

Professor Days, you said that Judge Thomas had asked naive questions. Were you referring to his pushing the penalties and the jail sentences on that?

Mr. DAYS. Yes. Among other things. I am not talking about that specifically, but certainly I could tell you why I think that has not been effective.

Senator SPECTER. Well, you had mentioned that in the context of the naive questions, and it seems to me that the penalties and jail sentences are a good idea. And when you say he hadn't suggested them to Congress, I don't know about that. We did know about them. He had written about them, and he testified that in the *Local 28 Union* case he had asked the solicitor to ask for contempt penalties in that case, so that he had moved forward in that direction.

Before you said that, I had planned on the first round to ask you a question which ties in with what you have just said. He has been known to rely upon prestigious authority for his positions against affirmative action because he quoted you. And that was what I had—

Mr. DAYS. Out of context, Senator.

Senator SPECTER. Excuse me?

Mr. DAYS. Out of context.

Senator SPECTER. Well, let's see about that. You don't know which quote I am going to pick. I have got two here. I could go either way.

Well, he quotes you in a quote, so let's see if it is out of context. One of the additional reasons—and when I talked to Professor Lawrence, I didn't by any means cite them all as to his reasons on affirmative action. And, again, I repeat, I think it is a great shame we didn't spend some real time on this question because that is his real area of expertise. And I think that is the real cutting edge of this issue in American civil rights on giving people a chance to get a job. If there is one question which deals with all of the problems in the African-American community, drugs, crime, and housing and advancement, it is jobs. And we have neglected it, and neglected it badly.

But this is one of the additional reasons that he advanced on the subject of his opposition to affirmative action. In the Yale Law and Policy Review, he says, "Moreover, the approval of goals and time-tables allows yet-undetected discriminators to create a numerical smokescreen for their past or present violations." Then he quotes in a footnote, "Professor Drew Days III, Assistant U.S. Attorney for Civil Rights during the Carter administration, believes that the affirmative action plan in *United Steelworkers v. Weber* was adopted by Kaiser Aluminum and Chemical Corp., at least in part to"—and then he quotes you—purports to quote you—"divert attention from the fact that it had long been engaged in discriminatory employment practices that violated Federal law." He cites a Yale Law Journal article of yours.

My first question to you—well, let's deal with the substance of it. Do you think that that is a valid argument that discriminators do divert attention away from their prior bad conduct by adopting affirmative action plans, which is the argument Judge Thomas makes?

Mr. DAYS. I don't think that that is a common situation. I was talking about a specific case, the *Weber* case, where I felt—indeed, argued as part of the Carter administration in that case that there was evidence of intentional discrimination and we should be careful not to let employers put forward affirmative action plans to hide more deep-seated discrimination and come up with remedies for that discrimination. So it wasn't either/or. My whole article is about tailored responses to situations of discrimination. And there may be some situations where it is necessary to have very hard numbers as a remedy; in others it may be recruitment, it may be spreading the word.

So I really think that that quotation was taken out of context, and that is why I said what I said. I don't think that it is a widespread practice of employers to use affirmative action plans to hide their intentional discrimination. I think what they are doing, with the encouragement of this Congress and, in the past, administrative agencies, is trying to deal with their own discrimination before the sheriff knocks on the door. And I think that is a commendable thing. But I think that they should respond to their history of discrimination and exclusion in a way that is tailored to their particular circumstances.

Senator SPECTER. Well, he doesn't say that you said it was a widespread practice. What he says you said was that it diverts attention from the fact that they had been long engaged in discriminatory employment practices that violated Federal law.

Mr. DAYS. Let me give you one example of how that is dealt with, Senator. There is something called the four-fifths rule that you are probably familiar with in employment discrimination. It suggests that if an employer has, let's say, minority or female employment that is 80 percent of what it should be in that particular work force, then Federal enforcement agencies may not go after that particular employer. But it is made very clear in the uniform guidelines that apparently Judge Thomas didn't like very well that the law does not protect employers who simply go by the numbers; that an individual who is excluded as a result of this approach has a right to go into court and get a remedy. And in other administrations, the Government has supported that type of effort.

So I think that to the extent that employers do what is described, there are remedies. That was not the issue I was dealing with in my article, and Judge Thomas plucked that out to make a point that apparently he was intent upon making.

Senator SPECTER. Well, OK. Even if he plucked it out, didn't you, in fact, say that it did divert attention from employers who had engaged in discriminatory practices to then adopt affirmative action plans?

Mr. DAYS. I did say that, and I think there may be situations that one has to be vigilant about, where an employer comes up and says "I have an affirmative action plan. I can't be a discriminator." And I think law enforcement officials and individuals and courts have to look beyond that.

Mr. LAWRENCE. Senator Specter—

Senator SPECTER. I won't pursue it further, but it seems to me a fair reading of this is that he did not quote you out of context. But I may be missing something.

Professor Lawrence.

Mr. LAWRENCE. I just wanted to add something because I think that this dialog, for me, gives us an opportunity to look at something that I think went unnoted in the discussion with Senator Hatch.

Senator SPECTER. Professor Lawrence, could I come back to you for that? I just want to finish up with Professor Days on one point. I would like to come back to you, if I may. Just one final question for Professor Days and then we will come back to you, Professor Lawrence.

Professor Days, do you think that Judge Thomas is intellectually and educationally qualified? And I ask you that because you are a professor at the Yale Law School, and we are about to have the dean of the Yale Law School testify in support of Professor Thomas. And we haven't given very much attention to that in the hearing, and I would be very interested in your evaluation as to whether he is intellectually and educationally qualified for the Supreme Court.

Mr. DAYS. My answer is, based upon the record as I have seen it, that he is qualified. Certainly having gone to Yale Law School, I could hardly be in a position to quarrel with that.

Senator SPECTER. Good.

Mr. DAYS. What I am interested in is how he used that education.

Senator SPECTER. On behalf of all the Yale Law School graduates.

Mr. DAYS. Indeed.

Senator SPECTER. Excuse me, Professor Lawrence. You had an addendum?

Mr. LAWRENCE. Right. The addendum I had, Senator Specter, was that I think that rather simplistic dichotomy that Judge Thomas and Senator Hatch have drawn between voluntary affirmative action and affirmative action in response to identified discrimination is troublesome for me and I think misleading. And I think it ties in with the comment that Professor Days made in this footnote, because I think that, as Professor Days noted, the Congress in these cases like *Weber* has identified systemwide, systematic discrimination in certain industries, and sees that, as a pragmatic matter, this discrimination cannot be ended. We do not have the resources to bring case after case, particularly individual case after case. And when we can encourage employers to identify their own past discrimination and enter into voluntary programs, that these voluntary programs are, indeed, remedial. They are remedial of and identify past discrimination by the employer who imposes it upon oneself.

Now, certainly there will be individual cases where the employer may try to hide behind that, and it is up to the Government enforcement agencies to identify those. But I think it very important to understand that voluntary affirmative action does not mean that there has not been past discrimination.

Senator SPECTER. Thank you very much, Professor Lawrence.

Just one comment in concluding, Mr. Chairman. The yellow light is on. I think it is important for people to focus—and it ought to be said explicitly—that when help is given for those who are discrimi-