. That's right, that is under existing case law, that's the approach.

Senator SPECTER. Let me cut through quite a lot of discussion with, again, a very direct question, without getting into the undergirdings of the opinion in *Metro Broadcasting*, would you agree with this succinct statement from Justice Stevens' concurring opinion, at the very start, in *Metro*: "Today, the Court squarely rejects the proposition that a government decision that rests on a racial classification is never permissible, except as a remedy for a past wrong."

Judge THOMAS. That's the state of the law.

Senator SPECTER. You agree with that state of the law?

Judge THOMAS. I have no reason to disagree with it.

Senator SPECTER. All right. That is a very important point and I am glad to hear you say that, because this really goes right to a core of a good bit of your writing.

Judge THOMAS. Well, it doesn't, as I mean that as a judge, Senator. I have had no basis as a judge to disagree with it.

Senator SPECTER. No, no, I am referring to the writings prior to the time you became a judge.

Judge THOMAS. Well, that is a policymaking function, and I—

Senator SPECTER. So, that was a different lifetime than all of this—

Judge THOMAS. Well, I have to adjudicate these as a judge and I know that is a distinction that some seem to think is troublesome, but it is a very, very important distinction for me.

The CHAIRMAN. Will the Senator yield on that point?

Senator SPECTER. Yes.

The CHAIRMAN. Not the case law, but the point about a judge. Judge, you are going to be the judge, you are going to be a judge who is not bound by stare decisis, has nothing at all that would bind you other than your conscience. And so I am a little bit edgy when you give an answer and you say, well, that's the policy, as if you are still going to be a circuit court of appeals judge, which means you have to follow that policy.

You are going to take a philosophy to the Court with you, as well, and you are not limited, as I understand it, in any way, including the methodology you have indicated you would apply to great questions of the day, from reaching a conclusion different than that which the Court has reached thus far. So I don't know why you can't tell us with a little more certainty in the case the Senator just laid out as the state of the law, because it is a big deal, whether you agree with it or not.

Judge THOMAS. Well, I understand that, Mr. Chairman, but what I have attempted to do is to not agree or disagree with existing cases.

The CHAIRMAN. You are doing very well at that.

Judge THOMAS. The point that I am making or I have tried to make is that I do not approach these cases with any desire to change them, and I have tried to indicate that, to the extent that individuals feel, well, I am foreclosed from a—

The CHAIRMAN. If you had a desire to change it, would you tell us?

Judge THOMAS. I don't think so. That would be— [Laughter.]

The CHAIRMAN. That is what worries me, Judge.

Judge THOMAS. But the—

Senator SPECTER. Was that an "I don't think so"?

Judge THOMAS. I think the point that I am trying to make, Mr. Chairman and Senator Specter, is that when I say I don't have an agenda, I mean I don't have an agenda. I operate that way as a court of appeals judge and that's the way I will function if I am fortunate enough to be confirmed as a member of the Supreme Court.

The CHAIRMAN. Thank you, Senator.

Senator SPECTER. Senator Biden, let me amplify Judge Thomas' answer for you.

The CHAIRMAN. I would appreciate it.

Senator SPECTER. He is testifying that he is not going to make policy as a Supreme Court Justice, if confirmed. He has written extensively that the courts have been thrust into a policymaking position and that the courts have made policy. He has disagreed with the policy and has stated that he would change a lot of law from an advocate's position on policy, saying, for example, in *Johnson v. Santa Clara*, that the dissent by Justice Scalia was preferable and saying, in another context, although not totally approving it, that one quick fix is to appoint new Justices to change the approach.

He is saying in these hearings, as I understand it, that all of that policy consideration that you were commenting about in those many speeches is a thing of the past, and you talked about that solely as an advocate.

The CHAIRMAN. Senator, you understand what concerns me. If I were a judge—

Senator SPECTER. Let me finish for him, Senator.

The CHAIRMAN. I leave those usually for Senator Hatch.

Senator SPECTER. I object. [Laughter.]

The CHAIRMAN. If he were employing me as a judge, in good faith, to change the position of the law, because he felt in good faith it was in my power to do so as a judge, and then he became a judge and didn't follow his own advice as to what he in good faith was giving me that was within my power to do, I would wonder about that. But that is my confusion and I will have to resolve that, but I would be delighted to hear more of your explanation, if you would like to give it.

Senator SPECTER. Well, to finish my question for you, Judge Thomas, which is really an understanding of mine as to what you are saying here, you are saying you are going to do your level best not to make policy. You are making a commitment not to make policy, you don't think that is a judge's function, and it is an about-face from a lot of what you have written.

Senator Metzenbaum earlier made a comment that he is disturbed by the position you have taken in disavowing much of what you have spoken about in your tenure as Chairman of EEOC, contrasted with your background and your roots, and I think that is something that this committee has to consider and the Senate has to consider. I am not so sure but what your roots are not more important in trying to predict what you will do, if confirmed, than your writings. Your writings and your answers are at loggerheads, they are inconsistent with what has been said.

You had written earlier in your career that you thought flexible goals and timetables were appropriate, and you changed that. Judge Thomas, isn't it entirely possible you could change your mind again and find that timetable and goals are the preferable course?

Judge THOMAS. Senator, what I have attempted to do here is to demonstrate that, in any number of areas, certainly the transition from policymaker to judge is an important transition. In specific areas, I have attempted to demonstrate, even when I have in the policymaking area strongly held views, that I have always looked to expand and to grow and to understand the counterarguments, not to simply reinforce my own.

There is always a possibility that someone who is open to argument, who thinks about issues, who is receptive to different points of views, there is not only a possibility, but a hope that person would grow and develop, and I hope that, in a positive way, that I would continue as a person to grow and develop.

Senator SPECTER. Judge Thomas, we have seen lots of changes of positions in the course of the hearings in the 10 or 11 years that I have been here, and I don't know any way to stop the Supreme Court of the United States from functioning as a superlegislature, regardless of what is said here, so we have to make an assessment of the whole man. But I understand what your statement is, that you agree with a very critical aspect as to what Justice Stevens defines on the *Metro* case. It is a very core issue and you don't have any intent at the moment to change it. More than that, what can be said.

Let me pick up with one other aspect of what Senator Metzbaum had questioned you about. He had referred to a speech you made in San Bernardino, on April 25, 1988, and picked out—and this is illustrative of much of what you have written, and when I say picked out, I don't mean extracted out of context—"Increasingly, they are being used by demagogues who hope to harness the anger of the so-called underclass for the purpose of utilizing it as a weapon in their political agenda."

I had made an abbreviated comment last week about your status as a role model and the fact that politics is involved at many levels of the confirmation proceeding, and at most of those levels I think it is appropriate. And one of the items which concerns me that I raise in a positive sense when I was talking about Professor Carter, is that you would be serving as a role model. You will be serving as a role model for young African-Americans who would look to the success you have achieved in terms of doing it entirely on your own, and that might not be something that many of the traditional African-American leaders want to hear.

Your speeches are full of comments about their being pro-Government and wanting the Government to have a larger role. But I think it is a very healthy thing, whether you are right or whether you are wrong, to have that other ideas put into the marketplace.

I had commented, and somebody didn't understand what I was saying when I had called you, after I read a speech you made after the 1984 election, that African-Americans were not as active in the Republican Party as they should be, entirely appropriate at that time. You weren't a judge. We sat down and talked about it, and I think it would be a very healthy thing for my State, for the city of Philadelphia, to have a two-party system, and to the extent there is a role model here and you have said that, given a chance, blacks would come to the conservative cause. That is not the element for my decision, I repeat, but that is a lurking undercurrent which I think is worthwhile to put squarely on top of the green-felt table here today.

A final roundup, Judge Thomas, as my time is almost up and I know your answers to these questions, because we have discussed them at your confirmation hearing on the court of appeals, but I think they are very important, and that is rockbed on *Marbury v.*

Madison, that the Supreme Court has the last word, no doubt in your mind about that.

Judge THOMAS. No doubt, Senator.

Senator SPECTER. You are not going to revisit that question.

The other one which I consider to be very important is the issue of court stripping. During my tenure in the U.S. Senate, there have been efforts to take away the jurisdiction of the Federal court on constitutional issues, and I just want to be sure that, if confirmed, you would not countenance that kind of a major change in our constitutional government.

Judge THOMAS. I think we discussed that the last time, and I think that my position is the same, that I would not.

Senator SPECTER. Thank you very much, Judge Thomas. I think about these hearings and the kinds of questioning, I think about the old case of *Ashcraft v. Tennessee*, which ruled unconstitutional relay questioning. You certainly had to do a lot of that here today, and I commend you for your stamina and I thank you for your answers.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Does anyone on this side of the aisle have any further questions at all for the judge?

[No response.]

The CHAIRMAN. I am sure the judge appreciates that.

I yield to my colleague from South Carolina, Senator Thurmond.

Senator THURMOND. Judge, I just want to ask you one question. There has been a lot of talk here about making policy. Under the Constitution, the Congress makes the law. The executive branch, headed by the President, administers the law, and executes the law. The judicial branch interprets the law. This should not be a question of courts making laws. Courts have done that, but they should not have done it. This should not be a question of making policy. A judge's job is to construe and to interpret the law. Judge Thomas, is that the way you see your responsibility?

Judge THOMAS. That is the way I see it, Senator.

Senator THURMOND. That is a good answer, and that is the correct answer. [Laughter.]

Now, Judge, we are about through here. We are going to wind up.

Mr. Chairman, yesterday the Washington Post ran an editorial which I ask unanimous consent be placed in the record. Briefly, I would like to quote from it. It states: "[Judge Thomas] will have a clearer sense of discrimination and its remedies than any other member of the Court * * * on the strength of the hearings so far, we think he should be confirmed."

The CHAIRMAN. Without objection, it will be placed in the record.

[The article follows:]