

Senator KENNEDY. Well, I think Senator Biden has responded to that. He indicated he—we went late into the evening last evening, as you remember, Senator. Do you remember how late we went? We went late into the evening. And I am sure that the committee will go and have a full day.

I want to thank these witnesses for very responsive answers, and we have every intention of moving the hearing along.

Do you have any questions?

Senator THURMOND. Well, I just want to say, if you are going to say 5 minutes, make it 5 minutes. If you are going to make it 7 minutes, make it 7 minutes. You went over and they went over, too.

I thank you for your presence. I have no questions.

Senator KENNEDY. Senator Simon.

Senator SIMON. Yes. I want to thank the witnesses for their testimony.

One of my Senate colleagues said it is not clear where Judge Thomas will go, but up to this point, he has had to basically follow the Reagan administration line; now he is going to be a free person; I think because of his background he will be doing the right thing.

How would you respond to my colleague?

Mr. EDLEY. The problem that I have with the question, Senator, is that it contains an assumption with respect to the burden of proof and the burden of persuasion—the burden of production and the burden of persuasion here.

It seems to me the administration and the nominee have the responsibility of persuading you that the nominee ought to be confirmed. It is not, it seems to me, for you to guess as to whether or not the nominee has an acceptably mainstream constitutional vision. It is the purpose of the confirmation process, it seems to me, to detect what that constitutional vision is.

Now, background and character are not a substitute for constitutional vision. As I said in my remarks, the character, integrity did not prevent *Dred Scott* or *Plessy* or *Lochner*.

In the discussion yesterday, for example, that Senator Specter began over various national security matters—war powers, Korea, and so forth—I was looking for the constitutional vision. Not that the question can be simply answered, but some sense of what are the principles that will inform a Justice Thomas as he struggles with the imponderable issues that are put before a Supreme Court.

I saw no indication that he has a framework for approaching constitutional issues. I saw artful ways of largely evading the question. Eventually, after a belabored discussion, he reached out for the political question doctrine, but I don't understand why the political question doctrine ought to apply or how it would be evaluated. There is simply nothing there, and character cannot fill in the blanks.

Mr. DAYS. Let me add, Senator Simon, that in my earlier comments I pointed to his role as a civil rights enforcement officer in the Government. He was not just any bureaucrat. And I think that it is some indication of his values and the standards and his world view that he took such a harsh position in opposition to existing

law, as I indicated, solutions that the courts and administrative agencies had developed in response to real problems.

Now, there are debatable points in the voting rights area, in the school desegregation areas, and in the employment area. But I join Professor Edley in thinking that there is nothing that has come out of his writings and in his statements that suggests the framework that he would use for going about deciding some of these issues. There tends to be a very superficial and sloganistic approach that he demonstrates to these very complex and profound issues. And given this background, I have no reason to think, in light of that world view, that if he were to get on to the Court that that process would not continue. It has very little to do with the fact that he was one of the President's men. It has to do with how he views the world and what values and what mode of analysis he uses. And I think that mode of analysis is terribly flawed.

Mr. LAWRENCE. I would add, Senator Simon, that I think another thing to look at, when one says, well, after all, he was a member of the administration, he had to take the administration line, that I look to more than that. Certainly in his responsibilities as a member of the administration there are certain areas in which one might do this.

On the other hand, most of his writings, most of his speeches were outside of the context of his role as a member of that administration.

If we look at other individuals who have served in these roles, if we look, for instance, at William Coleman, who was a member of the Cabinet, and look at the difference between his life outside of his position as a Cabinet member, the positions that he took, they are vastly different in terms of his concern for the very kinds of issues that would touch those people at the beginning of Judge Thomas' life than Judge Thomas' activities have been. And I am concerned about those persons and those groups and those ideas that he chose to foster, even outside of the scope of his responsibilities in the administration.

Senator SIMON. Since we have three academicians here, let me pose a question because this really is part of a bigger package in terms of the administration. Several of us on this committee serve on another committee dealing with the whole education field, and the chairman of that committee is here.

We have seen in recent months the administration using the civil rights laws to question the legality of minority scholarships. We have the Department of Education using their legal authority in accrediting agencies—which we gave to them so that some of these fly-by-night schools could be eliminated from getting any Federal assistance—all of a sudden saying to one of the major accrediting agencies in this Nation, "For you to require diversity on college campuses is beyond your prerogative." In both cases, I don't think anyone in Congress ever dreamed of anything like this.

My question to you is: Do you believe that your universities legitimately should be asking for diversity and pushing for it? And, No. 2, is there a legitimate reason for accrediting agencies to be pushing for diversity on campuses?

Mr. LAWRENCE. I think, Senator, that the answer to both of those questions for me is yes. It is important to remember—and I think

too many people have forgotten—that we are not so far away from *Brown v. Board of Education*, that we have not reached a place where these institutions are meaningfully integrated, certainly not at the levels of faculty and administration and not even at the levels of our students. As I have pointed out, without this push, as you indicated, to make our campuses more reflective of the larger society, those campuses would once again be lily white to a large extent.

And I think that it is both important as a moral consideration, as a policy consideration, for universities to continue to advance programs that ensure the diversity of those student bodies and their faculties, and that it is extremely important for the Congress—and the administration should support the Congress in that effort—to take whatever steps are necessary to support that effort by funding and by the use of the sanction of denying funds to those universities who do not make those kinds of efforts in the correct way.

Mr. DAYS. I agree with Professor Lawrence. I would just add that it is important, in my estimation, for efforts in the diversity area and in the minority scholarship area to be thoughtful and tailored to various situations. Of course, Congress has to legislate for the entire Nation, but it seems to me that institutions that are trying to reach out to minorities and women and bring them in and make certain that minority children get real opportunity, should be sensitive to the realities of their communities, the needs of their institutions and so forth.

In other words, I am not in favor of boilerplate responses by institutions to some of these problems, but I think again we have to recognize that these responses—minority scholarships and the push for diversity—those responses are against a backdrop of years and years of exclusion. And as I indicated earlier, if we are going to change the situation, there has to be this extra effort. There has to be a reaching out. It can't be done, as some people have suggested, by looking at poverty, for example, because in raw numbers there are more poor nonminorities than minorities. So that is not the answer to the problem of how do we change the traditional exclusive and exclusionary nature of many of our institutions.

Senator SIMON. Professor Edley.

Mr. EDLEY. I would just underscore that the impulse to press for diversity in these institutions and through these various mechanisms is a very good one, is a very noble one. And the impulse can be implemented well or not so well. So I hope the committee understands that for all three of us, as we speak in favor of these diversity measures, that is not to say that all ways of going about the search for diversity would make sense.

I would not be for rigid quotas in the education context any more than I am for them in the context of Supreme Court nominees.

Senator SIMON. And no one is suggesting that.

Thank you, Mr. Chairman.

Senator KENNEDY. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Lawrence, beginning with you, you have identified Judge Thomas' nomination as political, which I think is true, but I think it is not surprising that the President would seek an African-