

been distorted. He ran for the governorship in New York and damn near beat Cuomo. I mean he is not some fellow that just, you know, dropped down on the playing field and suddenly began to babble conservative things. He presented himself in a way where I believe that he got 49 percent of the vote in New York, or 48, in a very spirited race with the present Governor.

Anyway, I have much more and you are very good to respond, and I thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I next recognize a fellow who 15 years ago probably never thought that on his 58th birthday he would be sitting on a panel about to ask questions of a nominee to the Supreme Court. Senator Grassley, by the way, happy birthday.

Senator GRASSLEY. Thank you. I have no questions of this panel.

The CHAIRMAN. Well, we should do this more often on his birthday. [Laughter.]

I have been listening to the admonishments of the Senator from South Carolina, who has been telling me—and he will tell me, I assure you, throughout these hearings—that we should make them move more rapidly. We are going to limit witnesses to 5 minutes, and Senators to 10 minutes. It is important for Senators, like Senator Hatch, who have additional questions or comments to be able to speak, notwithstanding the fact that we have a large witness list.

So, I am going to recognize Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I have appreciated the testimony you brought here. We differ, but that is what makes America great, too. One thing, though, I did want to bring out is this issue of preferences. On the current civil rights bill, there was an amendment, an anti-preference amendment to do away with it. I voted for that. I have to say a number of others voted against it and it was defeated.

But Thomas' approach is that we should not have preferences on a racial basis or on a gender basis or any other basis that discriminates against other people. And I am concerned about it, because in this country today, almost everybody, one way or the other, has faced that issue at one time or another in their lives, and it is creating difficulty and problems over America which I think, in a sense, is creating even more unrest and distress.

Mr. Days, as you know, I have a great deal of regard for you, and I certainly respect both the others. I just do not know you as well as I know Mr. Days. But I do not think that lumping veterans preferences or welfare or food stamps or any number of other preferences that have given society into this particular discussion is correct, because, first of all, society does make preferences.

We in many ways take care of the poor, the sick, the needy, persons with disabilities, and those are preferences, but they are race neutral preferences, and veterans preferences are race neutral preferences. I think what Clarence Thomas is saying is, look, there is no justification to ever have racial preferences based solely on race or any kind of preferences based solely on what a person is or is not in our society. That ultimately involves discrimination against others.

Now, I think there are two interesting sides to this issue. If we could solve it, you and I would be so happy, because it is one of the real problems in our society today. I would like you, all three of you, if you will—I have respect for your intellectual acumen, individually—give some thought to how we might help everybody who is disadvantaged, not just those who are African-Americans or Hispanic-Americans or Asian-Americans, or whatever, but everybody who is disadvantaged, but at the same time really put some teeth into stamping out discrimination by building upon maybe these ideas that Clarence Thomas has, and others have, as well, to basically end discrimination through tougher penalties, rather than discriminating against other people, through reverse discrimination.

I think tougher penalties, either monetary sanctions or criminal penalties, may be the real way to get to the bottom of discrimination, and I think you would avoid the problem of so many people feel they are discriminated against, because we give racial preferences on the basis of race in any given situation.

But I would like to have your thoughts on that. I would like you to write to me and tell me how you think that might work and what might be the better approach, and give me what you think are the subtleties and the intricacies of how we would handle that type of approach vis-a-vis the other.

Now, I am not asking you to give up your ideas on the other, but I would like you to give me some suggestions, all of us some suggestions and ideas on how we might better really resolve these problems of discrimination in America.

Mr. DAYS. May I just respond briefly, Senator?

Senator HATCH. Surely.

Mr. DAYS. The problem I have with tougher criminal penalties is not that we find the evil actor, that person should not be penalized to the ultimate of the law, it is that, in so many respects, we have gone beyond that point in our society and we are dealing with employers who are not evil actors—

Senator HATCH. Right.

Mr. DAYS. [continuing]. But they have run institutions that in the past excluded minorities or women, and then the question becomes one of, well, how do we get them. Well, the employer says I have a test that I use to determine whom I am going to hire, and the laws well, well, if that test has a discriminatory impact upon those groups, then something has to be done about it.

Senator HATCH. Right.

Mr. DAYS. Now, that is not the employer that you want to put behind bars. Yet, what is the solution? The solution has been that the *Griggs* test, the approach that has been developed based upon *Griggs*, and even to this day is acknowledged, at last in part by the Supreme Court, is an answer that we have to continue to use until we have dealt with those institutional systemic problems of discrimination.

Senator HATCH. I am a hundred percent behind the *Griggs* test, and I think most people in the Congress really are.

Mr. DAYS. That makes me feel great, Senator.

Senator HATCH. I know, but I am.

Mr. DAYS. The counting that I have done on the Supreme Court makes me less comfortable.

Senator HATCH. To make a long story short, I really do believe that—I am not just talking criminal sanctions. That would only be used in the most extreme cases, but actual monetary penalties and sanctions, which business people did pay attention to because that is the bottom line to them. And I think that there may be some way of utilizing that. That is why I am asking you to consider it. There may be some way of utilizing that that gets us off of this racial preference approach, that discriminates against others who feel that sting of discrimination too, in our desire to get rid of past discrimination and current discrimination really at the expense of innocent people. And that is all I am asking, help us on this, because you people deal with this every day. I do in a sense, but not nearly in the depths that you have to and that you have personally.

So I am asking for help here, and sincerely doing so.

Mr. EDLEY. Senator, I appreciate the invitation to write you and will do that.

Senator HATCH. Good.

Mr. EDLEY. What I hope that the committee will focus on, however, is: In the context of this nomination, it seems to me that the committee should be looking for two things in the nominee. One of those is an ability to engage in precisely the kind of pragmatic, conceptually rich exchange about issues of race relations that you and Professor Days have been engaged in for the last couple of minutes. But the other is to see whether or not the nominee is someone who will not act as a superlegislator, someone who will be respectful of the policy balances that are struck by you here in the Congress.

Now, on both of those two criteria, pragmatism, principled pragmatism on the one hand and respect for the congressional role on the other, it seems to me this nominee on the record—not on his character but on his record—is woefully lacking. The manner in which he has engaged in discussions of these race issues in the past has not been along the terms that we have been engaged in for the last several minutes. Instead it has been dogmatic, as I was discussing with Senator—

Senator HATCH. Well, I think those are interesting comments. I didn't mean to cut you off.

Mr. EDLEY. And with regard to the respect for the congressional role, his repeated view, in my estimation, in my assessment, extreme and outside the mainstream interpretation of title VII as it now stands on the books and of judicial precedents indicate, it seems to me, that he would not be a fair umpire in disputes between the branches, a fair umpire in interpreting congressional will. Everything in the record suggests that as a Supreme Court Justice he would seek to implement the policy preferences, the preferred interpretations of statute in the 14th amendment that he has been speaking for the last 9 years, that he would overturn *Santa Clara*, that he would overturn *Weber*, that he would overturn *Fullilove*. He hasn't said anything to the contrary.

The work that the Congress has been doing in the last couple of years on civil rights legislation, it seems to me, is quite at odds