Thomas hearings avoid key issues

by Edward Spannaus

Sounding the alarm about the dangerous direction that the Rehnquist-dominated U.S. Supreme Court is taking, a prominent criminal attorney told *EIR* a few weeks ago: "There's only one kind of nominee who would make a difference. He or she would have to be the kind of jurist who would not only dissent, but who would go to the people, who would sound the alarm. . . . If Paul Revere were available, I'd support him."

At the conclusion of five days of questioning by the Senate Judiciary Committee, it is quite clear that Clarence Thomas is no Paul Revere. But it is even more obvious that the Senate Judiciary Committee wouldn't know what to do if Revere were to appear before them; they would probably have their aides draft a prepared speech denouncing him as "out of the mainstream."

The Thomas hearings were an incredible exercise in avoiding serious constitutional issues while pandering to the news media and "politically correct" popular issues. Until the last day of the hearings, only a handful of questions even came near to the overriding issue of this country's descent into a police state under the Hobbesian hand of Chief Justice William Rehnquist. (See *EIR*, Sept. 13, 1991, "Justice Rehnquist Led the U.S. Into a Police State.")

In fact, it was only in the area of criminal procedure that Thomas broke out of the bland, pre-packaged straitjacket into which his Bush administration handlers had tried to stuff him. Thomas repeatedly repudiated his previously professed belief in natural law, and he reappraised Oliver Wendell Holmes as "a great judge" and a "giant," despite his own earlier attacks on Holmes for "scoffing at natural law."

Backs Thurgood Marshall

On the final day of his interrogation at the hands of the Judiciary Committee, Thomas made a remarkably precise endorsement of the alarm sounded by retiring Associate Justice Thurgood Marshall last June. On the last day of the Supreme Court's 1990-91 term, Marshall issued a powerful dissenting opinion in the case *Payne v. Tennessee,* in which he blasted the Rehnquist-dominated majority bloc for its eagerness to throw out precedents protecting basic constitutional rights.

Marshall had charged that the new Rehnquist bloc "declares itself free to discard any principle of constitutional liberty" which the Court had previously recognized over the dissenting votes of four justices, and with which the new majority (the old dissenters plus two) now disagrees.

"Power, not reason, is the new currency of this Court's decision-making," said Marshall, who went on to say that "all decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment" are now up in the air, and dependent on "nothing more than the proclivities of the individuals who *now* comprise a majority of this Court." Marshall identified a "hit list" of decisions which Rehnquist intends to overturn in the next few years. These endangered precedents include major constitutional rulings in the area of criminal procedures, as well as rulings involving First Amendment and privacy rights.

This was the context in which the Thomas hearings were held. During the first three days of the hearings, there were no more than a dozen questions asked in the area of criminal law and procedure, although this issue has played a prominent role in previous confirmation hearings. And these questions were all from Republicans or conservative Democrats, who expected Thomas to toe the Rehnquist/Justice Department "tough on criminals" party line. Among the committee's prominent liberals, Patrick Leahy (D-Vt.) and Paul Simon (D-Ill.) didn't ask any questions on criminal procedure until the last day or so; Edward Kennedy (D-Mass.) and Howard Metzenbaum (D-Ohio) never touched the police-state issue at all.

But even in his answers to the few questions posed in the first days of the hearings, Thomas had clearly begun to distance himself from the Rehnquist line. Thomas, for example, defended the *Miranda* ruling and the exclusionary rule—anathema to most "conservatives"—as pragmatic steps to prevent constitutional violations and to prevent misconduct by law enforcement officials. When asked about the overturning of precedents, Thomas hinted at his disagreement with the Court's actions in the last term.

On the final day of the hearing, in response to questioning by Senator Leahy, Thomas called the Marshall dissent "a very stern admonition," saying that "you cannot simply, because you have the votes, begin to change rules, change precedent." Then, in a direct shot at Rehnquist, Thomas said that he couldn't look at himself in the mirror if he had made a decision "that willfully."

A short while later, Sen. Arlen Specter (R-Penn.) asked Thomas explicitly if he agreed with the Marshall dissent. In keeping with his pattern of not commenting on current cases, Thomas said tactfully that it would be inappropriate for him to agree or disagree, but that "I was certainly affected by it." He added that a judge's personal opinions, or his "clout," should not be the basis for making decisions.

Holmes vs. natural law

Readers of the Sept. 13 *EIR Feature* were probably among the few people who understood Thomas's retort to Kennedy, when the senator attempted to pin Thomas down

on the obvious inconsistency between his earlier attacks on Oliver Wendell Holmes and his current praise for him as "a giant of our judicial system." Kennedy read quotations cited by Thomas in a 1988 speech attacking Holmes for "scoffing at natural law," and then read Thomas's own statement that "if anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes."

While still avoiding the philosophical issue, Thomas deftly replied: "Much of this perhaps resulted from some concern about some statements like that in *Buck v. Bell* of Justice Holmes" (referring to Holmes's infamous 1927 pro-sterilization ruling). When Kennedy tried to pursue the matter, Thomas said, "I have some concern about statements like 'three generations of imbeciles are enough.' We certainly would have some problems with that."

Documentation

Following are excerpts from the questioning of Clarence Thomas by the Senate Judiciary Committee, as transcribed by EIR*:*

In response to a question by Senator Leahy (D-Vt.), on the subject of stare decisis *(precedent):*

Thomas: Justice Marshall's dissent in *Payne v. Tennessee* I think is a very important admonition, and that is, you cannot simply, because you have the votes, begin to change rules, to change precedent. That's not a basis for doing it. I think it's a very stern and necessary admonition to everyone, all of us who are judges. On a personal level as a judge, at the end of a day, if I made a decision in a case that willfully, I could not say to myself in the mirror: "I have acted consistent with my oath, and in the way I see my obligations as a judge."

Simon: I'm in a minority on this committee, in thinking that the death penalty is reserved for those of little means, that it means if you have enough money, and 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're black, hispanic, Asian, you're much more likely to get the death penalty. We have executed in this country literally hundreds of blacks for killing whites, but so far as I and my staff have been able to determine, only two whites have ever been executed for killing blacks. If you were on the Court, and if 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 are persuaded that the fact that a person is a minority was a factor in receiving the death penalty, what would your attitude be?

Thomas: Senator, it would be similar to the attitude I have now, that I have 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's only exacerbated by the fact that it's the death penalty. As I've noted earlier in these hearings, one of the reasons that it's 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 reviewing those cases, should be concerned if the death penalty is imposed based on socio-economic status and certainly imposed on the basis, or at least 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.

Specter: [I] heard you say Justice Marshall's decision was a "stern admonishment." Were those the words you used?
Thomas: "Stern admonition."

Specter: Do you agree with Justice Marshall's dissent?
Thomas: . . . I think it would be inappropriate for me, Senator, to agree or disagree with it. . . . 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.*

Specter: Do you agree with Justice Marshall's assertion that "power, not reason, is the new currency of this Court's decision-making"—his opening statement in *Payne?*
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.

Specter: Well I won't press you further on it then, but let me ask 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 in not making a 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?
Thomas: The answer to your questions, Senator, is yes. I don't understand the quote, it makes no—the statement, I think in Justice Rehnquist's opinion, it makes no sense to me, but . . . my answer to your question would be yes.