

# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	EEOC Confirmation Briefing Material (1 page)	n.d.	P5
002. briefing paper	EEOC Confirmation Briefing Material (1 page)	n.d.	P5

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**COLLECTION:**

Clinton Presidential Records  
 Domestic Policy Council  
 Stephen Warnath (Civil Rights)  
 OA/Box Number: 9592

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**FOLDER TITLE:**

[Equal Employment Opportunity Commission Confirmation Briefing Materials] [5]

ds67

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### RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

- b(1) National security classified information [(b)(1) of the FOIA]
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## ADA Litigation

- Q. What types of ADA lawsuits has the EEOC filed in federal courts?
- A. The EEOC has filed over twenty lawsuits under the ADA in federal court. Almost one-third of these cases involve allegations that covered entities violated the ADA by maintaining health insurance plans that treat AIDS-related expenses less favorably than non-AIDS-related expenses. The cases also include allegations that employers have discriminated in various employment practices on account of a wide range of disabilities, including carpal tunnel syndrome, mental illness, epilepsy, mobility impairments, cancer, back impairments, and AIDS. Several cases allege discrimination because an employer regarded an individual as having a disability, and several cases allege that an employer violated the ADA's restrictions on medical examinations and disability-related inquiries. Approximately 200 additional cases are currently being considered for litigation.

## ADA Application to Federal Government

Q. Does the ADA apply to the federal government?

A. Technically, Title I of the ADA does not apply to the federal government, but as a practical matter, it does apply. Specifically, Title I of the ADA prohibits discrimination based on disability by certain private employers and by state and local employers. Section 501 of the Rehabilitation Act of 1973 prohibits federal sector discrimination based on disability.

On October 29, 1992, Congress amended the Rehabilitation Act to apply ADA legal standards in complaints alleging non-affirmative action employment discrimination. This means that Section 501 of the Rehabilitation Act is now substantively the same as the ADA with respect to non-affirmative action employment discrimination.

Mike Royko Column -- "Frivolous" Charges

Q. I read a recent Mike Royko column commenting on the EEOC's current investigation of a case where a charging party alleges ADA discrimination because she has a microchip imbedded in her molar, and the microchip speaks to her. Isn't this making a mockery of the ADA?

A. I do not know the specific facts of the case Mr. Royko wrote about because that is confidential information. Specifically, EEOC employees are prohibited under federal law from publicly disclosing information regarding even the existence of a particular charge prior to an individual's filing an actual lawsuit in federal court.

I also understand that some journalists occasionally take things out of context, so I do not necessarily assume that everything Mr. Royko has written is an accurate reflection of the facts.

I will say that it is possible that charging parties will sometimes allege factual scenarios that may seem unlikely or bizarre to others. However, under the ADA, individuals have a right to file such charges with the EEOC. It is the duty of the EEOC to investigate whether the charge has any merit.

Obesity

Q. Is Obesity a Disability Under the ADA?

A. In most cases, no. The ADA defines a disability as an impairment that substantially limits at least one of a person's major life activities. Simply being overweight is not an impairment, and so, cannot be a disability. However, "morbid" or "gross" obesity, a clinical condition that is defined by the medical community as body weight that is 100% above the norm, would be an impairment. If a person's morbid obesity substantially limits that person's ability to perform at least one of his or her major life activities, it would be considered a disability within the meaning of the ADA.

There are also instances in which a person's obesity is the result of an underlying physiological disorder, such as a thyroid disorder. Since a physiological disorder is an impairment, the resultant obesity would also be considered an impairment. If the impairment substantially limits a major life activity, it would be a disability under the ADA.

Smoking

Q. Is Smoking a Disability?

A. The Commission has not yet adopted a position with regard to the application of the ADA to smokers. However, it is clear that people who smoke only occasionally and are not addicted to nicotine do not have a disability. What has yet to be determined is whether some smokers are addicted to nicotine, and whether such an addiction could be an impairment that substantially limits a major life activity. If the Commission or the courts were to determine that a particular smoker is addicted to nicotine and that that addiction substantially limits at least one of his or her major life activities, that person would have a disability within the meaning of the ADA.

## Preemployment Inquiries and Examination

- Q. Doesn't the Commission's recent guidance on preemployment disability-related inquiries and medical examinations make it difficult for law enforcement and other public safety employers to hire qualified individuals?
- A. I do not believe that the Commission's recent policy guidance has any detrimental effect on the ability of employers to hire qualified public safety personnel, including law enforcement personnel.

At the pre-offer stage, employers may ask applicants whether they can perform job functions, and may ask them to describe or demonstrate performance. However, the statute expressly prohibits disability-related inquiries and medical examinations before an individual is given a conditional employment offer. Disability-related inquiries and medical examinations can be done at the post-offer stage, before the individual starts work. In addition, an employment offer can be withdrawn because of an individual's disability if the reasons are job-related and consistent with business necessity.

The Commission's policy guidance on preemployment disability-related inquiries and medical examinations imposes no new restrictions on employers. Rather, it simply clarifies which inquiries are considered disability-related and which examinations are considered medical. The guidance actually assists public safety employers by discussing an employer's right to require applicants to describe or demonstrate performance at the pre-offer stage, and by clarifying that physical agility tests and physical fitness tests are generally not considered "medical" examinations.

## Preemployment Inquiries and Examinations

- Q. The Commission's recent guidance on preemployment disability-related inquiries and medical examinations permits employers to ask applicants about their disability status in connection with affirmative action programs. Do you believe the recent guidance is consistent with the statute?
- A. It is my understanding that the EEOC's recent guidance is consistent with the statute and the legislative history. The ADA does not prohibit affirmative action for people with disabilities. In fact, Congress specifically indicated in the House and Senate reports on the ADA that employers should be allowed to ask applicants to voluntarily self-identify as having disabilities if those employers actually provide affirmative action for individuals with disabilities.

Consistent with this, the EEOC's policy guidance says that employers can invite applicants to voluntarily self-identify as having disabilities if the employer is required to do so under federal law, or when the employer is undertaking actual affirmative action. For example, if an employer says that it is collecting the information for a voluntary affirmative action plan, the Commission will evaluate whether the employer is using the information to benefit individuals with disabilities with respect to employment opportunities, such as job offers or promotions. The Commission also will make sure that the employer has made it clear to the applicant that the self-identification is solely for affirmative action purposes, that self-identifying is voluntary, and that the employer will hold the information confidential.

## Preemployment Inquiries and Examinations

Q. The Commission's recent guidance on preemployment disability-related inquiries and medical examinations discusses whether psychological examinations are prohibited at the pre-offer stage of the employment process. Why does the EEOC think psychological tests might be medical, and what is the practical effect of this guidance on common examinations like the Minnesota Multi-phasic Personality Inventory (MMPI) or the California Personality Inventory (CPI)?

A. In the ADA's legislative history, Congress said, "[t]he prohibition against pre-offer medical examinations also applies to psychological examinations." As a result, under its recent policy guidance, the EEOC says that it will examine whether any particular psychological examination is or is not "medical."

The EEOC's guidance does not state whether any specific examination, such as the MMPI or the CPI, is medical. Instead, the guidance says that EEOC investigators will apply the same list of factors applied to other types of examinations to determine whether a challenged psychological examination is medical.

For example, the EEOC says that a psychological examination would be considered medical if it provides evidence concerning whether an applicant has a mental disorder or impairment, as characterized in the American Psychiatric Association's most recent Diagnostic and Statistical Manual of Mental Disorders. On the other hand, the guidance says that a test designed and used to measure only factors such as the applicant's honesty, tastes, and habits would not normally be considered medical.

## Reasonable Accommodations that Affect Co-workers

- Q. Some ADA reasonable accommodations, for example shift changes or reassignments, often have a negative effect on co-workers. What will EEOC do about this problem?
- A. The Commission has made clear that an employer cannot prove that a reasonable accommodation poses an undue hardship by simply pointing to its negative impact on the morale of co-workers. I would add that the best way to deal with such morale problems is to address them in advance by creating a workplace culture in which co-workers understand (1) that the employer must comply with all applicable employment laws, and (2) that such compliance may mean the provision of leave (e.g., under FMLA and ADA) and various reasonable accommodations (under the ADA).

## Reasonable Accommodation

- Q. Some courts have said that employers may have to provide workers who have disabilities with reasonable accommodations related to treatment -- even where they are able to perform their jobs. Do you agree?
- A. I believe that you are referring to the Ninth Circuit's recent decision in Buckingham v. United States. There the court approved the reasonable accommodation of transfer for the purpose of obtaining better medical treatment.

It is clear that the duty of reasonable accommodation under the ADA is not limited to accommodations that would enable an individual to perform his or her job. Accommodation goes beyond this. It can also be for the purpose of enabling a person to enjoy the privileges and benefits of employment, and for the purpose of enabling a person to pursue medical treatment. Congress clearly contemplated leave for the purpose of obtaining treatment as a form of reasonable accommodation. Buckingham is new in that it approves the reasonable accommodation of transfer for the purpose of obtaining better treatment.

## Personal Care Attendants

- Q. The Commission has said that, if a personal care attendant is required primarily for the personal benefit of the individual with a disability, then the employer will not have to provide the attendant as a reasonable accommodation. Do you agree with this position?
- A. As I understand it, the Commission recognizes that many individuals with disabilities require the assistance of personal care attendants to help with eating and toileting. However, the question for the Commission is whether, and to what extent, employers must provide such assistants as a form of reasonable accommodation. In the Appendix, the Commission explained that employers must provide, as a reasonable accommodation, any modifications or adjustments that are required to meet job-related needs, but that they do not have to provide modifications or adjustments that are primarily for the personal benefit of the individual with a disability. This is consistent with the approach taken under the Rehabilitation Act.

As you have pointed out, the Commission has said that, if a personal care attendant is required primarily for the personal benefit of the individual with a disability, then the employer will not have to provide the attendant as a reasonable accommodation. In this situation, however, the employer would be required, as a reasonable accommodation, to permit the individual with a disability to provide his or her own personal attendant (unless it would impose an undue hardship). If on the other hand, a personal care attendant is required to assist in the performance of job-related functions, then the employer would have to provide an attendant as a reasonable accommodation. So, for example, an employer might have to provide for attendant care on occasional business trips. An employer might also have to provide attendant care if it maintains a Health Service that regularly provide medical and other personal services to the employer's employees.

As cases arise presenting this issue, I will review them carefully.

## Mental Health Issues

- Q. Mental health advocacy groups have criticized EEOC's ADA guidance for giving insufficient attention to mental health issues. What would you do in this area?
- A. I believe that the Commission has taken this criticism seriously and is addressing the important mental health issues in all ADA guidance currently under development. In addition, Commission staff are drafting guidance specifically devoted to ADA and Psychiatric Disability. I will ensure that the Commission continues to focus on these important issues.

## Violence in the Workplace

- Q. Do employers need to worry about an ADA lawsuit if they take action against an employee who is physically violent at work?
- A. NO. An employer need not tolerate physical violence from employees with disabilities when it does not tolerate such conduct from non-disabled employees. An employer may terminate disabled employees if it terminates all other employees who are physically violent at work. This is the case even when an employee is violent because of his or her disability.

## Violence in the Workplace

- Q. Do employers need to worry about an ADA lawsuit if they take action against an employee who is making threats against other employees at work?
- A. NO. Again, an employer need not tolerate threatening behavior from disabled employees when it does not tolerate such conduct from non-disabled employees. The employer is free to apply its usual discipline to employees with disabilities. When the usual discipline is not termination, however, the employer may have to offer reasonable accommodation if the threatening behavior was caused by a known disability.

## Conduct Standards

- Q. May employers discipline disabled employees for misconduct that is not violent but is caused by their disability?
- A. YES. Employers may apply uniform conduct and discipline to individuals with disabilities, even when misconduct is caused by a disability. When the appropriate discipline is not termination, however, the employer may be required to offer reasonable accommodation for a known disability.

## Discrimination Against Persons with AIDS

- Q. Is the ADA helping persons with AIDS?
- A. Much of the Commission's AIDS enforcement activity has involved persons with HIV or AIDS. Of 500 charges filed by persons with HIV/AIDS, 329 have been resolved in some fashion. The Commission has filed ten lawsuits based on charges from persons with HIV/AIDS. It has also issued enforcement guidance saying that, where an employer singles out a specific disability (such as AIDS) for unfavorable treatment in a health insurance plan, it must prove that its action is not a subterfuge to evade the purposes of the ADA.

We expect to continue to aggressively enforce the law in these cases.

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For a complete list of items withdrawn from this folder, see the  
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### Direct Threat to Self

- Q. The EEOC included a direct threat to self defense in its final ADA regulation. However, that defense does not appear in the statute. Will you be reconsidering this defense?
- A. As I understand it, the EEOC believes that the direct threat to self standard set forth in its final rule is necessary to ensure that employers do not exclude individuals with disabilities from employment opportunities because of myths and fears about safety. It is true that the ADA does not itself include the employer defense of direct threat to self. However the Commission was aware that the courts interpreting section 504 of the Rehabilitation Act read into it the concept of direct threat to self. In doing so, they utilized various standards, many of which have permitted the consideration of generalizations about the effect or progress of the disability or about the anticipated future ability of the individual to perform the job -- criteria that can no longer be considered under the stringent direct threat to self provisions of the Commission's regulations.

Under the Commission's direct threat standard, the employer must show that the individual poses a significant risk of substantial harm. The determination that an individual poses a direct threat to self can only be based on the individualized assessment of objective, factual, medical and other evidence relevant to the individual's present ability to safely perform the essential functions of the job. The opinion of the employer and/or speculation about the individual's future ability to perform the job are irrelevant.

Thus far the "direct threat to self" defense has not been a critical issue in ADA enforcement. Should it become so, it is possible that the Commission may revisit the issue.

## Health Insurance

Q. Should the Commission Retain Its Policy of Permitting Health Insurance Plans to Continue to Provide Lesser Coverage for "Mental/Nervous" Conditions than for Physical Conditions?

A. The ADA prohibits discrimination on the basis of disability. It does not overhaul the insurance industry or reform the nation's health care system. The Commission's position is that the traditional insurance plan distinction between coverage of physical conditions, on the one hand, and coverage of mental/nervous conditions, on the other, is not a classification that is based on disability. In other words, the mental/nervous classification does not single out a particular disability or group of disabilities. Rather, it applies to a broad range of treatments that are used by people with and without disabilities. Insurance classifications that do not single out a particular disability or group of disabilities are not subject to ADA scrutiny.

The Commission's position appears to be a reasonable interpretation of the ADA. It is also consistent with the case law applying the Rehabilitation Act of 1973, the statute on which the ADA is modelled, to health insurance plan distinctions. The Commission position should, therefore, be retained, unless the Congress enacts health care reform legislation that prohibits such an insurance distinction.

### Long Term Disability Plans

Q. Does it Violate the ADA for Long Term Disability Plans to Provide Lesser Benefits for "Mental/nervous" Conditions than for Physical Conditions?

A. The question is whether "mental/nervous" distinctions in long term disability plans should be viewed as disability-based insurance distinctions -- unlike the mental/nervous distinctions in health insurance plans. If it is determined that such a distinction is disability-based, it would violate the ADA unless the distinction could be shown to be justified by the risks or costs associated with mental/nervous conditions.

This is a very difficult issues which will require further study before a definitive answer can be given.

## Disability Retirement

- Q. The Commission has received numerous letters from retired police officers asking whether it violates the ADA for an employer to have an income offset provision in its disability retirement plan, when there is no such provision in its regular service retirement plan. Many of these retired officers have also filed discrimination charges raising this issue. Do you have any views on this matter?
- A. As I understand it, the Commission has not yet formally adopted a position on this matter. However, a Federal District Court in California recently ruled that disability retirement and service retirement are clearly different benefits that serve different purposes. According to the court, because they are different benefits, it does not violate the ADA for a disability retirement plan to have different or less favorable features than the service retirement plan, as long as individuals with disabilities who are qualified for service retirement are not denied service retirement because of their disabilities. Felde v. City of San Jose, 3 Americans with Disabilities (AD) Cases 147 (N.D. Cal. 1994).

This is clearly an issue in need of resolution by the Commission and one that I intend to address.

## Workers' Compensation

- Q. An employee with an occupational injury will generally have a workers' compensation claim where the injury results in some type of disability. Since the ADA also covers individuals with disabilities, does this mean that attorneys will be able to turn every workers' compensation claim into an ADA claim as well?
- A. No. The term "disability" has a specific definition under the ADA. Although an injured employee may have a disability under a workers' compensation law, he or she may not have a disability for ADA purposes. Many occupational injuries result in impairments that are only temporary or are not severe enough to be considered a "disability" for ADA purposes.

## Workers' Compensation

- Q. Employers have been providing light duty for employees with occupational injuries as a way of more quickly returning them to the job and reducing workers' compensation costs. Does the ADA now require employers to make light duty jobs available to every employee who has a disability?
- A. The Commission is currently studying this issue. An argument can be made that such a policy does not violate the ADA because light duty assignments would be made on the basis of the cause or source of the disability, and not the disability itself. An employer may not use such a policy, however, as a way of avoiding its obligation to provide other reasonable accommodations to qualified individuals with disabilities.

Damages

Q. Do you support legislation to eliminate the caps on the amount of damages that an employer would be liable for, which are currently based on the size of the employer (number of employees)?

A. I believe that it is unfair to cap the amount of damages that can be received under Title VII for discrimination since individuals who are discriminated against on the basis of race and national origin have unlimited recoveries available to them under other statutes such as Section 1981. Thus, individuals who are subject to the same discriminatory conduct but on different bases (i.e., race and sex) have unequal remedies available.

Q. Do you believe that it is appropriate for the Commission to lobby Congress on lifting the damage caps?

A. As the leading enforcement agency in this area, we would be remiss if we did not provide our views and expertise to Congress on this important subject.

Q. Should the Commission's position on punitive damages be consistent with Hazen Paper in as much as the Hazen Paper Court was concerned with whether liquidated damages were appropriate under the ADEA?

A. This is an issue that I anticipate that the Commission will be exploring further. [At first blush, it does appear that Hazen Paper would have some bearing inasmuch as the Court there was defining "reckless disregard" and punitive damages are allowable under Title VII when the employer acted with "reckless indifference."]

Retroactivity

- Q. In light of Landgraf and Rivers, the cases that concluded that with respect to damages and Section 1981 respectively, the Act does not apply retroactively, do you think any provisions of CRA 91 should operate retroactively?
- A. The Commission will be studying the issue. However, I would note that the Court in Landgraf and Rivers did not set forth a rigid rule and that each section should be looked at individually. [Thus, for example, the ADEA statute of limitations provision is likely to have retrospective application.]

Charge Processing

Q. With a backlog of 83,000 charges (a full year's work) and an annual intake of 100,000 charges, what do you propose to do about the work that faces EEOC?

A. The Commission has an enormous workload, and there are three fronts in which that workload must be attacked. First, we must ensure that Congress gives EEOC adequate resources to do the work that must be accomplished. Second, the Commission must look at the way that individual charges are processed to make sure that they are handled expeditiously and appropriately. Third, the Commission must look at new and innovative methods for uncovering and remedying discrimination, as well as new methods for resolving those individual charges in its inventory.

Charge Processing.

Q. Do you believe that EEOC must investigate each and every charge filed with it.

A. There are a few different ways to approach your question. Strictly as a matter of law, there is no requirement that EEOC investigate all charges filed under ADEA or EPA. While Title VII, and thus the ADA, require an investigation, the law does not define what must be done nor does it require that a "full" investigation be done of each and every charge.

As a matter of policy, we must be careful to balance all the interests. We do not want to ignore discrimination that exists in the workplace. Neither do we want to spend needless time on one charge when there are so many others that require our time. As Chair, I will attempt to balance these competing concerns to ensure a process that is appropriate for each charge.

Charge Processing - Pattern or Practice

Q. Do you think the focus of the Commission's litigation cases should be individual intentional discrimination cases or systemic cases?

A. Both individual intentional discrimination and systemic cases are a part of the Commission's enforcement mandate. Although individual discrimination claims still constitute a significant portion of the Commission's enforcement activity, it should be noted that systemic claims generally involve a large number of employees who can benefit from the Commission's enforcement action and is an efficient and effective use of Commission resources in its mission to eliminate discrimination.

Q. Would you support the vigorous use of pattern or practice and adverse impact cases to enforce Title VII since it has been suggested that because these cases involve significant segments of the workforce they are ultimately a more efficient use of resources?

A. Under the 1991 Civil Rights Act, Congress codified the longstanding Supreme Court precedent, beginning over 20 years ago with Griggs, that adverse impact is a valid cause of action under Title VII. Thus, Congress has acknowledged and approved the pursuit of these kinds of cases. I believe that this is an efficient use of Commission resources in the pursuit of its mandate to eliminate discrimination.

## EEOC Operations

- Q. What do you intend to do about morale problems, chronic understaffing and inefficiency?
- A. I believe that by renewing the Agency's leadership role in civil rights enforcement, the Commission staff's morale would improve markedly. But, I would note that the Commission's consistent underfunding coupled with additional responsibilities under new laws has overburdened the small staff of the Commission.
- Q. Do you believe that because performance reviews for field personnel are based on their number of processed charges that this practice has led to incomplete investigations and poor quality charge processing?
- A. To be honest, I believe that this system does need some reform. Keeping in mind the overwhelming number of charges and our obligation to charging parties and respondents, it is clear that the managers at the Commission are attempting to handle the caseload. However, it is my belief that while productivity is important, it is inevitable that when the entire focus is on quantity, quality will suffer.
- Q. What reforms would you suggest or implement in response to the criticisms in a recent report by the group 9 to 5 that intake personnel are rude, indifferent and fail to provide adequate information about the charge process?
- A. I found the report extremely disturbing. As Chairman I intend to investigate these allegations fully. No doubt the understaffing and the current poor morale has contributed to this problem, which of course does not excuse rudeness and like behavior. As one of my goals in revitalizing the agency, I will of course focus on the front lines. [It has occurred to me that one partial solution is to provide brief printed materials that explain to charging parties their rights and responsibilities.]

## Proposed Harassment Guidelines

### *N.B. Inappropriate Questions*

Under the Administrative Procedure Act, federal officials have wide latitude to consider and speak out on matters that are before them and will come before them. They cannot, though, demonstrate an inalterably closed mind, especially on rulemakings they will be considering. The following types of questions should be approached with caution:

- What position will you take on the elimination of religion from the harassment guidelines?
- Will you vote to eliminate religion from the harassment guidelines?

The caution is that, whatever your answer, it should not show that you have so prejudged an issue that you could not change your mind based on your examination of public comment and other analyses that you may see as a decisionmaker.

Q. In the introduction to the Guidelines, the Commission noted that sexual harassment presents unique issues of human interaction and therefore should be kept separate from the Consolidated Guidelines. Some comments have suggested that consolidation would better enable employers to formulate policy and understand their responsibilities. If you issue revised guidelines, will they consolidate the Sexual harassment Guidelines?

A. Although I cannot comment definitively on what the Commission will ultimately decide with respect to the Guidelines, the Commission will take these comments seriously.

Q. As you know, the Senate by a vote of 94-0 passed a Sense of the Senate resolution indicating that religion should be removed from the Guidelines as currently written because religion presents special issues not presented by the other categories. The resolution indicated that any guidelines that include religion should be further clarified. What do you intend to do about these Guidelines?

A. Again, I cannot comment definitively on the Guidelines. I can say, however, that I believe it is important to issue guidelines in this area because there is so much confusion over what does and does not constitute harassment. In whatever decision the Commission makes about the Guidelines, I can assure you that the Commission will be guided by the Senate resolution.

## Religious Harassment

- Q. Only 1/2 of 1 percent of charges involve religious harassment. Do you think that religious harassment is really a problem in the workplace?
- A. Even one case of religious harassment makes it a problem with which the Commission must grapple. I would point out, in addition, that there are a number of reported cases, in which charging parties have alleged severe instances of harassment and have been granted relief by the courts. For example, in one district court case a Jewish employee was continually taunted with epithets such as "Christ killer," and "Dirty Jew." Unfortunately, religious harassment does occur.

Religious Harassment

- Q. Won't **any** attempt to regulate religious harassment lead to a religion neutral workplace in violation of the First Amendment.
- A. As Chairman of the EEOC my job would be to enforce Title VII. That law prohibits religious harassment but also requires employers to accommodate employees religious beliefs. [The accommodation provision preserves employees First Amendment Exercise rights]. If an employer tried to sterilize the workplace of religion, he or she would no doubt run afoul of Title VII's accommodation requirement.

## Harassment - Limits on Liability

- Q. Following a Second Circuit case, Karibian v. Columbia University, there has been some question about whether, even if an employer has an effective anti-harassment policy and fully reacts to charges of harassment, it may nevertheless be liable. Do you think an employer should be able to absolve itself of liability for harassment by supervisors or co-workers if it has done everything possible to rectify the problem?
- A. In the Commission's Enforcement Guidance on "Current Issues of Sexual Harassment," the Commission followed Supreme Court precedent (Meritor) indicating that principles of agency liability should be applied in this context. In that document, the Commission stated its position that an employer that has a firm anti-harassment policy that it vigorously enforces may be able to absolve itself of liability. The Commission also noted, however, that in some cases, if the harasser had "inherent authority" to harass (e.g., the harasser was so highly placed within the organization that the charging party would reasonably believe that the organization implicitly "approved" of the harasser's conduct) then the employer could be liable. I believe that the Commission's current policy is judicious and balances the factors appropriately.
- Q. Because Title VII provides a cause of action for disparate treatment, the question has arisen whether an employee would have a cause of action against an employer that harasses both men and women. Is a person who harasses both men and women guilty of illegal sexual harassment?
- A. This is an unsettled issue and is likely to depend on the facts of the particular case. I note that the Ninth Circuit recently considered this issue and concluded that both the men and women who were harassed had a cause of action under Title VII. [One factor in that case appears to have been that the form or severity of the harassment directed against the men and the women was different].

### After-Acquired Evidence

- Q. The Supreme Court has agreed to hear a case involving the issue of after-acquired evidence, where an employee was allegedly discriminatorily discharged but the employer discovered evidence, after-the-fact, that would have caused it to discharge the employee anyway. Don't you think that an employer should be able to avoid liability when the employee alleging discrimination has lied to it? Is there a problem with the notion that an employer who has engaged in discrimination could escape liability by ferreting out evidence that would justify its action?
- A. Of course the anti-discrimination laws have two purposes -- both to make the charging party whole and to deter employers. If the purpose of the statute is deterrence, it is not good policy to allow the employer to relieve itself of liability merely because after the discriminatory conduct was committed it discovers a reason to justify its action.

## Comparable Worth and Pay Equity

- Q. The "comparable worth" doctrine, in essence, would require employers to provide equal pay to employees in dissimilar jobs, often entailing totally different skills and responsibilities (for example, nurses and maintenance workers), where the jobs being compared are of comparable worth (or value) to the employer. Although in a 1981 decision (County of Washington v. Gunther), the Supreme Court did not decide the validity of comparable worth claims under Title VII, numerous other courts, before and after Gunther, have rejected such claims. In addition, in a 1985 Commission decision, the EEOC also rejected the doctrine, holding that there was no statutory basis for claims for increased wages based on a comparison of the intrinsic worth of different jobs. What is your position on comparable worth? Would you support this doctrine and revise/modify the EEOC's existing policy in this regard?
- Q. Would you support legislation requiring equal pay for comparable jobs?
- Q. The Fair Pay Act of 1994 is designed to eliminate wage disparity based on sex, race, or national origin. Do you think that the passage of the Fair Pay Act of 1994 sponsored by Ms. Norton will result in a need for additional resources for enforcement? And since the EEOC has been lax in its enforcement of the Equal Pay Act generally, what would it do to enforce this act if it is passed?
- Q. The Commission has been criticized for failing to properly enforce the Equal Pay Act. How do you intend to beef up enforcement of the EPA?
- Q. Women who are paid less than men who have similar jobs should have a means of redress. Do you think the availability of remedies under both Title VII and the EPA are sufficient to redress this form of discrimination?

Miscellaneous Wage Discrimination Issue

- Q. I understand that some men have complained that they are low paid because they are in jobs that are underpaid because they are typically held by women. Should men have standing to challenge discriminatory practices when they suffer pecuniary injury as a result of discrimination targeted at women?

Hicks Legislation

- Q. Do you support legislation to overturn the Hicks decision, which has been interpreted as making it harder for employees to prove intentional discrimination by requiring proof that an employer's offered reason for its action was false and was an attempt to hide discrimination?

Exemption for Religious Organizations

Q. Section 702 of Title VII exempts religious organizations from the provisions of Title VII involving religious discrimination. Do you think religious organizations should be exempt from provisions of Title VII dealing with other bases of discrimination?

## Gay Rights Bill

- Q. Senator Kennedy recently introduced a bill prohibiting employment discrimination on the basis of sexual orientation. How do you feel about the new sexual orientation bill, particularly in light of your experience with the military?
- Q. The bill will give the Commission additional enforcement responsibilities. It also does not contain some measures included in Title VII (e.g., no adverse impact cause of action, no affirmative action, a complete exemption to not-for-profit activities of religious organizations). Is there anything you see in the bill as causing EEOC problems?
- Q. Do you think that discrimination against individuals because of their sexual orientation is already covered by the existing anti-discrimination laws?
- Q. While the bill does cover heterosexuals, isn't it just really creating special rights for gay men and lesbians?
- Q. What affect would this legislation have on the Commission's current backlog?

English-Only Rules

- Q. The Supreme Court recently declined to review a case involving an employer's speak-English-only rule (Garcia v. Spun Steak Co.). The Court's decision leaves standing the Ninth Circuit Court of Appeals' decision in Spun Steak, which upholds the employer's English-only rule as applied to bi-lingual employees and which is significantly at odds with the EEOC's position on this issue. Under the EEOC's Guidelines on National Origin Discrimination, such rules are presumed to have disparate impact on the basis of national origin and violate Title VII unless justified by business necessity. Would you support legislation to nullify Spun Steak by codifying the Commission's position on English-only rules?
- Q. To the contrary, would you support revising/modifying the Commission's position on English-only rules in light of the Supreme Court's decision not to hear the Spun Steak case?

## Testers

- Q. Testers have been used successfully to enforce fair housing laws and in limited circumstances by non-profit employment law groups. Some argue that since qualifications for employment are more subjective, testers are not a natural fit in the employment context. However, there are some cases in which testers have uncovered employment discrimination. First, although the Commission has taken the position that testers have standing, what are your personal views about whether testers have standing in the employment context?
- Q. Second, do you think the Commission should use testers to enforce anti-discrimination laws?
- Q. Do you think individual testers should be allowed to keep any damages they are awarded, since it may be claimed that damages may give testers a monetary incentive to exaggerate their claims?
- Q. If the Commission were to use testers, would it use its own employees/staff as testers, and wouldn't this compromise its impartiality during the administrative process or do you think it analogous to investigative techniques commonly used in a variety of law enforcement contexts?

## Affirmative Action

Q. Do you believe in quotas?

A. The Supreme Court has well established when race and gender conscious remedies may and may not be used to redress violations of laws. These decisions will dictate the Commission's policies regarding affirmative action. Obviously, the Commission should not seek race or gender conscious remedies where, under the controlling Supreme Court decisions, remedies of that sort would not be appropriate.

Q. Isn't affirmative action contrary to notions of fairness and merit-based decision-making?

A. Often affirmative action is an effective strategy for advancing merit principles. Employers who follow affirmative action policies may end up hiring or promoting exceptionally well-qualified individuals who might otherwise be barred from such opportunities. Thus, affirmative action is an effective means of assuring that all qualified individuals will be considered for employment opportunities.

Q. Shouldn't the best qualified applicant always get the job?

A. In many instances, there is no best qualified applicant. As the Supreme Court has noted, an applicant from a diverse background may bring unique qualities to a job. Also, it is clear that the courts continue to require that all applicants be qualified for the job, even where affirmative action might be a consideration.

Q. Do you believe that individuals who are not themselves victims of discrimination should be entitled to preferential treatment under the guise of affirmative action?

A. It is often difficult or impossible to identify specific victims of discrimination where an employer's discriminatory practices are targeted toward women or minorities as a group. Thus, it is often impossible to know exactly who would have gotten a job absent discrimination.

Q. What is your position on reverse discrimination generally?

A. It is clear that Title VII protects all individuals, regardless of their race or gender. Title VII does not recognize a separate cause of action called "reverse discrimination." I believe that, therefore, such charges should be treated as any other charge of discrimination.

Q. How do you feel about the University of Texas case, recently reported in the NY Times, alleging reverse discrimination in law school admissions? [case allegedly involves 15% set aside for minority admissions]

A. [Is DOJ participating? Have they taken a position? Probably say that you cannot comment because you don't know all of the background and facts of the case, but we will be following it closely.]

Pre-Employment Inquiries

- Q. Why has the Commission not issued an enforcement guidance on permissible pre-employment inquiries under Title VII?
- Q. Can employers use information obtained during the application process to screen out potential employees, i.e., information concerning arrest records and conviction records?

Native Americans

Q. It has come to our attention that Indian tribes have often attempted to invoke the tribal exemption for businesses that they own and that the EEOC has either not responded to such charges or has questioned the applicability of the exemption. Since we exempted tribes, is there any question that tribally owned businesses should be able to use the exemption? How far do you think the exemption of Indian tribes goes? Does it cover organizations with a nominal involvement with the tribes themselves?

A. This is an issue that the Commission will probably be looking at fairly soon. I understand that the question has recently arisen in connection with regard to tribally owned casinos. Because it is likely to come before the Commission, and because I want to study the issue more closely, I don't think that I should take a position at this time.

## Minority Recruitment

"Minority recruitment" is a term used to describe a variety of targeted recruitment and referral practices designed to assist employers in meeting their voluntary affirmative action objectives with respect to the employment of minorities and women. These practices include, among others, exclusively recruiting, interviewing, and referring minority and female candidates; holding minority-only or female-only job fairs and recruitment dinners; sponsoring minority and female clerkship and internship programs; and maintaining minority and female resume books. We understand that the Commission is reconsidering its long-standing position that exclusionary recruitment and referral practices violate Title VII.

- Q. Do you believe that Title VII permits employers, or employment agencies acting on behalf of employers, to exclusively recruit minorities and women to further employers' voluntary affirmative action goals? If so, under what circumstances would such practices be lawful?

Mission and Direction of the Agency

- Q. Do you believe that race discrimination is still a problem in this country? Approximately forty percent (40%) of all charges taken by the Commission involve race discrimination. However, the Commission's focus in recent years has been on sexual harassment and the ADA. Will we see a renewed focus on the crucial area of racial discrimination in your administration?
- Q. What are the most pressing discrimination issues facing the EEOC? As Chairman, what issues interest you most and would you probably focus on?

## Alternative Dispute Resolution

Q. Do you see alternative dispute resolution playing any role in your policies as Chairman?

A. EEOC must, like every federal agency, consider the use of ADR in all of its processes. The workload that confronts EEOC - and that workload is about resolution of charges - suggests that innovative methods of ADR may be appropriate. Clearly, we must use every available option that we believe will be effective in resolving charges of discrimination.

I can categorically state that I have not ruled out anything because we will need to look at a number of issues dealing with charge processing to chart a course for the Commission. We need to look at what charges EEOC receives and which ones they don't receive, how EEOC has in the past processed charges and how they do it now, and we have to look at methods for attacking discrimination that obviates the need for thousands of individual charges.

### Reporting Requirements

Q. For years the EEOC has required universities to file an EEO-6 report. I understand that the EEOC is no longer requiring that report. Will you reinstate it?

A. I understand that the Office of Management and Budget has been working with EEOC and the Department of Education to have one report from universities that both agencies can use. Right now I understand that EEOC does not have OMB approval to require the EEO-6 report. If the Education report is not adequate for our purposes, then I will go to OMB to have EEOC's authority for the EEO-6 report restored.

Q. What is your position of OMB's efforts to revise the race and ethnic designations used by federal agencies?

A. [Will it affect enforcement of the civil rights laws? If positively, support it; if negatively, oppose it?]

Violence in the Workplace

Q. Do you see EEOC having any role to play in reducing instances of violence in the workplace?

A. [Do individuals resort to violence because there is no other method to resolve workplace problems? Do we think that better methods at EEOC to resolve charges will reduce violence, or do we think that better employer mechanisms to resolve disputes will reduce violence?]

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Responses to "The Numbers Game at the EEOC"

Q. Do you think that employers should be allowed to have policies that exclude/disqualify employees because they have arrest records?

A. A blanket exclusion would likely violate Title VII because such a policy may disproportionately exclude blacks and Hispanics. However, there are circumstances where an employer may be allowed to consider an arrest record. Apart from this, however, you should keep in mind that arrest records should be treated differently from convictions because an arrest is merely a suspicion that an individual employee committed a crime, and thus, a blanket exclusion on this basis should be closely scrutinized. An exclusion that is job related and consistent with business necessity, i.e., one that is narrowly tailored to the position at issue, would not be unlawful.

Q. Do you think that the Commission should focus its enforcement activities on individual intentional discrimination claims or on systemic claims involving adverse impact, which usually affect a large number of employees?

A. Both intentional discrimination and adverse impact are a part of the Commission's enforcement mandate. Under the 1991 Civil Rights Act, Congress codified the longstanding Supreme Court precedent, beginning over 20 years ago with Griggs, that adverse impact is a valid cause of action under Title VII. Thus, Congress has acknowledged and approved the pursuit of these kinds of cases. Although individual discrimination claims still constitute a significant portion of the Commission's enforcement activity, it should be noted that adverse impact claims generally involve a large number of employees who can benefit from the Commission's enforcement action and is an efficient and effective use of Commission resources in its mission to eliminate discrimination.

Q. Would you agree that pursuing adverse impact claims results in employers implementing quotas?

A. Adverse impact claims sensitize employers to the underrepresentation of different groups in the labor force. I do not think that such claims lead to quotas.

Q. Is the heavy case load of the EEOC an indication of understaffing or inefficiency?

A. The current case load is a reflection of continued understaffing in the face of additional enforcement responsibilities assigned to the Commission by the ADA and the

Civil Rights Act of 1991, and the prior Administration's policy of limiting resources. It is my belief that the charge processing system may need to be revised in light of the current case load. This is an area to which I intend to devote much time and attention.

Q. What does the EEOC do about frivolous suits being brought against employers who, though blameless, ultimately decide to settle out of court and avoid full blown litigation expenses?

A. If the EEOC believes that a charge is frivolous, it issues a "no cause determination." Unfortunately or not, we cannot control the overly litigious employee who decides to go to court anyway. With respect to the cases brought by the Commission, these suits are instituted only after a finding that discrimination most likely occurred and the employer has been unwilling to settle prior to institution of the suit. As an aside, the Federal Rules of Civil Procedure [Rule 11] provide sanction against parties who bring frivolous suits.

Q. Critics charge that the EEOC pressures employers into settling during the EEOC administrative process before there is any determination of discrimination. Do you believe this is true, and if so, what would you do to reform this policy?

A. The EEOC is required by Title VII to engage in conciliation after a finding of reasonable cause. The agency also tries to resolve charges, when the parties agree, prior to making such a finding. It is the Commission's belief that pre-suit settlements are an efficient and effective means of resolving discrimination claims without forcing litigants to incur substantial court costs. Currently, the agency is engaged in a pilot program of alternative dispute resolution, which we hope will be a viable means of further settling charges prior to court.

Q. How would you respond to the charge that the EEOC's policy of pursuing disparate impact cases has left firms reluctant to locate in areas with large minority populations?

A. I would be surprised if any business did not choose to locate to a site because of the EEOC's policy on disparate impact rather than on cost-based factors.

Q. What kind of oversight would you build into the charge processing system to ensure that EEOC investigators follow procedures?

A. I would look at how employees are evaluated. As I understand it, performance evaluations are directly tied to disposition

of charges, making speed in processing the overriding motive. Accordingly, I believe that a re-evaluation of the charge processing system is in order to ensure that charges receive their due consideration and that investigators are well trained.

Q. Shouldn't remedies be limited to actual victims of discrimination rather than those who belong to a specific group?

A. It is often difficult or impossible to identify specific victims of discrimination where an employer's discriminatory practices are targeted toward women or minorities as a group. Thus, it is often impossible to know exactly who would have gotten a job absent discrimination.

Q. What is the Commission's position on affirmative action? Do you believe that affirmative action is really just a requirement that employers adopt quotas to avoid liability? Does Title VII permit affirmative action policies?

A. The Supreme Court in Johnson and Weber upheld affirmative action measures under Title VII. It is clear that affirmative action measures are an effective means of remedying past discrimination. It is my position that, despite charges to the contrary, affirmative action is not quotas. The Supreme Court has carefully defined when an employer may engage in voluntary affirmative action under Title VII and it is clear that the Court has allowed employers to implement employment practices that benefit targeted racial or gender groups under a limited set of circumstances. The Commission does not generally require employers to engage in affirmative action except when necessary to remedy a finding of discrimination, and supports the voluntary efforts of employers who are trying to eliminate imbalances in their workforces.

Q. Do you believe that the EEOC should seek or approve settlements where there has been no determination of discrimination?

A. If parties can reach agreement between themselves, the EEOC will generally approve such a settlement. However, each case is considered according to its own merits, and if the Commission believes that systemic discrimination is at issue, rather than just a dispute between an employee and respondent, then it will act accordingly.

Q. How do you feel about job aptitude tests? Do you think such tests are discriminatory? How does the 91 Civil Rights Act's prohibition on norming affect your response?

A. Sometimes tests can be valid predictors of job performance if they test for skills or aptitudes that are related to the jobs at issue. We do not discourage the use of tests when they are valid predictors of job performance. However, it is well documented that many of these tests have been found to have discriminatory effects on minorities, and therefore, I believe that employers should be very cautious in using such tests.

Commission Involvement in Decisions

Q. What role will you play as Chairman, and what role will the other Commissioners play, in setting policy for the Commission.

- A. [●Policy is the concern of all 5 Commissioners;  
●The Chairman has administrative and managerial responsibilities that other Commissioners do not have;  
●Work together to accomplish many tasks ahead of us]

# NOMINATION

**HEARING**  
BEFORE THE  
**COMMITTEE ON**  
**LABOR AND HUMAN RESOURCES**  
**UNITED STATES SENATE**  
NINETY-NINTH CONGRESS

SECOND SESSION

ON

CLARENCE THOMAS, OF MISSOURI, TO BE CHAIRMAN OF THE EQUAL  
EMPLOYMENT OPPORTUNITY COMMISSION

JULY 23, 1986



Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE

68-495 O

WASHINGTON : 1986

## NOMINATION

WEDNESDAY, JULY 23, 1986

U.S. SENATE,  
COMMITTEE ON LABOR AND HUMAN RESOURCES,  
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman) presiding.

Present: Senators Hatch, Kennedy, Wallop, Grassley, Thurmond, Metzenbaum, and Simon.

### OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. We are happy to welcome everybody to the committee this morning.

We are meeting here this morning to consider the nomination of Clarence Thomas for reappointment as Chairman of the Equal Employment Opportunity Commission.

Mr. Thomas, you are no stranger to this body, and we have a lot of respect for you. I think your record at the commission is very well known to this committee as well. In my opinion, you have done an incredible job as Chairman, and I am personally grateful to have been able to work with you. You have been so willing to work with the committee as problems come up. And of course I look forward to working with you for another term as well.

In July 1981, this committee became very aware of critical management and financial problems at the EEOC which, in our opinion, required immediate correction. I asked the GAO to conduct an audit of the agency as quickly as possible. Three months later, in October 1981, the GAO provided the committee with an interim report that found the Commission at that time to be in financial chaos. Its books could not be audited; reports were unreliable; accounts were mismanaged; fund controls were inadequate, and transactions were unrecorded. It was a mess.

In fact, there were over \$27 million in unliquidated obligations, over \$9 million in error transactions, and over \$1 million in outstanding travel advances which had not been collected from staff.

In June 1982, the GAO released its final report. That report again documented the financial problems confronting the Commission; it raised serious questions about the integrity of past management, and documented possible violations of the law.

For example, the audit revealed that the EEOC managers were certifying annual reports which they knew were inaccurate; and the Commission had given \$1.2 million to private attorneys to sub-

### COMMITTEE ON LABOR AND HUMAN RESOURCES

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(11)

sidize the filing of lawsuits at a time when its own General Counsel's Office had run out of funds.

It is amazing to me that there was not a fuss made about all this, other than by this committee, at the time. At the same time, other reports found that the average Commission attorney was handling only three cases a year. Suits were being unnecessarily delayed. The Commission's backlog had grown to 12,000 cases. And complaints were often being settled without any regard for the merits of the case. One can only wonder how many cases could have been handled if the Commission was not being operated in such a fashion, really, in such total confusion.

So in sum, the EEOC that you, Clarence Thomas, inherited when you were confirmed in 1982 was a pure and simple disaster.

I did give you copies of all the GAO reports and asked you to do whatever you could to make improvements. And I just want to say as chairman of this committee that I think your efforts have exceeded all expectations. And I want to personally compliment you, because I have not seen anybody do a better job of cleaning up the mess that really existed in the Commission at that particular time.

In 1984, for the first time in its history, the EEOC received full approval of its financial accounting system by the GAO. The \$1.2 million in outstanding travel advances was eliminated through a tough debt collection system. And, as one would expect, enforcement activities have increased under your leadership.

In the 3 years since you became Chairman, the EEOC has obtained through litigation and compliance efforts \$419.9 million in monetary benefits for victims of discrimination—more than in any other 3-year period of the Commission. In fiscal year 1985, the Commission won \$54.2 million in relief through litigation—more than in any other preceding year in the Commission's history.

The number of cases going to litigation has also increased. The 411 court actions filed in fiscal year 1985 is the second highest total for a single year. Of the suits that were filed, over half were class actions. Moreover, the Commission has handled more charges during your stewardship than in any other comparable period.

Again, I want to compliment you for that.

Clarence Thomas has in my opinion been an excellent Chairman of EEOC at a time when the Commission desperately needed courage, integrity, and leadership. You have served without applause, without self-indulgent fanfare. You have even been attacked by some for agreeing to be part of the Reagan administration.

But the simple fact is that the EEOC today is doing a much better job of combating employment discrimination than it was back in 1982. The difference, in my opinion, has been Clarence Thomas, yourself.

It is my hope that when the committee next meets in executive session on July 30, that we will favorably report your nomination to be Chairman of the EEOC again.

You have been and will continue, I believe, to be an effective, courageous, and productive Chairman, and I think you deserve our expeditious review of your nomination.

I apologize for having postponed your hearing from last week, but a couple of our Senators just could not be there, and I wanted to accommodate them because they do have some questions; and

they pretty well agreed that if we held this hearing today that we will then have the markup or at least report you out.

[At this point we will receive Senator Grassley's statement for the record.]

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR  
FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, a little over 200 years ago the Founding Fathers made a Declaration of Independence from Great Britain. In that declaration, they affirmed their belief that the Creator has created all men equal and endowed them with certain unalienable rights, that among these rights are life, liberty, and the pursuit of happiness.

It seems to me that in the two centuries that have passed since the Declaration of Independence was penned by Thomas Jefferson, that clear affirmation has been both our main inspiration and our main challenge as a nation.

The challenge is how we, as a nation, will put into practice the principle that men are created equal and endowed with unalienable rights, and that the fundamental duty of Government is to protect those rights.

Today, we are considering a very important nomination indeed. The Equal Employment Opportunity Commission is charged with eliminating discrimination based on race, color, religion, sex, national origin, or age from the workplace.

The EEOC is thus charged with protecting our most fundamental American value, the right of all Americans to have an equal opportunity under the law to better himself or herself and make a contribution to our society.

I have noted that Chairman Thomas, in his tenure at EEOC, has made a strong commitment to enforcing the various laws that prohibit discrimination in the workplace. It is the duty of this committee in these hearings to examine Mr. Thomas' record in order to determine if he has conscientiously and diligently carried out his mandate as Commissioner.

The CHAIRMAN. With that, we will turn to Senator Kennedy, the ranking member of the committee.

I might first say that Senator Danforth called and regrets that due to a reconciliation markup, he will not be able to be here as he was 4 years ago to speak in support of you. Senator Danforth hired you as you graduated from law school in the attorney general's office in the State of Missouri. He brought you to the Senate as a legislative assistant when he was elected in 1976. If he were here, he tells me he would tell us that he thinks Clarence Thomas is a first-rate individual, a man of great capability, great integrity, and great commitment to the cause of racial justice. So he commends you to the committee, and I think that is high praise coming from Senator Danforth.

We will turn to Senator Kennedy at this time.

Senator KENNEDY. Thank you, Mr. Chairman.

I want to acknowledge your willingness to adjust these hearings to accommodate the interest of the membership. All of us are grateful for this. The position of the nominee is of very significant

importance and consequence, and this hearing will provide us with an opportunity to examine the record.

I am not familiar with any time agreement for the committee's consideration of the nominee, although I do not believe that I know of any reason why there should be delay. Since there was some reference to a time agreement, I want to at least express my understanding of the situation.

Mr. Chairman, in 1972 the Congress recognized that the equal employment laws of the Civil Rights Act were not being enforced. We granted the Equal Employment Opportunity Commission significant new powers to enforce title VII of the act. The Commission also has responsibility to enforce the Equal Pay Act and the Age Discrimination in Employment Act.

Yet now, 14 years later, there is disturbing evidence that the laws have been made a dying or dead letter again; disturbing evidence that policies in effect for more than a decade on affirmative relief in cases of proven or admitted discrimination have been abandoned. And they were abandoned by orders given without notifying the Congress.

The Commission has changed the standards of proof in hiring cases, with the result that the most effective civil rights remedy in the Federal arsenal has been dulled and set aside; and again, the change was made in the dark rather than in the sunshine as the law requires.

The rights of older workers to their pensions has been ignored because of pressure from the Office of Management and Budget, even though the Equal Employment Opportunity Commission has twice voted to change the law and end the discrimination against older workers and their pension rights.

The evidence goes on. Chairman Hawkins' House Labor Committee has reported on mismanagement in the Agency, including not only secret changes in major policies, but also manipulation of enforcement reports to give the illusion that the law has been carried out.

This nomination hearing could not be more timely. The Supreme Court has flatly rejected the administration's argument that affirmative action to remedy past discrimination is unconstitutional or illegal. The House report has raised serious questions about policy and management at the Agency. And this committee has just voted to reject the administration's nominee to the office of general counsel of the EEOC.

Few agencies in Government so embody our deepest hopes and most shared principles as does the Equal Employment Opportunity Commission. Congress has a responsibility under the laws and the Constitution to see to it that the Commission has the leadership and resources it requires to discharge its duties. And I am certain that Mr. Thomas is aware of the criticism of the EEOC, and I am sure that he shares our interest in setting the record straight.

The CHAIRMAN. Thank you, Senator Kennedy.  
Senator Wallop.

Senator WALLOP. Thank you, Mr. Chairman.

I welcome the opportunity to welcome Mr. Thomas this morning.

Our committee has an opportunity today to demonstrate that we can consider a qualified Presidential nomination in a reasonable and dispassionate manner.

Lately, it seems that this committee has been ganging up on the President's executive nomination. If the President, no matter what his party or political persuasion, nominates a qualified individual to serve in his administration, the President deserves the courtesy of Senate approval.

Mr. Thomas, by his performance and by his dedication to the concept of equality, deserves the Senate's approval. As we now consider Clarence Thomas for a second 4-year term as Chairman of the Equal Employment Opportunity Commission, we find that not only is he well-qualified but also, in my opinion, very brave to once again go through what has become a brutal, degrading nomination process.

According to his liberal critics, Mr. Thomas is guilty of not coming to the EEOC with a political agenda. This was a sharp departure from the practices of his predecessors who, too often, were intent on legislating through regulations rather than providing a proper administration of existing statutes.

It is certainly no secret that during the seventies, the EEOC was in total chaos and was on the verge of ceasing to function as an effective mechanism for resolving discrimination complaints. The major reason was the increased politicization of the EEOC.

Now, fortunately for us all, Mr. Thomas has devoted his first 4 years at the EEOC to imposing better management on its operation. The EEOC has focused on better turnaround on the job discrimination complaints. The Commission is hearing more cases than ever before and has decreased its backlog, which was a major problem of the seventies.

It should also be noted that the Commission has been largely spared from budget cuts. The budget in President Carter's last year was \$125 million; the 1985 operating budget was \$164 million.

Chairman Hatch's opening statement reviewed the improved efficiency of the EEOC, so I will not repeat this most impressive record. I have attached a table to my statement which reviews the diligent enforcement activities of the Commission.

But it is frustrating to face a situation where a dedicated public servant is efficiently and effectively implementing a law, yet is subject to a barrage of criticism because he is not administering the law as it is interpreted by some special interests.

For instance, the statutes guiding the EEOC say nothing about quotas to remedy discrimination complaints. But critics believe that quotas are the only remedy for resolving employment discrimination suits.

Mr. Thomas has read the law and has correctly decided that goals and timetables are the proper remedy.

Clarence Thomas should be congratulated by this panel for his administrative accomplishments and his dedication to carrying out the law.

Senator Danforth, for whom Clarence Thomas worked both in Missouri and in Washington, best described him as follows: "He is a person of very high character, very fine judgment, has a fine mind, and is a person who is totally committed to the cause of im-

proving employment opportunity for all the people of this country." I urge the committee to reaffirm Mr. Thomas as Chairman of the EEOC as quickly as possible.

Thank you, Mr. Chairman.

[The table referred to follows:]

Programmatic Activities of the U.S. Equal Employment Opportunity Commission

Fiscal Year	76 7/1/75- 9/30/76	77 10/1/76- 9/30/77	78 10/1/77- 9/30/78	79 10/1/78- 9/30/79	80 10/1/79- 9/30/80	81 10/1/80- 9/30/81	82 10/1/81- 9/30/82	83 10/1/82- 9/30/83	84 10/1/83- 9/30/84	85 10/1/84- 9/30/85
Court Actions Settlements and Interventions	484	241	188	208 <sup>1/</sup>	350	444	243	195	310	411
Class Actions Percentage of Data Filed 3/	N/A	N/A	N/A	N/A	N/A	N/A	420	554	514	544
(Number of Subpoena Enforcement Actions & Orders Included)	(N/A)	(N/A)	(12)	(16) <sup>1/</sup>	(32)	(76)	(77)	(39)	(88)	(125)
Monetary Relief Through Litigation	\$5.5 million	\$10 million	\$24 <sup>1/</sup> million	\$9 million	\$20.9 million	\$14.2 million	\$33.5 million	\$40.3 million	\$36.8 million	\$54.2 million
Monetary Relief Through Compliance	N/A	\$18.2 million	N/A	\$21.8 million	\$57.3 million	\$91.7 million	\$101.2 million	\$104.8 million	\$107.1 <sup>2/</sup> million	\$75.0 million
Total Monetary Benefits	N/A	\$28.2 million	N/A	\$21.8 million	\$78.2 million	\$107.9 million	\$134.7 million	\$144.8 million	\$145.9 million	\$129.7 million
Charges Received To Process	\$3,413	\$7,542	\$7,390	15,379	41,042	\$3,700	\$0,935	66,461	63,133	67,211
Cases Closed	N/A	48,922	52,715	38,915	69,353	71,490	\$7,052	74,441	55,024	63,346
Administration	Ford	Ford to 1/77	Carter	Carter	Carter	Carter to 1/81	Reagan	Reagan	Reagan	Reagan
		Carter from 1/77				Reagan from 1/81				
Chairman	Lowell Bury 5/75-5/76	Whelan (V. Chair)	Horton	Horton	Horton	Horton to 2/81	Smith to 3/82	Thomas	Thomas	Thomas
	Edna Whelan (V. Chair) 2/75-8/77	E.E. Horton 6/77-2/81				J. Clay Smith 3/81-3/82	Cathie A. Dattuck 3/82-5/82			
							Clarence Thomas from 5/82			
Subject Authority (Millions)	682,349 <sup>1/</sup>	\$70,813	\$84,550	\$111,417	\$124,562	\$144,610	\$344,739	\$147,425	\$154,039	\$182
Authorized Positions	2,504	2,487	2,637	2,752	2,779	2,790	2,328	2,084 <sup>3/</sup>	2,125 <sup>4/</sup>	2,125
Average Employment	2,189	2,470	2,409	2,243	2,390	2,058 <sup>10/</sup>	1,084	1,084	1,044	1,097

Notes

- 1/ FY76 was 15 months long due to change in fiscal period.
- 2/ ADEA and EPA litigation authority began 7/1/79.
- 3/ FY80 was first full year EEOC had jurisdiction of ADEA and EPA.
- 4/ Does not include ADEA and EPA.
- 5/ Complete data on type of cases filed was not maintained until FY82.
- 6/ CE case \$29.4 million.
- 7/ CH case \$42.5 million.
- 8/ Includes 3-month transition \$18,490,000.
- 9/ Full-Time Equivalency (FTE).
- 10/ Includes 433 new hires Oct. 1980 through Dec. 1981.

The CHAIRMAN. Thank you, Senator Wallop.

We will turn to Senator Metzenbaum.

Senator METZENBAUM. Mr. Chairman, as I sit here, I cannot help but think of the time many years ago when I fought for the enactment of Fair Employment Practices Commission legislation in the Ohio General Assembly. It was a tremendous battle, and finally we won it, after a period of something like 10 years. We went back to the legislature year after year after year.

And then I remember when there was the appointment of the chairman, and the chairman was up for confirmation and, almost without exception, every civil rights leader in the State was anxious to come forward to testify in his behalf.

To me it is rather significant, and I would think to the nominee himself it would be particularly significant, that we are conducting a hearing today in connection with his renomination, and to the best of my knowledge, nobody—nobody—in the American civil rights community will be here urging the confirmation of the nominee.

That gives a message loud and clear to the entire Nation. And I would think it would have a strong message to the nominee himself. I think it would say to him: What is there about me that causes the civil rights community not to be here, supporting my nomination? Does the whole army march to a different drumbeat than that which I play?

And, if that be so, how can I comport with myself my designation as the Chairman of the Equal Employment Opportunity Commission?

I would think that the nominee would have some real concerns about that.

It is wonderful to have my distinguished chairman speak so eloquently about your administrative achievements, and my colleague from Wyoming speak to how well you have been doing—and I respect them for that, and I commend you for their support. But I believe that there is a very loud and clear message that has to be found in the failure of the civil rights community to come forth to support this nomination.

Having said that, Mr. Chairman, you had indicated your desire to move this matter forward promptly, and I have no quarrel with doing that. On the other hand, I do want to know the answers to the questions that are asked routinely in our questionnaire. One of those has to do with contributions to political candidates. Our nominee said that he made nominal contributions to several candidates, cannot remember the names of the candidates or the amounts contributed.

Before this matter goes to an executive session for action, I would hope and expect you to direct the nominee to go back and search his records. Normally, political contributions are made by check; the check stubs are available, canceled checks are available. I believe the committee is entitled to have that information so we may determine for ourselves whether they are nominal, and also that we may be advised as to who received those contributions. So I want to say to the Chairman that I would ask you to direct the nominee to search his records for that purpose.

The CHAIRMAN. Do you have any problem with that, Mr. Thomas?

Mr. THOMAS. I do not have any problem. The contributions, if any, were to such events as receptions held in honor of candidates, and they were very nominal, probably in the order of \$10 to \$20, and they were cash.

The CHAIRMAN. So you just do not have any—

Mr. THOMAS. I do not have the funds to make major contributions.

The CHAIRMAN. Would you do this for us. If you have any checks that you can find—

Mr. THOMAS. I do not have any; I mean, it is as simple as that. I do not make contributions to political candidates, as a matter of practice. I do not have the funds to do it.

The CHAIRMAN. I think that is a good explanation, but we will of course allow Senator Metzenbaum to ask specific questions about it, and whether they were Republicans—I presume, maybe you did support some Republicans. You never know.

Senator METZENBAUM. That is not illegal or even unethical yet.

Senator WALLOP. It is not even unwise. [Laughter.]

Senator METZENBAUM. It might be bad judgment, but it is not illegal.

The CHAIRMAN. All right.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

There is no question, based on what the chairman said and what Senator Wallop said, that you have done a good job on the administrative side. And frankly, Senator Danforth has spoken to me about you and has spoken very highly.

I think the question is do you really believe in the mission of the agency, and that is what I want to sense. I think, with all due respect to my good friend from Wyoming, when he says, "If competent, we owe the President the courtesy of approval," that is a different standard than the advise and consent understanding of those who wrote our Constitution.

I think we have to ask for more than competency. I think we have to ask for belief in the job that you are doing. And I do not know that my colleague from Wyoming would differ on that.

And here when, for example, my colleague mentioned goals and timetables, I have your testimony before the House Education and Labor Subcommittee in which you say, "I do not support the use of goals and timetables. I do not think as a practical matter that they work."

There are some things in the record that do disturb me, and I hope during the course of this hearing that we can have a chance to get that out on the table and have a good discussion not only of your nomination, but of what the real function of your agency is.

I thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Let us turn to you, Mr. Thomas, if you have any statement you would care to make. Just summarize; I do not think you need to take much time.

Go ahead, please.

**STATEMENT OF CLARENCE THOMAS, NOMINATED FOR REAPPOINTMENT AS CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

Mr. THOMAS. First, Mr. Chairman, I would like to thank you for having the hearings in an expeditious manner, and I would like to read my prepared remarks. But before that, I would like to make a couple of observations about the comments.

I perhaps wisely or unwisely made the decision to seek renomination for some very personal reasons. I agree with Senator Wallop that the process has been somewhat grueling for those who come before this committee and other committees. But I find some of the criticism that have been leveled absolutely amazing over the past 4 years, and in some instances, actually to contradict themselves.

I find also amazing the talk about commitment. Senator Metzbaum mentioned his efforts in the Ohio Legislature. Well, all I have to offer is the fact that I grew up under segregation. I attended school under segregation, and I was the only black in my high school for 2 years of high school. And I am not used to walking in step with anybody because I was the only one of my kind, normally, wherever I was.

I also find it amazing that the amorphous concept of commitment is equated with agreement with those who claim commitment. I happen to be committed to what we are talking about. I have said it again and again and again. I have seen statements ripped out of context. I have seen statements distorted about statistics and other matters, for example.

I think it would be absolutely incongruous to work long hours, to upgrade and make an agency that I think is important work, to now take the position that I do not believe in what it I am doing. It is the height of absurdity for me to wake up and go to work to do a job—which is indeed a thankless job, and the only feedback that we normally get is criticism—if I did not believe in what I was doing.

With that, I would like to take the opportunity to introduce three of my Commissioners who joined me. The fourth unfortunately could not be here after the hearing date was changed. Commissioner Tony Gallegos; Commissioner Ricky Silberman; and Commissioner William Webb.

The CHAIRMAN. We welcome you, Commissioners, and appreciate having you with us.

Mr. THOMAS. And I again have the distinct pleasure to appear before this committee to seek your confirmation of my renomination as Chairman of the Equal Employment Opportunity Commission.

I am pleased to be here primarily because I believe in the mission of EEOC and because I now know we have become an effective agency in enforcing the laws under our jurisdiction.

Four years ago, I was not that confident. GAO had found, as the Chairman pointed out, serious problems in the administration and management of the Agency, and of course this committee had found similar problems. Simultaneously, there was considerable debate over and interest in a number of employment issues which involved EEOC as an Agency and me in my capacity as Chairman.

I made the conscious choice at that time to concentrate my energies on strengthening the management of the Agency, to make the Agency effective. Although we still have quite a way to go, we are now headed in the right direction—a positive, constructive direction.

Problematic areas such as financial management have been greatly improved, and the deficiencies highlighted by GAO have been successfully addressed. We are now locking in and institutionalizing management controls so that the deficiencies do not recur. We are also preparing the Commission to enter the 21st century with an integrated management structure and service delivery system that can effectively enforce the laws under our jurisdiction.

At my first confirmation hearing, Mr. Chairman, I stated that, "Essentially, the Commission is an enforcement Agency and should function as such." Over the past 4 years, we have consciously and deliberately transformed EEOC into an enforcement Agency. I use the word "we" because the Commissioners have unanimously and unequivocally supported this philosophy by adopting a remedies policy and an enforcement policy. The Commission unanimously adopted the remedies policy which in essence says that to the greatest extent possible, we are going to immediately place the charging party in the position he or she would have been but for discrimination and that we want the discriminatory conduct ended and remedied now—no promissory notes.

The essence of our enforcement policy is that we will enforce our administrative findings of discrimination.

But as the members of this committee know, tough talk is cheap, and implementation is tough—very tough. The initial efforts to develop the capacity to implement our policies have been very positive. But so much remains to be done. Tough but fair enforcement must become the hallmark of EEOC or it has absolutely no reason to exist.

The Commissioners have successfully garnered and focused the positive energies of the Agency toward such enforcement. But we still must enhance our ability to properly characterize cases at the earliest possible stage of our administrative process. We must improve on the quality and timeliness of our investigations. We must enhance the credibility and quality of our litigation efforts. We must continue to develop a systemic program that focuses on discernible patterns and practices of discrimination and effectively eliminate them from the workplace. We must continue in our efforts to automate EEOC and build centralized data systems with integrity. Perhaps most important, we must continue to upgrade our personnel and our resources.

This must do list is a major reason for my seeking to remain as Chairman of EEOC. I have felt, since my confirmation in the spring of 1982, that continuity and consistency at the top of the Agency were critical if there was to be progress.

I am the eighth Chairman of a Commission that is only 21 years old, and I have served 4 of those years, the second-longest tenure. At the top, EEOC's history has been a saga of discontinuity.

I believe in the mission of this Agency, and I believe that continuity at the top is an indispensable ingredient in carrying it out.

But there are several personal reasons. This committee and the committee staffers have made our efforts less difficult. Mr. Chairman, you and your staff members have never waived in your support of the Commission, even when others did waiver. This was particularly true in those instances when we had no place else to turn for assistance.

The group of Commissioners we currently have at EEOC are in my opinion unsurpassed in their support for the whole concept of equal employment opportunity and their collegial attitude, which encourages both vigorous debate and respect for each other. Not only is it a joy to work with them, but also to know that together, we can accomplish so much.

I also have a great deal of respect for the many employees at the EEOC who worked to support our efforts to build an effective Agency and enforcement policy.

Even more personal, however, I was raised by two people, my grandparents, who taught me that individual freedoms are essential to our way of life and that these fragile but important freedoms must be protected. One of the most basic roles of Government is to protect its citizens not only from those beyond our borders, but from each other. Unless that is effectively done, those who are the least liked, the least tolerated and the most vulnerable will not have a prayer, and will be subjected to the whims of the majority—as those of us raised under segregation so well remember.

We who believe in free enterprise have an obligation to see to it that we are not just paying lip service to empty platitudes—that those who have been discriminatorily excluded in the past are now included. Just saying that everyone has an opportunity does not make it so.

This Commission has charted a positive course and has built the momentum to make the Equal Employment Opportunity Commission an effective force in making the freedoms and opportunities of this country a reality for all. If confirmed, I intend to maintain that course.

I will respond to whatever questions you have.

[The biographical sketch of Mr. Thomas with attachments follows:]

## STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: THOMAS Clarence NMN  
(LAST) (FIRST) (OFFICIAL)

Position to which nominated: Chairman, Equal Employment Opportunity Commission Date of nomination: \_\_\_\_\_

Date of birth: 23 June 1948 Place of birth: Savannah, Georgia  
(DAY) (MONTH) (YEAR)

Marital status: Divorced Full name of spouse: N/A

Name and ages of children: Jamal Adean Thomas - 13

Education:	Institution	Dates attended	Degrees received	Dates of degrees
	St. Pius X High School	1962-1964	None	
	St. John Vianney Seminary	1964-1967	High Sch Diploma	
	Immaculate Conception Seminary	1967-1968	None	
	Holy Cross College	1968-1971	AB	June 4, 1971
	Yale Law School	9/71-5/74	JD	May, 1974

NOTE: St. Pius X High School and St. John Vianney Minor Seminary are no longer in existence.

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Alpha Sigma Nu

National Jesuit Honor Society

## Memberships:

List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
Coordinating Cmte, National Capital Area, CFC	Chairman	Summer, 1982 to present
Board of Trustees, Holy Cross College	Trustee	9/78 - 5/86

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

5/82 - Present - Chairman, Equal Employment Opportunity Commission, Washington, D.C.  
 5/81 - 5/82 - Assistant Secretary for Civil Rights, U.S. Department of Education, Wash., D.C.  
 8/79 - 5/81 - Legislative Assistant to Senator John C. Danforth, Washington, D.C.  
 1/77 - 8/79 - Attorney for the Monsanto Company, St. Louis, Missouri  
 6/74 - 1/77 - Attorney General of Missouri, Asst. Attorney General, Jefferson City, Missouri  
 6/73 - 8/73 - Summer intern for Hill, Jones, & Farrington Savannah, Georgia (partially funded by a grant from the Law Students Civil Rights Research Council - \$60.00 per week). Firm is no longer in existence.  
 9/72 - 6/73 - Legal Intern for Community Action Research Project (CARP), New Haven, CT. - during 2nd year of law school, (can't remember exact date  
 6/71 - 5/74 - Legal intern for New Haven Legal Assistance New Haven, Connecticut

## Government experience:

List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

NONE

## Published writings:

List the titles, publishers and dates of books, articles, reports or other published materials you have written.

SEE ATTACHED

## Political affiliations and activities:

List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

Republican

Made several political speeches (e.g., Milwaukee, Wis., Savannah, Ga. etc.)

Made nominal contributions to several candidates. (can't remember names of candidates or amounts contributed)

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

N/A

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

NONE

3. Has a commitment been made to you for employment after you leave Federal service?

NO

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

Until next Presidential election or several months prior to it.

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

NONE

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

NONE

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

NONE

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

NONE

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

N/A

## Articles By Clarence Thomas

**The Equal Employment Opportunity Commission: Reflections on a New Philosophy.**  
Stetson Law Review Volume XV, Number 1  
Labor and Employment Law Symposium  
Tampa, FL

**Abandon the rules; they cause injustice**  
USA Today  
Arlington, VA  
September 5, 1985

**No one is speaking for the American blacks**  
Register  
New Haven, CT  
November 18, 1985

**Pluralism Lives: Blacks Don't All Think Alike**  
The Los Angeles Times  
Los Angeles, CA  
November 15, 1985

**Pluralism Lives: Blacks Don't All Think Alike**  
New Pittsburgh Courier  
Pittsburgh, PA  
November 30, 1985

**Pluralism Lives**  
New Iowa Bystander  
Des Moines, IA  
November 29, 1985

**Blacks Don't All Think Alike**  
Times  
Miami, FL  
December 5, 1985

**Black society has right to express its pluralism**  
Milwaukee Sentinel  
Milwaukee, Wisconsin  
November 19, 1985

**Definition of 'the black view'**  
Call  
Allentown, PA  
November 18, 1985

**CLARENCE THOMAS**

An opposing view

**Abandon the rules;  
they cause injustice**

WASHINGTON — In the 1960s, this country committed itself to end systematic discrimination against blacks.

The Civil Rights Act of 1964 prohibited employers from discriminating on the basis of race, color, sex, religion, or national origin. Unfortunately, this commitment to non-discrimination soon gave way to a system of group preferences.

The government encouraged and required employers to institute the very practices that sponsors of the civil rights law had observed "are themselves discriminatory." Equally ironic is the willing acceptance of these practices by corporate executives who, if personally affected by them, would undoubtedly object.

The alternative to these group preferences is strict enforcement of the law by the Equal Employment Opportunity Commission. In the past, victims of discrimination were often ignored by the EEOC as it instead encouraged employers to adopt "goals and timetables." Now, for the first time, the commission is committed to seek relief for every victim of discrimination.

Some argue group preferences are beneficial, despite their conflict with the law.

They ignore both the substantial black economic progress before quotas and the evidence that hiring and promotion preferences have benefited the most-advantaged members of the preferred groups — people who would

*Clarence Thomas is chairman of the Equal Employment Opportunity Commission.*

have succeeded just through application of the non-discrimination requirement of the 1964 law — while causing the least-advantaged members of those groups to fall farther behind.

Moreover, the notion that blacks must be given preferences in order to succeed and should not be judged by the same standards as other people is founded upon the racist assumption that blacks are inherently inferior. No matter what the benefits might be, conceding this assumption is far too great a price to pay.

Employment preferences will disguise but not change the fact that poor children often attend schools where they will not learn; nor decrease the disastrously high birth rate among black teen-agers, which commits mothers and children to lifetime poverty and despair; nor reduce the crime and other pathological behavior that strangles the neighborhoods where many poor people live.

As Labor Secretary Bill Brock has observed, this country "will have to have some form of affirmative action for the foreseeable future." But if we confuse affirmative action with quotas, "goals and timetables," or other types of group preferences, we will fail to address the real issues and condemn the most disadvantaged individuals in our midst to an even bleaker future.

USA TODAY  
 "USA TODAY hopes to serve as a forum for better understanding and unity to help make the USA truly one nation."  
 —Allen H. Neuharth  
 Chairman and Founder  
 Sept. 15, 1982

BA • THURSDAY, SEPTEMBER 5, 1985 • USA TODAY

Mag Thomas

# Pluralism Lives: Blacks Don't All Think Alike

By CLARENCE THOMAS

A recent survey by the Center for Media and Public Affairs "revealed a surprising divergence between black leaders and the average black American on a broad spectrum of concerns, including some at the very heart of race relations. This conclusion and the survey itself have been attacked as both unscientific and biased."

John E. Jacobs, president of the National Urban League, in a recent column concluded that "... this new poll sinks under the weight of ideological bias and probable methodological errors." Jefferson Morley in the New Republic, asserted that "... the poll is shoddy, disingenuous and slightly ugly." And, as usual, the media stand ready to fan the flames of disgre-

ment. Whether Linda Lichter, co-director of the nonpartisan, privately funded research group and conductor of the poll, is discredited is really of no moment. Lichter's report merely confirms what we already know: Blacks are no less pluralistic than the rest of society. Just as no one really speaks for white America, no one really speaks for black America. I am certain that many views are shared, but no one, except some politicians who must stand for election or reelection, takes a poll or conducts a referendum before trying to persuade a respondent before trying to influence a public opinion poll. I am certain that a black America is on this issue before I determine my own opinion.

The argument that the views of the black leadership are consonant with those of black Americans misses the point, since most blacks are not represented by black politicians. Nor are most black members of organizations that claim to represent them. Regulations that claim to represent them of such organizations as the National Urban League represent only the members of that organization, not the black community as a whole. The views of black Americans may not agree on all or even most matters.

The real issue here, however, is not who represents black America or whether Lichter's survey is right or wrong. Rather, the real issue is why, unlike other individuals in this country, black individuals are not entitled to have and express points of view that differ from the collective hodgepodge of ideas that we are members of the same race. There seems to be an obsession

with painting blacks as an unthinking group of automatons, with a common set of views. Anyone who does not back this viewpoint is immediately cast as attacking the black leadership or as some kind of anti-black renegade.

By insisting on one point of view, this new orthodoxy stifles serious debate and the possibility of any meaningful discussion of the countless problems facing blacks today. The cost of having a new or different idea is simply too high. The dissenter from the common view becomes a pariah, and cannon fodder for cute phrases by silver-tongued orators. Differing views are bent and twisted to become the words that we all love to hate. Dissenters are pilloried and used for target practice in the media.

If the dissenters dare raise a hand to defend themselves, they are admonished for attacking the sacred "leadership." Many of us accept the ostracism and public mockery in order to have our own ideas, which are not intended to coincide with anyone else's although they may well do just that.

Beyond the distortions, outright lies and constant harangues against dissenters, black Americans clearly reject the demeaning and racially derogatory notion that we must all think alike. Lichter's survey is not an indictment of black leaders as her critics assert, but an affirmation of the pluralism of black Americans in spite of the intense pressure to conform or, more accurately, not to differ.

Clarence Thomas is the chairman of the U.S. Equal Employment Opportunity Commission.

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# No one is speaking for the American blacks

By Clarence Thomas  
A recent survey by the Center for Media and Public Affairs "revealed a surprising divergence between black leaders and the average black American on a broad spectrum of concerns, including some at the very heart of race relations. This conclusion and the survey itself have been attacked as both unscientific and faulty. John E. Jacobs, president of the National Urban League, in a recent column concluded that "... this new poll sinks under the weight of ideological bias and probable methodological errors." Jefferson Morley, in the New Republic, asserted that "the ... poll is shoddy, disingenuous and slightly ugly." And, as usual, the media stand ready to fan the flames of disagreement. Whether Linda Lichter, co-director of the nonpartisan, privately funded research group and conductor of the poll, is discredited is really of no moment. Lichter's report merely confirms what we already know:

Blacks are no less pluralistic than the rest of society. I cannot imagine a person saying, "I must see what the view of black America is on this issue before I determine my own opinion." The argument that the views of the black leadership are consonant with those of black Americans misses the point, since most blacks are not represented by black politicians. Nor are most blacks members of organizations that claim to represent them. Heads of such organizations as the National Urban League represent only the members of their respective organizations. Even those actually represented by this leadership may not agree on all or even most matters. The real issue here, however, is not who represents black America or whether Lichter's survey is right or wrong. Rather, the real issue is why, unlike other individuals in this country, black individuals are not entitled to have and express points of view that differ from the collective hodgepodge of ideas that we supposedly share because we are members of the same race. There seems to be an obsession

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Clarence Thomas is the chairman of the U.S. Equal Employment Opportunity Commission.

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Thomas

NOV 30 1985

BURRELLES

## Perspective

# Pluralism Lives: Blacks Don't All Think Alike

By CLARENCE THOMAS

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Clarence Thomas is the chairman of the U.S. Equal Employment Opportunity Commission. Reprinted by permission of the Los Angeles Times.

DES MOINES, IA  
NEW IOWA BYSTANDER  
WEEKLY 3,700  
NOV 29 1985

BURRELLES

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# Pluralism Lives

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MIAMI, FL  
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BURRILL'S

# Blacks Don't All Think Alike

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MILWAUKEE SENTINEL  
MILWAUKEE, WISC.  
P. 103,620

Thomas  
NOV 19 1985  
BURRILL'S

## Black society has right to express its pluralism

By Clarence Thomas  
Los Angeles Times special

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LOS ANGELES TIMES  
LOS ANGELES, CA  
Largest Circulation in the West  
D. 1,048,965 SUN. 1,298,487  
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NOV 15 1985

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## Definition of 'the black view'

By CLARENCE THOMAS <sup>629714</sup>

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Thomas '85

NOV 15 1985

The CHAIRMAN. Well, thank you so much. I am going to reserve my questions at this time and will turn to Senator Kennedy.

Before I do, however, let me just put two statements into the record. I forgot to put these into the record immediately following the statements of Senators. There is a position statement in support of the renomination of the Honorable Clarence Thomas as Chairman of the U.S. Equal Employment Opportunity Commission, by the International Association of Official Human Rights Agencies; and a statement by Representative Barney Frank.

We will put those into the record at this point.

[The statements referred to above follow:]



INTERNATIONAL  
ASSOCIATION  
OF OFFICIAL  
HUMAN RIGHTS  
AGENCIES

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Treasurer  
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(717) 787-4410

Glen Martin  
Immed. Past President  
Louisville, Kentucky  
(502) 588-4024

POSITION STATEMENT  
in support of  
THE RE-NOMINATION OF

HON. CLARENCE THOMAS

as  
CHAIRMAN

of the

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Respectfully submitted by:

Anthea M. Boorman  
Executive Director  
International Association of Official  
Human Rights Agencies

MAY IT PLEASE THE COMMITTEE:

On behalf of President James E. Clyburn, and the members of the International Association of Official Human Rights Agencies, I welcome this opportunity to support the re-nomination of Hon. Clarence Thomas as Chairman of the U.S. Equal Employment Opportunity Commission.

The International Association (I.A.O.H.R.A.) is a professional association of 180 Human Rights and Human Relations Commissions in the United States and Canada. Approximately eighty I.A.O.H.R.A. member agencies contract with the U.S. Equal Employment Opportunity Commission (E.E.O.C.). These State and local human rights commissions resolve approximately 50% of the national caseload of employment discrimination charges filed with the E.E.O.C., or dual-filed by the contract agencies.

The Board of Directors and member agencies of I.A.O.H.R.A. at their Annual Meeting held July 5-11, 1986, unanimously endorsed the re-nomination of Chairman Thomas, for three significant reasons. First, the consistency and stability brought by Chairman Thomas in his four years' tenure are essential to formulation of responsible Equal Opportunity policy in a time of social and economic flux. Second, the State and local human rights commissions strongly endorse Mr. Thomas' view that strong law enforcement policies and excellence of case resolution are essential to maintenance of responsible administration of E.E.O. laws. Third, the litigation posture of E.E.O.C. under

Mr. Thomas' direction will assure development of a body of case law on individual discrimination; to undergird precedent based on statistical evidence alone.

Chairman Thomas has led the Equal Employment Opportunity Commission longer than any other Chair, with the sole exception of Hon. William H. Brown (1969-1973). E.E.O.C. changed direction and focus many times in the ten-year period during which there were eleven Chairmen, and the consistency and maturity of judgement which Chairman Thomas brings is essential for those who make and enforce policy regarding the enforcement of anti-discrimination laws throughout the country. State and local Commissions, with policy-making authority of their own, look to the federal E.E.O.C. for guidance based upon its collective experience. During the past four years, E.E.O.C. has issued clear, distinct policies on various topics of concern in the administration of anti-discrimination law enforcement, to the benefit of the State and local contract agencies. I.A.O.H.R.A. endorses the consistency of leadership demonstrated in Chairman Thomas' term of office.

The State and local Human Rights Commissions, in keeping with the views of their governing authorities and under established enabling authority and legal precedent, endorse three specific and important directions undertaken by E.E.O.C. under Chairman Thomas' direction: strong emphasis on law enforcement, excellence in case management and charge processing/compliance, and

determination of the merits of complaints. Additionally, E.E.O.C.'s emphasis on not only traditional race discrimination charges, but also developing areas such as age discrimination and sex harassment has resulted in consequent judicial and administrative guidance for the State and local law enforcement efforts. I.A.O.H.R.A. supports Chairman Thomas' programs and policies in these areas.

Finally, under its current leadership, E.E.O.C. has initiated more litigation on individual charges of discrimination than in any previous administration. The case law in the field of Equal Employment Opportunity developed at a time when statistical evidence standing alone supported charges that minorities were denied opportunities equal to those of their majority counterparts. With the changes in law regarding sex and age discrimination, and the development of neutral employment "systems" (which may have adverse impact on workforces and applicants for employment), practice in this field has become increasingly sophisticated. Discrimination is as invidious, but more subtle in its forms in 1986 than in 1964. Thus, the time for judicial development of individual cases has come. I.A.O.H.R.A. supports Chairman Thomas' direction of litigation of individual charges of discrimination.

For these three major reasons: the stability of Chairman Thomas' term and the need for consistent, mature judgement in development of E.E.O.C. policy; the similarity of views among all

civil rights law enforcement agencies regarding the need for excellence of case resolution techniques and results, determination on the merits of charges, and the need for emphasis on developing areas such as age and sex discrimination as well as traditional race discrimination; and the new litigation presence of E.E.O.C., I.A.O.H.R.A. strongly endorses the re-appointment of Clarence Thomas as Chairman of the U.S. Equal Employment Opportunity Commission.

STATEMENT OF  
 REP. BARNEY FRANK  
 CHAIRMAN, HOUSE GOVERNMENT OPERATIONS COMMITTEE  
 EMPLOYMENT AND HOUSING SUBCOMMITTEE  
 BEFORE THE  
 SENATE LABOR AND HUMAN RESOURCES COMMITTEE

Women, minorities, the elderly and Federal employees deserve protection through vigorous enforcement of our civil rights laws and regulations. One key to such enforcement should be the chairman of the Equal Employment Opportunities Commission, but Clarence Thomas has failed to provide critically needed leadership. He should not be rewarded with another term in this sensitive position.

In 1984 and 1985 the Subcommittee on Employment and Housing, which I chair, held hearings on EEOC enforcement of the Title VII prohibition of sex-based wage discrimination, an area of critical importance to women workers. In 1981 the Supreme Court had decided in the Gunther case that claims of such discrimination may be brought even where the jobs are not the same. It is distressing that to this day the EEOC has not pursued this avenue to combat the discrimination which contributes to women's earning only 3/5ths as much as men. In fact, although Mr. Thomas had described another key case as "pure

Gunther", he responded to a Subcommittee inquiry about Gunther-type EEOC cases by saying that the Commission did not understand our request. In four years of Mr. Thomas' chairmanship the EEOC has not brought a single sex-based wage discrimination case based on the Gunther precedent.

The enforcement of equal employment opportunity requirements for Federal employees is another area of great concern to the Employment and Housing Subcommittee. We receive a constant flow of individual reports of endless delays in investigating and deciding charges of discrimination. The EEOC statistics bear out the stories of inexcusable delays at both the agency level and at the Commission. Mr. Thomas has testified repeatedly about his wish for a centralized system to handle all Federal discrimination complaints at EEOC, but it was only after the Subcommittee called a recent hearing that there was any evidence of an effort to obtain the resources and amended regulations to implement such a reform. Many thousands of Federal employees continue to suffer under a system which lacks all credibility. The Federal government is far from a model "equal opportunity employer".

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Mr. Thomas, in 1971, the Supreme Court held unanimously that a plaintiff makes a prima facie case of discrimination in the employment practices if the plaintiff establishes, through the statistical evidence, that a hiring test had an adverse impact on the plaintiff and the group of which he is a member; is that correct?

Mr. THOMAS. I think you are referring to the *Griggs* decision?

Senator KENNEDY. That is correct.

Mr. THOMAS. Yes; I think so.

Senator KENNEDY. The Court specifically noted that it was not necessary to show the defendant intended to exclude a particular group with the test; it is enough that the test has that effect. Is that correct?

Mr. THOMAS. I think that is generally correct.

Senator KENNEDY. The way that a plaintiff demonstrates that a test has adverse impact is with statistics; is that correct?

Mr. THOMAS. I think—yes, to some extent; not entirely.

Senator KENNEDY. After passage of the Equal Employment Opportunity Act, the Commission enacted the Uniform Guidelines on Employee Selection Procedures. These guidelines state that it is a violation of the guidelines for a selection procedure to have an adverse impact on minorities, unless the test is shown to be job-related. No showing that the employer intended to discriminate has to be made. Is that correct?

Mr. THOMAS. I think that the guidelines do a bit more than that, Senator. The guidelines say that it is discrimination if there is a disparity.

Senator KENNEDY. Suppose, if you have 200 individuals who are applying for a job as ditch-digger—100 blacks, 100 whites—and the city took 80 whites and 20 blacks and said you need a high school education. Based on statistics, would that be prima facie a violation of disparate impact? Would you have any trouble with that?

Mr. THOMAS. Could you just repeat it?

Senator KENNEDY. 200 individuals apply for a ditchdigger job in a community, 100 blacks, 100 whites. The city hires 80 whites and 20 blacks and says you need a high school education to do the job, which obviously is unrelated. As far as you are concerned is that a prima facie case?

Mr. THOMAS. I would have no problems with that case.

Senator KENNEDY. Statistics are the controlling element in those situations, are they not?

Mr. THOMAS. Senator, statistics are part of it—

Senator KENNEDY. Well, what else would you want in an 80-20?

Mr. THOMAS. For example, I could look at the composition up there—

Senator KENNEDY. Let me ask you the question—what else would you want in the fact situation I gave to you?

Mr. THOMAS. In the fact situation you just gave me, I would not want anything else, OK. You do not need a high school diploma to dig a ditch, and that is very simple.

Senator KENNEDY. OK. Now, in a letter last Monday, as I understand, you wrote Representative Hawkins that "Subsequent

changes would not be made to the guidelines in contravention to the principles established in the *Griggs* case"; is that correct?

Mr. THOMAS. That is right.

Senator KENNEDY. All right.

Mr. THOMAS. I think I have stated that on numerous occasions.

Senator KENNEDY. Now, I just want to compare what you have mentioned this morning with some other statements that you have made. As I understand, in the *Stetson Law Review* in 1985, you wrote that,

We have unfortunately permitted sociological and demographic realities to be manipulated to the point of surreality by convenient legal theories and procedures such as adverse impact and prima facie cases.

How do you explain this statement in light of your other statements that you support the *Griggs* case and the Uniform Guidelines, which set out the adverse impact doctrine?

Mr. THOMAS. Senator, I think it has been fairly clear in the court cases that more is required than just to show statistical disparities. There are statistical disparities all over the place. There are statistical disparities up there. You just cannot take one set of numbers broadly, compare them to another set of numbers, and always assume that you know the case.

Now, in the case that you gave, it is easier. You have a job, a ditch-digger, that does not require formal education, and you have got a requirement that seems to be clearly pretextual. I do not have a problem with that. But there are many other instances where it is not that clear.

Senator KENNEDY. Well, what were the problems that you found with the Uniform Guidelines? They have been used as the basic test for a number of years, I think with substantial success.

Mr. THOMAS. Well, first of all—

Senator KENNEDY. What is your understanding of the situation that is different from the guidelines?

Mr. THOMAS. Senator, the problem that I have had with the application of any of these approaches is by and large the rigidity. For example, we have instances where the guidelines, as the 80-percent rule—that is that if one group is selected at a rate less than 80 percent of another group—that under the guidelines, that can be discriminatory conduct and require validation.

Well, we have had instances in which the only difference has been one person, and the request from those individuals utilizing the guidelines was for us to find discriminatory conduct for that one person.

You also have, I think, in my opinion, a real problem when you begin to assume that every disparity reveals some kind of discriminatory conduct. The guidelines—the court cases, at least—presumptively, a prima facie case may be made out, but you have an opportunity to then come back and show that there is some reason for it, or to explain why this disparity exists. I think the guidelines tend to be more rigid. They tend to assume that there is discrimination if there is that disparity.

Now, the GAO has called for us to look at the guidelines. I was pressured early in my tenure to look at the guidelines—all of which I resisted. Our initial efforts with respect to the guidelines

were to take a long look at the history of the guidelines, to take a look at all the criticisms of the guidelines. The American Psychological Association has been looking at their standards and have come up with nothing definitive.

So my effort at the Commission has been to take a long studied look at the guidelines in conjunction not only with the testing industry, but also with the available court law. *Griggs* is the seminal case law on that.

Senator KENNEDY. All right. You have written to OMB that you will propose revisions to the Uniform Guidelines.

Mr. THOMAS. I will make proposals of revisions after we have done the studies that I have indicated to you, Senator.

Senator KENNEDY. Well, what are you going to tell us about it today? What types of changes you are going to propose?

Mr. THOMAS. Senator, I have proposed no changes to the guidelines.

Senator KENNEDY. What are you going to tell us? Do you mean after we confirm you, that you will then go ahead and do it? You have now said that you are going to make changes. This is something that is extremely important, yet you will not tell us.

Mr. THOMAS. Senator, I have—

Senator KENNEDY. You have been on the job. Why can't you tell us what you are going to change? This is enormously important.

Mr. THOMAS. The guidelines have not been top priority. The proposed changes in guidelines have not been top priority for me over the past 4 years. I have received pressures from all sources to make changes to the guidelines. It is a matter that I intend to look into, a matter that I intend to make proposals on.

I have, as I have indicated to you, had suggestions that agreed with my own general view of the guidelines, that I have dismissed, because my approach to making policy at the Commission is to go back, to look at all applicable law, to look at the criticisms, to get input from others, and then to make proposals—not to make proposals and then get the input.

Senator KENNEDY. You said back in 1985, in OMB required submission—and I know you are pressed, but this is over a year ago—“I shall propose to the Commission and to the consignatory agency a revision of the new GST that will recognize statistical disparities are not tantamount to discrimination.”

Mr. THOMAS. They are not tantamount to discrimination.

Senator KENNEDY. That was in June 1985. Now you are back up here in July 1986. You say that you will change it, and quite frankly, the tone of your answers today are a good deal different from “are not tantamount to discrimination.” In your response to questions you indicate that there are other factors that ought to be considered.

Mr. THOMAS. Well, I think that “not tantamount”—they are not the equivalent of discrimination. Every statistical disparity is not discrimination. Otherwise, the—

Senator KENNEDY. You did not say “every one”; you said that “statistical disparities are not tantamount to discrimination.”

Mr. THOMAS. They are not.

Senator KENNEDY. What about the workmen situation; do you think that is tantamount?

Mr. THOMAS. Senator, when we get those cases, we look—

Senator KENNEDY. Is that tantamount?

Mr. THOMAS. The example you gave me, I think, makes an excellent prima facie case of discrimination.

Senator KENNEDY. Do you have any question in your mind as to what Congress intended when the United States passed that legislation? Did you think that Congress would find that?

Mr. THOMAS. That in the example that you gave me—

Senator KENNEDY. The kind of situation I gave you.

Mr. THOMAS. The example that you gave me, I indicated I have no problems with. But it is not as simple as that in most of the cases that we get. The *Griggs* kind of situation is pretty rare now. The way that the statistics are used are a lot more complicated than the example that you gave me, Senator.

Senator KENNEDY. As I understand, you are saying that you have a different understanding of that particular provision of the legislation dealing with disparate impact than you had in 1985. Am I correct in assuming that you are going to promulgate regulations sometime in the future and you will not tell us the criteria today? Am I missing something?

Mr. THOMAS. Senator, I said that the example that you gave me was fine; I have no problems with that. The guidelines have been the subject of debate since they were adopted in 1978. They are not universally accepted by everyone, as it appears in the media sometimes. That is not true. There are problems with the guidelines. The guidelines are enormously complex. The guidelines have testing provisions and recordkeeping requirements that are subject to debate.

What we have attempted to do, Senator, what I attempted to do—I have my own personal opinions about things—but I have attempted with respect to those guidelines to go back and to look at all the criticisms, to look at all the case law, applicable case law, et cetera, and then to form a basis to make proposals to the Commission, so we all start at the same point.

One of the problems we have with the guidelines is that EEOC does not have a repository, it does not have the background documents on the initial formulation of the guidelines. I think that it is inconceivable that an agency that adopts a guideline or adopts any regulatory measure does not have the background documents to support it. So the first thing we did was to go back and to formulate that. That has taken us quite some time.

Senator KENNEDY. Of the various disparate impact cases that have been brought by the agency, what ones trouble you the most that have been decided under the existing guidelines?

Mr. THOMAS. The one that troubles me the most is the Sears case.

Senator KENNEDY. And beyond that?

Mr. THOMAS. There is an IBM case out of Baltimore. The same thing—very broad statistical disparities, both of which, needless to say, we had some problems with.

We have had some internally. We do adverse impact cases all the time. But it is more than just taking one broad set of numbers and comparing those numbers.

Senator KENNEDY. So Sears and IMB.

Mr. THOMAS. Those are litigated cases. The others are confidential cases inside.

Senator KENNEDY. And how many of those have you—

Mr. THOMAS. Senator, I do not know. We do hundreds of cases. We reviewed last year over 700 cases for litigation, and I cannot give you an exact percentage.

Senator KENNEDY. In the application of the existing guidelines, what has been the most egregious situation that you find in the application of the current guidelines?

Mr. THOMAS. I gave a couple, several examples—again, remembering that these cases that we consider for decision are normally confidential cases; they are not reported cases. I gave several examples in a hearing before on this. One, for example, was the case involving one person, just one person. There was a selection rate of 64 percent for black individuals and a very small work force, and one person would have then put the selection rate at 87 percent. That again is a rigid application of the guidelines and a statistical disparity.

Senator KENNEDY. If you change that by a couple of percentage points, would that meet your guidelines? Exactly what are you talking about in terms of changing the guidelines? That is very important to me. It might not be to others, but I want to know whether you are talking about along the edges, or are you talking about a significant change. I cannot say that anything you have said this morning does not involve a significant change. If you are talking about the edges, then that might be different, but I cannot make a judgment on something which is so basic and fundamental in terms of employment, when you say that you wanted to change these guidelines over a year ago. And now you come back to our committee and do not give us any indication of what the changes are, other than making some observations about egregious situations. All of us understand that in the application of general law there is always—tragically and unfortunately—some injustice.

Mr. THOMAS. Senator, I have had numerous opportunities to prejudge precisely what I was going to propose. I have taken none of them from either side. It is my job as Chairman of this Commission to go back and to do all of the underlying work on these guidelines and make proposals that are consistent with existing law, regardless of what my personal opinions are. I have said that to individuals who wanted me to change them before, and I say it now.

You are asking me to do the same thing I refused to do for others 4 years ago—to prejudge precisely what the changes are going to be. I do not know.

Senator KENNEDY. How in the world are you going to have predictability and certainty if you do not know?

Mr. THOMAS. Well, I would have predictability and certainty if—

Senator KENNEDY. How can we expect companies and corporations to understand what we are doing if you do not have predictability certainty?

Mr. THOMAS. Senator, I will propose to the Commission changes based upon the background document, which is approximately 600 pages, that we have done. We could have done it on short statements, people's personal opinions or ideology. There is the impact

of the *Teal* decision, which knocks out bottom line. We have got to look at that. We are not the only ones who have problems with the guidelines.

Senator KENNEDY. Let me move on. As I understand, the staff of the House Education and Labor Committee has interviewed regional enforcement authorities of the EEOC. They found that the Commission has reportedly renounced the adverse impact theory to prove discrimination, and that when cases are referred to headquarters for approval, EEOC lawyers, and I quote, "must articulate other theories to prove discrimination."

Are you aware that such instructions have come from the Commission?

Mr. THOMAS. Senator, that is absolute nonsense.

Senator KENNEDY. You had nothing to do with that?

Mr. THOMAS. There is no such policy.

Senator KENNEDY. OK. Let me go to another area, and that is the pension accrual for older workers. You are aware the Commission has voted twice that it is a violation of the Age Discrimination in Employment Act for an employer to discontinue the accrual of pension benefits for workers over 65. The Commission has yet to implement regulations implementing that decision. As a result, millions of dollars in pension benefits have not been paid to older workers. The committee is aware that on several occasions members of the Commission and staff of the Commission have attended meetings with the Office of Management and Budget concerning these regulations.

Have you attended such meetings?

Mr. THOMAS. I have attended several informal meetings, but not specifically on the pension accrual. Staff members have done that.

Senator KENNEDY. Were you at meetings where this was discussed?

Mr. THOMAS. I was at meetings where it was discussed, Senator.

Senator KENNEDY. Was that in June 1985?

Mr. THOMAS. No; that was not in June. That was staffers, career, and a member of my personal staff attended that meeting.

Senator KENNEDY. Are you aware that Mr. Zuckerman indicated that you were present, in a letter dated March 17, 1986—

Mr. THOMAS. There was a meeting having to do with the regulatory agenda, but not with the moving of the regulations themselves through OMB.

Senator KENNEDY. Mr. Zuckerman said, "I have attended four meetings at OMB, at which the pension benefits issue has been discussed."

Mr. THOMAS. That is right. He was a member of my staff.

Senator KENNEDY. One of those dates is June 17, and one of the people there was yourself.

Mr. THOMAS. I believe the only meeting that I have attended specifically involving pension accrual, to my knowledge, had to do with whether or not it appeared in the regulatory agenda.

Senator KENNEDY. When was that?

Mr. THOMAS. I cannot remember, Senator.

Senator KENNEDY. Does June 1985 make sense, or not?

Mr. THOMAS. Well, it could be June, it could be July. I would have to go back and look at my calendar. It makes sense.

Senator KENNEDY. Would you look at it later and just let us know?

Mr. THOMAS. It makes sense.

The Chairman. Would you go through your memoranda and supply that?

Mr. THOMAS. But let me go back, with respect to the post-normal accrual of pensions and straighten that out.

Senator KENNEDY. Do you remember what was said and by whom at that meeting, or the meeting that took place in June?

Mr. THOMAS. Well, we argued vehemently to move the guidelines through. There were previous meetings for that. The problem is very simple. The solution is the most difficult part. The EEOC—

Senator KENNEDY. That is generally so. I am sorry.

Mr. THOMAS. The EEOC became part of the executive branch in the reorganization, which is different from any other of the Commissions around town, the Federal Trade Commission, the FCC, et cetera. As a result of that, we have to go through OMB like any of the other executive branch agencies, to get our regulations through.

And the saga—our involvement with this particular guideline, as far as I am concerned, is a clear example of the maxim that "No good deed goes unpunished." I resurrected those guidelines, those regulations, in an attempt to move it through. The OMB had some concerns about it, and indicated that we had to do an impact analysis, a regulatory impact analysis. That has been the single longest problem that we have had with that. We have just recently completed it and approved the impact analysis, to formally send the whole document over to OMB.

But this is the second time. The first time was at the end of the last administration, and then it was deep-sixed.

Senator KENNEDY. Do you have a copy of that? Do you have a copy of the document that you submitted to OMB?

Mr. THOMAS. We have not submitted it yet, the impact analysis. I do not know whether or not—I do not have a problem with the document per se. I do not know whether or not we are supposed to release that.

Senator KENNEDY. Well, you support it, do you not? You support the document that you are about to submit to the OMB; is that right?

Mr. THOMAS. The change in the pension accrual—

Senator KENNEDY. Yes.

Mr. THOMAS. Oh, certainly. I am the one who resurrected it.

Senator KENNEDY. All right, is there any reason that we cannot review it?

Mr. THOMAS. No; it has been in circulation for 2 years. There is no problem with it.

Again, the Commission unanimously voted to—

Senator KENNEDY. Could you get it for us?

Mr. THOMAS. I have no problems with it. It is a public document.

Senator KENNEDY. Could you supply it to the committee, please. Do you know whether there are any recordings or transcripts of those meetings?

Mr. THOMAS. Senator, the most that occurred in those final meetings that I was involved in was whether or not it would appear in

the regulatory agenda. To my knowledge there is absolutely no recording. It is a coordination function. It is a part of our obligation under the Executive order. It was not a part of the open meeting.

Senator KENNEDY. If it has been in circulation for 2 years, what is the possible rationalization or justification for that?

Mr. THOMAS. Senator, when you have to get regs through—it has been longer than that, actually, and I think that is a concern of the various interest groups, because it was originally passed in 1980 and withdrawn from the agenda by the previous Commission. Then I resurrected it and voted on it, and the problem has simply been that in order to get an impact analysis done, we have got to go through this long process of letting the contract, bidding the contract, getting back the bids, picking the contractor, then having the impact analysis done. In addition to that, you add the fact that we had discussions with OMB about whether or not we should have it in the first place. We did not think we should. But again, the final decisions on disputes with respect to regulations are made by the Executive Office of the President, again pursuant to the appropriate Executive orders. So again, it just takes a long time.

Senator KENNEDY. More than 2 years?

Mr. THOMAS. Senator, I did not put the procurement process into place.

Senator KENNEDY. What did they tell you over there at OMB?

Mr. THOMAS. That if the impact is going to be over \$100 million that you have got to do an impact analysis.

Senator KENNEDY. Yes; but why does it take over 2 years?

Mr. THOMAS. Senator, I think any agency—

Senator KENNEDY. When was the last time you called OMB?

Mr. THOMAS. I have had personal discussion—they have got a new group of individuals there now—with them on several occasions in the past few months. But we had to await the completion of the impact analysis, which was done by a private contractor.

Senator KENNEDY. When do they tell you that the impact analysis will be completed?

Mr. THOMAS. That has been completed, and we are prepared to submit that to OMB. That has been completed about a month ago and was approved by the Commission recently.

So the entire package is now ready to go. The underlying regulations were ready for quite some time. But a part of the package to submit to OMB has to include the impact analysis; it is as simple as that.

Senator KENNEDY. How does it differ from what you had initially submitted?

Mr. THOMAS. None. But it has the impact analysis.

Senator KENNEDY. Mr. Chairman, I have taken a good deal of time. I have got some other areas to cover, but I know my colleagues are waiting to question Mr. Thomas.

The CHAIRMAN. Well, thank you so much, Senator Kennedy.

We will turn to you, Senator Metzzenbaum.

Senator METZENBAUM. First, Mr. Thomas, you were asked to submit the list of articles you have written, and you said, "See attached," and as you well know, eight of the articles are all the same article. I guess you felt that you should list them, because

they were published at different places, and that is fine. Then you have one other article.

Are there any other articles that you have written?

Mr. THOMAS. I have refrained. I have not had the time to do a lot of writing. I give some speeches, but that is about it. To my knowledge, I have not written any, and I do not have a file of written articles.

Senator METZENBAUM. You have no recollection of any others at all?

Mr. THOMAS. There have been some speeches that I have given that have been reprinted, but I cannot remember articles.

Senator METZENBAUM. What is this Stetson Law Review article?

Mr. THOMAS. That is a speech that I gave at Stetson that they reprinted.

Senator METZENBAUM. All right. Mr. Thomas, on May 9 in a letter supporting Jeffrey Zuckerman's nomination, you endorsed Zuckerman's objections to goals and timetables as a remedial approach under title VII because in your legal judgment—and I am now quoting—"courts may not order employers to hire people on the basis of their race, color, sex, religion or national origin."

In March, before the House Subcommittee on Employment Opportunities, you expressed the belief that title VII prohibits the use of goals and timetables, based on your reading of the *Stotts* decision. You also made clear to the House Subcommittee your support for Acting General Counsel Butler's 1985 directive that EEOC attorneys not seek goals and timetables as relief in Federal litigation.

In light of the Supreme Court's recent decision in the *Firefighters* case and the *Sheet Metal Workers* case, do you still believe the use of goals and timetables is unlawful under title VII?

Mr. THOMAS. Well, Senator, I do not think my beliefs have anything to do with it now that the Court has so ruled that they are lawful under title VII and the Constitution. I think that is the end of that.

Senator METZENBAUM. In the *City of Cleveland* case, the *Firefighters* case, the Supreme Court clearly held that voluntary race-conscious affirmative action incorporated into a consent decree is permissible under title VII. The Court further held that the Government has the same latitude as a private party to seek out or agree to such affirmative action relief.

As Chairman, what if any specific steps will you now take to see that the EEOC seeks or agrees to the use of goals or timetables when negotiating consent decrees in the future?

Mr. THOMAS. Well, I think we are prepared to—in fact, I intended to do it previously, before this hearing—to simply inform our attorneys and our district directors that they are now to seek goals and timetables or the race-conscious or sex-conscious remedies permissible under the rulings of the Supreme Court.

Senator METZENBAUM. When do you expect to do that, Mr. Thomas?

Mr. THOMAS. It is just a matter of a couple of days; it is no problem.

I think we are instructing general counsel and the head of our program offices to do that.

Senator METZENBAUM. Will that be done before your confirmation?

Mr. THOMAS. Yes. That is no problem. It is just a matter of a letter. I mean, the law is the law, and I have said clearly—I said in the same hearing that you quoted from—that when the Supreme Court ruled, that was the end of it. I do not have a problem with that.

Senator METZENBAUM. Can you make a copy of your direction to your attorneys available to the committee?

Mr. THOMAS. Yes. That is no problem.

Senator METZENBAUM. In the *Sheet Metal Workers* case, the Supreme Court held that title VII may require a district court to impose goals and timetables where an employer or union is engaged in egregious discrimination or under certain other conditions. The Court stated in such circumstances goals and timetables may be the only effective way to ensure the full enjoyment of the rights protected by title VII.

Other than that which you have stated you intend to do with respect to the attorneys as pertains to consent decrees, what other specific steps will you take to seek such court-ordered relief?

Mr. THOMAS. I think it is clear, Senator, when the cases come before us for approval—a number of these cases do not come to the full Commission for approval—the attorneys and the district directors have latitude to develop the remedies. I have stated clearly that when the Supreme Court ruled and gave us direction in this particular area, we would follow that direction. All the cases are not the same; they are not carbon copies. There are different remedies that are more appropriate. We think that a lot of the creative remedies that we have developed are excellent. In some of those instances, again consistent with the Supreme Court decision, goals and timetables are one of the remedies available. And our district directors and our regional attorneys who develop these remedies will be given the latitude to include goals and timetables consistent with these decisions.

Senator METZENBAUM. Have you directed your Acting General Counsel Butler that EEOC attorneys could negotiate or seek to have courts impose goals and timetables where appropriate, or is this what you intend to do within—

Mr. THOMAS. That is what we are going to do. It is just a brief statement that they are now to seek goals and timetables in appropriate cases.

Senator METZENBAUM. You mentioned that there are other remedies that may be available or that may be appropriate. Do you have any further reservation with respect to the use of goals and timetables as an appropriate remedy for the EEOC to seek?

Mr. THOMAS. Senator, I think again, the Supreme Court has ruled, and as far as I am concerned, that is that. Whatever reservations I have are purely personal, and they are subversive literature at this point.

Senator METZENBAUM. Did I hear you use the words, "subversive literature"?

Mr. THOMAS. Dissenting opinions, according to J. Willie Moore, are nothing but subversive literature.

Senator METZENBAUM. The EEOC over the past 9 months has declined to seek affirmative action. During that period, you publicly stated your constitutional, legal, moral, and ethical opposition to the use of what you called preferences and quotas at an affirmative action conference in New York City.

If you have such moral and ethical opposition, the legal problem has been solved because it seems the Supreme Court has spoken; but what about this moral and ethical opposition? Is that still going to provide any reservation for you?

Mr. THOMAS. Senator, I have indicated in every context where the issue of goals and timetables has been raised with respect to my job as Chairman of EEOC that I would abide by the Supreme Court rulings on it. And the Supreme Court has ruled. That is the law of the land. Whether I like it or not, I am to abide by it. I take an oath to enforce the law, and I enforce it aggressively.

Now, with respect to my opposition to counting by race, I have a problem with that—I have had a problem with that. I was counted by race. Again, you do not go unmarked in society when you are the one counted out because of your race. Now, that is a part of my own history, a part of my biography.

I have said that goals and timetables are part of the remedies that we are to seek, and I would enforce it, and that is the end of it.

Senator METZENBAUM. Have you done anything on affirmative action at all since the Supreme Court decision?

Mr. THOMAS. We have not had any cases.

Senator METZENBAUM. Well, have you made any statements: have you sent any letters? Have you said anything at all on the subject?

Mr. THOMAS. Well, first of all, the only people who asked were the press, and I did not see any need to comment. The Supreme Court decisions spoke for themselves. Other individuals around the agency speak about it, but that is pretty much it. I have given no speeches. I gave one speech—excuse me—in Anchorage, AK, in which I indicated that, thank God, the debate is over, and now we can get on with our work.

Senator METZENBAUM. Did you indicate anything further in that speech as to your intention to live up to live up to the responsibilities—

Mr. THOMAS. I have always intended that. If I cannot do the job, if I cannot enforce the laws under the jurisdiction, then I will just quit. I do not have a problem with that. I have other things I could do.

Senator METZENBAUM. Let me then ask you categorically, will EEOC make a clear statement, commitment to goals and timetables as one form of relief in order to dispel the confusion resulting from its waffling on this issue in recent months?

Mr. THOMAS. EEOC will make a clear statement to our people that goals and timetables are one form of relief available under title VII, consistent with the Supreme Court.

I mean, that is that.

Senator METZENBAUM. And that will be done within the next few days?

Mr. THOMAS. That is right. That has already verbally been done. It is just a matter of codifying it.

Senator METZENBAUM. The Supreme Court in *Sheet Metal Workers* carefully noted that the EEOC had joined the plaintiffs in seeking affirmative action relief from the lower court and had argued to the Second Circuit that *Stotts* in no way bars such relief. You then abandoned this position in the Supreme Court and embraced the Justice Department approach, which has now been conclusively rejected.

Why did the EEOC change its position after 13 years of litigation, including 3 years of your tenure? In other words, how can we expect you to stand up to the Justice Department on this issue in the future, and will it be you or the Meese-Reynolds team that really decides EEOC policy on affirmative action?

Mr. THOMAS. All cases argued in the Supreme Court are argued by the Solicitor. We have, in addition to that, a majority of the Commission at the time who had problems with—who believed that under title VII that some of the relief involving goals and timetables—or, goals and timetables were not available under title VII. That is ended, it is over. I mean, there is no argument left with respect to what the Supreme Court has ruled on.

The *Sheet Metal* case was a case of bad actors; we all understood that. We make our suggestions to the Justice Department. We argue our position. The Solicitor, I think, is an excellent Solicitor who listens, for example, in the *Vinson* case, who listens to our point of view and argues our point of view. In some instances, you do not win. But only one person can argue for the executive branch, and that is the Solicitor.

Senator METZENBAUM. Well, Meese and Reynolds have indicated that they are not quite that prepared to accept the decision. Will they be calling the shots, or will the EEOC?

Mr. THOMAS. Senator, the Justice Department has litigation authority for, one, the executive branch, which includes EEOC, and unless we have specific statutory authority to litigate in cases in which the Attorney General litigates, we are out. Those cases in which the Attorney General has specific statutory authority involving title VII to litigate are in the public sector cases where most of these arise. And ultimately, the Solicitor has the authority to argue in the Supreme Court of the United States.

~~EEOC is not an independent agency, and it should be.~~

Senator METZENBAUM. What does that mean, now?

Mr. THOMAS. It means that the ultimate decision in the public sector cases will be made at the Justice Department, and the ultimate cases being argued in the Supreme Court will be made by the Justice Department.

Senator METZENBAUM. And how will you fight for the EEOC position—

Mr. THOMAS. As we always do. I mean, you go over, you prepared your documents, and you go over and fight like every other agency. That is just the process. There is one lawyer for the Government in the Supreme Court of the United States.

Senator METZENBAUM. As you well know, Mr. Thomas, this is a terribly important area, and I want to be sure this committee is informed about EEOC progress in enforcing the law as Congress

and the Supreme Court intend. I would therefore request that you submit 6-month summaries to this committee, briefly describing each case in which the EEOC seeks, agrees to, or declines to participate in the use of goals and timetables as part of a consent decree; and second—

Mr. THOMAS. Wait a minute, now. I missed that—6 months past, or 6 months following?

Senator METZENBAUM. Future; every 6 months in the future.

Mr. THOMAS. That we decline because of the use of goals and timetables.

The CHAIRMAN. Yes, you have got to decline that. You are not going to have a case-by-case review of this outfit up here. Maybe if somebody else is chairman, you can have it, but I would not do that. If I were in the executive department, I would tell us to go to hell, I really would.

That is ridiculous.

Senator METZENBAUM. It is a report, Mr. Chairman—

The CHAIRMAN. I mean, why don't you just get them and read them? I mean, let's not burden them; let us have them work on discrimination.

Senator METZENBAUM. Well, Mr. Chairman, I think the committee does have oversight responsibility—

The CHAIRMAN. We do, but it should be reasonable, Howard.

Senator METZENBAUM [continuing]. And I think that therefore we are entitled to know whether or not the EEOC is seeking or declining to participate in the use of goals and timetables as part of a consent decree, and we also are entitled to know whether or not the EEOC is attempting to persuade a court to order affirmative action relief that includes goals and timetables.

The CHAIRMAN. Well, are these cases published? Are the decisions published?

Senator METZENBAUM. They are not all published.

Mr. THOMAS. The decisions are confidential with respect to the litigation. The intervention—and of course, the cases are a matter of record.

The CHAIRMAN. That is what I am saying.

Mr. THOMAS. The problem that we do have, Senator, is that once we begin to breach the closed sessions of our meetings, then we have no defense with respect to discovery in litigation.

Senator METZENBAUM. Well, you could very well redact the names of the litigants in order to protect their privacy, couldn't you?

Mr. THOMAS. No, no.

The CHAIRMAN. Do you want these cases before they decide them down there; is that what you are saying?

Senator METZENBAUM. No—

Senator KENNEDY. He is trying to find out, if the Senator would yield, what the test is that is being used.

Mr. THOMAS. First of all, it is rare that we get any of these cases. I mean, it is rare.

Senator METZENBAUM. Then there would be very few that you would have to report to us.

Mr. THOMAS. Our problem, Senator, goes beyond—I do not care whether you have the documents. Our problem is that once we

breach that process, we have no protection for our closed session considering confidential information.

Senator METZENBAUM. Well, as long as you eliminate the names, you would have no problem in providing us that information.

Mr. THOMAS. Well, Senator, can we engage in some kind of discussion so we can protect our process? I do not have my legal counsel here; I do not have the individual here.

Senator METZENBAUM. We would be happy to do that.

Mr. THOMAS. I do not know whether we can do it. I think it is a real problem. This is the second time we have had discussions about breaching the closed session of our meetings.

Senator METZENBAUM. Why don't you just send them to the Labor Committee without publishing them?

The CHAIRMAN. Wait. First, let us ask what are you asking for? Are you asking for cases that are decided, or are you asking for cases in esse?

If you are asking for cases in esse, he cannot do that, and he cannot do that because the mosaic alone would disclose confidential information that is crucial for them to decide the case.

Now, if you are asking for published cases, we can get those. I mean, you can send those to us.

Senator METZENBAUM. We are asking for each case after it happens to determine whether or not they did seek or declined to participate in the use of goals and timetables as part of the—

The CHAIRMAN. Their decision as to whether they are going to pursue it, whether they are going to go into court—you cannot have the whole strategy of what they do.

Senator METZENBAUM. I think what we are talking about, Mr. Chairman, is we have before us an individual who is up for confirmation who has in the past indicated his opposition to goals and timetables. Now the Supreme Court has spoken—

The CHAIRMAN. He has also said the Supreme Court has spoken, and he is going to follow it, and he has given verbal directions to do so, and he will put it in writing.

Senator METZENBAUM. That is right, and I accept what he has said. But I believe that this committee has a responsibility to determine whether or not his actions are equal to his words.

The CHAIRMAN. I think once the decisions are made and are published, yes, we can determine that.

Senator METZENBAUM. Well, but the fact is—

The CHAIRMAN. You cannot interfere with their deliberative process—you cannot.

Senator METZENBAUM. Well, Mr. Chairman, if the decision is that they are not going forward and seeking that goal or timetable, we are entitled to know that. We are entitled to know whether or not they are refusing to use goals and timetables, affirmative action, as a part of their process. They can say they are, but if time after time after time they do not do so, then I think this committee ought to know about it.

The CHAIRMAN. I do not disagree. Let me just say this. I do not disagree in one regard. But the question is when—when should you provide that information.

Mr. THOMAS. The problem that I have is not with disclosing information for the public record. The problem is that in order to get

that information, you are undermining our ability to preserve the confidentiality of our deliberative process.

Now, you say you are talking to a person who does not agree with goals and timetables. I did not agree with them when I enforced them within the Federal Government, where we have 99 percent compliance.

We also utilized them in the General Motors agreement, but I did not agree with them.

I am not saying to you—I have given my commitment, and obviously, that is not worth anything, that we will obey the law. I have said it time and time and time again. I am not accepting—I am not going back to this position to defy the Supreme Court.

And my problem is with the deliberative process. Once you open that up, individuals who have some problems with the way that we have brought litigation against them begin to discover our discussions during the closed session of our meetings when we vote to litigate their cases. I have a real problem with that.

Senator METZENBAUM. Well, Mr. Thomas, I think you had suggested that perhaps we can work out a way to operate. And between now and the actual meeting of the committee, I would suggest that you or your representative meet with my staff and the staff of the committee to see whether or not we cannot work out some way that we can live with this so that we will be able to perform our duties.

The CHAIRMAN. I think we can work that out, but I agree we cannot get into their deliberative process, or we undermine what they are trying to do. I think we have to have your commitment to abide by the Supreme Court decisions, no question about that, and you have already made that commitment.

Senator KENNEDY. The only point, Mr. Chairman, we have got access to information to be able to make judgments which we do not reveal or make public. The Judiciary Committee, and for years, the Antitrust Committee had the most sensitive documents on market ratios in terms of oil companies to carry forward and that never was revealed. We get FBI reports on individuals; we do not make those public. I mean, there are a lot of things that go through our committee process, in examining various witnesses and the functioning of various agencies that we get which we keep confidential.

So I think in fairness to the nominee, quite frankly—I mean, these are the questions that you heard from me, and you are now hearing from Metzenbaum—all we want to do is find out what the record is. I for one do not question your own sincerity. It is just a question of whether you are applying it the way that others—you might say it one way—

The CHAIRMAN. The way that I want you to apply it.

Senator KENNEDY. The way that it has been applied in the past. If we have a difference on it, we want to know it, so we can make a judgment. And that information, I think, is both fair to you, and it is fair to us.

The CHAIRMAN. Well, let us see if we can work that out so it is an acceptable thing.

Mr. THOMAS. I would like to make one point.

The CHAIRMAN. You get your staff and so forth to work it out.

Mr. THOMAS. We will do that. I would like to make one point. No matter what the disagreement has been with individuals with me in this city, my word is my bond, and that is it. And nobody can say that I have gone back on that.

The CHAIRMAN. Nobody is questioning that.

Senator METZENBAUM. We are not questioning your word, we are not questioning that.

The CHAIRMAN. I do not think they are questioning your word.

But let us do that. There are parameters that we should not invade, and there are parameters you ought to meet, too, and I think we can work those out. But you know, in the Judiciary Committee, we do get some interesting things, but we do not get into what judges' deliberation processes are, and I do not think we do it very often with success in the administrative deliberative process.

So let us just work it out to the extent that we can. I think you will be cooperative.

Senator METZENBAUM. Mr. Thomas, under EEOC Management Directive 707, Federal agencies are given detailed instructions for developing and implementing affirmative action plans. For several years, the Justice Department and other Federal agencies—State, Education and others—have placed themselves above the law by refusing to submit an affirmative action plan that contains goals and timetables.

What are you doing to enforce MD-707 against the Justice Department and other agencies that flaunt your directive, and what can we in Congress do to help you in this respect?

Mr. THOMAS. Well, without getting into the substance of the disagreement, this has been something that has been going on for 4 years. But let me note parenthetically that we have close to 100 percent compliance with Management Directives 707 and 711.

Now, there is no enforcement provision for the affirmative action components of title VII in the Federal Government.

Senator METZENBAUM. Would you favor enactment of a bill that would create a cause of action for the EEOC and for aggrieved individuals against an agency that fails to develop and carry out an effective affirmative action plan?

Mr. THOMAS. I would favor any kind of enforcement mechanisms not only for that, but an improvement in title VII enforcement provisions, across the board.

Senator METZENBAUM. Well, does that mean yes, you would favor legislation—

Mr. THOMAS. I do not know whether a cause of action—any enforcement provisions that are effective. I think that matter would have to be worked out as to exactly what it would be. If the government is suing the government, I do not know whether that is possible.

Senator METZENBAUM. Well, what kind of enforcement action can there be? If you do not have the authority now, then Congress has to give you that authority or give the aggrieved individual that authority, or both.

Mr. THOMAS. I think Congress has the enforcement authority now, just simply doing oversight.

Senator METZENBAUM. Oversight does not resolve the problem.

Mr. THOMAS. Yes, but in the Appropriations Committee and the Oversight Committee, it has a way of getting your attention.

Senator METZENBAUM. Well, are you suggesting we cut off the funds of a department of Government if they do not—

Mr. THOMAS. It gets my attention, OK, regardless of whether you cut off the funds. I mean, to appear before your appropriations committee and your oversight committee on these issues does get your attention. But I think that that provision does need some kind of enforcement mechanism if it is going to work.

Senator METZENBAUM. Well, under your leadership, the EEOC announced its intention to revise MD-707 by September 1985 in order to eliminate the use of goals and timetables by Federal agencies. Has that new directive been completed?

Mr. THOMAS. We have postponed that. Again, one of the things that I thought was important was that whatever direction the Supreme Court set, that we have the benefit of that and then to utilize or involve that in whatever decision we made.

Senator METZENBAUM. Will you announce any proposal to modify MD-707 at least 60 to 90 days before it is finalized and provide adequate opportunity for public review and comment?

Mr. THOMAS. It has to be done long before that. That is why we had to not issue them. We have to coordinate with the other agencies first, and we are talking approximately 5 or 6 months before there are any changes made.

Senator METZENBAUM. Will you send the members of the Committee a copy of any public notice at the time—

Mr. THOMAS. We could do that. I will make a note to do that.

Senator THURMOND. Mr. Chairman, I wonder if the able Senator from Ohio would just give me 5 seconds?

Senator GRASSLEY [presiding]. Will the Senator yield?

Senator METZENBAUM. For 5 seconds, I yield to the distinguished President pro tempore.

Senator THURMOND. Thank you very much.

Mr. Chairman, I have a statement strongly endorsing Mr. Thomas and to save time I am just going to put it in the record.

Senator GRASSLEY. Without objection.

Senator THURMOND. Thank you.

I think he has done a fine job, and he should be confirmed.

Thank you very much.

Mr. THOMAS. Thank you, Senator.

[The prepared statement of Senator Thurmond follows.]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.); BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES REFERENCE NOMINATION OF CLARENCE THOMAS TO BE CHAIRMAN OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SD-430, JULY 17, 1986, 2:00 P.M.

MR. CHAIRMAN:

I would like to voice my support for the nomination of Mr. Thomas to serve another five years as Chairman of the Equal Employment Opportunity Commission (EEOC). I believe that he is eminently qualified to continue service in the high post entrusted to him by President Reagan.

Mr. Thomas has served as Chairman of the EEOC with distinction and ability. His leadership as Chairman, and his past career background, demonstrate the high capabilities of Mr. Thomas.

His past employment experiences include service as Assistant Secretary for Civil Rights at the Department of Education; legislative assistant to Senator John C. Danforth (R-MO); counsel for the Monsanto Company; and Assistant Attorney General of Missouri.

Mr. Thomas graduated from Holy Cross College and is a member of the Board of Trustees of that institution. He attended Yale Law School and received a J.D. degree in 1974.

Throughout his career, I believe Mr. Thomas has exhibited the legal and administrative skills that are an absolute necessity in running an agency with 3,000 employees and a \$100 million budget.

Mr. Chairman, upon reviewing the testimony we will receive today on this fine gentleman, I am confident that my colleagues will join me in urging the speedy confirmation of Mr. Thomas.

Unfortunately, other duties of the Senate require that I must leave at this time.

Senator GRASSLEY. Senator Metzenbaum.

Senator METZENBAUM. I have just a few more questions.

I have been critical of your position with regard to affirmative action, but I also want to give credit where credit is due.

In November 1985, you served the public well when you and your colleagues recommended Government participation on the side of the plaintiffs in city of Riverside against Rivera. You argued that a rule restricting attorney fees where the monetary recovery is small would result in less than full relief for individual victims and would discourage private attorneys from taking title VII cases that involve only individual claims.

Although the Justice Department rejected your recommendation, your position was vindicated by the Supreme Court last month.

What role should the Commission now play in shaping the administration's position on attorney fee awards in the future?

Mr. THOMAS. Well, let me move back a bit. I think the Commissioners have indicated that in the enforcement of civil rights laws, particularly the EEO laws, that you need some kind of incentive for private litigators, private attorneys, to be involved in that, because we cannot do all the case—it is as simple as that. And in some of them, the reward is not actually the monetary reward.

I think that the Commission—as I have felt in all civil rights and EEO matters—should play, particularly in EEO matters, the central role, the lead role.

Senator METZENBAUM. That the Commission should play—

Mr. THOMAS. That is right.

Senator METZENBAUM. There is now a bill pending in the Judiciary Committee that would limit attorney fee awards to \$75 an hour in civil rights cases brought against Government defendants. Do you support that approach?

Mr. THOMAS. I have not looked at that bill. The normal way for supporting or commenting on legislation within the executive branch is to have it cleared through OMB.

Senator METZENBAUM. Do you have a personal point of view?

Mr. THOMAS. I do, but I do not think it is relevant.

Senator METZENBAUM. Well, although it is not relevant, would you share it with us?

Mr. THOMAS. I would be more than happy to share it with the Senator off the record, but the wrath of OMB is not coming down on my head.

Senator METZENBAUM. Well, you are probably discreet.

I have some other questions I will submit for the record. I see that Senator Simon is here and is waiting very patiently. But I have some questions, and I hope you will be able to respond to them prior to the markup.

Mr. THOMAS. Thank you, Senator.

Senator GRASSLEY. The Chair recognizes Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

In response to one of the questions of Senator Metzenbaum, you, in referring to the reports you make to OMB and the Justice Department, said that your agency "should be independent"; did I hear correctly?

Mr. THOMAS. Yes, I did say that, Senator.

Senator SIMON. So that if we could change the statute to give greater independence, it would improve the effectiveness of your agency?

Mr. THOMAS. That is right.

Senator SIMON. I think that is important for us to know.

Let me express candidly my concern. When I get a letter like this from the NAACP saying:

The National Association for the Advancement of Colored People has grave reservations regarding the confirmation of Clarence Thomas to a second term as Chairman of the Equal Employment Opportunity Commission. Our opposition is premised on the fact that the Commission under Mr. Thomas' leadership has been derelict in its enforcement role and has voiced strong opposition to affirmative action.

I guess—

Mr. THOMAS. Do they give you any facts, Senator?

Senator SIMON. Well, this particular letter does not have, but there are other letters—and I am going to be questioning you about some of these—that do contain at least some facts—you may wish to interpret them differently than others have.

But when I read your testimony, in 1982 you say that, "I do not believe that there should be a wholesale abandonment of any sort of numerical timetables, at least as monitoring devices. They are necessary in monitoring some sort of progress in certain areas."

In response to a question by Senator Eagleton, you say, "In my present job, I have found that the need for data, the need for goals for monitoring progress, are there."

And yet before the Labor Subcommittee on the House side you say, "I do not support the use of goals and timetables. I do not think as a practical matter that they work."

I guess my concern is this, bluntly. I want someone who heads your agency who is not going to just dance around the edges of the problem, but who is going to march, who is going to see that people who may not have all the talent that you have also have an opportunity. And that sense of marching is what I miss.

In response to questions by Senator Metzenbaum on the Supreme Court ruling, the Supreme Court ruling—and I just reread it here—permits—it does not mandate—goals and timetables. But I want someone who is going to do not what you have to do, but who is out there leading the charge. And I do not sense that leading the charge on your part.

Now, what is wrong with what I sense?

Mr. THOMAS. I have just got a low-key personality. I am not much for this charismatic stuff. I am not much for making flamboyant speeches. I said that I was going to put an agency together that could operate, and that is what I intend to do. I intend to finish it. It is as simple as that.

In terms of commitment to civil rights, Senator, I always find that absolutely astounding that people could question others' commitment to anything. I may not agree on goals and timetables, but what is that an indicia of? I did not agree on quotas in 1964. I did not believe in race-consciousness in 1964. I was raised by two people who did not believe in it, OK—my grandfather, raised by a freed slave. So what is a commitment?

The agency—to work, in my opinion, 12, 14 hours a day, the frustrations of dealing with this kind of small agency, to get it to oper-

ate, that is commitment, not making speeches. Speeches are easy to write and deliver. That is commitment? Goals and timetables rarely come up at EEOC in these cases. There are 70,000 cases that we have got to figure out how to process and how to process well. Those are the little guys. Those are the insignificant cases that are not reported in BNA, that do not make national headlines. That is where the bulk of the work is.

And I think that we have gone to EEOC, and we have said that we were going to put a remedies policy in place that got something; that we were going to as Commissioners sit down and review these cases and make sure that every case got fair treatment, not short shrift, that we were not going to pick and choose, that we were going to enforce these cases for the people who relied on us; that we were going to have a system that worked, that we were going to have computers that dealt with information, that we were going to have management systems that held people accountable, that we were going to train our employees so that they knew the law better—it goes on and on and on—improve our delivery system.

It is wonderful, I think, to say I support this, or I support that. That is the easiest thing in the world. But to actually sit down and deliver is the hard job, and that is what we have the commitment to do, and that is precisely what we are doing. And that is why I am going through this to have 2 more years of going through that.

Senator SIMON. Well, I want to see delivery. But much of what you describe in the nuts and bolts things are things that your administrative assistant ought to be doing. And I guess it gets back to—for example, what do you really believe in goals and timetables?

Mr. THOMAS. Let me go back. An administrative assistant—the first thing that I did was eliminate the executive director. If you are going to run this agency, the person who heads the agency has to run it. That is something that we should have learned from the 21-year history of EEOC. And I think that my predecessor started doing that. She set it on a management course, and we are finishing it up.

Until you have that, you have nothing but a promise.

Now, with respect to goals and timetables, I indicated and I think my predecessor indicated, and I think others have indicated, that we need some way to monitor big cases. You can call it goals and timetables, you can call it just monitoring devices, or whatever you. That is different from just throwing it out as a remedy. OK. I implement it at EEOC. I started the monitoring of cases on a systematic basis—even the cases including goals and timetables as a remedy. That is important—is any progress being made; are we achieving the purposes of title VII. Or have we just gotten something, and we are going to put it on the back burner and forget about it? That is important. But just to have goals and timetables every time you have discrimination, not even the Supreme Court said that you could do that. There is more to it than that. There are employment practices that are wrong that can be changed, and should be changed, not just give someone goals and timetables that they can shove in a drawer, recognize that it is never going to be monitored, and then never correct the discriminatory conduct. We want it all done. And the Supreme Court has now said that in cer-

tain cases, goals and timetables can be used. We intend to use everything that we can use, including goals and timetables.

Senator SIMON. OK. So if I follow you now, what you are saying is that goals and timetables can be a legitimate tool for effecting the goal of equality of employment opportunity?

Mr. THOMAS. It is one of the devices that we have in our arsenal, and we will use it.

Senator SIMON. Now, on the first part of your answer, let me just say, your job is not a custodial job. The administrative part is an essential part of it. That is part of Chuck Grassley's job as U.S. Senator from Iowa, it is part of my job as U.S. Senator from Illinois. I have to make sure the mail gets answered, that we do not exceed the budget by hiring too many employees and so forth. But I have to lead; you have to have a sense of direction of where you are going, and that is infinitely more important than that custodial function. The custodial function is essential, but the inspiration and the leadership is absolutely vital. And that, I want in your office and from you.

Mr. THOMAS. Senator, I am not a custodian of EEOC. My job is to provide leadership for the Agency and a direction. We have set the direction, we have set the course. And I think if anyone would spend some time looking at the Agency, you can see it—it is obvious. We are not running around in circles, chasing our tails. We intend to make EEOC an enforcement agency. I have said it, and I intend to deliver on it. That is why I have got to stay.

Senator SIMON. Now, in that connection, I have a letter from the Women's Legal Defense Fund, signed by Judith Lickman and Claudia Withers. They say that in 1980, the Commission filed 79 Equal Pay Act cases; in 1981, 50; in 1985, 15. Now, there is at least a superficial indication that the Commission is not moving aggressively.

Mr. THOMAS. Senator, with respect to cases that we file, we file every single case that fails conciliation where we have a cause finding. Eighty-five percent of those that the general counsel recommends for litigation, the Commission approves. We do not pick and choose them.

Now, we could go through them and just pick and choose EPA cases. Many of those cases are dual-filed under title VII and the Equal Pay Act. Equal pay tends to be very narrow, and I think if I were an employer, and I saw a difference like that, rather than letting it fail conciliation, I would settle it out. It is a very simple statute.

Senator SIMON. But you are being just as aggressive now as the Commission was in 1980.

Mr. THOMAS. Senator, we are filing more cases. In 1980 they filed 858 cases; in 1985, we filed 411. And it will go up. It should be up around 500 this year. I do not know what you read in those numbers, but the fact of the matter is that in terms of litigation, the cases that fail conciliation, of those that are recommended to us for litigation from our people, we approve 85 percent. That is predictable. You can expect that 8 out of 10 times when a case fails conciliation and is recommended for litigation, and 75 percent of the time, that case will go to litigation. Not 1 out of 10, not 1 out of 2.

Senator SIMON. I have no further questions at this point.

Senator Kennedy has requested that I ask this question: "Mr. Thomas, in reply to a question from Senator Kennedy, you said that the report of the Education and Labor Committee that EEOC has renounced the adverse impact test were false. Will you submit to the Senate Labor Committee any and all documents and records concerning orders made to EEOC attorneys regarding use of the adverse impact test? We are willing to work out whatever confidentiality protections are necessary and appropriate."

Mr. THOMAS. I do not have the slightest idea of any orders about the adverse impact test. I do not have the slightest idea. Now, maybe we can go back and discover some. But the adverse impact test was not the subject of any directive by this Commission to my knowledge.

Senator SIMON. And you are willing to provide any documents along that line, if any can be discovered?

Mr. THOMAS. If I can find some.

Senator SIMON. Thank you, Mr. Chairman.

Senator WALLOP [presiding]. Thank you, Senator Simon.

The record will remain open until the end of the day for any further statements.

[Additional statements submitted for the record and responses of Mr. Thomas to questions submitted to him follow:]



COMMITTEE ON EDUCATION AND LABOR  
U.S. HOUSE OF REPRESENTATIVES  
5101 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515

July 29, 1986

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Honorable Orrin G. Hatch  
Chairman, Committee on Labor  
and Human Resources  
United States Senate  
Washington, D.C. 20510

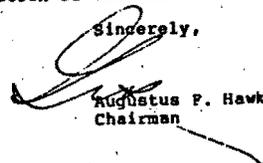
Dear Mr. Chairman:

Enclosed herewith is my testimony regarding the renomination of Clarence Thomas to serve a second term as Chairman of the Equal Employment Opportunity Commission. Thank you for leaving the hearing record open so that I may submit testimony on this very important matter.

I strongly urge that you and the members of the Committee on Labor and Human Resources who share my views that the effective enforcement of federal equal employment opportunity laws is of paramount importance, seriously consider the issues raised in my testimony when you deliberate the possible confirmation of Mr. Thomas.

I am also enclosing a copy, for your information, of a letter submitted to me by Women Employed, a Chicago-based women's advocacy organization, regarding this group's strong position in opposition to the confirmation of Chairman Thomas.

Sincerely,

  
Augustus P. Hawkins  
Chairman

cc: Members of the Committee on Labor  
and Human Resources

TESTIMONY OF AUGUSTUS F. HAWKINS  
CHAIRMAN, COMMITTEE ON EDUCATION AND LABOR  
U.S. HOUSE OF REPRESENTATIVES

BEFORE  
THE COMMITTEE ON LABOR AND HUMAN RESOURCES  
U.S. SENATE

ON

CONFIRMATION OF CLARENCE THOMAS  
CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

JULY 23, 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR GRANTING ME THE OPPORTUNITY TO SUBMIT THIS TESTIMONY REGARDING THE CONFIRMATION OF CLARENCE THOMAS TO SERVE A SECOND TERM AS CHAIRMAN OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. AS YOU KNOW, AS CHAIRMAN OF THE COMMITTEE ON EDUCATION AND LABOR OF THE HOUSE OF REPRESENTATIVES, I HAVE RARELY BEEN INVOLVED IN THE DELIBERATIONS OF THIS BODY CONCERNING APPOINTMENTS TO EXECUTIVE BRANCH AGENCIES. HOWEVER, MY CONCERN WITH THE EFFECTIVENESS OF THE ENFORCEMENT OF THE NATION'S EQUAL EMPLOYMENT OPPORTUNITY LAWS PROMPTS ME TO APPEAR BEFORE YOU TODAY TO EXPRESS MY GRAVE AND SERIOUS CONCERNS REGARDING THIS POSSIBLE REAPPOINTMENT.

I HAVE THREE PRINCIPAL RESERVATIONS CONCERNING MR. THOMAS' PROPOSED SECOND FIVE-YEAR TERM AT THE EEOC.

1) I AM CONCERNED ABOUT MR. THOMAS' POLICIES RELATING TO EQUAL EMPLOYMENT OPPORTUNITY LAW, INCLUDING THE USE OF GOALS AND TIMETABLES AS A REMEDY FOR EMPLOYMENT DISCRIMINATION, AND THE USE OF STATISTICS TO PROVE DISCRIMINATION;

2) I AM TROUBLED ABOUT THE WAY IN WHICH CHAIRMAN THOMAS HAS CONDUCTED THE BUSINESS AND POLICY-MAKING OF THE EEOC, IN POSSIBLE CONTRAVENTION OF THE ADMINISTRATIVE PROCEDURE ACT AND THE "GOVERNMENT IN THE SUNSHINE" ACT;

3) AND LASTLY, I AM CONCERNED ABOUT RECURRING PROBLEMS RELATING TO THE EEOC'S ADMINISTRATIVE ENFORCEMENT PRACTICES UNDER HIS CHAIRMANSHIP.

WHILE I WILL BRIEFLY ADDRESS THESE ISSUES, I REFER YOU TO THE REPORT OF MY COMMITTEE STAFF ENTITLED, "INVESTIGATION OF CIVIL RIGHTS ENFORCEMENT BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION". (MAY 1986) THIS REPORT WAS BASED ON VISITS TO SIX EEOC DISTRICT OFFICES, WHICH MY STAFF CONDUCTED LAST FALL. I BELIEVE THAT THE FINDINGS INDICATED IN THIS REPORT WILL BE VERY ILLUMINATING, AND WILL GIVE YOU AN EXCELLENT SENSE OF THE BASIS OF MY CONCERNS AND THE PROBLEMS CURRENTLY FACING THIS AGENCY. I ASK THAT THIS STAFF REPORT, AS WELL AS MY WRITTEN TESTIMONY, BE INCLUDED IN THE OFFICIAL RECORD OF THIS HEARING.

## I. POLICY ISSUES

### GOALS AND TIMETABLES

WHEN MY COMMITTEE STAFF CONDUCTED VISITS AT EEOC DISTRICT OFFICES LAST FALL, THEY LEARNED THAT THE COMMISSION'S ACTING GENERAL COUNSEL ORALLY DIRECTED THE COMMISSION'S REGIONAL ATTORNEYS THAT THEY WERE NOT TO RECOMMEND THE USE OF GOALS AND TIMETABLES IN CONSENT DECREES OR TO INTERVENE IN CASES IN WHICH GOALS AND TIMETABLES ARE PROPOSED AS A REMEDY FOR EMPLOYMENT DISCRIMINATION. COMMITTEE STAFF LATER DISCOVERED THAT THE ACTING GENERAL COUNSEL ALSO HAD INSTRUCTED THE LEGAL STAFF NOT TO SEEK THE ENFORCEMENT OF GOALS AND TIMETABLES IN EXISTING CONSENT DECREES AS WELL AS IN FUTURE ONES. THIS INFORMATION WAS LATER CONFIRMED BY MR. JOHNNY J. BUTLER, THE ACTING GENERAL COUNSEL, AT A HEARING BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES IN MARCH OF THIS YEAR.

NOT ONLY WAS THE COMMISSION'S LEGAL STAFF THOROUGHLY CONVINCED THAT THE COMMISSION OPPOSED THE USE OF GOALS AND TIMETABLES, THE EEOC COMPLIANCE STAFF, WHICH CONDUCTS INVESTIGATIONS OF COMPLAINTS OF DISCRIMINATION, ALSO MADE IT CLEAR THAT "GOALS AND TIMETABLES WERE DEAD". WHILE THE SUPREME COURT HAD GRANTED CERTIORARI IN WYGANT V. JACKSON BOARD OF EDUCATION, LOCAL 28 V. EEOC, AND LOCAL 93 V. CITY OF CLEVELAND, TO REVIEW THE VALIDITY OF AFFIRMATIVE RELIEF, THE LAW APPLICABLE AT THE TIME OF THE GENERAL COUNSEL'S DIRECTIVE CLEARLY PERMITTED THE USE OF SUCH REMEDIES AND IT HAD LONG BEEN THE PRACTICE OF THE

COMMISSION TO SEEK SUCH RELIEF.

WHAT IS MOST TROUBLING, MR. CHAIRMAN, IS THAT IF MY COMMITTEE STAFF HAD NOT CONDUCTED ITS INVESTIGATION LAST FALL, NONE OF THIS INFORMATION REGARDING A MAJOR CHANGE IN EEO ENFORCEMENT POLICY WOULD HAVE BEEN BROUGHT TO LIGHT. WHAT IS EVEN MORE TROUBLING IS THE FACT THAT CHAIRMAN CLARENCE THOMAS, IN HIS REPLY TO A LETTER SENT TO HIM BY FIVE MEMBERS OF CONGRESS, INCLUDING MYSELF, EFFECTIVELY CONDONED MR. BUTLER'S ACTIONS. IN HIS LETTER, CHAIRMAN THOMAS WROTE:

PLEASE BE ADVISED THAT THE STATEMENT (OF THE ACTING GENERAL COUNSEL) WAS MADE PURSUANT TO THE ACTING GENERAL COUNSEL'S AUTHORITY TO CONDUCT LITIGATION ON BEHALF OF THE COMMISSION...AND HIS INTERPRETATION OF THE GENERAL DIRECTION OF COMMISSION POLICY.

COMMITTEE STAFF LATER DISCOVERED THAT IN KEEPING WITH THIS UNANNOUNCED POLICY CHANGE, THE EEOC HAD EARLIER SIGNED A CONSENT DECREE IN THE CASE OF MEYER V. MACMILLAN PUBLISHING COMPANY, WHICH CONTAINED THE FOLLOWING LANGUAGE: "THE EEOC TAKES NO POSITION WITH REGARD TO SECTION VII OF THIS DECREE PERTAINING TO GOALS, AND WILL NOT PARTICIPATE IN ITS ENFORCEMENT". THIS LANGUAGE WAS ADDED TO THE CONSENT DECREE OVER THE OBJECTIONS OF BOTH THE PLAINTIFFS AND DEFENDANTS IN THIS CASE.

CLEARLY, CONGRESS DID NOT CONFER THE POLICY-MAKING FUNCTIONS OF THE COMMISSION UPON THE GENERAL COUNSEL. NOR DID IT INTEND FOR THE CHAIR OF THE COMMISSION TO USE THE OFFICE OF THE GENERAL COUNSEL AND ITS "PROSECUTORIAL AUTHORITY" AS A PRETEXT FOR POLICY-MAKING THAT HE OR SHE FINDS POLITICALLY UNPALATABLE. IF CHAIRMAN THOMAS HAD SERIOUS PROBLEMS WITH THE USE OF GOALS AND TIMETABLES TO REMEDY THE EFFECTS OF DISCRIMINATION, HE SHOULD HAVE PRESENTED HIS CONCERNS TO THE COMMISSION WHICH, IN TURN, COULD HAVE VOTED TO MODIFY ITS AFFIRMATIVE ACTION GUIDELINES AND THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES. AS THINGS STAND TODAY, CHAIRMAN THOMAS HAS LEFT HIS STAFF, EMPLOYERS AND POTENTIAL CHARGING PARTIES IN A STATE OF CONFUSION.

WHILE WE HAVE SOUGHT CLARIFICATION REGARDING HIS COMMITMENT TO USE ALL OF THE ENFORCEMENT TOOLS AT HIS DISPOSAL, IT REMAINS UNCLEAR WHETHER CHAIRMAN THOMAS HAS FULLY ACCEPTED THE SUPREME COURT'S MOST RECENT PRONOUNCEMENTS IN WYGANT V. JACKSON SCHOOL BOARD, LOCAL 28 V. EEOC (A CASE IN WHICH THE EEOC CHANGED ITS POSITION WHICH WAS, INITIALLY, IN FAVOR OF GOALS AND TIMETABLES), AND LOCAL 93 V. CITY OF CLEVELAND. I REMAIN CONCERNED THAT IF CLARENCE THOMAS IS CONFIRMED BY THIS BODY, MY COMMITTEE WILL BE FORCED TO CONDUCT EVEN MORE VIGOROUS OVERSIGHT TO ENSURE THAT THE LAW AS INTERPRETED BY THE COURTS WILL BE ENFORCED. WHAT IS STATED IN EEOC GUIDELINES AND TESTIMONIES AS POLICY MAY NOT BE WHAT IS ACTUALLY IMPOSED UPON THE EEOC STAFF AND THE PUBLIC.

THE ASSURANCES GIVEN DURING THOMAS' LAST CONFIRMATION HEARING AND HIS SUBSEQUENT ACTIONS SUPPORT THE ARGUMENT THAT WHAT CHAIRMAN THOMAS TESTIFIES TO BE HIS POLICY MAY NOT BE REFLECTED IN SUBSEQUENT ENFORCEMENT ACTIONS. IN 1982 CHAIRMAN THOMAS ASSURED THE MEMBERS OF THIS COMMITTEE, IN HIS FIRST CONFIRMATION HEARING, THAT GOALS AND TIMETABLES "ARE NECESSARY IN MONITORING SOME SORT OF PROGRESS IN CERTAIN AREAS". LATER, WHEN TESTIFYING BEFORE MY SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES IN 1984, HE STATED THAT,

I DO NOT SUPPORT THE USE OF GOALS AND TIMETABLES. I DO NOT THINK, AS A PRACTICAL MATTER, THAT THEY WORK, NOR DO I BELIEVE THAT WE CAN IN ANY WAY DETERMINE WHAT IS THE PERFECT WORK FORCE REPRESENTATION FOR ANY GROUP AT ANY TIME. \*

IN 1985, CHAIRMAN THOMAS REMOVED ALL DOUBT AS TO HIS VIEWS ON THE USE OF GOALS AND TIMETABLES WHEN HE WROTE IN THE EEOC'S SUBMISSION TO THE REGULATORY PROGRAM OF THE UNITED STATES GOVERNMENT:

THE FEDERAL ENFORCEMENT AGENCIES, INCLUDING THE EEOC AND THE DEPARTMENTS OF JUSTICE AND LABOR, TURNED THE STATUTES ON THEIR HEADS BY REQUIRING DISCRIMINATION IN THE FORM OF HIRING AND PROMOTION QUOTAS, SO-CALLED GOALS AND TIMETABLES, ...AS CHAIRMAN OF THE EEOC, I HOPE TO REVERSE THIS FUNDAMENTALLY FLAWED APPROACH TO

\* Oversight Hearing on the EEOC's Enforcement Policies: Hearing before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, 98th Cong., 2d Sess (1984)(p.9)