

The CHAIRMAN. Thank you very much, Dean Griswold.

It is not often, if my recollection serves me well, that you have come before this committee to urge rejection of a nominee. As a matter of fact, the last very controversial nominee we had, you came to support that nominee, Judge Bork.

Mr. GRISWOLD. No, Senator, I did not appear—

The CHAIRMAN. You did not appear. I am mistaken.

Mr. GRISWOLD [continuing]. On either side with respect to Judge Bork.

The CHAIRMAN. Well, I am glad you have refreshed my recollection correctly. I am sorry, I assumed that you had.

The point I wish to get to—and I apologize for misrepresenting your position, I thought you had—concerns the issue of qualification. You measure and measured Judge Thomas against an array of giants in the legal profession and on the Court.

Let me ask you this question, if you would, because there has been assertions made by some on and off this committee that Judge Thomas is being held to a different standard, a higher standard, than others who have recently come before this committee. How would you rate, using the same test, comparing them to the giants that you mentioned, the second Justice Harlan and others, Justice Jackson, how would you rate Justice Souter, a person who had limited experience and practice, little governmental experience as a counsel to a Governor from an extremely small State, only about as small as mine, and had served only on the State court? How would you rate him relative to the men that you mentioned?

Mr. GRISWOLD. Senator, this is embarrassing. He was as former student of mine, and if there were deficiencies, perhaps I share some of the responsibility, but I would not have regarded him as a distinguished nominee.

The CHAIRMAN. The last question I will ask—and I do not say this to embarrass you, Dean Griswold, I say this to genuinely elicit information, because the charge has been made and will be made again, and that is why the record should reflect this, that not only you, but others who have raised questions—is whether you are limiting your high standard for admission to the Court to just Judge Thomas. Justice Kennedy, when he was before us, regardless of how he is performing now, but when he appeared before us at the time, Justice Kennedy did serve on the Federal bench for some time longer, how did he rate?

Mr. GRISWOLD. Well, he came much closer to it. He had an extensive period in the practice and about 10 years on the Ninth Circuit Court of Appeals, where he had a very sound and substantial record in dealing with the difficult Federal-type questions which come before the courts of appeals. I would have no hesitation in saying that Judge Kennedy was qualified, although I agree that it is hard to hold anyone up to the standard of Charles Evans Hughes and the second Justice Harlan.

The CHAIRMAN. I would point out—and I do not say this as a criticism of the print media, which is the source of most of your information—that there was, to put your mind at ease or raise your concern, whichever, there was extensive questioning of Judge Thomas on the matter of separation of powers, probably several hours, at least I know an hour, I think, of more detailed question-

ing. I will not characterize the extent of the answers, but there was a genuine attempt to deal with that issue, and I would say it is more likely he was forthcoming on that issue of separation of powers than, I would suggest, he was on other issues. We did discuss with him, as a matter of fact—I may be mistaken, but I think the Senator from Colorado, among others—discussed the principle of federalism and preemption with the Judge, as well. Again, I do not say that to be critical, but just to assure you that there is a good deal of testimony and even a greater deal of questioning on that subject.

Let me ask you, Mr. Brown, if I may, one last question: How do you deal with the Booker T. Washington-DuBois analogy that is always made with regard to the rights of black Americans, Afro-Americans? His views are constantly put in that context, that is, he is committed to civil rights. There is a sort of litany about Booker T. Washington and William DuBois that is brought out. I think an historically accurate litany, that there has been a split for over 200 years, on occasion, among and between black leaders, and that at one point or another throughout the history of the struggle of black Americans to reach equality in this Nation, there have been different tactics offered, with the same fundamental commitment, that is, to see to it that black Americans receive their fair share of what people often refer to as the American birthright, equality under the law.

I do not know whether you heard the eloquent testimony of the president of Lincoln University, which, as I understood her testimony, is basically that Judge Thomas may have a different view than the prevailing view of the establishment of the black leadership today, in particular the NAACP, and white civil rights leaders who come from that genre of leaders, but that does not mean he is not committed, and it does not mean blacks are any likely to be less well off than they would be under the present regime of conceptual approach to the Constitution? How do you respond to that?

MR. BROWN. First let me say, Senator, that the Lawyers Committee has only appeared here once to oppose a nominee to the Supreme Court. And we, like most groups, do not come to the conclusion that we have arrived at lightly.

I think that African-Americans, like all other groups, you will find differences of opinion in terms of the approach and what is the best way of getting to a reasonable and a valid objective. And we are no different in that regard than anyone else.

What we have looked at, though, is not so much the positions that are taken by people who are not considered to be candidates for the Supreme Court of the United States. I think we ought to make that distinction right up front.

What we are talking about here is an individual who, through his writings, through his—

THE CHAIRMAN. Let me just stop you there to make sure this is well—at least is understood by me, and if it is understood by me, then it is well taken here. That is, if DuBois were before this committee with his views, I assume in the general sense you would not be particularly excited about confirming him. Is that correct?

MR. BROWN. Well, I don't know whether we would be excited about confirming him to the Supreme Court, but clearly he would