

employers are going to discriminate or are not going to do the things that are right for society, that we do have fines in extreme cases where it is highly justified, perhaps even criminal sanctions.

So I am going to look at that, and—look at him. He is already starting to gear up. You can just see it.

Senator KENNEDY. That was already in our civil rights bill, Senator, for intentional discrimination—

Senator HATCH. For intentional discrimination.

Senator KENNEDY. Particularly against women and also disability.

Senator HATCH. Yes, but we opposed the anti—

Senator KENNEDY. It is also in Senator Danforth's bill. So we will welcome you taking a good look at—

Senator HATCH. Well, as you know, I did.

Senator KENNEDY. I am not going to tell Senator Thurmond that you are over either.

Senator HATCH. All right. As you know—

Senator KENNEDY. I promise not to tell him because—

[Laughter.]

Senator HATCH. As you know, I did—

Senator THURMOND. I think you ought to call the time on everybody who goes over so we can get through the hearings.

Senator KENNEDY. Look over on your right there—

Senator HATCH. And just remember—

Senator THURMOND. When you are the chairman, you control it.

Senator KENNEDY. I did not with—

Senator HATCH. If I could just add one last thing.

Senator KENNEDY. I guess you will.

Senator HATCH. In the civil rights bill—it is only fair.

In the civil rights bill, I did oppose the preferential aspects, although I tried to resolve it myself and miserably failed. And I commend Senator Danforth for his efforts, and thus far it is still not quite there. But hopefully we will get that resolved. Maybe this is something we can put in that will resolve it, because it is not in there in the form that I think it should be in.

But I appreciated the discussion, and I appreciate having you here.

Senator KENNEDY. I just have one brief question, and then I will recognize Senator Specter and anyone else. Just one clarification and then a question.

As I understand it, Professor Days, you felt so strongly about Judge Thomas' nomination that you withdrew from participation as a reader for the ABA Committee that testified yesterday. Is that correct?

Mr. DAYS. That is correct.

Senator KENNEDY. Let me just ask this question and then a brief comment from all the panelists. Some people argue that it is important that a black American sit on the Supreme Court, and that if Judge Thomas is not confirmed, it is highly unlikely that President Bush will nominate another black American.

What weight do you give that in terms of the support for Justice Thomas? Professor Lawrence, maybe we will go the other way this time.

Mr. LAWRENCE. I think that I certainly would feel that it would be a tragedy if President Bush, because we found his first African-American nominee wanted, would not choose from among a wealth of other African-American nominees who we would find to be quite ready to support, even from his own party. So I think that would be a tragedy if this were used in this way.

At the same time, I also feel that, as retired Justice Thurgood Marshall admonished us upon his retirement, the important issue here is not the color of the nominee's skin in terms of a voice for our community, but the nature of that voice. So that, for me, I think that certainly I would hope that the President would find another nominee from within the African-American community, and there are many, many who I feel are extensively more experienced, extensively more qualified than Judge Thomas.

At the same time, I feel that if I am given the choice of a person who shares with me only the color of my skin and a person who will speak for the interest of my community, I will choose the latter.

Mr. EDLEY. I would paraphrase some responses to this that were given in a report issued by the Congressional Black Caucus Foundation recently. Diversity is important, and we do value the goal of having an African-American on the Court; but we do not value it above all else, and we don't value it above some of the principles that we have been discussing on this panel.

It seems to me that the choice is not properly understood as take this conservative black or a white conservative. It seems to me the choice is between taking this very conservative black now or waiting for another African-American or other minority of more mainstream views, if not appointed by Mr. Bush then appointed by the next President.

I think on the scale of decades in which the Supreme Court operates, we are willing to be patient still.

Senator KENNEDY. Dr. Days.

Mr. DAYS. Senator Kennedy, as I indicated at the outset, this has been a very difficult situation for, I think, most African-Americans and most people of good will in this country, because it would give me great pride to see another African-American sit on the Supreme Court; but to follow my colleagues on this panel, I want to see something below the skin, beneath the skin that convinces me that that person will be a voice and a vote for the people who are voiceless and voteless on the Supreme Court, particularly during this time on issues that are of critical importance to all of us and issues that will affect us for as long as certainly the people on this panel will be alive.

Senator KENNEDY. Thank you very much.

Senator SPECTER, I see we have been joined by Senator Simpson. I would be glad to recognize Senator Simpson, and then I think Senator SPECTER had a short—

Senator SIMPSON. Mr. Chairman, I thank you. I think I will defer to Senator SPECTER. He was here prior to my entrance, and I thank you for your courtesy.

Senator KENNEDY. Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.