

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

with the positions that this nominee has taken historically. And a close reading of the transcript does not dispel the concern that I have that as a Justice he would be an activist in every bit the same way that the current Supreme Court has been an activist, to the collective dismay of the Congress, on civil rights issues.

Senator HATCH. Well, what you seem to be saying is that if he is a liberal activist that is fine, but if he is a conservative activist that is not so good.

Mr. EDLEY. No, I—

Senator HATCH. Let me just say this: I have known Clarence Thomas for 10 years, and I have to say that it is interesting how two individuals can perceive a person so much differently.

For instance, I have no doubt in my mind—well, you will probably notice that the only affirmative action questions came from this side of the table. It started with Senator Specter, and I was the only other one to even raise the issue. Nobody on the other side raised the issue, to my recollection—although they may have. I may have been temporarily absent on a couple of occasions. But it was raised by us because we think it is an important issue.

I have known him for 10 years, and I have to say, No. 1, on the pragmatic issue, he understands this area very, very well. Probably as well as any of you do. In fact, I would submit he does. He has had wide experience, both in the private sector as a corporate lawyer, in the State, in all three branches of the Federal Government, and really almost 10 years in the EEOC which is one of the most complex, difficult agencies to run.

I think if anybody does understand these issues, it has got to be Clarence Thomas. And part of the reason that I understand him is we have had a dialog for 10 years. Now, part of it also because Mr. Days and I have had dialog on these issues as well, and I consider very few people his equal in this area.

So, No. 1, I think he does understand it, and I think he takes a position that is contrary to yours and I think which is supported by the vast majority of the American people. No. 2, with regard to his fairness, I want you to know that I know Clarence Thomas very well, and over the last 10 years, if I was to pick a person who would be super fair on race relations and equal rights and civil rights, he would be one of the people that would be at the top of the list, because I think he will be. And I do not think he will be an activist for conservative principles. I think he will be an activist in trying to make sure that individuals are granted rights and are kept free and that they have civil rights and equality.

So that has been my perception. Yours is different. And mine comes from very practical experience of working with him as chairman of the Labor Committee and also as ranking member since Senator Kennedy has become chairman on problems on a daily basis involving these very problems.

So I think we both share the same concerns. All four of us—the three of you and myself—and I think Clarence Thomas would like the same type of results. The question where we differ is what is mainstream in America and what isn't. And I submit that the vast majority of the American people would agree with Clarence Thomas on the issue of preferences.

Well, thank you. I appreciate you, I appreciate listening to you, and I will look forward to not only letters, but any time you are in town, if you would like to try and stop in and chat with me about these things, I would be more than happy to do so and get your advice on some of these suggestions we have made.

The CHAIRMAN. Good luck, gentlemen.

Let me make one point, if I may, speaking of pragmatics. I recognize there is a different constitutional test that is applied with regard to types of preferences that are offered. From a pragmatic standpoint, a preference is a preference is a preference to someone who gets bumped out because of preference. I continue to find it fascinating that we talk about preferences as they relate to affirmative action when they affect blacks and women and minorities, but we also talk about preferences when they relate to standing, status, and tests, for example, when applying to school. Your law school, Mr. Days, is one of the—probably the most difficult one to get into. I am not suggesting that it is the best but because of its small class size, it is the most competitive.

I was told by several law deans—whom I will not name, but I don't think anyone will dispute this—that the vast majority of the people who apply to your law school are qualified to do the work there. Most people who apply to your law school, Mr. Edley, are qualified to do so. They don't apply to Harvard and Yale unless they are already, in most cases, qualified.

The question is: How do you pick among the qualified?

Now, if, in fact, somebody's father and grandfather went to Yale and they get in, even though their marks aren't quite as good as, say, the son or daughter of someone who didn't go to Yale, that is a preference. The end result is that somebody didn't get to go to Yale because of a preference. The real impact is the same. But somehow we don't talk about those things.

Someone's father or mother contributes to a library to be constructed on campus, assuming they are already qualified, it does impact on whether or not they get into school. That is a preference. We do not call that a preference.

Now, granted, I recognize the constitutional distinction, but the impact is one that I hope we do not lose sight of when we are talking about preferences. A preference is a preference is a preference. Somebody gets excluded, because of the existence of a preference, and I find we get all upset and excited about preferences when they relate to minorities, but hardly ever get exercised when they are preferences as a consequence of social standing or any other aspect of the way this society functions. I am not criticizing, I am just pointing out.

At any rate, let me ask one question of Mr. Edley. I apologize, and I thank Senator Kennedy for chairing these hearings. I was unable to be here this morning. I have this one question.

If Justice Scalia's views in *Morrison*, the dissenting views were the majority view, not whether or not Clarence Thomas holds those views, not whether he subscribes to them, but this is an area of expertise you have, you possess, were Justice Scalia's views in *Morrison* to prevail on the Court, what would be the impact upon regulatory agencies that exist today in the Government?