The CHAIRMAN. Well, Senator, if I could cut you off there——

Senator SIMPSON. I'm through.

The CHAIRMAN [contining]. And just make the point that it seems to me if you all are not able to say you are against him before you heard the record, then Senators shouldn't here say they are for him before they have heard the record, and all the Senators said we are for him—that's not a problem. So what's good for the goose is good for the gander, and we are finding that the goose changes as time moves.

Thank you all very, very much. I appreciate it.

Ms. YARD. Thank you. Let's hope we're not here next August doing the same thing.

The CHAIRMAN. Believe me, Ms. Yard, I hope I get to see you next August, but I hope it's not at one of these hearings.

Let me move on, and I have received the proper admonition of my colleague from South Carolina that I allowed and encouraged and was part of going beyond the time, and I will try not to let that happen again.

Our next panel, testifying in support of Judge Thomas' nomination includes a group of distinguished professors. I apologize if I sound too familiar with the first names, but this is the list as the White House gave us the list, and it says "Joe"—I don't mean to sound familiar—but Joe Broadus—I don't know whether it is Joseph or Joe and I apologize for the familiarity, but it is the list we were given by the White House—a professor at George Mason Law School in Arlington, VA; James Ellison, a professor at Cumberland Law School, which I have had the great pleasure of speaking at as well, and it is a fine law school, at Samford University in Birmingham, AL; Shelby Steele, a professor at San Jose State University in San Jose, CA; Rodney Smith, Dean of the Capital University Law School in Columbus, OH; and Charles F. Rule, a partner in the law firm of Covington & Burling in Washington, DC.

Welcome to all of you, and professor, if you would begin.

STATEMENTS OF A PANEL CONSISTING OF JOE BROADUS, PROFESSOR, GEORGE MASON LAW SCHOOL, ARLINGTON, VA; JAMES ELLISON, PROFESSOR, CUMBERLAND LAW SCHOOL, BIRMINGHAM, AL; RODNEY SMITH, DEAN, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OH; AND CHARLES F. RULE, COVINGTON & BURLING, WASHINGTON, DC

Mr. BROADUS. Thank you, Senator.

It is a pleasure to appear here before the committee today, and I thank you for this opportunity. Primarily, I will be giving a report that evaluates two reports that I made on Judge Thomas—one on his performance at the EEOC, and the other on his work as assistant secretary of education at the Office of Civil Rights.

Primarily, these reports were approached by taking earlier reports that were critical of Judge Thomas and attempting to verify their conclusions from the record and going to court cases, going to the records of the EEOC, and going to various others sources to see whether those charges could be confirmed.

In terms of the attitude of my report, I want to tell you that I tried to make a certain kind of decision. I tried to separate out

those issues which could be said to be disputes over prudential issues—that is, issues of policy—whether or not it was good to do (a) or (b), and issues that related to fundamental commitments—fundamental commitments to equal opportunity, fundamental respect for law, and tried to make a decision so that we wouldn't—I believe it would be improper to have an overlap where someone in the executive was merely being punished later, for example, for failing to agree with others on particular approaches rather than for a lack of commitment to law or a lack of commitment to equal opportunity.

I believe that the charges that were made against Judge Thomas and his chairmanship that, for example, he weakened the EEOC, lacked commitment to equal opportunity, that those cannot be supported in the record.

Already over the last few days, you have heard from people who have worked at the EEOC and have personally known Judge Thomas, and you have already heard some of the statistics. You have heard about the problems that that agency had when he came to the agency, and you have heard about the efforts that he made to turn that agency around. You know about the disputes over guidelines and tables, and you also know about the improvement on the administrative side of the agency, and you have been told by other witnesses that if you are going to have equal opportunity, it is not enough to have laws—you must have an efficient and effective agency for carrying out those laws. And the record does support that Judge Thomas worked with innovative ideas.

We have already heard a great deal about the dispute over whether you should have an individual case approach or whether you should try for class action remedies, and we know that that is somewhat misleading because in fact the agency both had record numbers of cases in both categories and record returns in both categories during Judge Thomas' tenure.

The other area that is of interest is Judge Thomas' performance at the Office of Civil Rights, and much of the dispute in this time seems to center from his involvement in something that has already been greatly discussed, and that is the *Adams* litigation. It is significant in *Adams* because the charge that emerges is that Judge Thomas lacked the basic respect for law in his performance or response to the court orders that were issued to establish tables and guidelines for the performance of OCR in the *Adams* litigation.

I think in reviewing this there has been to a certain extent a certain amount of misrepresentation of the posture of that case and of Judge Thomas' response to it. We know already that he was not the initial party who was charged in the motion to show cause. What hasn't been quite made as clear is that there were kind of conflicting motions—one to show cause, and the other one was to modify the order that the court had. And we know that ultimately this order trying to find the Government, trying to find Judge Thomas in contempt, was held to be premature. That is, he hadn't been in office long enough for the judge to decide that you could make a decision on this.

So I would think that there is nothing in that kind of performance that would establish that the judge behaved in a reckless

manner or showed disregard or disrespect for the law, which is the more serious charge that grows out of this litigation.

But what hasn't further been discussed is the ultimate outcome of that case, and that outcome was a determination that it was in fact the court itself which had exceeded its jurisdiction in attempting to impose those guidelines. So we have there a case where what really happens is that there is a conflict over what is the proper role of the judiciary and the executive which is ultimately resolved for the executive, but a great deal of bitterness, which is turned into a kind of personal vendetta against the judge and which is largely unjustified.

Thank you.

Senator SIMON [presiding]. We thank you, Professor Broadus.

Professor Ellison.

STATEMENT OF JAMES ELLISON

Mr. ELLISON. Mr. Chairman, I would like to thank you for giving me the opportunity to state my reasons for supporting the confirmation of Judge Clarence Thomas as an Associate Justice of the U.S. Supreme Court.

My name is W. James Ellison. I am a professor of law at the Cumberland School of Law, Samford University, Birmingham, AL. I am also cochairman of Alabama Citizens Committee to Confirm Clarence Thomas and of Alabama Attorneys to Confirm Clarence Thomas.

I would like to limit my remarks to a brief statement in support of Clarence Thomas' concerns about affirmative action policies which permit and encourage race-norming tests and gender and race-based preferences and quotas.

As currently engaged in, race-norming tests and gender and race-based preferences and quotas have three incontrovertible characteristics. The first of these is that they discriminate against white males in favor of ethnically identifiable minorities and in favor of white females who have had themselves legislatively declared a disadvantaged class.

It seems to me that the same constitutional standards which prohibit discrimination against African-Americans solely because of the color of their skin prohibit similar discrimination against white American males.

Today, racially discriminatory attitudes and practices cause much pain and suffering, but we cannot end discrimination against one class of Americans by discriminating against another class of Americans. Instead of gender or race-based remedies, corporate and individual wrongdoers should be held accountable for their discriminatory conduct under existing traditional civil law remedies. After proving discrimination in a court of law, a plaintiff should be awarded actual damages, attorney fees, and significant punitive damages. Each individual plaintiff would, in essence, act as a private attorney general.

Second, race-norming tests and gender and race-based preferences and quotas are premised on the proposition that their beneficiaries are intellectually inferior to white males or are otherwise