The CHAIRMAN. Excuse me, Senator. I am sorry. I apologize for interrupting. I was told by staff that Senator Brown, in fact, had no questions. I misunderstood. I guess you wish to make a statement. Is that correct, Senator Brown?

Senator BROWN. Thank you, Mr. Chairman. I think I can complete this within——

The CHAIRMAN. Take your time. I am sorry. I just was told you had no questions or nothing to say. Senator Brown. I apologize to my friend from Alabama.

Senator BROWN. I thank the chairman. I simply wanted to make an observation that I think is important to appear in the record.

There is a lot riding on this consideration, and I don't think any of our members have made statements that they intentionally meant to be misleading. But as I review the record, one thing, at least in my mind, is quite clear. Judge Thomas' remarks with regard to how he would use natural law in my view are very clear and very consistent. He stated before this committee that he would not use natural law in the interpretation of the Constitution if he sat as a Justice of the Supreme Court.

In viewing the consistency of that, I have looked back at the 1½ years of his tenure on the circuit court of appeals, and also at a very similar question that was asked of him when he came before this committee for confirmation to the circuit.

The transcript of what he said at that time is virtually identical to what he said before us. And the suggestion by some that there is some sort of a change in his commitment to not use natural law to interpret the Constitution I think simply is not borne out by the facts. I wanted that observation as part of the record.

I will yield back, Mr. Chairman.

The CHAIRMAN. Thank you.

The Senator from Alabama.

Senator HEFLIN. Thank you, Mr. Chairman.

Judge Thomas, your explanation of the apparent inconsistency in your evaluation of Justice Oliver Wendell Holmes, from a speech in 1988 to the explanation that you give today, troubles me. Let me read this again, the speech at the Pacific Research Institute civil rights task force, which I will read shortly. But as I understand your explanation, it is that when you made this speech you were not as familiar with the work and the opinions and the writings of Oliver Wendell Holmes as you are today; and that when you made this speech, you didn't realize as much as you do today about Holmes; and that since making this speech, you have read books on Holmes and you have changed your opinion.

Now, is that a correct statement of your explanation?

Judge THOMAS. No, I don't think so, Senator, and it is probably because I didn't make myself clear. What I was attempting to say was that I did make the statement, and the concerns that I did have were expressed there. But I said that I did not stop there in my development; that he was someone that I continued to look at, and after going on the bench I decided to go back and to read more about him and to look at him as a person. There was a recent biography of him, "The Honorable Justice," which I read. And it didn't necessarily mean that I didn't—that what I said there is what I believed at that time, but rather that I didn't stop with just that

point of view. I wanted to know more about him and that clearly he is a great Justice, but that doesn't mean that we can't disagree with him.

Senator HEFLIN. Well, basically you are saying, as I understand you, that you read a biography, you studied his writings, his opinions, his life, and you came to a conclusion he was a great Justice.

Judge THOMAS. With the—no. I came to the conclusion that I had differences of opinion with him, but, you know, I think it is one thing to read about a judge or a Justice, I think, when you are on the outside. It is another thing to read about him when you are sitting on the bench also. And I think know more about him now, but I still have that disagreement, as I said, with him that I expressed in that speech.

Senator HEFLIN. Well, in that speech, you basically are expressing a disagreement with Justice Holmes about natural law. Are you not?

Judge THOMAS. Well, no. The disagreement, I think the overall disagreement was one in which I felt that he did not look back to the Declaration that is the backdrop of our regime, not to use it to interpret the Constitution, but rather to not think that there is anything back there at all. As I indicated, our Founding Fathers believed in natural law, and not to recognize that——

Senator HEFLIN. I don't see anything in here about Founding Fathers and looking back—let me read to you the statement that has caused this criticism.

The homage to natural right inscribed on the Justice Department building should be treated with more reverence than the many busts or 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 put it in his essay on Holmes, most recently reprinted in William F. Buckley and Charles Kessler's "Keeping the Tablets," "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 well."

As constitutional scholar Robert Falkner put it, "What Marshall—

Meaning John Marshall—

had raised, Holmes sought to destroy." And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they existed at all apart from willfulness, whether of individuals or officials.

Now, that is the quote.

Now, from reading this, it would appear that in your scholarship prior to this speech that you had read Walter Burns' essay on Holmes and you agreed what constitutional scholar Robert Falkner said about him. But for you to attack with words like this in a speech a Justice of the Supreme Court, as well as one who is generally regarded as one of the giants of the Supreme Court, raises some question in my mind.

First, what was your scholarship in determining at that time before making those statements about Holmes? How much had you read about him at that time?

Judge THOMAS. I think I had read what I cited there, and, Senator, as I noted earlier, one of the points that I had felt that, you know, his statement in *Buck* v. *Bell* was troublesome to me. My point was not so much that he did not use natural law or anything; it was a matter of my attempting to understand natural law at

that time as a backdrop to our Constitution, not as a method of adjudication.

What I was saying recently to Senator Kennedy here with respect to Holmes is that, as a judge, I decided that—I knew I had read Mr. Kessler and some of the others. As a judge, I decided that, look, I want to go back, and I want to learn more about Oliver Wendell Holmes. I want to know more about Warren Burger. I want to know more about all of our judges and Justices. And as a judge, as I indicated, in my readings my point was that even though I may have had in that context, in pulling together my own political theory and trying to develop my own way of looking at our country, my own philosophy, I wanted to look at him from the posture of a judge. And that was a comment that I was trying to make to Senator Kennedy earlier this morning.

I think that it is totally different, at least it has been for me. I have heard comments here that it doesn't make any difference. You don't change when you become a judge. And, of course, you have been a judge. But for me, becoming a judge, as opposed to being in the executive branch, was a dramatic change. And it is one that certainly required me to take a step back and to look at the responsibilities of the job and to look at the difficulty of deciding cases. It also gave me a different appreciation of the role of a judge, one that I could not have had when I was on the outside talking about how we govern our country as opposed to how we adjudicate our cases.

And I think that any of us who became judges or who have become judges look to someone like an Oliver Wendell Holmes, whether we would agree with him from a political theory standpoint or not. My job, my effort has been as a judge to learn from everyone. That is what I was attempting to do, and that is why I indicated to Senator Kennedy—I was trying to suggest a sense of humility that one learns when one sees the daunting task of being a judge.

Senator HEFLIN. Well, now, reading this from your speech, it appears to me—well, it is certainly subject to an interpretation, but it is a very strong interpretation that you are criticizing Holmes because Holmes takes the position that natural law should not be used in constitutional adjudication.

Judge THOMAS. That was not my intention there, Senator. My intention was solely to indicate that I didn't believe that he had an understanding of what it meant to our regime, as a teacher or as a political theorist. I think it would have been easy enough to say that he should have used it in constitutional adjudication. I have not said that.

My effort was solely to look in that speech and the speeches that I have given, to solely look at how our Constitution and how our form of government relates to the Declaration and our Founding Fathers, et cetera. I think I have tried to say that throughout these hearings.

I in no sense considered myself a jurist or considered myself someone who felt that the role of natural law was to be a part of constitutional adjudication. I did not feel that. And I have indicated—attempted to indicate that.

Senator HEFLIN. Well, I read this part of that toward the end of your speech. These are your words: "And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they existed at all apart from the willfulness, whether of individuals or officials."

Earlier in the speech, you say, "You will recall Holmes as one who scoffed at natural law, that brooding omnipresence in the sky."

Now, this language isn't talking about Holmes the political theorist, but it is speaking about Holmes the jurist.

Now, explain—this leaves me that you at this particular time are criticizing Holmes because he said and believed that natural law is not to be used as a means of constitutional adjudication.

Judge THOMAS. Well, I think my criticism perhaps was a bit broader than that, Senator. Certainly—I know I am repeating myself. I did not then nor do I now see a role for natural law in constitutional adjudication except to the extent that I have noted, and that is as the Founding Fathers saw it.

What I was attempting, the point that I was attempting to make in my speeches, in this speech, was that you couldn't just simply ignore it and say it doesn't exist at all, it didn't exist, it had no role in our regime, it had no role with the Founding Fathers.

The Founding Fathers did believe in that. It did have a role in our Declaration, and it did in some significant ways influence the kind of government that was established in our country. But at no point—at no point—did I suggest that it had a role in constitutional adjudication.

Senator HEFLIN. All right, sir. Now, let me ask you about the *Sears & Roebuck* case. This was a case that EEOC was the plaintiff and brought against Sears & Roebuck, largely based on a reliance upon—almost entirely I would say, a reliance upon statistics to prove disparate impact. And I think that you were not the head when this suit was filed.

Judge THOMAS. That is right.

Senator HEFLIN. But as the suit went along, you personally authorized the increase of money for statistical studies in that case. On March 30, 1983, you authorized an increase of $135,000. In May 1983, you again authorized the increase of another $534,000. On August 10, 1984, you authorized another payment of $315,896. Now, close to $1 million was authorized to you, as I understand it, for statistical studies as the case went along.

Then in the case, as the case was proceeding and had not come to any judgment, you made the speech in which you criticized, relying on statistics, and basically said that the agency had relied too heavily on statistics and investigations initiated by the Commission itself and in its review of complaints filed by individuals. And in that statement, you said, "For example, he said a case filed by the Commission in 1979 against Sears & Roebuck Company, still pending in the Federal court, relies almost exclusively on statistics to show discrimination against women."

I am not arguing statistics or whether it is proper or not, but with the investment that had been made in that case, isn't it unusual for a head of an agency to, in effect, cut the feet out from

under the agency's lawyers by making such a statement pending the litigation?

Judge THOMAS. Senator, I believe that that statement occurred once in an interview in 1984. The circumstances of the interview I will not get into. It was not in a speech, and it wasn't in prepared remarks. Not that that excuses it.

There had been an ongoing debate about the use of statistics, not statistics alone but the use of statistics. And I felt that in specific cases in the agency that we had used broad statistical comparisons or broad statistical disparities. I think we discussed it a little earlier in my testimony before this committee. We used those broad disparities as a basis for deciding whether or not discrimination occurred, and it didn't necessarily always show that. I have expressed that concern, and we made changes in the way that we operated at EEOC to address that concern and to solve that problem.

With respect to this case, I indicated immediately after I made that statement—it was an inadvertent statement and it was an unfortunate statement, and I said precisely that. And I think I said that in my last confirmation hearing or in the interview that I had—I can't remember—that it was an unfortunate statement. I do not believe that it either undermined the case or impeded the prosecution of the case. It was, again, an unfortunate statement, nor did it in any way undermine my commitment to pushing that case and financing that case.

We pushed to the point of having to choose between furloughing employees and financing that case. Although it didn't come to that, we had chosen or decided—I decided that we would furlough employees rather than underfinance that particular case.

Senator HEFLIN. Now, the age discrimination problem and the fact that Congress had to come in twice to pass laws to give people who had lapsed claims the right to pursue them causes some concern that has been gone into, basically because there was a charge against you, and it was made at your court of appeals hearing, too, at that time. First there were some 78 cases that had lapsed; later, continuing to grow, one figure was 900 and then 1,608 and then finally somebody came up with the idea of 13,000 of the cases. Your explanation, as I recall, was that you didn't know how the 13,000 came along and that you, as head of the agency, after Congress gave them the right to continue to sue, passed laws in effect eliminating the hurdle of the statute of limitations. You all sent out letters to those—over 2,000 letters went out pertaining to it.

In your explanation in the court of appeals—I don't believe I have heard it here—you raised the issue that there were two statutes of limitations and that there was confusion as to which one would apply; that there was a 2-year statute and there was a 3-year statute. And then came along the case of *TWA* v. *Thurston* that, in effect, strictly construed the 3-year statute. The 3-year statute was based on willfulness.

Now, there was some misunderstanding and confusion, not only in your office but in the district offices, the State and the local offices, pertaining to this. The statutes of limitations are always in the minds of a practicing lawyer. He gets a lawsuit, and he investigates, and he has got real fears that if the statute of limitations ran against him. His client couldn't pursue in court because of the

statute of limitations, and he would be subject to malpractice suits as well as losing for his client outright. And it is a thing that practicing lawyers sometimes wake up in the middle of the night in horror and dream of something like that. All practicing attorneys develop a methodology in order to prevent the statute of limitations from running on any case that is in their office. You try to develop it where you will be sure that it doesn't happen.

Now, in this case, let me ask you, was the issue of the statute of limitation an issue that was involved in the interpretation of this as to why these claims lapsed?

Judge THOMAS. It was early on. When I arrived at the EEOC, Senator, it was commonly felt that the agency had basically conflated the two statutes and considered the statute that really limited it to be the 3-year statute.

After *TWA* v. *Thurston*, there was certainly concern that you could no longer do this. The agency had interpreted willfulness to mean basically that if a company knew that it was covered by the Age Act, then any violation during that period was a willful violation. That is a generalization. That was basically the agency's view. So the agency simply responded to the 3-year statute. After *TWA* v. *Thurston*, the agency had to take a look at and be concerned about the 2-year statute.

Your view of the response to statutes of limitation is my view. I think I noted earlier in the hearings that I have made that midnight run to the office of the attorney general, to the attorney general's office. I wasn't in private practice, but you wake up in a cold sweat and you throw something over your pajamas and you run down to the office to make sure that you haven't missed the date for filing a notice of appeal or responding to interrogatories or what have you.

I felt that everyone responded when you heard "statute of limitations." You responded with fear or apprehension, et cetera.

That was not the case, however. The response wasn't always that way. It depended on the individuals in the particular offices, and that is not a criticism of all the individuals. But some individuals responded the way you and I responded. Some individuals did not respond. Indeed, some individuals said that the statutes were missed because it was a management decision, which horrified me that anyone could feel that way.

But we did eventually put in—some managers had their manual tickler system to show when the statute was running. What we had to do in headquarters was to help to develop an automated tickler system in the computer so that there was absolutely no reason why anyone could say that he or she didn't know that the statute of limitations was approaching.

But I would not pass off the change in the *TWA* v. *Thurston* ruling in the way that we viewed the statute of limitations as a reason for missing those statutes. It was a complicating factor. It was one of the many factors. But I don't think that there is any excuse for missing a statute of limitations. Indeed, when this whole matter came up, I offered none.

Senator HEFLIN. Well, in order to clarify a distinction between two statutes of limitation, isn't it from an administrative viewpoint, since this involved primarily an issue of whether or not you

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