

approach that you have taken. I think you are doing a great job. Just keep it up.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator Hatch.

Senator Metzbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

I would just like to make a comment before getting into another line of inquiry. My colleague from Utah wants to know why you are being treated differently than Judge Souter with respect to the question of a woman's right to choose. I think it is pretty obvious that—

Senator HATCH. Not just Justice Souter; all of the prior justices.

Senator METZENBAUM. Well, all of them. You have written very extensively and have spoken out quite extensively in this area, and I think it warrants that inquiry. Beyond that, I think there is a greater sense of alarm as to the direction in which the Court seems to be moving, and I think to fail to inquire of you in that area would be irresponsible on our part.

But, Judge Thomas, to another area. In the past, you and I have had disagreements over policies which you pursued at the EEOC. But there is one area of your record at the Commission which is particularly troubling to me, and that is your record with respect to age discrimination, discrimination against senior citizens. Discrimination against the elderly does not always receive the same amount of attention or provoke the same degree of outrage as racial discrimination or sexual discrimination. But employers who dismiss or refuse to hire individuals because of age, as you know, violate the law every bit as much as employers who discriminate on account of race or sex.

That is why, Judge Thomas, in reviewing your record, I was shocked to come across a 1985 statement you made in an interview with the ABA Banking Journal, a banking industry trade publication. In that article, you suggested that discrimination against the elderly could be justifiable. You are quoted as saying that, "The age discrimination issue is as complicated an economic issue as any we confront in the equal opportunity area." You continued on, "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical or economic reasons, make sense. Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary. In an economic downturn or when technology calls for staffing changes, employers tend to eliminate the most experienced and costly part of their work force."

Judge Thomas, at that time, you were the chief Federal official in charge of enforcing the law against age discrimination. Yet here you were characterizing age discrimination as an economic issue, and then stating that many violations of the age discrimination law make sense.

My question to you is: How could you, as a law enforcement official, make a public statement which could easily be interpreted by employers as condoning violations of that law?

Judge THOMAS. Senator, if I could have the whole quote, it would be helpful to me so I could look at the context. But let me say this: I have never condoned violations of the Age Discrimination in Em-

ployment Act. In fact, just the opposite. The act itself has made some very difficult decisions.

For example, in the mid-1980's, the act itself covered the ages from 40 to 65 and then from 40 to 70—actually earlier than that. From 40 to 70, then uncapped during the 1980's. The age act also makes clear that there can be factors other than age that could result in those sorts of distinctions. That is in the statute. Those aren't my decisions.

I have not, do not, and never did condone discrimination, unlawful discrimination under the Age Discrimination in Employment Act.

Senator METZENBAUM. Well, Judge Thomas, what concerns me is that when the chief Federal official in charge of enforcing the age discrimination law says that many technical violations of that law make sense, it sends a signal. It suggests both to employers and even to EEOC personnel that age discrimination issues are not a high priority within the Commission.

Weren't you concerned about sending that kind of signal? Now, it is my understanding that you do now have a copy of the article.

Judge THOMAS. I have a copy of the article. The point that I am making is this: To individuals—and I don't think that I suggested that it made sense to or condoned the violation of the act. But it would make sense to an employer to think that, well, this approach is OK. That is a violation of the Age Act to say that we are going to pinpoint or focus on older workers. The important issue is not so much for me whether or not to the individual the employer says—the employer says we want to make the decision of downsizing our work force. The employer says, well, that makes sense. Perhaps what we could do is look for the highest paying jobs.

Well, that might make sense to the employer. The problem for us when an employer makes a decision of that nature is: Does that violate the Age Discrimination in Employment Act? And as you remember, during the 1980's, during those significant downturns, during those mergers and acquisitions, employers were making those decisions and we were bringing a significant number, a larger number of lawsuits to counter that. So it might have made sense to them. The problem is that it violates the Age Act.

Senator METZENBAUM. My point is, Judge, that you sort of indicate you weren't sending a signal, but you made that statement to the ABA Banking Journal, which, as you know, is a trade journal for the banking industry.

Now, would you have made that same statement if you had an interview with the AARP's publication? Do you think you would have said that many technical violations of the Age Discrimination in Employment Act make sense?

Judge THOMAS. I think, Senator, if you would look at the whole article, the point that I was trying to make in the article—and I haven't had a chance to review the entire article—is that we were actually upgrading enforcement; that, indeed, this is one area that was technically very complex; that, indeed, employers were at a greater risk.

Later in the article, for example—and I just had a chance to skim it here—I say, "Under Thomas, the EEOC has changed to a system that investigates all cases that fail conciliation." Well, that

is actually a misstatement, but it says, " 'About 85 to 90 percent of cases probably will go on to court,' Thomas said." That is an increase in enforcement, and that is something that we did over time.

The article also refers to, I believe here, the automation programs that I was beginning at that time so that we could better enforce the law.

I have not in any place condoned a violation of the Age Discrimination in Employment Act. These efforts on the part of employers may make sense to them. But if they are wrong, they are wrong. If they violate the act, they violate the act.

Senator METZENBAUM. Well, I guess words speak for themselves when you say that technical violations make sense. I think that it certainly sends a signal.

In that same interview, after you assert that there are many technical violations of the Federal age discrimination law which make sense, you go on to say:

Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary. In an economic downturn or when technology causes staffing changes, employers tend to eliminate the most experienced and costly part of their workforce.

Now, Judge, many older workers, as you well know, are really the people who built the company. They were there for 20, 30, 40 years. They are loyal, long-term employees. Courts have consistently held that employers may not target older workers for layoffs.

In a 1988 opinion of the Second Circuit Court of Appeals, after examining cases that were decided well before you made your statement, that case summarized the law in this area by stating:

Courts have emphatically rejected business practices in which the plain intent and effect was to eliminate older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts.

In view of that court decision and the law, the specifics of the law, why would you publicly suggest that it was sensible for employers to lay off older workers because of higher salaries when the courts had made it clear that the age discrimination law forbids such a practice?

Judge THOMAS. Senator, let me repeat what I have said. It may make sense to the employer, but if it is a violation of the Age Discrimination in Employment Act, it is a violation. We at EEOC I think pursued those cases aggressively. Just because it is logical to them that this is an area that perhaps they could make changes, if it is a violation of the Age Discrimination in Employment Act, then it should be addressed. Those cases were investigated to the best of our ability. They were litigated, and they were pursued.

As you remember, during that time those were difficult issues in the downturn in the economy. And I think that we wrestled with them in a professional and an appropriate manner. There were differences of opinion as to how that should be best done.

I don't think that I am saying here that it is OK, that it is acceptable, that it is fine to violate the law. The line that I am trying to, I think, and I haven't had a chance to read the entire article, to point out here is this: That it does perhaps make sense to the employer. But that is a violation of the Age Act.

Senator METZENBAUM. Did you say that at the time?

Judge THOMAS. I did not—again, I didn't write the article, Senator. If I had the whole interview—

Senator METZENBAUM. I understand that, but the point is the article is quoting you, and there you are saying to the banking industry that many technical violations of the Age Discrimination in Employment Act make sense for practical or economic reasons. You don't put any qualifier on it. You don't put any condition on it. You don't say it is still a—that you are going to prosecute those cases. You are sending a message that you understand that there are some violations of the age discrimination law that make sense. And that is of concern to senior citizens. It is a concern to many people in this country.

Judge THOMAS. Well, Senator, you state that I put no qualifiers on it. The point that I am making is that, one, I did not write the article. Perhaps I gave an interview. But at no time did I endorse or permit or allow violations of the Age Discrimination in Employment Act. If someone were to ask me the questions, do you find that there are violations out there? Why is it that employers are running into violations in the new era of mergers and acquisitions? Why are they having more violations of the Age Discrimination in Employment Act?, then I would say, well perhaps they think it makes sense or it makes sense to do this.

But that is not an endorsement of a violation of the Age Discrimination in Employment Act.

Senator METZENBAUM. But, Judge, I find again you want to move away from your own statement. You didn't say what some others might think. You are saying, "I am of the opinion." That is a quote. "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical or economic reasons, make sense." It is you who is speaking, not somebody who is interpreting your words.

The Age Discrimination in Employment Act requires older workers to file their age bias claims with the EEOC. The Commission is authorized to investigate the claim and, if it has merit, attempt to work out a settlement or file a lawsuit on behalf of the older worker. The Age Discrimination in Employment Act has a 2-year statute of limitations, meaning that either the EEOC or the older worker who brings the age discrimination charge to the EEOC's attention must file a lawsuit within 2 years of the alleged act of discrimination. If not, the older worker loses his or her right to seek redress under the law.

As you well know, unfortunately during your tenure as head of EEOC, thousands of age bias claims sat languishing in the EEOC for over 2 years. As a result, thousands of older workers lost their right to bring lawsuits under the ADEA. Congress did not become aware that there was a systemwide problem within the Commission until late January 1988. Then, as you know, Congress moved quickly to pass special legislation in April 1988 which restored the rights of those older workers who believed they had been discriminated against.

As I mentioned in my opening statement, the problem of lapsed age cases happened not once, but twice, Judge Thomas. For now, let's focus on the first batch of lapsed cases.

Your agency's own internal documents show that as far back as January 1986, Commission members, including yourself, were aware that EEOC field offices were having trouble meeting the statute of limitations on age discrimination cases. A January 1986 litigation memo presented to all five commissioners, including you, stated that even though there was substantial merit to one age case, the general counsel's office had to recommend against litigation "primarily due to statute of limitation problems."

An April 1986 litigation memo presented to all five commissioners, including you, in another meritorious age case stated that, "The statute of limitations is already operating to bar individual claims on almost a daily basis."

I have two questions for you, Judge Thomas. First, how could these lapses have happened? Second, given that there were early warning signs going back to January 1986, why did it take almost 2 years before the Commission discovered that it had a system-wide problem which was causing thousands of older workers to lose the chance to vindicate their rights?

Judge THOMAS. First, Senator, with your permission, I would like to just simply comment on to the extent that there is any question about my view of enforcing ADEA claims from the last quote, my point is and remains firmly that I would not tolerate nor permit any violations of the Age Act.

With respect to this particular problem, as you know, this was a very difficult problem and a very difficult period for me during my tenure. I am a lawyer, or I was a lawyer before I went on the bench. And one of the things that I can remember early in my own tenure as a lawyer is making that panicked midnight run to the law office or to the attorney general's office because I thought there was a deadline approaching. I thought that when others heard the word statute of limitation, their reaction or that panic set in in the exact same way.

If I could have investigated every single one of those age charges, I would have. That was the low point of my tenure. I said it then, and I say it now.

I don't have the presentation memos that you are talking about, but let's put that in context a second. If you want to get to them in detail, I will just do that. But let me talk generically about the problem that we were facing in the mid-1980's.

First of all, the initial inkling of a problem that we saw was that when cases were presented after they had been investigated in the field, and those cases were then sent to our headquarters, they were sent to our general counsel's office. When those cases came in, in any number of areas we found that there was this problem. The problem was whether it was title VII or the Age Discrimination in Employment Act. The cases would sit in that office for months and sometimes years.

We immediately changed that policy. I think I changed it sometime in the early 1980's, perhaps 1984 or 1985, so that when these investigated cases recommending litigation came from the field offices, they immediately came to the full Commission.

As a part of that, what we noticed was that cases could, while sitting in the general counsel's office or in the regional attorney's office in the district offices, they could miss the statute of limita-

tion. That was a separate problem from the one that you and I have talked about.

One of the things that we did was this, with respect to those cases: The problem with respect to the lapse is separate from that. That is an administrative problem in the field offices. It is not a problem that comes from the period that the cases are sent to the headquarters office, and then those cases sitting there waiting to be attended to by an attorney. The administrative problem results from this, or resulted from this: When I went to EEOC—

Senator METZENBAUM. Could you wind up shortly, please?

Judge THOMAS. When I went to EEOC, there was a process—EEOC did not investigate routinely age discrimination charges. Myself and the other commissioners felt that they should be investigated, and we introduced a policy to do that. That took more time.

The second component of that is this: that the Age Act has a 2-year statute of limitations, unlike title VII. Our first initiative when we changed the policy, recognizing that it would take longer to investigate the cases, was to require the district directors to monitor their workload more closely. Some district directors, unfortunately, did not do this, and unfortunately some cases missed the statute of limitations.

I found out about this in December 1987. I notified Congress as soon as it returned from the Christmas break, and my staff or EEOC's staff worked closely with your staff to develop legislation, which was introduced and passed and enacted I believe in April.

Senator METZENBAUM. Judge Thomas, I just have to take issue with you that Congress acted at your behest.

Judge THOMAS. No. We cooperated with you.

Senator METZENBAUM. Well, you didn't oppose it. A 1988 report by the staff of the Senate Aging Committee concluded that, "The EEOC misled the Congress and the public on the extent to which age discrimination charges had been permitted to exceed the statute of limitations." That is a quote.

The report states that when it initially requested data on this issue in September 1987, the EEOC responded that only 70 cases had lapsed. But at that time, an internal EEOC survey revealed that over 900 Federal age discrimination charges had lapsed the statute of limitations. In December 1987, EEOC told the Aging Committee that only 78 cases had lapsed, but a trade publication reported that nearly 988 charges had exceeded the statute of limitations. One month later, in January 1988, you formally advised the Aging Committee that 900 cases had lapsed.

Senator David Pryor, the current chairman of the Aging Committee, has stated that, "After months of fruitless attempts to obtain additional and accurate information on this matter, the Aging Committee issued a February 1988 subpoena to Chairman Thomas to provide data on the lapsed charges."

The EEOC now acknowledges that the age bias claims of over 4,000 workers lapsed due to your agency's failure to process those claims in a timely manner. Both the Senate and the House Aging Committees have estimated that as many as 13,000 older workers may have lost their rights due to your agency's inaction. Congress

was trying to find out the extent of the lapsed cases problem at your agency.

The Senate committee which deals with senior citizen issues was attempting to determine whether older workers were losing their rights. The current chairman of the committee has stated that the committee's efforts to inform itself on this issue were being frustrated, and so a subpoena was issued. Ten Democrats and three Republicans on the committee supported the issuance of the subpoena. No member of the Aging Committee objected, and yet here is how you characterized that subpoena in a speech prepared for delivery on April 7, 1988, the exact same day that the President signed the law passed by Congress restoring the rights of older workers. You said, "My agency will be virtually shut down by a willful committee staffer who has succeeded in getting a Senate committee to subpoena volumes of EEOC records. It will take weeks of time and cost hundreds of thousands of dollars, if not millions. Under the guise of exercising oversight functions, the staffer seeks to implement the program of the American Association of Retired Persons. Thus, a single unelected individual," said you, "can disrupt civil rights enforcement all in the name of protecting rights."

Now, Judge Thomas, those comments were absolutely astounding. Congress was trying to find out the scope of a problem that affected thousands of senior citizens. Congress had to enact two pieces of legislation restoring the rights of lapsed cases because the statute of limitation that applied. We were trying to find out how to keep it from happening again. You declare that the Aging Committee acted improperly in issuing a subpoena to determine whether or not your agency had neglected the legal rights of thousands of older workers. You also maligned the integrity of the committee which issued the subpoena. It was not my committee. It was Senator Pryor's committee. You suggested the committee was doing the bidding of the American Association of Retired Persons.

My question, Judge Thomas, is: How could you, on the very day on which the law bailing out your agency went into effect, condemn so vehemently Congress' efforts to find out whether older workers were still losing their rights as a result of your agency's inaction?

Judge THOMAS. Senator, there is quite a bit there. We received, on a Thursday afternoon, a very detailed request from the Senate Select Committee on Aging, then under Senator Melcher, concerning very detailed information over Labor Day weekend at EEOC. The request, which was not handled directly by myself, but by our legislative office and our administrative people and our general counsel, the request was for a variety of data, including charges, those are the administrative charges that come in to EEOC, and cases that had passed the statute of limitations.

Our personnel separated those tasks, the requests for charges and the requests for cases, and took those requests, assigned those to the relevant offices. The requests for cases were assigned to the general counsel's office. The requests for charges were assigned to the administrative people. The document request that we responded to about the numbers that had lapsed, that had missed the stat-

ute of limitations, was the request response from the general counsel's office concerning cases, not charges.

There was no effort ever to mislead the committee. In fact, we attempted to have the committee clarify for us precisely what it wanted us to respond to in such a short period, so that we could do that quickly.

Normally, when a request comes to EEOC, the request or the requesting body sits down with our staff people and we go through the documents, we go through the requests and we determine how to respond. In this instance, that did not occur.

Now, with respect to learning about the mischarges, as opposed to the cases, what we attempted to do was, as soon as I found out, was to not only inform Congress, but to make it public. I found out in December 1987 and reported to Congress the day Congress returned for the next term in January.

Senator METZENBAUM. My time is about to expire, but I want to make it clear before it does, that when the lapsed age case issue came to light, you stated that it wouldn't happen again. But as we all know now, after Congress' corrective legislation in 1988, the problem didn't go away, you didn't take care of it. Thousands of age cases continued to lapse, due to your agency's failure to insure that the claims were processed in a timely manner. We had to pass a separate bill in October of 1990, due to the inaction of your commission and, as a consequence, costing thousands of aged workers the loss of their rights.

Judge THOMAS. Senator, we did everything, and I certainly did my tenure, with the resources that I had, we have a very spread-out agency, to respond to that problem. As you remember, it was a difficult problem. If I could have investigated every one of those cases, I would have. There were approximately 2,000 cases within EEOC or charges within EEOC which had missed the statute during over a 4-year period out of the approximately 50,000 or 60,000 that we receive a year, and I believe approximately 100 cases did involve actual—there was as finding of discrimination. But even one, as I have indicated, is too many.

We took steps to solve the problem. We automated or completed automating the automation of the agency, so that the cases could be more accurately tracked, that is both at headquarters and in the field offices. We sent notices to the individuals, so that they would know when the statute was approaching. We held managers more accountable. We had done that before, but we redoubled our efforts.

The point was that we are trying to make an entire agency respond to something that I felt strongly about and I know that you felt strongly about. It was enormously frustrating. I did as much as I could possibly do. I did not want a repeat of that. In fact, I never wanted it to happen. But getting an agency to respond, a bureaucracy to respond is sometimes far more difficult than wanting it done.

Senator METZENBAUM. Thank you, sir.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.