

Senator SIMON. I thank all of you. Professor Ellison, as I listen to your testimony, you follow the same legal theories pretty much in your personal beliefs that Judge Thomas does. He has criticized, as you do, and I am quoting him, "race-conscious legal devices."

I am not asking you to say how Judge Thomas would rule now, but in your case. We have in Congress created special assistance for historically black colleges and universities. If Professor Ellison were Justice Ellison, would you rule those unconstitutional?

Mr. ELLISON. Not if they were race-neutral, not if the decision-making was a race-neutral process.

Senator SIMON. Aid for historically black colleges and universities is obviously not race-neutral.

Mr. ELLISON. Senator, you can have persons selected for different reasons. If the goal of the Senate is to bring in a geographical or ethnic or cultural mix of individuals and the Senate or the House of Representatives then goes out and selects those people, then what you have is a preference.

If the Senate, on the other hand, simply said we are going to reserve certain slots for minorities or for women without any other basis being considered, then I think that would be wrong.

Senator SIMON. Well, what we are saying is we are reserving certain money for historically black colleges and universities.

Mr. ELLISON. Are you asking me if that is constitutional?

Senator SIMON. I am asking Justice Ellison whether that is constitutional.

Mr. ELLISON. The only way I would be able to answer that question would be for you to tell me the basis upon which you made your decision. For instance, if you decide that black colleges play a certain role in society the same as similarly situated white colleges, whether they be in Appalachia or some other place, and that the Congress is delegating a certain amount of funds for those colleges, then I would have no problem constitutionally with the Congress doing that.

Senator SIMON. I think that is precisely what Congress does, but it is a race-conscious legal device; no question about that.

Mr. ELLISON. Well, you define it as race-conscious, Senator. It is only race-conscious if you decide that the only reason you are doing it is because of race. If you do it for some other public policy concern—that is, promoting the education of people wherever they tend to go to school, and the case with black colleges being that black students go to black schools primarily—then you send the money where the students are. Now, that is not race; it is just coincidence.

Senator SIMON. I suppose I had better stop this discussion here, but it seems to me that what you are doing is precisely what some of us feel we have to do, and that is to move away from the legal theories to see how we improve our society.

Dean Smith, you used a phrase about a liberty-maximizing approach to the church-state issue. Your assumption of a liberty-maximizing approach is to accept the *Lemon* criteria, I gather.

Mr. SMITH. Well, it is difficult to say that I accept the *Lemon* criteria, because I think Judge Thomas is right when he says that the way that test is interpreted can vary greatly. I think he said it effectively in his testimony, when he said the real question and what

we must face, whatever test is used, are issues about do we have something like strict separation which I think rarely can occur in reality, do we have some measure of accommodation and, if so, under what kind of test, or do we have some form of establishment, and he indicated his concern over issues like coercion—and I think that is something that must be examined in these cases.

He also indicated his concern over the notion of that State placing its imprimatur or endorsement on anything. I think whatever the test that is used, it needs to be a test that focuses on the liberty of individuals, including, as he pointed out and was sensitive to in his testimony, those individuals who feel coerced by the presence of religion in the public sector. So, I think he would be liberty maximizing on both sides, or so I would hope.

Senator SIMON. My time is expired. I gather you have written a fair amount in this field. The phrase "liberty-maximizing approach" is meaningless to me. You send me something that explains what you mean, if you will.

Mr. SMITH. I certainly would be pleased to do that, because I have something of the same title.

Senator SIMON. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

I want to take this opportunity to welcome you gentlemen here. This is one of the most distinguished panels I believe we have had thus far. You have expressed yourselves, you have endorsed Judge Clarence Thomas, and I think you have taken the right stand.

This committee has the greatest responsibility. The nine people on the Supreme Court are the most influential people in this Nation, next to the President. Some of them have gone on not only to interpreting the law, but making the law, which is a mistake, of course. So, it is very important that we put the right people on the Supreme Court.

From the view I made of Judge Clarence Thomas, I am convinced that he is a man of character, he is a man of integrity, he is a man of judicial temperament, he is a man of competence, and he should be confirmed.

Now, I would like to ask your opinion. I will just ask two questions. There is no use in taking a lot of time. We have had a lot of bickering on technicalities here and nit-picking over affirmative action and privacy and all of those things. It all boils down to this: In your opinion, is Judge Clarence Thomas qualified, by reason of integrity, judicial temperament, and competency to be on the Supreme Court of the United States? Those are the questions that the American Bar Association considers, integrity, professional competence, and judicial temperament, and I want to ask that question of you, and we will start with you, Mr. Broadus.

Mr. BROADUS. Yes, I believe he is qualified.

Senator THURMOND. Professor Ellison.

Mr. ELLISON. Yes, he is, Your Honor.

Senator THURMOND. Incidentally, you say you grew up in Rock Hills, SC?

Mr. ELLISON. That is correct.

Senator THURMOND. You were born there?

Mr. ELLISON. I was.

Senator SIMON. Don't hold that against him, Senator Thurmond.  
[Laughter.]

Senator THURMOND. I was just going to say that maybe that has got a lot to do with his great success, he is from South Carolina.

Mr. ELLISON. I don't doubt that, Senator.

Senator THURMOND. Dean Smith.

Mr. SMITH. I wholeheartedly concur, Senator.

Senator THURMOND. Mr. Rule.

Mr. RULE. Yes, Senator.

Senator THURMOND. I will ask this question now: Do you know of any reason that you heard advanced or that has come out while this committee should not confirm Judge Thomas and why the Senate should not confirm him, do you know of any reason for that?

Mr. BROADUS. No.

Mr. ELLISON. None.

Mr. SMITH. None.

Mr. RULE. No, Senator.

Senator THURMOND. Those are all the questions I have. I think that is the essence of the whole confirmation situation.

Thank you very much, Mr. Chairman.

Senator SIMON. Thank you, Senator Thurmond.

We thank all of you for being here.

Let me just add that no one on this committee has been more faithful in attendance than Senator Thurmond and, just as another member of the committee, I want you to know I appreciate it, Senator Thurmond.

Senator THURMOND. Well, you have done a good job yourself, being here more than the rest of them, and I commend you.

Senator SIMON. Our next panel, testifying in opposition to Judge Thomas' nomination, includes Dr. James J. Bishop, on behalf of Americans for Democratic Action; Patricia Williams, on behalf of the Center for Constitutional Rights; Haywood Burns, on behalf of Supreme Court Watch; and William B. Moffitt, on behalf of the National Center for Criminal Defense Lawyers.

Unless anyone has any reason to do otherwise, we will call on you first, Dr. Bishop.

Mr. BISHOP. Some of us have spoken earlier, Senator, and we thought that perhaps—

Senator SIMON. Let me add again, for all of you, we will enter your full statements in the record and we will limit you to the 5-minute rule.

Mr. BISHOP. We thought earlier that if Mr. Burns would go first, it would be helpful.

Senator SIMON. Fine, and let me just add, Mr. Burns, I have looked at your document and I am impressed by the scholarship of you and whoever else is involved in this.

Mr. BURNS. Thank you, Senator.

Senator SIMON. Mr. Burns.