Well, thank you. I appreciate you, I appreciate listening to you, and I will look forward to not only letters, but any time you are in town, if you would like to try and stop in and chat with me about these things, I would be more than happy to do so and get your advice on some of these suggestions we have made.

The CHAIRMAN. Good luck, gentlemen.

Let me make one point, if I may, speaking of pragmatics. I recognize there is a different constitutional test that is applied with regard to types of preferences that are offered. From a pragmatic standpoint, a preference is a preference is a preference to someone who gets bumped out because of preference. I continue to find it fascinating that we talk about preferences as they relate to affirmative action when they affect blacks and women and minorities, but we also talk about preferences when they relate to standing, status, and tests, for example, when applying to school. Your law school, Mr. Days, is one of the—probably the most difficult one to get into. I am not suggesting that it is the best but because of its small class size, it is the most competitive.

I was told by several law deans—whom I will not name, but I don't think anyone will dispute this—that the vast majority of the people who apply to your law school are qualified to do the work there. Most people who apply to your law school, Mr. Edley, are qualified to do so. They don't apply to Harvard and Yale unless they are already, in most cases, qualified.

The question is: How do you pick among the qualified?

Now, if, in fact, somebody's father and grandfather went to Yale and they get in, even though their marks aren't quite as good as, say, the son or daughter of someone who didn't go to Yale, that is a preference. The end result is that somebody didn't get to go to Yale because of a preference. The real impact is the same. But somehow we don't talk about those things.

Someone's father or mother contributes to a library to be constructed on campus, assuming they are already qualified, it does impact on whether or not they get into school. That is a preference. We do not call that a preference.

Now, granted, I recognize the constitutional distinction, but the impact is one that I hope we do not lose sight of when we are talking about preferences. A preference is a preference is a preference. Somebody gets excluded, because of the existence of a preference, and I find we get all upset and excited about preferences when they relate to minorities, but hardly ever get exercised when they are preferences as a consequence of social standing or any other aspect of the way this society functions. I am not criticizing, I am just pointing out.

At any rate, let me ask one question of Mr. Edley. I apologize, and I thank Senator Kennedy for chairing these hearings. I was unable to be here this morning. I have this one question.

If Justice Scalia's views in *Morrison*, the dissenting views were the majority view, not whether or not Clarence Thomas holds those views, not whether he subscribes to them, but this is an area of expertise you have, you possess, were Justice Scalia's views in *Morrison* to prevail on the Court, what would be the impact upon regulatory agencies that exist today in the Government?

Mr. EDLEY. It is an excellent question, Senator, and it certainly, I think it quite obviously poses a serious challenge. It has certainly been a basic tenet in administrative law, since at least the ICC, that it is possible to create administrative agencies with some measure of independence from direct presidential control.

To assert now at this late hour that this administrative invention is an affront to individual liberties is not only wildly historical, but it really stands on its head many of our understandings about the separation of powers.

So, I think that if one is going to speak, if one is going to embrace the Scalia dissent in *Morrison* v. *Olson,* one must, certainly as a constitutional lawyer, be prepared to explain where is the stopping point in this line of analysis, if the President must have control.

The CHAIRMAN. That is my point. As I read the dissent—and I have read it and reread it and read it and reread it, read the critiques of it, read the praise of it—it seems to me inescapable—and please correct me if I am wrong—the conclusion seems inescapable that every major regulatory agency, if you apply the reasoning he applies in *Morrison* v. *Olson,* would fall on the grounds that his strict application of separation of powers, as he defines it—although it is not defined in the Constitution in that strict sense—would render every one of those major agencies in Government that do limit the ability of the President to fire without cause, to begin this practice, just that one point.

Mr. EDLEY. That is right, Senator. Now, I might also add that—well, the key point, it seems to me, is that you could try to salvage the principle that Scalia suggests by, for example, saying that this kind of criminal prosecution and investigation is in some sense at the core of the Executive power, and that——

The CHAIRMAN. So, it is unique in that sense, and, therefore——

Mr. EDLEY. That is right, and that other matters of Executive administration would not be treated the same way.

The CHAIRMAN. But at a minimum, you would have to distinguish in ways that, on its face, do not seem obvious.

Mr. EDLEY. And if I can drive the point home, Senator, at a minimum, I would hope that a nominee to the Court would be able to engage in a dialog with you about how the principle might be limited or what the implications of that principle would be.

If we expect a constitutional vision from a member of the Court, it seems to me you could expect no less than that in the confirmation process.

The CHAIRMAN. Gentlemen, I thank you very much. As you can tell, I quite frankly assumed that by this time you would be long gone. The fact that you are all here still testifying is evidence that this panel has great respect for your judgment, or at least feels an obligation to challenge your assertions, because of the respect given you by the community at large, so it is a compliment to you all.

I appreciate your taking the time, and making the effort to be here. I know from experience that, for law professors of standing and consequence to testify against a nominee to the Supreme Court is not seen as a wise career move so I thank you very much for having the strength of character to make your views known. As I have said, I have known Mr. Days for a long time, and we have

agreed and disagreed, but speaking of character, one could never question his, nor that of the other gentleman.

So, I thank you very much and appreciate your taking the time to be with us this morning.

Mr. EDLEY. Thank you, Senator.

The CHAIRMAN. Now, we will move to the next panel. Our next panel, Sister Mary Virgilius Reidy, former principal of a school attended by Judge Thomas, St. Benedict's, in Savannah, GA; Father John Brooks, president of Holy Cross College; Hon. John Gibbons, former chief justice of the third circuit, and now professor of law at Rutgers University; and Dr. Niara Sudarkasa, president of Lincoln University.

I appreciate you all being here. Dr. Sudarkasa does not know, but she and I are almost neighbors. Lincoln University is sort of in my backyard, or I am in their front yard.

I want to thank you all. Let me acknowledge ahead of time, Sister, when you are speaking, if I find myself involuntarily saying "yester" or "noster," it is purely that, involuntary. Father Brooks, if I say something to you that appears to be contentious, will you give me anticipatory absolution, and if you could write a little note to my brother-in-law, who is a graduate of your university, that I treated you nicely, regardless of how it goes, I would appreciate it.

With that, with all kidding aside, let me begin, I assume in the order that we began. Sister, welcome. It is nice to formally have you before us, and please begin with your testimony.

**STATEMENT OF A PANEL CONSISTING OF SISTER MARY VIRGILIUS REIDY, FORMER PRINCIPAL, ST. BENEDICT'S, SAVANNAH, GA; FATHER JOHN BROOKS, PRESIDENT, HOLY CROSS COLLEGE; HON. JOHN GIBBONS, PROFESSOR OF LAW, RUTGERS UNIVERSITY; AND NIARA SUDARKASA, PRESIDENT, LINCOLN UNIVERSITY**

Sister VIRGILIUS. Mr. Chairman and members of the committee, I would like to introduce myself. I am Sister Mary Virgilius Reidy, a member of the Institute of Missionary Franciscan Sisters.

We, the Missionary Franciscan Sisters have a long history among the black people of Georgia, a history of which we, the so-called "nigger nuns," are justifiably proud. Our foundress, a few years after establishing a first foundation in Minnesota in 1873, having heard of the poverty and oppression of the recently freed Negro in the South, moved courageously and quickly to open a training school for girls in Augusta, and one later in Savannah. After the turn of the century, we opened other schools in both cities and continued to educate black children at primary and high school levels, until laws concerning integration caused their closure.

From my lived experienced in Georgia for 13 years, during which time I first met Clarence Thomas as a fifth grade student, I can readily empathize with any youngster who grew up as a second-class citizens in the hard days of segregation.

Clarence Thomas was no stranger to the indignities suffered because of the Jim Crow laws. It was not easy to have to swim at a beach for blacks only, to be served food through a hatch at the back of a restaurant in the pouring rain, a restaurant only whites