

or somebody can proceed to sue, whether you sue on behalf of them, whether the EEOC sues on behalf of, or whether they allow them to sue?

Now, it seems to me that any uncertainty would have called for a managerial approach to try to at least take the thinking don't take a chance on the third-year statute, you had better work on the 2-year statute if there is any question at all about it. Was there any activity on the part of you or your lawyers in the EEOC to so advise all people that were handling such claims on behalf of the EEOC?

Judge THOMAS. That was certainly my response, Senator. I didn't think that it made sense to rely on the 3-year statute of limitations. That may have been a secondary approach, but it certainly should not have been our primary approach.

We did, as I have indicated, I think in discussions with Senator Metzenbaum, that when I arrived at the agency, the agency didn't attempt to investigate most of the age charges. I don't know what the percentage is, but it was a small fraction of the charges that were actually investigated. Unlike title VII, the Age Discrimination in Employment Act does not require that there be an investigation. There were normally some attempts made at conciliating or reaching the employer, and the case was closed out by the agency in about 60 days, and the charging party was told to find a lawyer and pursue your case in court.

When I arrived at the agency, what we attempted to do as Commissioners was to recognize that we should put the age cases from an administrative standpoint on parity with our other cases; that is, we had an obligation to investigate them. Actually investigating them, however, took more time.

We realized that, and we attempted to inform our managers and to instruct them, cajole them, put it in their performance agreements, to get them to realize that the inventory had to be managed with this consideration in mind that there is a 2-year statute of limitations that must be taken into consideration, not just the first-in, first-out approach that had been used in the past.

That worked in many instances. In a number of instances, however, it did not work. We followed that up, again through performance agreements with management directives, as well as with requirements that they take into account age cases that are approaching the statute of limitations, that they move those to the head of the line. We did all those things.

The problem, however, was that in some offices there simply wasn't a response, an appropriate response. Hence, we missed the statute of limitations in a number of cases.

Senator HEFLIN. I believe my time is up.

The CHAIRMAN. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Judge let me just add, your family deserves some kind of a special medal for patience, sitting through all of this, and we appreciate their doing that.

If I may get back to a question that you declined to answer, for reasons I understand, and that is the *Rust v. Sullivan* decision. But

what is involved there is something very basic, and that is whether the Federal Government can restrict speech if we fund something.

Let me take some hypothetical cases that you will not be faced with. The Federal Government funds libraries through the Library Services and Construction Act; just a small amount, but we provide some funding.

Would it be constitutional for the Federal Government to decide there are certain books—let's just say back when we viewed communism as an immediate threat, if the Federal Government decided you can't have any books by Karl Marx in the library because we provide funding. Would that be constitutional?

Judge THOMAS. Senator, I think that we could take an example like that, and I could offer an opinion on it and say that that would not be—that was a problem, a violation of the first amendment. But I think that the difficulty would be in offering an opinion on those kinds of examples would lead me back to *Rust v. Sullivan*. But let me make this point: I would be concerned by any effort—and I think that we all should be concerned that when the Government can, especially with the Government being involved in more and more parts of our lives every day, we should be concerned that if the Government funds or attaches strings that limits fundamental rights merely because of the receipt of those funds. I would be concerned about it, and I think as I noted earlier, I certainly would be concerned in this case that there would be some condition on the exercise of first amendment rights.

Senator SIMON. And I am not suggesting that—obviously you have not had a chance to look at anything in depth here. But to get a feel for where you stand, a little more of a feel than the generality that you just gave us, your off-the-top-of-your-head instinct, would the Government have the right to restrict what books they can have in a library?

Judge THOMAS. Without committing myself, Senator, could I—  
Senator SIMON. Without committing yourself—

Judge THOMAS. I might—

Senator SIMON. I don't want you to commit yourself to doing certain things: I don't want you to be on the bench and think, well, I told the Senate committee this or that. But I am interested in knowing what your feeling is on the first amendment.

Judge THOMAS. Well, I would hope that the Government can't do that. I would have grave concerns if the Government can, through simply providing funding, undermine fundamental rights. It would be my hope that that could not happen.

Senator SIMON. All right. I have some other examples, but let me get to a more specific example that you were involved in at the EEOC. There was a man named Frank Quinn who was in charge of the San Francisco district. He was the district director. In 9 months he was going to retire. He had high ratings. He was asked by Newsweek magazine to comment, and he gave a comment that was not complimentary to the Washington office of the EEOC. And then he was transferred to the Birmingham office—meaning no disrespect to Birmingham here now. I may get in trouble with my colleague. He was transferred to the Birmingham office where they had had a vacancy for a full year.

He went into court, and a judge appointed by President Nixon, Judge Schnackey, in upholding Frank Quinn's right not to be transferred, said,

We have, I think, an overly outraged reaction to the initial publication demonstrating at the very least deep anger at the temerity of anyone in Mr. Quinn's position to make the statement that he did. On the evidence before me, I can find absolutely no rational basis for the agency's conduct. All of the evidence tends to support Mr. Quinn's view that this was a deliberate, arbitrary, and capricious desire to punish him. I haven't the slightest doubt Quinn was transferred as punishment for the exercise of his First Amendment right.

Now, you may want to comment on the case. But the more fundamental question is: How do you view first amendment rights for Government employees?

Judge THOMAS. Senator, I fundamentally disagree with that statement. And I did then and I do now. When I arrived at EEOC, I established a policy and made it clear to all district directors, who are members of the Senior Executive Service, that they would be rotated. I had rotated some into headquarters from the field offices—in fact, one from Birmingham—and intended to rotate the others across the field.

The indication that this was in response to an article, I do not believe I have seen the statement in the article, and certainly it had no bearing whatsoever on my decision to move Mr. Quinn. I have stated that and would continue to state that. And if I did, I think it is inappropriate.

My own view is that individuals—I would hope that individuals who worked for me wouldn't feel the need to criticize me publicly, but I think they have the right to do so.

Senator SIMON. And they have the right to do that without being transferred or anything like that?

Judge THOMAS. I think so. But this case was not that point. Others have criticized me, and there certainly were no efforts against them. I think that this was confused in this case with a policy that I thought was important to the development of EEOC as an agency. When I arrived at the agency, the agency was stagnant. The agency needed some stimulation, and I believe that the agency needed to have the managers moved around, sort of stir up the waters somewhat. And I made that clear, and we did rotate managers and continue to rotate managers.

Senator SIMON. You can understand the judge's assumption, because it happened only a few days after the Newsweek article appeared, that he was transferred because of that.

Judge THOMAS. That has been quite some time, but I think that that had been in the works prior to the Newsweek article. I had made a number of decisions early on in my tenure and simply began to implement them. That had, from my standpoint, no relationship whatsoever. And I don't think—I don't remember that what he said was particularly offensive anyway.

Senator SIMON. You gave a talk to the Kansas City Bar Association in which you refer to the Newsweek article. You were unhappy with the Newsweek article, obviously. Do you happen to remember—

Judge THOMAS. But not the Quinn—I don't think I referred to Mr. Quinn. I thought that the article was off base, but I didn't refer to him, I don't think.

Senator SIMON. I don't have that here. I don't know. But in terms of basic freedom of speech, if an employee of any Federal agency speaks—and obviously some things are confidential, some things are classified. There are some limitations. But just because something would be embarrassing to an agency is not cause for restricting freedom of speech for a Government employee?

Judge THOMAS. It certainly wasn't from my standpoint, and I would be concerned if as an employee my speech was in some way impeded.

Senator SIMON. In an area where you have expressed your opinion here to the committee, on the death penalty—where I happen to be in the minority on this committee—two realities are a part of the imposition of the death penalty in our country. One is it is a penalty we reserve for people of limited means. If you have enough money, you hire the best attorneys; you never get the death penalty. The second reality is that it is much more likely to be applied to minorities. If you are black, Hispanic or Asian, you are more likely to get the death penalty.

We have executed in this country literally hundreds of blacks for killing whites. So far as I have been able to determine, my staff has been able to determine, only two whites have ever in the history of the country been executed for killing blacks.

If you were on the Court and the circumstances were such that you felt that economic circumstances dictated a lack of qualified counsel for someone who received the death penalty, or you were persuaded that the fact that a person was a minority was a factor in receiving the death penalty, what would your attitude be?

Judge THOMAS. Senator, it would be similar to the attitude I have now and that I expressed here. I don't know of any judge who could look out the back window of our courthouse and see busload after busload of young black males and not be worried and not be concerned and not be troubled. I think it is only exacerbated by the fact that it is the death penalty.

As I have noted earlier in these hearings, one of the reasons that it is so troubling is that it is a very fine line between my sitting here and being on that bus. And I think that any judge who has that obligation and that responsibility of adjudicating those cases and has that responsibility of reviewing those cases should be concerned if the death penalty is imposed based on socioeconomic status and certainly imposed on the basis or at least to a large extent disproportionately on the basis of race. It is certainly something that I am concerned about at this point and would continue to be concerned about as a judge.

Senator SIMON. And it would be something that you would have to weigh as a member of the Supreme Court. Am I reading you correctly?

Judge THOMAS. It is something that I certainly go there with in my mind and in my calculus when I think about these issues.

Senator SIMON. But it is not just that you go there with that in your mind. If you were convinced someone received the death penalty because he or she did not have adequate counsel, for example,

because of economic circumstances, would that be a factor that you would weigh, among others?

Judge THOMAS. I think it would be important for me to take that into account, Senator.

Senator SIMON. OK. Let me shift to a couple of loose strings. The Jay Parker/South Africa issue we have talked about. We have received one additional phone call from someone who verified that there was a staff meeting. We talked about it; you did not recall. Do you recall this any further upon reflection, or has anyone reminded you or anything at all?

Judge THOMAS. Senator, I have attempted to reflect on it. My recollection is as I have told you. I have attempted to try to understand where the confusion could come from. And I knew that Jay Parker, for example, represented one of the homelands. That could be a source of confusion as to whether or not he represented South Africa. I also knew that a colleague and friend of mine who worked with me here in the Senate and went on to other endeavors, as well as worked with me during the Reagan administration, represented South Africa. That was a matter of public knowledge.

I don't think—I do not remember or recall Jay Parker's involvement being a matter of public knowledge prior to my nomination. I certainly was not aware of it until the last few months.

The only confusion that I could think of, based on my own recollection, would be that he has had significant dealings in South Africa, and someone may have felt—or I may have imprecisely stated that, and they may have felt that he was representing South Africa. But I simply didn't know. I don't recall knowing, and I don't recall such a meeting.

Senator SIMON. Do you now or have you ever had any financial dealings with Jay Parker?

Judge THOMAS. No. We had no financial dealings. He is a friend of mine.

Senator SIMON. And, again, on recollection, you were not aware prior to your nomination and the publicity that came with it of any involvement on his part with the Government of South Africa other than the homelands?

Judge THOMAS. No, I was not. My recollection was that, again, a mutual friend of ours, a Bill Keyes, was representing—and that was public knowledge. He represented South Africa.

I was not aware of Mr. Parker's involvement, and I do not recall the meeting that you indicated. Again, there may have been confusion, as I have indicated, but I did not—I was in no way aware of that.

Senator SIMON. Thank you very much, Judge.

I have no further questions, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman.

I would like to commend you on your patience and open-mindedness during this hearing, particularly under circumstances which were at times trying.

Judge Thomas, I would like to give you one more opportunity to talk about what many of us are concerned about, and that is the