

The CHAIRMAN. OK. Well, let us not get upset about it. We are close and let us just keep plugging along.

Let us take a 10-minute break now, Judge, and then maybe Mr. Duberstein and I can speak a minute here.

[Recess.]

The CHAIRMAN. The committee will come to order.

Before I yield to Senator Hatch, what we have been doing, I say to the public, in the interim is trying to figure out how we best order bringing the testimony of Judge Thomas to an end, without cutting off legitimate questions that are left, and there are some. I think if we just let the string run here, we are going to do just fine.

I received an admonition, though, Judge, I want to tell you this. Your mom may be angry. She said she wants to go home. She told me she has one of her patients who is 104 years old, has been watching this on television, saying when is she coming home, and she told her patient, "Clarence won't let me," and I am sure you are going to tell her, "Biden won't let Clarence. [Laughter.]

Let us see if we can move this along now. Again, I do not mean in any way to disparage you. There are some very important questions that are left, but I think if we can just move with dispatch here, whether or not we get it done by lunch, we will get it done. We are not going to be long beyond that. I think we may still be able to do that, but let us just move along.

Senator Hatch.

Senator HATCH. Thank you, Chairman Biden.

I do not want you to go home, either, just yet. I think you have really added a lot to these proceedings, so we are proud to have you here.

Judge, I think you fully understand that it is awful tough when you make a lot of speeches in the past, and I am sure that some of those speeches were written by an ardent and well-intention staff, as they are for us in many cases, and I think we all understand that.

You are being criticized on one side for not being liberal enough, and then I notice in the press this morning there are other articles that are criticizing you for not being conservative enough, so I think it just goes to show that you cannot please everybody.

I do just want to take a few minutes, because Senator Metzbaum did go into your EEOC record, and I think the Washington Post sums it up pretty well, because on May 17, 1987, the Washington Post said this—and you had been in there for, what, 5 years at that time?

Judge THOMAS. That is right.

Senator HATCH. OK. Here is what the Washington Post said:

Things are markedly different at the Equal Employment Opportunity Commission. Here the caseload is expanding and budget requests are increasing under the quiet, but persistent leadership of Chairman Clarence Thomas.

Now, that is pretty darn good, after 5 years, being in this very tough maelstrom of a position, to have the Washington Post praise your leadership, knowing that you were in the Reagan administration, which they did not very often praise, and some people think with just cause, but I think it is important to point that out.

Second, let me point out some more. When you became Chairman of the EEOC, I was chairman of the Labor Committee at that time. Senator Kennedy was my ranking member, and now it is reversed. He is chairman and I am ranking. But we overruled the EEOC. When you became Chairman of the EEOC, the General Accounting Office right at that time issued a report on the state of the EEOC, and that report listed the numerous financial and managerial problems at the Commission. In fact, it was entitled, "Continuing Financial Management Problems at the Equal Employment Opportunity Commission," and it was issued May 17, 1982, right at the time you came into office.

Now, if you would just look at some of the—well, first of all, the 1982 GAO report, talking about the predecessors who operated the EEOC, they found that the agency up to that time couldn't even control its funds or its accounting practices. They said:

The Commission has failed to properly maintain and operate the system. Records and reports produced were unreliable, receivables were not properly collected, and bills were not paid on time. Also, in failing to follow some established procedures, the Commission's employees have created violations of law that now must be dealt with.

These problems predated you coming into the Commission. In the 1981 interim report, GAO stated that, "Some of EEOC's actions"—now this is even before you were put in—"Some of EEOC's actions may be thwarting its efforts to eliminate employment discrimination."

Then the Office of Personnel Management released another report on the EEOC in May 1982. It was entitled, "A Report on Personnel and Administrative Management in the Equal Employment Opportunity Commission." They had audited some 60 jobs at the EEOC's Office of Administration before you became Chairman or went to that Commission. They audited the 60 jobs to determine the relative accuracy at the EEOC's pay scale, and they found that 53 positions were overgraded, 42 percent of the positions were overgraded by 3 or more grades, 26 percent were over 2 grades, and 32 percent were by 1 grade.

Just look at the headings of the summary of findings. I think they indicate the disarray the EEOC was in when you came, No. 1, "Substantial overgrading exists within the Office of Administration and likely exists in other parts of the agency." This is before you came in. This is the predecessor agency.

No. 2, "The supervisory structure is excessive and expensive." No. 3, "The Personnel Office's two core programs, staffing and classification, are not in compliance with OPM requirements." No. 4, "Administrative operations are deficient in closing out contracts, accounting for physical property, cataloging in the library and mail room operations." No. 5, "The agency's management accountability plan may be failing to account for quality of its achievements." No. 6, "Management appears to have tolerated and contributed to a work environment beset by acrimony, improperly employee conduct, poor performance, and favoritism." Those are the titles or the headings of the sections in that OPM or Office of Personnel Management report.

Let me ask you a question: Did you work on those problems?

Judge THOMAS. Senator, during my confirmation hearings in 1982, one bit of advice that you gave me, indeed you told me you would hold me accountable for, was within a short period, to correct particularly the financial problems within a short period of time, and we were able to do that. In fact, we were able to correct the financial accounting problems and have a GAO certified system, I believe within 2 years.

Senator HATCH. In fact, the EEOC had \$1 million they could not even account for, is that not so, at that time?

Judge THOMAS. That was one of the items that you told me specifically to account for in the travel area.

Senator HATCH. And you cleared that up and resolved it?

Judge THOMAS. We cleared that up and put in place a variety of procedures and a variety of checkpoints, so that would not reoccur. I think it would not be overstating the case to say that EEOC today has one of the finest financial accounting systems in Government.

Senator HATCH. Is it not true that each one of those problems listed in that OPM report and listed in the GAO report, you either improved or resolved?

Judge THOMAS. We resolved those, I believe, shortly after you instructed us to do so, as chairman of the Labor and Human Resources Committee. We attempted to address some of the long-term problems, but the recommendations that were made in the GAO report became the basis for our short-term plan, the immediate actions that we had to take upon arriving at EEOC, but most of those problems were corrected, I believe, within the first year or two.

Senator HATCH. In fact, you cleared up monitoring consent decrees and settlements, you insured not only that the judgments were won, but that they were enforced. I think most would say, having watched your tenure, would say you were creative when changed circumstances necessitated an alteration in ongoing consent decrees, some would cite the Ford Motor Co. situation as one of the highlights. You certainly aggressively corrected and improved management of the systemic litigation system, which was in disarray at the time.

I could go into all of that, but I do not want to take the time. I just want to make the point that some of these criticisms that are being brought up about the EEOC are not only wrong and misinformed, but they are distorting what really happened, because you inherited an agency that was in disarray, the people were fighting with each other, they were not bringing the litigation as they could. Even the age discrimination cases were in disarray. You did not have a central management system that was working well, you did not have a good accounting system or a good financial system, you had a lot of back-biting among employees, because they were upset with each other because there was not a management team that was necessary. All of that, as far as I could see, during your tenure was improved upon or resolved. Is that a fair statement?

Judge THOMAS. We did our best, Senator, and we think that we not only addressed those problems, but we were able to engage in some practices and to engage in some programs and develop programs that took EEOC far beyond where it was in 1982.

Senator HATCH. Well, I have to say that I think most who really know the situation, and I happen to know it, can find something to

criticize, no matter what, because it is a big agency with a lot of problems, and they are tough problems, they are among the toughest problems in our society today, they involved equal employment opportunities and all kinds of other civil rights issues. It is a very complex area, so they can find fault, but the fact is that you cleared up all of these tremendously difficult problems that existed down there.

Some would say that you really—in fact, most who know would say, in fact, I think all would say who know that you put forth an aggressive effort to stamp out workplace discrimination at the time that you ran the EEOC. In fact, some would say that is unquestioned.

Litigation recommendations received from district offices increased dramatically. The changes went up as high as 400 or 500 percent increase in better approaches of the EEOC.

I do not want to take the time of the committee, because I know we are trying to get through this and do our very best to finish today, and I do not want to take anybody's time. But let me just go into this one problem on fetal and reproductive hazards that Senator Metzenbaum brought up.

If I understood his charge, it was basically that, at the EEOC at the time you were Chairman, women who were barred from certain jobs because of fetal protection concerns did not have their rights enforced, but let me just respond to that.

During your tenure there at the EEOC—and you correct me if I say anything wrong here—there was a legitimate difference of opinion among lawyers and others over whether title VII forbids employers from excluding women from jobs that might endanger any unborn children that they might be carrying or that they might carry in the future.

Now, that is a very, very complicated area of employment law and title VII law. It involves scientific and medical considerations, as well as legal considerations. And because of the complexity of the issue and because other Government agencies such as OSHA, the Occupational Safety and Health Administration, and the EPA, the Environmental Protection Agency, had to weigh it in their views or weigh in with their views on this issue, it naturally took some time for the EEOC to formulate a position on this issue, and as it did, fetal protection discrimination charges that were filed with the EEOC were naturally held in abeyance, because a judgment had to be reached, a fair judgment, taking into consideration all of the matters, including medical and legal and other matters.

But because the charges were filed that were held in abeyance, they were not prejudiced because they actually had been filed, is that correct?

Judge THOMAS. That is right.

Senator HATCH. So, you had protected the rights of these people during the time that the medical, legal, scientific, and other considerations were taking place, and the filing of the charges tolled the statute of limitations and stopped it from running.

Moreover, the plaintiffs whose charges were held in abeyance, they were free, as I understood it—and correct me if I am wrong—they were free to sue privately in Federal court, is that correct?

Judge THOMAS. They could have perhaps received the right to sue later and gone into Federal court, Senator.

Senator HATCH. If they had wanted to.

Judge THOMAS. That is right.

Senator HATCH. So, nothing was interfering with their rights to do that, which was a very important right.

Judge THOMAS. That is right. The difficulty, Senator, as you pointed out, was that it was as very complex area and an area that involved a tremendous amount of work safety-related problems, as well as health and medical problems and concerns, and we attempted to work them out or to wrestle with them, but EEOC does not have the scientific and medical capability on its own to make or did not have the capability to make all of those determinations.

We attempted to coordinate, as I said to Senator Metzenbaum, with the other agencies and that took some time. However, even during that process, we gave significant detailed guidance, I believe in 1983 or 1984, to the field on how to handle and how to investigate these charges, and then ultimately to forward those to our headquarters.

Senator HATCH. After study of the issue in 1988, the EEOC, as I understand it, issued regulations reflecting case law as it had developed up to that time in the Federal courts of appeals.

Now, the regulations permitted fetal protection restrictions on female employees only when the employer demonstrated that there was a substantial risk of harm to the fetus and that there were no other reasonably available less discriminatory alternatives that would effectively protect female employees' offspring, is that correct?

Judge THOMAS. That sounds accurate, Senator.

Senator HATCH. Further, the EEOC regulations required that if there was a similar danger to male offspring, that fertile men be excluded from the positions, as well, so you handled it that way. When I say you, I mean the EEOC, because you just do not do these things by yourself.

After the seventh circuit ruled in 1989 that plaintiffs had to bear the burden of disproving that an employer's sex-based fetal protection policy is justified by business necessity, the EEOC announced that it rejected that decision and that its regulations, the burden of proof remained on the employer to show that a fetal protection exclusion was a bona fide occupational qualification under the criteria of the 1988 regulations.

This year, the Supreme Court, in *International Union v. Johnson Controls, Inc.*, agree with the EEOC, that the burden of proof is not on plaintiffs in fetal protection exclusion cases, so they came down to the same point of law that you had come up with. In addition, however, the Court went further and held that a fetal protection exclusion policy can never be justified as a bona fide occupational qualification.

But the bottom line is that no one was prejudiced by the EEOC's consideration of this extremely complex set of cases or issues, should I say, and that the position taken by the EEOC was reasonable, in light of the fact that it was based on the developing case law in the courts of appeals.

I just wanted to bring that out, because I think that if that is not brought out, you are not being treated very fairly, because you did everything you knew how to do under the circumstances, and finally the Supreme Court resolved it, and it resolved it going a little further than EEOC went, but, nevertheless, adopting basically your ideas up to that point.

Now, one last thing: When the Justice Department was considering amicus participation in the *Meritor Savings Bank v. Vincent* case, concerning whether sexual harassment on the job constituted a title VII violation, would you be kind enough to tell us what role you played in formulating the Government's position?

Judge THOMAS. Senator, that case, of course, involved the instance of whether or not there could be sexual harassment outside of the context in which a woman does not receive her promotion as a result of not agreeing to engage in the prohibited conduct; that is, if a woman does not concede to the wishes of the supervisor. It was whether or not there could be a hostile working environment.

Our agency, as was the practice, communicated with the Justice Department that we felt that the Government should be actively involved in this case. There was some resistance. Some individuals argued that hostile environment was not a violation of title VII as sexual harassment.

My direct role was not only at EEOC in developing the arguments that were transmitted to the Justice Department, but to personally meet with the Solicitor, his staff, individuals who disagreed throughout the Justice Department, and to argue for the Government's involvement in that case in the Supreme Court. And ultimately EEOC itself played a very extensive role in the development of the legal arguments in that case in the Supreme Court.

Senator HATCH. Well, that is great, because that issue of whether sexual harassment on the job constituted a title VII violation, then Solicitor General Charles Fried of the Harvard Law School said that that was an open question the Court had not resolved. So he then sought the views of the EEOC.

Judge THOMAS. That is right.

Senator HATCH. He came to you and said, We would like to have your ideas on this tough question, we would like to know where you stand. And he personally said that you, Judge Thomas, then Chairman Thomas, Chairman of the EEOC, forcefully argued that the Federal Government should side with the woman plaintiff that sexual harassment is clearly discriminatory and cognizable under title VII, this issue that was not decided, had never been decided by the Court.

As you know, the Government did side with the woman plaintiff in the *Meritor Bank v. Vincent* case, and the Court finally held that sexual harassment creating an offensive, hostile, or abusive work environment constitutes sex discrimination under title VII.

I think it needs to be pointed out, for a number of reasons, but the principal reason is that when the chips were down, when that case could have gone either way, as either not within the confines of title VII—in other words, outside of title VII and therefore not enforceable, or within, Chairman Thomas argued forcefully with the Solicitor General's office and with the administration that sexual harassment of women should be included within title VII,

and the Supreme Court upheld your position. Now, I just wanted to bring that out.

I think it is also important just to conclude with this comment. These are very difficult areas of law. Reasonable people can disagree and without any prejudice on the part of anyone. And I contend that, Chairman Thomas, once you get on that Court, you are going to be watching out for the people, the little people out there that many are worried about, who need help and who need their rights resolved and watched over. And you will do it in a fair and reasonable, responsive way, as you did at the EEOC.

I have to say the EEOC still has plenty of room for improvement, as does every agency of Government. But compared to what it was in 1982 when you took over, it is worlds apart. And you are the person who helped bring about the effective and good changes. That needs to be said by somebody like me who has watched it for all these years and takes a special interest in it and who wants that agency to work right and well.

So I just wanted to say that and correct the record and commend you for the service you have given, and I have absolutely no doubt that you will give equal service, if not better service, on the Supreme Court in the interest of everybody in America.

Thank you, Mr. Chairman. I think I took about 15 minutes. I didn't intend to take more than 10, but I apologize.

The CHAIRMAN. Thank you very much, Senator.

The Senator from Massachusetts, Senator Kennedy.

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

I wanted just to return very briefly to a couple of areas that we talked about last Friday, Judge Thomas. Welcome back.

Judge Thomas, I want to come back briefly to the subject that we talked about on Friday, your view of Justice Oliver Wendell Holmes. On Friday, when I asked you for your view about Justice Holmes, you said that—and I quote—

He was a great judge. Of course, when you have opportunities to study him, we might disagree here and there. But I had occasion to read a recent biography of him, and obviously now he is a giant in our judicial system.

I then read your quotation from a speech you gave at the Pacific Research Institute in 1988, including a portion in which you quote a statement by Walter Burns on Holmes. And you correctly stated that I was quoting your reference to Walter Burns' view of Holmes. But I just want to read the entire passage into the record so that your view of Justice Holmes in 1988 is not misunderstood.

You stated, and I quote:

We cannot expect our views of civil rights to triumph by acceding the moral high ground to those who confuse rights with willfulness. The homage to natural rights inscribed on the Justice Department building should be treated with more reverence than many busts and paintings of Justice Oliver Wendell Holmes in the Department of Justice. You will recall Holmes as one who scoffed at natural law, that brooding omnipresence in the sky. If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes. As Walter Burns puts it in his essay on Holmes, most recently reprinted in William Buckley and Charles Kessler's "Keeping the Tablets"—

and here you quoted Mr. Burns—

"No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach what a people needs in order to govern itself."