

I am quite confident that your predecessors in the Senate, when they confirmed Justices in the past, believed them, by and large, to be men and woman of high character, and yet we have had some very serious constitutional missteps in this country, and character did not prevent *Plessy v. Ferguson*.

So, while not excluding the importance of character and, indeed, the importance of diversity, it seems to me your fundamental task, respectfully, is to discern that constitutional vision, and it seems to me we look and we look and it is simply not to be found.

I disagree somewhat with your assertion, Senator, that his views with respect to affirmative action in racial issues, preferences and so forth, are reasonable. This reminds me very much of Professor Michelman's distinction last night between dogmatic and pragmatic.

In most of his writings and speeches, Judge Thomas only talks about the costs, and I agree with Professor and Lawrence and with you, that the costs identified by Judge Thomas are serious ones, but a pragmatic approach would also look at the benefits and would undertake willingly the difficult task of balance in particular circumstances how the costs and benefits compare.

A dogmatist, which Judge Thomas has shown himself to be in this area, would only focus on one side of the equation and would use that dogmatism, it seems to me, to interpret statutes and, indeed, interpret the Constitution in a way that is outside the mainstream. Character, acknowledging that he has a great character, it seems to me does not undo that difficulty for me.

Senator SPECTER. Thank you, Professor.

Mr. Chairman, I have a question for Professor Days, but I will wait for when my turn comes around, because the red light is on.

Senator KENNEDY. Senator Heflin.

Senator HEFLIN. I do not have any questions.

Senator KENNEDY. I just have one, but we will come back to Senator Hatch.

Senator HATCH. Do you want to ask yours first?

Senator KENNEDY. I recognize Senator Hatch.

Senator HATCH. Well, I would like to welcome you all here again.

Mr. Days, it is nice to see you again.

Mr. DAYS. It is good to see you.

Senator HATCH. I appreciated it when you served here and I have great respect for you, as you know, and for each of you.

I would like to ask the witnesses about affirmative action and the differences on this issue between Judge Thomas and others who might be called the traditional civil rights leadership.

Now, my purpose, in this limited timeframe in which we have so many more witnesses to follow, is not to argue the merits of the difference, but to try to identify the difference clearly. Now, would you all agree with me that Judge Thomas has supported that form of affirmative action aimed at increasing the numbers of minorities and women recruited into an employer's applicant pool, steps like advertising in the media that primarily reach minorities and women, recruiting at schools and colleges with primarily minority and women enrollment, and other similar steps? Would any of you disagree that he has at least done that?

Mr. DAYS. I followed his testimony and I know something about his practices, and certainly he has said here that he is in favor of those techniques, and I do not doubt that response.

Senator HATCH. In the EEOC, under his jurisdiction, they have been forcing business that have not been doing right to use those techniques.

Mr. DAYS. That is correct.

Senator HATCH. Do you disagree with that, Professor Edley?

Mr. EDLEY. No, I do not disagree, I just do not understand his position. I do not understand how he distinguishes his support for that form of affirmative action from his opposition to stronger forms of affirmative action.

Senator HATCH. You mean quotas—

Mr. EDLEY. I do not understand it, but I agree with your statement.

Senator HATCH. You means quotas and preferences?

Mr. EDLEY. No, I mean—no, I don't mean quotas and preferences. I mean more affirmative steps, I mean goals, flexible goals.

Senator HATCH. When I discussed it with him last week, he covered everything except quotas and preferences.

Let me go to you, Professor Lawrence. Do you agree that he basically has been for those type of approaches?

Mr. LAWRENCE. Yes, as far as I am able to determine from his testimony and earlier writings, that the limited approaches he—

Senator HATCH. I presume, from your testimony here today, you have examined his service at the EEOC?

Mr. LAWRENCE. Yes, I did.

Senator HATCH. And certainly, if it stands for anything, it stands for that, plus many, many other things. But under this form of affirmative action, once these steps are taken to widen the applicant pool, and then the actual decision to hire or promote is to be made without regard to race or gender on a nondiscriminatory basis, that has been his position.

I might add that another form of affirmative action goes beyond this. and tell me, if you will, if this is a fair summary: This form of affirmative action takes race and gender into account in the actual selections for training, hiring and promotion. Here the persons preferred for these selections would not have obtained them, but for their race or gender.

Now, this kind of affirmative action is sometimes justified as a voluntary effort to reach some level of racial and gender parity in a job, including, but not limited to jobs where there are few or no minorities or women. Now, here in these cases there is no finding of discrimination against the employer.

The other justification for this form of affirmative action is as a remedy, after a finding that the employer engaged in egregious, persistent, intentional discrimination. Now, the persons who lose out may have greater seniority, as in the *Weber* case, or are regarded as better qualified, even if only slightly so.

Now, Judge Thomas, it is clear from his testimony here and his speeches and efforts in the past, he has criticized this form of affirmative action, and I take it that many in the traditional civil rights leadership favor that type of affirmative action.

Now, is this difference the heart of the affirmative action disagreement with Judge Thomas by the traditional civil rights leadership in the country?

Would you say that, Drew?

Mr. DAYS. Senator Hatch, it is a pleasure to see you again.

Senator HATCH. Nice to see you.

Mr. DAYS. You asked a very complex question. I will try to respond as briefly as I can.

There are, if we want to do it roughly, two types of affirmative action. One is voluntary affirmative action and the other is remedial affirmative action.

Senator HATCH. And he seems to be totally for the voluntary type, except for this preference.

Mr. DAYS. Well, I don't want to speak for Professor Edley, but I think as a legal and constitutional matter, if for recruitment purposes one uses race or sex as a criterion, it really is, as a theoretical matter, just like a quota. Because you are using race to extend benefits to one group that you wouldn't extend to another.

Senator HATCH. So that you are leaving the decision as to hiring the person best qualified for the job to the individual employer, the promotion and other type decisions?

Mr. DAYS. I understand those practical considerations, but I just wanted to point out that at every point in the spectrum of affirmative action, from the softest recruitment affirmative action to what we call quotas—and I don't use that term pejoratively. I think in some instances, as the Supreme Court has said, quotas are the only way to go, and I am talking about the hiring of qualified people.

Senator HATCH. If I can interrupt you for just one second—

Senator KENNEDY. Can he finish?

Senator HATCH. He can finish. We are having a dialog.

Senator KENNEDY. Yes, but let me—I would like to hear it. That was a very interesting question. I would like Mr. Days' response to all of it.

Senator HATCH. Well, I would, too. I just wondered if at that particular point—do you mind if I interrupt you?

Mr. DAYS. No. That is quite all right.

Senator KENNEDY. Well, I mind if he interrupts, but that doesn't seem to make much difference here.

Senator HATCH. I don't care if you mind. [Laughter.] It makes no difference if you mind, as far as I am concerned.

The point I am making is, yes, that may be true, but there is a difference. In the other kind, the kind that we are talking about, it extends it to where there may be innocent persons who are discriminated against in what is called reverse discrimination.

Mr. DAYS. Right.

Senator HATCH. Where in the other situation, that isn't necessarily so. But go ahead.

Mr. DAYS. Well, I won't debate that point with you, Senator. I could, but I—I think that in the voluntary area, we face a situation where the Congress has effectively said for a number of years that we would like to encourage voluntary solutions to problems of discrimination in this society. So we don't want to incapacitate employers from reaching out and in some instances, given the nature of their situation—for example, if an employer looks at his or her

work force and sees that there are no blacks and there are no women in a community where there appear to be quite qualified pools of blacks and women, then I think Congress has indicated and the Supreme Court has indicated that that employer should reach out.

Now, the employer may use race or sex as part of the process, but I think that is consistent with title VII. If Judge Thomas disagrees with that—and I believe he does under those circumstances—

Senator HATCH. He does.

Mr. DAYS [continuing]. I think he is wrong and he is uninformed about the reality out there that Congress certainly understood when it enacted title VII.

Now, getting to the question of hiring and training and promotion, it seems to me that in remedying—and this gets back to something that Professor Edley said. In remedying discrimination, there may be instances where so-called innocent people will be harmed. But that is not something unusual in our society. We have, for example, veteran's preferences, and no one says when the veteran comes back, Look, you can't get your job back because someone who didn't go to fight has it now. We say, Sorry, you have that job, you who stayed around, you did a good job, but we have a higher societal value that we want to achieve, that we want to reach. And it seems to me that remedying discrimination in employment and in our society generally is something that has to have a higher value in this society than just ordinary considerations.

In fact, it seems to me that Judge Thomas at the EEOC really recognized this problem and responded to it, but has not admitted in his writings and has not admitted to this committee that he has done so. When he switched from so-called class action suits to individual suits, what he said through the EEOC was: If we find a person who has been discriminated against, we are going to do the best job we can to put that person in the job that he or she was entitled to.

Senator HATCH. Right.

Mr. DAYS. Without regard for who is in the position. And so we might have a male or a woman in that position, and as I read the EEOC statement, that person might be displaced. Not necessarily, but in doing that, Judge Thomas surprisingly was acting in conformity with what other administrative agencies have done and what the courts have done.

I don't think we have a situation where courts willy-nilly bump incumbent employees in order to remedy acts of discrimination. There are all kinds of techniques that are used.

My last comment, Senator, really picks up on something that Senator Specter asked, and that is the reasonableness of Judge Thomas' position. And I want to say that it is reasonable and one can discuss these, but what is surprising, and I think disappointing, about Judge Thomas' record is that he is asking questions that people who are totally uninformed ask. They are not wrong questions to ask, but he has been there. He has been working in the EEOC. He has seen these cases. And yet he comes up with the same questions that someone who is naive in this area would ask, and the answers that he gives are answers that have been already

thought of, they have been tried, and in some instances they just have not worked. And yet he continued as Chairman of the EEOC to promote these so-called alternatives.

For example, criminal penalties in employment cases. I don't think that is a very good idea, but I think the test is that he never once, to my knowledge, proposed to Congress through his own administration that efforts be made to amend title VII to provide that remedy.

Senator HATCH. Well, my time is about up, so let me just make these comments. The distinguishing feature, it seems to me, is that you did make the comment that in those cases where there has been discrimination, he has been bringing individual cases, and I think rightly so. But we are talking—the real distinction between Clarence Thomas and, say, traditional civil rights leadership, including yourself and the other two professors here, is that he doesn't believe anybody should be discriminated against through reverse discrimination if we have other means to resolve these problems. And he suggests that those means are that if we have a situation where there has been intentional discrimination, then we ought to have fines or we ought to have jail terms for that type of activity—which I think would get to the bottom of this a lot quicker than, say, allowing discrimination against a totally innocent third party, be that party of any particular race or gender.

So I think we both will admit there is a legitimate argument on both sides of this issue. It is very complex. It is very difficult. And I think he, along with you, choosing different paths, are trying to get to the problem of discrimination in our society in the very best way that he thinks possible. You disagree with him; he disagrees with you.

I happen to believe there is no justification to discriminate against anybody where you do not have intentional discrimination.

Mr. DAYS. Well, Senator, I don't think anybody in what I suppose Judge Thomas would call the orthodox camp in this regard wants to latch on to affirmative action remedies when there are other alternatives that would do the job. That has not been the inclination of civil rights organizations or people who are bringing these cases. I also think that there is room for debate in these areas.

But I think it is incumbent upon people who enter the debate to come to that debate informed, and certainly in some many respects Judge Thomas, even if he knows what is going on, has not revealed that publicly and he has not revealed it here in these hearings. And that is what makes me very uncomfortable.

Senator HATCH. I think those are good comments, except for one thing: I think everything he did at the EEOC does—I am going to challenge my good friend from Massachusetts. It may be that the way around this reverse discrimination approach, this discrimination against purely innocent people just because we have a desire to resolve some of the racial conflicts in America—and we all have that desire—that instead of discriminating against solely innocent people or completely innocent people who really have not participated in the discrimination and causing them reverse discrimination, maybe what Clarence Thomas has done for us here in these hearings is very valid. And maybe what Senator Kennedy and I and others need to do is to provide a change in title VII whereby if

employers are going to discriminate or are not going to do the things that are right for society, that we do have fines in extreme cases where it is highly justified, perhaps even criminal sanctions.

So I am going to look at that, and—look at him. He is already starting to gear up. You can just see it.

Senator KENNEDY. That was already in our civil rights bill, Senator, for intentional discrimination—

Senator HATCH. For intentional discrimination.

Senator KENNEDY. Particularly against women and also disability.

Senator HATCH. Yes, but we opposed the anti—

Senator KENNEDY. It is also in Senator Danforth's bill. So we will welcome you taking a good look at—

Senator HATCH. Well, as you know, I did.

Senator KENNEDY. I am not going to tell Senator Thurmond that you are over either.

Senator HATCH. All right. As you know—

Senator KENNEDY. I promise not to tell him because—

[Laughter.]

Senator HATCH. As you know, I did—

Senator THURMOND. I think you ought to call the time on everybody who goes over so we can get through the hearings.

Senator KENNEDY. Look over on your right there—

Senator HATCH. And just remember—

Senator THURMOND. When you are the chairman, you control it.

Senator KENNEDY. I did not with—

Senator HATCH. If I could just add one last thing.

Senator KENNEDY. I guess you will.

Senator HATCH. In the civil rights bill—it is only fair.

In the civil rights bill, I did oppose the preferential aspects, although I tried to resolve it myself and miserably failed. And I commend Senator Danforth for his efforts, and thus far it is still not quite there. But hopefully we will get that resolved. Maybe this is something we can put in that will resolve it, because it is not in there in the form that I think it should be in.

But I appreciated the discussion, and I appreciate having you here.

Senator KENNEDY. I just have one brief question, and then I will recognize Senator Specter and anyone else. Just one clarification and then a question.

As I understand it, Professor Days, you felt so strongly about Judge Thomas' nomination that you withdrew from participation as a reader for the ABA Committee that testified yesterday. Is that correct?

Mr. DAYS. That is correct.

Senator KENNEDY. Let me just ask this question and then a brief comment from all the panelists. Some people argue that it is important that a black American sit on the Supreme Court, and that if Judge Thomas is not confirmed, it is highly unlikely that President Bush will nominate another black American.

What weight do you give that in terms of the support for Justice Thomas? Professor Lawrence, maybe we will go the other way this time.