

Let me pursue for just one moment, Ms. Aiyetoro, the question of the decisions, and I don't want to place too much emphasis on it. But the case that you cite in your brief, *United States v. Rogers*, or that you cite in your statement, was a case with Judge Wald and Judge Ginsberg, who I think it fair to say are, at the minimum, not conservative or right-wing judges. And it involved a case where the prosecution offered some evidence of a prior conviction in a paper which was not objected to by the defense. And the court went into some detail explaining that it was a tactical decision, and in that context it could not be assigned as error.

And, as I read the case, I saw no problem with his decision. It was not suggestive of something conservative or right wing or extreme. I wondered if you had had a chance to see *United States v. Lopez*, which was not an opinion by Judge Thomas, but one where he was on the panel and one where I questioned him, because this was very much on the other side of the fence. This involved a sentencing and the Uniform Code prohibits taking into consideration socioeconomic factors.

And the U.S. attorney said that to take into account Mr. Lopez's background, his family, his home life, his dual—his approach from both Hispanic and a U.S. point of view, and Judge Thomas joined the court in allowing that to come in over the objection of the prosecuting attorney, which suggests some expansiveness.

So that I think that Judge Thomas' record shows some balance there. And his testimony was, in response to the question on activist, was the Warren court activist in giving defendants rights, he supported the Warren court. There is nothing in his writings that I know of, and I believe I have read all of this writings, that say anything to the contrary.

What I would ask you on the issue of qualification is how you would weigh the views you have expressed with the testimony of Prof. Drew Days who, although not in favor of Judge Thomas, said that he had the intellectual and educational qualifications, and Judge John Gibbons, formerly Chief Judge of the third circuit, who knew him as a member of the Holy Cross board and knew him for years, and Judge Gibbons, again, is not a conservative judge, he said he was well qualified, and Dean Calabrese of the Yale Law School who said he was at least as well-qualified as recent nominees.

How would you assess those evaluations compared to your own.

Ms. AIYETORO. I would first like to point out our concern with the criminal cases because the points you started off with was questioning the position on the criminal cases.

The concern that we have is not whether or not he agrees or disagrees with the other Justices on his panel. The concern we have is that of all the criminal cases that he has had the responsibility to write the decision, in all but one, in our understanding, or research, he has supported the Government's position. The Government's position that whittles down some of the rights of the defendant, and that is our concern.

We, I think, say, or I will say today if we don't, that clearly even though he has been on the bench 17-18 months he has not ruled on enough decisions to make a strong definite position on where he is

as a Justice, but it appears that he is leaning—in all but one he supports the Government, and that is our concern.

Senator SPECTER. Well, by supporting the Government's position that doesn't necessarily mean he is wrong. If it is *United States v. Rogers*, which you cite, I don't conclude that he was wrong there.

Beyond supporting the Government's position, are you contending that he was wrong in doing so?

Ms. AIYETORO. We think, Senator Specter, that because of the fact that the criminal arena now, the criminal justice arena now is disproportionately dealing with people of color that it is important that procedural due process rights of the defendants get supported to the *n*th degree, to make sure that we are not convicting people who are not guilty and sending people to prison who are.

It seems to me, not that I disagree with this specific opinion, but the point that we were attempting to make is that even though Judge Thomas may have said, and he has said in several of the criminal defense opinions that he has authored, that indeed it was a problem, indeed the Government was wrong. But he finds harmless error.

And it is our opinion that we have to go further. We can't just say harmless error when you are looking a national prison statistic that almost 50 percent of the people that are incarcerated in this country are black and more than 50 percent are people of color.

And that is not to say that we think that he should go the other way and never uphold the Government, but that we feel that there has to be—that the harmless error issue becomes more and more problematic when you are looking at the kind of criminal justice system we have now. So that is our position.

The other point that I believe you asked me was whether or not—how I would view his intellectual capability, and you named other persons who had said that he was intellectually qualified. Our opposition to him is not based on whether or not he has the intellectual capability to be a judge. Not many people go and graduate from Yale who don't have the intellectual capacity to qualify to be a judge. We are not taking the position that he is unqualified because of that.

We are opposing him because of his record; because of his record in all of his public office that appears to undermine the right of people of color, women, and the disenfranchised. We take that position.

We take the position also, as I said in my oral testimony, that his testimony and his record also indicate someone that is not really 100 percent aboveboard in many ways, and we've given examples of that. For those reasons, we oppose him. Not because he is not smart enough. Not because he didn't go to law school. Not because of anything else, even though we think that he doesn't have the kind of stellar background that many other justices have.

Senator SPECTER. One final brief question, if I may, Mr. Chairman.

The CHAIRMAN. Yes.

Senator SPECTER. Reverend Taylor, you said in your statement that Judge Thomas has not, in his years of public service, conducted himself as one who can think clearly for himself. Did you see