

what is so sacred about a sandwich, Jack, or men named Warren, Frankfurter, Black, Douglas, who read the Bill of Rights and believed.

I realize, Judge Thomas and for members of this committee, it may seem more newsworthy to report the judge's remarks only when they have been critical of traditional civil rights leadership, and I realize some of his critics who object to his expressed views against reverse discrimination and preference wish to make him look ungrateful, but it is a false portrait of character being drawn.

So, Judge Thomas, I think you have a lot to be proud of in not only your statements, but your actions in support of efforts of others in the civil rights community who carry the ball and run with it, and I think you have adequately recognized their contribution, and I thank you for it.

That is the end of the time that I will use now, Mr. Chairman.

The CHAIRMAN. Well, I want to thank you, Senator.

After conferring with Judge Thomas' spokespersons in the break here, it seems appropriate we will take a break for lunch now.

Now, let me just give everyone a heads up on where we are going to go from here. We will go to Senator Leahy next, unless Senator Metzbaum comes back and claims his 15 minutes. Then what we will do I hope, as I count the time, we should be able to finish everything by 4 o'clock today with Judge Thomas.

We will then move to the ABA today, and they will probably move to the first panel of witnesses. We will move at least to one other panel, maybe two, and tonight we will go with the public witnesses until sometime close to 6:30, to try to move this along, because we are going to end early tomorrow night and we will not be in session on Wednesday, so we will see how much we can move along and catch up with the other end here.

Now, we will break for lunch until 1:30, at which time, in all probability, we will resume with, if it is convenient for Senator Leahy, with Senator Leahy—

Senator LEAHY. I will be prepared to start my questioning right at 1:30, if that is what the Chair wants.

The CHAIRMAN. Yes, we will start at 1:30. We will recess until 1:30.

[Whereupon, at 12:17 p.m., the committee was recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order, please.

The Chair recognizes the Senator from Ohio, Senator Metzbaum.

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

Judge Thomas, before the break this morning, I was inquiring about the EEOC's failure for 6 years to process sex discrimination charges involving fetal protection policies. I am frank to say that I regret that I missed your ensuing discussion of this issue with Senator Hatch and, as has been publicly stated, I missed it only because I am also sitting on the Gates nomination hearings which are going on at the same time.

But as I am informed by my staff, you agreed with Senator Hatch's statement that "women were not prejudiced by the EEOC's

failure to act on this issue for over 6 years while you were Chairman."

Judge Thomas, I simply cannot accept the idea that women were not harmed by the agency's default on this issue. The women who lost their jobs due to sex discrimination were certainly harmed. Some of them didn't get their jobs back for 10 years, and some of them never got their jobs back at all.

Had you acted in a timely manner to resolve their charges, they surely would have been spared much of this harm. And had the EEOC declared fetal protection policies to be illegal in 1982, as it did in 1991 after your departure, the women who were forced to undergo sterilization in order to keep their jobs might have been spared that terrible outcome.

Judge Thomas, you pointed out that women were free to file their own lawsuits challenging fetal protection policies. The women who lost their jobs, that were sterilized as a result of fetal protection policies, were blue collar women working at an hourly wage. These women came to the EEOC, because they could not afford to file their own cases or they needed assistance with the complex issues involved.

These women sought the help of the EEOC in fighting for their rights. That is why the agency is there. But under your direction, it didn't hear the cases, it turned its back on these women.

My question is do you really believe that these women did not have their rights prejudiced at all, simply because they retain their right to bring a private lawsuit?

Judge THOMAS. Senator, the point that I thought Senator Hatch was making was that the right to bring a lawsuit or to engage in litigation continued to exist and did not expire. I do not think either one of us intended to suggest that individuals who have to wait for long periods of time to resolve these issues aren't in some way and to some extent prejudiced to that degree.

The point with respect to what we did during my tenure I think has to be refocused in this way: In thinking about this issue, where we eventually arrived in developing a policy, I believe the BFOQ approach was originally rejected prior to my going to EEOC, and there was significant debate about that.

We attempted to resolve the issue in what I think was an appropriate way. It didn't happen as fast as most of us would like it, but it was a very, very difficult issue and it was one the rulemaking and the final resolution that you are talking about or that you commented on was one that was developed during my tenure, although finalized after my tenure.

It again was something that in these difficult areas you would hope to have been able to done a lot quicker or done in a more expeditious way, but this was one of the most difficult issues we wrestled with.

Senator METZENBAUM. Well, before the break this morning, you stated in response to my question that it took 6 years for the EEOC to take action on charges involving fetal protection policies, because you were faced with difficult issues outside its area of expertise. However, Judge Thomas, even if these charges did present difficult issues, that would hardly justify taking no action on them for so many years.

In addition, although some of the charges may have turned on complex scientific issues, many others represented clear violations of title VII. For example, in one case, a female job applicant was denied a job requiring exposure to lead due to fetal health risks which might arise if she became pregnant. The employer's personnel manager told her that she wouldn't like plant work, anyway, that plant work would be too dirty for her and that he could use a pretty face in his office.

The applicant, understandably, filed a discrimination charge in 1981. The Commission investigated the charge, but took no action to resolve it for 8 years. In 1989, the commission closed the case, because it was unable to locate the charging party.

Now, some charges filed with the Commission languished, even though the employer had offered no evidence at all to back up its discriminatory assumptions regarding the health risks posed by the hazard in question. In other cases involving x-ray technicians, the commission had already issued their decision prior to your tenure, finding violation based on parallel facts. I do not dispute that some of these issues may have raised difficult issues, but do you really believe that that justifies the EEOC's total inaction for 6 years? One has to say why did it take so long for any action at all to occur.

Judge THOMAS. Senator, as I have indicated, I think that the agency during my tenure could not be said not to have been taking any action. The results may not have occurred in a way that we would have liked it to have occurred, as expeditious as possible, but to say that we took no action is incorrect, I believe.

The agency, the Commissioners, including myself, attempted to review this particular policy in a professional way and a way that would protect the rights of women. We recognized—and there was disagreement among staff, as well as Commissioners, and I think even within the Government—we recognized that this was a difficult issue that involved scientific, as well as health problems or health concerns, and we attempted to resolve it in a way that took those factors into consideration.

Senator METZENBAUM. Judge Thomas, I must also take issue with Senator Hatch's suggestion that, in the *Johnson Controls* decision, the Supreme Court "adopted basically your ideas on fetal protection and carried them a little further." As Senator Hatch pointed out, your position in the EEOC's 1988 policy guidance was that, where a substantial risk to a fetus or potential fetus existed, employers could use fetal protection policies which applied only to women.

What Senator Hatch did not mention is that your 1988 policy allowed women to be excluded from jobs, even if those women were fully able to perform their jobs, but the Supreme Court expressly rejected that position in *Johnson Controls*, holding that these policies could never be justified by reference to the well-being of a fetus or potential fetus. In short, it took the EEOC 6 years under your tenure to develop a position that the Supreme Court rejected out of hand.

Judge THOMAS. I could be—if my recollection serves me right, Senator, I think Senator Hatch must have been referring to I think the 1990 policy. Again, I do not have that in front of me, but I

think the 1990 policy was consistent with the Supreme Court decision. I would have to go back and look at that. Again, I am operating just off memory.

Senator METZENBAUM. Judge Thomas, the facts actually speak for themselves. This was an issue of great significance to women in the workplace. According to the Bureau of National Affairs, as many as 15 to 20 million jobs may involved reproductive hazards, and thus could have been affected by exclusionary fetal protection policies.

Given the fact, it is not surprising that one Federal judge said that the *Johnson Controls* case was "likely to be the most important sex discrimination case since the enactment of title VII."

You were sworn to protect the rights of the millions of working women in this country against employment practices that completely barred them from high-paying industrial jobs. Frankly, Judge Thomas, based upon the facts, not on opinion, but based upon the facts, it would appear that, instead of protecting these women, you abandoned them. For most of the 1980's, you refused to resolve over 100 discrimination charges that had accumulated at Commission headquarters.

In addition, when you finally began to act, you sold women short by allowing employers to adopt facially discriminatory policies that excluded women who were fully capable of performing their jobs.

In this year's *Johnson Controls* decision, the Rehnquist Supreme Court concluded that employers have no business depriving women of their jobs in the name of protecting non-existent future fetuses. The Court expressly held that "decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them, rather than to the employers who hire those parents." That is the Court's language.

Three months ago, the EEOC finally took the position that "policies that exclude members of one sex from a workplace for the purpose of protecting fetuses cannot be justified under title VII." The EEOC conceivably, probably should have reached that conclusion 10 years ago. You had an opportunity to make it occur. You didn't.

The EEOC's failure to protect women apparently at your direction gives me and millions of American women and men cause for concern, because it appears on the basis of the facts that you didn't protect their rights, when it was your sworn responsibility to do so, and I am very worried that you won't protect their rights as a member of the Supreme Court.

Judge Thomas, as I reflected on our last 4 days of hearings and as I reflect back on your answers to my questions this morning, I feel compelled to repeat a point I have made to you. I am struck and can't figure out a reason, I can't comprehend the number of times in which you suggest that this committee should discount past statements which you have made.

For example, you gave speeches to lawyers and wrote articles in law journals advocating the use of natural law, a subject to which the chairman has addressed himself quite extensively, but now you say that you never meant to suggest that natural law should be used in deciding cases.

You have condemned aggressive legislative oversight, characterized Congress as unprincipled and out of control, and commended

Justice Scalia's narrow vision of congressional power under the separation of powers clause, but now you say that those remarks were just part of the normal tension and give-and-take between Congress and the executive branch.

And other issues such as economic rights, the minimum wage, and affirmative action, there is a conflict between your testimony to the committee and statements which you have made in the past.

But in the area of abortion, one of the most important issues facing this Nation, one that has been discussed and about which you have been asked at great length, it is in that area that you have most seriously sought to distance yourself from your past record.

To the millions of American women who are wondering where you stand on that critical issue, your answer is "trust me, my mind is open, I don't have a position or even an opinion on the issue of abortion." Judge Thomas, that is just incredulous. It is difficult for millions of Americans, whether they are pro-choice or pro-right-to-life, to accept.

You have a record in this area. You simply don't want us to take account of it. You are asking us to believe that you didn't really mean it, when you said Lehrman's antichoice polemic was splendid. You are asking us to believe that you didn't really mean it, when you signed onto a report that criticized *Roe* and other pro-choice decisions.

You are asking us not to worry that you criticized the key constitutional argument supporting a woman's right to choose. You are asking us not to worry that you were on the editorial board of a journal that has only published articles on the abortion issue which vehemently attacked a woman's right to choose. You are asking us to ignore the fact that your nomination is championed by antiabortion groups and that you were selected by a President who has pledged to appoint Justices who will overturn *Roe*. And you are asking us not to be concerned that you, like other nominees have gone onto the Court and undermined the right to choose, have singled out this particular subject for silence.

Judge, I cannot ignore your past statements on the abortion issue and on other critical legal issues and policy issues. I cannot accept the idea that we should give little weight to what you said or did before going on the bench. I reject the notion that what you said or did about certain issues becoming a judge bears no relation whatsoever to what you will do with respect to those issues once you are on the bench.

And I cannot accept your suggestion that we should discount some of your most controversial statements, such as your praise of the Lehrman article or your condemnation of the *Morrison* case, on the grounds that you didn't endorse or agree with what you were saying. That explanation only raises more questions than it answers.

The bottom line is this, Judge: You have a record and I believe this committee and the Senate must evaluate your nomination based upon that record and based upon the way in which you have discussed that record with this committee.

Thank you, Judge Thomas.

Thank you, Mr. Chairman.