

nesses. We appreciate very much your effort in being here, but we hope that you will be able to respond to what questions we have—limit your presentation to 5 minutes and then respond to questions. All of the statements will be included in their entirety in the record.

According to our committee, I guess we have to swear you in. Do you swear the testimony you will give is the truth, the whole truth, and nothing but the truth, so help you God.

Mr. EDLEY. I do.

Mr. LAWRENCE. I do.

Mr. DAYS. I do.

Senator KENNEDY. Mr. Days, welcome. I had the good opportunity to work with, I think all of you, on a number of different public policy issues, and we know of your continuing interest in all of these matters on the Constitution. So we are very fortunate to have you.

Professor Days.

**TESTIMONY OF DREW S. DAYS, PROFESSOR, YALE LAW SCHOOL; CHRISTOPHER EDLEY, JR., PROFESSOR, HARVARD LAW SCHOOL; AND CHARLES LAWRENCE, PROFESSOR, STANFORD LAW SCHOOL, ON BEHALF OF THE SOCIETY OF AMERICAN LAW TEACHERS**

Mr. DAYS. Senator Kennedy, thank you for allowing me to testify this morning before this committee during what we all recognize is a very important proceeding. I can assure you that I respect the solemn responsibility that the Senate must discharge in its constitutional advise-and-consent role, and that I offer my testimony in that spirit.

I think it has been very difficult, Senator Kennedy and Senator Thurmond, for many people to come to grips with how they would respond to the nomination of Clarence Thomas. And I certainly include myself in that category. It has not been easy coming to a determination.

But one of the things that I was concerned about—and I think that thinking was very much affected by the opening statements that many of you made at the beginning of these proceedings about the role of a Justice of the Supreme Court, about the role of the Supreme Court as a guardian of the individual. I think Senator Heflin talked about the Supreme Court being the people's court, dealing with real issues and real people. Senator Thurmond, you talked about its responsibility to administer justice, to be concerned about that standard.

What I tried to do was place Clarence Thomas in that context, as a guardian of individual rights, as a member of a people's court. And the more I did that, the more difficult I found it to envision Clarence Thomas as the next Associate Justice of the Supreme Court.

My conclusion was very much affected by two things: First, reading his writings and reviewing some of the speeches that he has given on issues of concern to me, and issues that I have dealt with for most of my professional life, what strikes me about his articles and his speeches is their detachment from history; his treatment of

these issues as though they arose only yesterday or, indeed, in some cases the day before he began to speak about the issues, rather than as a consequence of very long, difficult, and hard and painful efforts by a number of people, including civil rights groups, to deal with problems of discrimination and exclusion.

For example, on the issue of goals and timetables, he rejects goals and timetables as a technique for dealing with discrimination in employment. But as we both know, although Judge Thomas does not seem to recognize this in many of his public positions prior to becoming a judge on the court of appeals, goals and timetables were a response to years of recalcitrance and resistance by employers and unions to efforts by civil rights groups and individuals to get employment opportunities on a fair basis.

He talks about school desegregation and criticizes *Green v. New Kent County*, a very important case in 1968, as though it were a concoction of the Supreme Court and not a response to years of massive resistance by school districts all across the country. In fact, I found it somewhat interesting, when Judge Thomas talks about his experiences, that there is no reference to the fact that in his home town—Savannah, GA—for many years people were fighting just to get one black child into a desegregated school.

In fact, in Savannah, for some years until the courts intervened, black children were being given IQ tests and all kinds of psychological batteries to determine whether they were suitable to sit next to white children in schools that had been segregated in the past.

He also talks about questions of discrimination in other areas, voting rights particularly. And, once again, as you know, Senator Kennedy, for many years the Justice Department and other private individuals tried to deal with voting discrimination, without success. It was required for the Congress to come in and pass the Voting Rights Act of 1965. And when Congress extended the Voting Rights Act in 1970, and 1975, and most recently in 1982, it was responsive to real, not imagined, problems of discrimination in that area.

The second concern that I have about Judge Thomas is his role as a civil rights enforcement official in both the Reagan and Bush administrations. Judge Thomas has attempted to compartmentalize his life into what he was before he became a judge and the fact that he is a judge now. But the truth is he was occupying a position as a bureaucrat that was set up by Congress because of its view that people needed special protection. There needed to be an Office for Civil Rights in the Department of Education. There needed to be an EEOC to make certain that people who were systematic victims of discrimination could get some relief.

And I think the way he occupied those two positions—for example, in the title IX area in the Department of Education, not seeing the necessity for extending title IX to discrimination against women in education, and his treatment of his responsibilities in the EEOC—did not reflect the type of sensitivity to that special responsibility and role that he had in the Federal Government.

Thank you very much.

[The prepared statement of Mr. Days follows:]