Senator KENNEDY. Thank you very much.

We will follow a 10-minute rule for the questions. Some people argue that, despite Judge Thomas' record of hostility on civil rights, we should trust that if he is confirmed to the Supreme Court, he will be sensitive on civil rights. Given both his past record, statements, position, actions, and statements before the committee, what kind of weight should we give that kind of advice or guidance, Professor Days?

Mr. DAYS. The concerns that I expressed, Senator Kennedy, the administration and Judge Thomas have suggested that his humble beginnings will cause him to rise to the defense of those who are most in need of protection, but it seems to me that, given his world view and the examples that I just described, his impressive story of his journey from poverty to prominence is not assurance enough.

What strikes me about his discussion of the world is that there seem to be two periods in his life, his early experiences in Savannah and today, and there seems to be very little recognition of what had gone on between that. And when he talks about discrimination, he talks about his own experience. He rarely talks about the little people out in the street who are struggling to get jobs, trying to get their children into decent schools, trying to get an effective way to participate in the pollical process.

So, I do not think the record causes us any assurance that, when he gets into the Supreme Court, if he gets into the Supreme Court, he will do what is required of him.

One of the things that I think is important about the role, as Professor Lawrence indicated, about Justice Marshall and Justice Brennan, was that they represented those who are at the margins of the society not only in their opinions and not only in their dissents, but I am confident that in conferences, in the formal and informal discussions within the Court, they helped educate some of their colleagues to what was going on on the streets, what was happening down below the level that they perhaps had ever experienced in their own lives, and I do not have any confidence, given what I have read of Judge Thomas' writings and what I have heard him say in these hearings, that he can play that role or is willing to play that role.

I am sure that the other Justices will know about his life in Pin Point, GA, but whether they know about the lives of those kids in Savannah who were struggling to get a decent education is as big question.

Senator KENNEDY. Mr. Edley, Mr. Lawrence.

Mr. EDLEY. The only thing I would add, Senator, is that it seems to me it is just simply too romantic. I would like to believe in the possibility of redemption, but I would like some evidence. It seems to me it is too much to play Russian roulette with our rights or with the role of the Congress, the critical issues that I think are at stake here.

The background determinism that is suggested by the fact that he came from Pin Point and, therefore, will act in a special way on the Court seems to be counter-factual. That is not what the record demonstrates. What the record demonstrates is that, despite the diversity suggested by his experience, what has he made of that experience? And what he has made of that experience, it seems to me,

is harshly judgmental, and that is not the kind of representation certainly that I believe the Supreme Court needs.

Mr. LAWRENCE. I would only add, Senator Kennedy, that, to my mind, we must hold him responsible for the choices that he makes in his adult life, as I indicated, what he has done with this experience, and it seems to me quite clear from his record that those choices have been choices that would not lead us to believe that he would be sensitive to these very things that might have been so important an influence on him.

I think the other thing that I would be concerned about is that he has been so unforthcoming in these hearings, in his discussion of the particulars of his judicial philosophy and what that philosophy might be, that if this committee has any uncertainty as to whether his record or his beginnings really influence his life, in order to assure us of his direction, that we must require that he be considerably more forthcoming on the particulars of his judicial philosophy than he has been willing to be.

Senator KENNEDY. Let me ask also the panel, as we obviously have got limited time, about what our country would have looked like, if Judge Thomas' view had been the prevailing view in the Supreme Court, say, for the last 20 years.

Perhaps, Mr. Days, because, unfortunately, I know that light is going to go on, if you can also perhaps in your response try and help me to understand the distinction which Judge Thomas placed upon diversity for women, the *Santa Clara* case, diversity for women in the workplace, versus diversity at the university, which you are currently associated with at Yale, what that distinction is that he mentioned and how important, serious is it.

Finally, on the voting rights cases, you are familiar with his general criticisms of voting rights cases, this has been an area of particular interest, I know, to you and to the panel. I have difficulty in understanding the nature of the criticism, given both the Supreme Court holdings and the legislative action.

I think I have probably given you an awful on that, but, first of all, what the country would have looked like, if his view had been the prevailing view, generally, and then specifically, if you would address those two subquestions.

Mr. DAYS. Senator Kennedy, it gets back to my initial point. Over the last 20 years, the Supreme Court has demonstrated its greatness, it seems to me, when it understood the realities outside of the marble walls of the Supreme Court, when it understood that real people were going to be affected by its decisions and did not let labels, as such, blind them to the fact that there needed to be pragmatic and effective remedies to discrimination and exclusion.

I think that if Judge Thomas' approach had been the prevailing one during this period, we would have been left with slogans and with very superficial catch lines and buzz words to describe very complex situations.

For example, in school desegregation, the Supreme Court was not responding to an abstraction, when it voted in *Green* v. *New Kent County,* to require school boards to do more than just sit on their hands, when they had been involved in years, decades of intentional segregation. That was as pragmatic response, it was responsive to the realities.

Now, with respect to Judge Thomas' distinctions, I have to admit, Senator, that I have tried very hard to understand those distinctions and they continue to elude me, as well.

Yale Law School has had an affirmative action program for a number of years, and the idea is, given the fact that in this country there has been a systematic exclusion of minorities and women from legal education and other types of higher education, it was necessary for institutions to reach out and find qualified individuals and bring them in, because doing it by the numbers, putting them through a computer would not produce that result.

I think the situation is the same, when we talk about *Santa Clara County* and the *Johnson* case. Over 250 men were employed in that agency, and no woman had ever had a supervisor job. For us to think only in terms of the individual and not see that institutional context, it seems to me is to miss the reality that the law ought to respond to.

I think that Justice O'Connor was correct, when she talked about Justice Scalia's appearing to write on a clean slate in dealing with these issues. I think that is Judge Thomas' inclination, to write on clean slates, with no history, with no background, with no reality to guide his responses.

Now, with respect to the Voting Rights Act, he apparently agrees with all of the decisions that have been mentioned to him in these hearings, although he made a categorical statement of opposition to what was happening in the voting rights area.

He did say he was opposed to the effects test. I do not know exactly what he means by that, but you know, Senator Kennedy, that the Congress struggled with that issue and arrived at the position that, given the continuation of very deeply imbedded evidence of discrimination and vestiges of discrimination, it was necessary to provide some trigger to identify where minorities probably would continue to be excluded from the political process, and that was necessary in 1982, and I would expect that the Congress will look again to determine whether new responses are necessary to respond to new problems. I do not see Judge Thomas doing that.

Mr. LAWRENCE. I would add to this, Senator Kennedy, in response to the first part of your question, what would this look like, I recall being here in Washington for the argument of the *Bakke* case, that Professor Cox began his oral argument by pointing out that if the Supreme Court were to decide that voluntary affirmative action were improper on behalf of universities, that we would return to a time when our campuses were lily white, and I think that one of the changes might have been that Clarence Thomas would not have been at the Yale Law School, were his policies implemented by the Supreme Court at an earlier time.

The other thing that I want to point out that troubles me about the distinction between the education cases and the employment cases is that those of us who have litigated employment cases on the front line know that these cases, that even the voluntary programs are in response to deeply imbedded discriminatory practices and attitudes, that are not attitudes that people state purposely, but are, nonetheless, deeply imbedded in the attitudes in the institutions.