

year. Such refund shall occur not later than 30 days after the date of the withdrawal or expulsion of the student.

#### SEC. 7. CIVIL RIGHTS.

(a) IN GENERAL.—An eligible institution participating in the scholarship program under this Act shall not discriminate on the basis of race, color, national origin, or sex in carrying out the provisions of this Act.

(b) APPLICABILITY AND CONSTRUCTION WITH RESPECT TO DISCRIMINATION ON THE BASIS OF SEX.—

(1) APPLICABILITY.—With respect to discrimination on the basis of sex, subsection (a) shall not apply to an eligible institution that is controlled by a religious organization if the application of subsection (a) is inconsistent with the religious tenets of the eligible institution.

(2) CONSTRUCTION.—With respect to discrimination on the basis of sex, nothing in subsection (a) shall be construed to require any person, or public or private entity to provide or pay, or to prohibit any such person or entity from providing or paying, for any benefit or service, including the use of facilities, related to an abortion. Nothing in the preceding sentence shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

(3) SINGLE-SEX SCHOOLS, CLASSES, OR ACTIVITIES.—With respect to discrimination on the basis of sex, nothing in subsection (a) shall be construed to prevent a parent from choosing, or an eligible institution from offering, a single-sex school, class, or activity.

(c) REVOCATION.—Notwithstanding section 3(f)(2)(D), if the Corporation determines that an eligible institution participating in the scholarship program under this Act is in violation of subsection (a), then the Corporation shall revoke such eligible institution's certification to participate in the program.

#### SEC. 8. CHILDREN WITH DISABILITIES.

Nothing in this Act shall affect the rights of students, or the obligations of the District of Columbia public schools, under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.).

#### SEC. 9. RULE OF CONSTRUCTION.

(a) IN GENERAL.—Nothing in this Act shall be construed to prevent any eligible institution which is operated by, supervised by, controlled by, or connected to, a religious organization from employing, admitting, or giving preference to, persons of the same religion to the extent determined by such institution to promote the religious purpose for which the eligible institution is established or maintained.

(b) SECTARIAN PURPOSES.—Nothing in this Act shall be construed to prohibit the use of funds made available under this Act for sectarian educational purposes, or to require an eligible institution to remove religious art, icons, scripture, or other symbols.

#### SEC. 10. REPORTING REQUIREMENTS.

(a) IN GENERAL.—An eligible institution participating in the scholarship program under this Act shall report to the Corporation not later than July 30 of each year in a manner prescribed by the Corporation, the following data:

(1) Student achievement in the eligible institution's programs.

(2) Grade advancement for scholarship students.

(3) Disciplinary actions taken with respect to scholarship students.

(4) Graduation, college admission test scores, and college admission rates, if applicable for scholarship students.

(5) Types and amounts of parental involvement required for all families of scholarship students.

(6) Student attendance for scholarship and non-scholarship students.

(7) General information on curriculum, programs, facilities, credentials of personnel, and disciplinary rules at the eligible institution.

(8) Number of scholarship students enrolled.

(9) Such other information as may be required by the Corporation for program appraisal.

(b) CONFIDENTIALITY.—No personal identifiers may be used in such report, except that the Corporation may request such personal identifiers solely for the purpose of verification.

#### SEC. 11. PROGRAM APPRAISAL.

(a) STUDY.—Not later than 4 years after the date of enactment of this Act, the Comptroller General shall enter into a contract, with an evaluating agency that has demonstrated experience in conducting evaluations, for an independent evaluation of the scholarship program under this Act, including—

(1) a comparison of test scores between scholarship students and District of Columbia public school students of similar backgrounds, taking into account the students' academic achievement at the time of the award of their scholarships and the students' family income level;

(2) a comparison of graduation rates between scholarship students and District of Columbia public school students of similar backgrounds, taking into account the students' academic achievement at the time of the award of their scholarships and the students' family income level;

(3) the satisfaction of parents of scholarship students with the scholarship program; and

(4) the impact of the scholarship program on the District of Columbia public schools, including changes in the public school enrollment, and any improvement in the academic performance of the public schools.

(b) PUBLIC REVIEW OF DATA.—All data gathered in the course of the study described in subsection (a) shall be made available to the public upon request except that no personal identifiers shall be made public.

(c) REPORT TO CONGRESS.—Not later than September 1 of each year, the Corporation shall submit a progress report on the scholarship program to the appropriate committees of Congress. Such report shall include a review of how scholarship funds were expended, including the initial academic achievement levels of students who have participated in the scholarship program.

(d) AUTHORIZATION.—There are authorized to be appropriated for the study described in subsection (a), \$250,000, which shall remain available until expended.

#### SEC. 12. JUDICIAL REVIEW.

(a) JURISDICTION.—

(1) IN GENERAL.—The United States District Court for the District of Columbia shall have jurisdiction in any action challenging the constitutionality of the scholarship program under this Act and shall provide expedited review.

(2) STANDING.—The parent of any student eligible to receive a scholarship under this Act shall have standing in an action challenging the constitutionality of the scholarship program under this Act.

(b) APPEAL TO SUPREME COURT.—Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States.

#### SEC. 13. EFFECTIVE DATE.

This Act shall be effective for each of the fiscal years 1998 through 2002.

#### SEC. 14. APPROPRIATION OF INITIAL FEDERAL CONTRIBUTION TO FUND.

There are hereby appropriated, out of any money in the Treasury not otherwise appropriated, \$7,000,000 for the District of Columbia Scholarship Fund.

Mr. STEVENS. Mr. President, is it proper at this time to move to reconsider the action taken by the Senate under this time agreement?

The PRESIDING OFFICER. Yes.

Mr. STEVENS. I move to reconsider the vote.

Mr. GREGG. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. FORD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SESSIONS. Mr. President, I ask unanimous consent the call of the quorum be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SESSIONS. I know there may be some agenda items that are necessary for other Members of the Senate to complete tonight. If so, I am happy to yield at an appropriate time.

#### BILL LANN LEE NOMINATION

Mr. SESSIONS. Mr. President, I rise to talk about the Bill Lann Lee nomination as Assistant Attorney General for Civil Rights. He is a good man, a lawyer of skill and experience. He is the son of an immigrant who has worked hard and done very well professionally and financially.

However, his nomination is in the Senate Judiciary Committee. Many of his positions are outside the mainstream of current legal thought, and I believe we need to reject that nomination. Regretfully, I intend to vote no when it comes up before the Judiciary Committee.

There has been some discussion and comments made that there have been scurrilous attacks against him. I just want to say that is not so. Certainly it is not so from the Senators who are members of the Judiciary Committee who have considered this nomination. Senator HATCH, the chairman of the Judiciary Committee, came to this body earlier this week. He made a very long, professional address, delineating his concerns about this nomination and why he had decided to vote no. He talked about legal issues, professional issues, positions of importance, and that is the basis of our concern—not personal attacks.

This position is a serious position. Mr. Lee has been treated respectfully. I have been at every hearing he has attended, and I have been at every hearing in which his nomination has been discussed. It has been discussed on a high level, according to the highest professional standards of this Senate. That is the way it should be. But his

position is an important position, so it is necessary that we ask important fundamental questions and that we get answers from him, and then once we get those answers, it is our responsibility, under the advice and consent responsibility of the Senate, to make a judgment as to how we should vote.

I want to say we must protect the civil rights of all Americans. We cannot, however, utilize civil rights laws as a tool to favor one group over another. We need to know what Mr. Lee thinks on what the issues are facing America. He is an advocate. We know that. I respect that. But we need to go beyond that. How deep is his advocacy? Can he take it away and can he be an objective and effective administrator of the civil rights policies of the U.S. Government, or does he maintain some of his advocacy views that are outside the mainstream of American legal thought?

That is why, I submit, he has been asked a number of questions and why we have taken this seriously.

This position has been vacant for 18 months. The President just recently submitted his nomination. Our committee has moved promptly to consider that nomination, and we brought it up last week for a vote. His supporters, perhaps fearing they did not have the votes, asked it be put over again for another week. I expect we will take that up Thursday of next week. Some have suggested that if there are not enough votes in the committee to confirm this nomination, that we ought to, regardless of that, send the nomination to the floor.

As a new member of the committee, I thought we had an interesting discussion about that. The Members who felt they were on the losing side raised quite a number of questions and earnestly argued for their position. Of course, this is a decision that we can make, and we can make any decision we choose, and they cited a number of historical examples why we should do that. Senator HATCH has been a member of the committee for a number of years and delineated the history. There has been no Executive nominee—and this nominee would be part of President Clinton's administration—reported out of that committee other than with a favorable recommendation since 1953.

In fact, a number of Democratic Senators on the committee were the very ones who just a few years ago voted not to send the nomination of Bill Lucas, an African-American who had been nominated by President Reagan to be civil rights chief—they voted not to send his nomination out. And they did the same with William Bradford Reynolds, another nominee of President Reagan, who was not sent forward, on their objection.

Therefore, they took the position—and I think one that is quite proper—if they so choose and if our committee so chooses, that the committee makes a recommendation as to whether or not a nomination should go forward.

Let me say there have been suggestions that scurrilous complaints and attacks have been made. I hate to hear that, but I say they have not come from our side. I say there have been some unwise and intemperate remarks by those who are supporting the Lee nomination in this U.S. Senate. They have, in effect, said, "Agree with us and you report out this nomination, or we will say you are against civil rights, we will accuse you of being against African-Americans, we will say you are against women, we will say you are against Chinese-Americans." They would, in fact, play the race card.

Sad to say, they have done just that.

Mr. President, let me share with Members of this body and the American people some of the things that were said by Senators in this body about those of us who have concerns about this nomination. The Democratic leader had a press conference earlier this week, and he said, "The far right doesn't want the Civil Rights Division filled because they don't want civil rights laws enforced."

Now, I submit that is a sad thing to say. That is an extreme thing to say, that the chairman of our committee, Senator ORRIN HATCH, who has worked hand in glove with this administration to confirm every nominee they sent forward for the Department of Justice, except this one. This is the only one he has objected to. It is extremely unfair to say that we don't want civil rights laws enforced because we want to question this nominee and we believe he is outside the mainstream of current legal thought.

Senator KENNEDY said, "It's wrong for Republicans to hold him hostage to their anti-civil-rights agenda." I'm for civil rights. I believe in that. The other Members do. We just need to talk about what we really mean by the words "civil rights." Do civil rights mean equality for all as we traditionally thought? Or do we go to a new definition of civil rights that means preferences and advantages to one group or another group because of the color of their skin? We are not against civil rights. Senator KENNEDY went on to say, "It would be an outrage for a small band of anti-civil-rights Republican Senators to bottle up this nominee. A vote against Bill Lee is a vote against civil rights," he said.

Another Senator, Senator BOXER said, "By opposing Bill Lee, I think the Republicans are sending a signal to every minority in this country, to every woman in this country, that, frankly, they don't believe in equal opportunity for everyone."

That hurts me, Mr. President, to hear a Member of this body make such an extreme statement as that. I really think it was unnecessary and goes beyond what ought to have been said. We can disagree whether or not this nominee ought to be confirmed. But I think we ought to all respect each other's views and opinions more than that. So I am concerned about that.

Another Senator, Senator MIKULSKI, was also aggressive in her remarks. This is how it was reported in the Washington Times the other morning on the front page:

Congressional Democrats, in a bid to save the nomination of a Chinese American as assistant Attorney General for Civil Rights, yesterday accused Republicans of racism.

"I don't think the United States Senate should be a forum for attacking Chinese Americans," said Senator Mikulski. "We don't want Bill Lann Lee to be the Anita Hill of 1997," she said.

This is what the paper reported:

Just after finishing leveling fire, the Maryland Democrat walked over to Senator Edward M. Kennedy and said under her breath, "I hated to do that, but we had no choice."

I am glad at least to know that she was reluctant to make those comments. I think she well should have been because I intend to take, and every member of this committee intends to take, this nominee seriously. We need to give him a fair hearing. He needs to be treated respectfully. But if his ideas are outside the mainstream of current American law, outside the direction we believe this Nation ought to go in civil rights, we have a responsibility to reject the nomination, and that is what I intend to do. I intend to fulfill my responsibility.

I want to say right now that I don't intend to be intimidated by attacks of that kind. I am going to do what I believe is right for this country.

Let me read you what some of the testimony was at hearings about this nominee.

Mr. Gerald A. Reynolds, an African-American, president of the Center for New Black Leadership, testified that he strongly opposed the nomination of Mr. Lee. He said:

If confirmed as Assistant Attorney General, Mr. Lee's background suggests that no democratic principle, controlling legal authority, nor legal standard will prevent him from furthering his particular ideological agenda.

Further he said:

For the last 30 years, traditional civil rights organizations have used civil rights laws as a weapon to extract benefits for racial minorities, no matter what the cost. Mr. Lee has spent most of his professional life doing that same thing.

Mr. Lee's legal defense fund sought to overcome the will of the citizens of California by persuading the ninth circuit to affirm Judge Henderson's ruling against Proposition 209.

I would argue that the legal defense fund's attempts to nullify Proposition 209 constitutes a direct assault upon our democratic principles. The legal defense fund's case against Proposition 209 rested on a thin reed. Basically, it rested upon two cases that are easily distinguishable from the facts surrounding Proposition 209.

I think we will talk about Proposition 209 in a minute. But just to point out, that is a civil rights initiative in California that said people should be treated alike regardless of the color of their skin, and it mirrored almost exactly the 14th amendment to the Constitution of the United States and the Civil Rights Act of 1964.

Mr. Reynolds goes further:

There are other examples. We can look to the lawsuit in Los Angeles. The Los Angeles County Metropolitan Transportation Authority decided to increase its bus fares and eliminate monthly bus passes. Mr. Lee's legal defense fund lawsuit alleged that the MTA action violated the civil rights laws and the Constitution because they had an adverse impact on minorities and poor people.

Mr. Reynolds continues:

We can debate whether it was a good idea to eliminate some of the benefits that the citizens of Los Angeles enjoyed, but I think it is a stretch to conclude that a policy decision such as raising a bus fare and eliminating bus routes and eliminating bus passes constitutes a constitutional violation.

He went on to note that:

The lesson that we should have walked away with is that race is a toxic circumstance, and that it is wrong to distribute benefits and burdens on the basis of race.

I questioned Mr. Reynolds and I asked him about busing and how people in the minority community feel about busing.

Mr. Reynolds replied:

I think it is clear that most parents are concerned with the quality of education that their children receive, and most parents, black and white, do not care. Well, actually they prefer that it be a neighborhood school. More importantly, I think time has shown that forced busing has been an unmitigated disaster.

Those were the words of Mr. Reynolds. I further asked him, had he seen cases like the Houston busing case, on which Mr. Bill Lann Lee was the attorney, and where lawyers, professional litigators, who were involved in these issues as a business, their livelihood, continued to pursue remedies that the children and the parents of the children do not want. Mr. Reynolds answered: "Yes."

Well, that was from Mr. Gerald Reynolds, an African-American citizen of this country, opposing Bill Lann Lee. Is he against African-Americans? I submit not. Is he against women? I submit not. Is he against Chinese-Americans? I submit not. Is he against civil rights? I say no. He's for civil rights. There is no doubt about that.

Let me read you this excerpt from the testimony, in June, of Charlene F. Loen. Like Mr. Lee, she is a Chinese-American, and she gave some of the most poignant testimony I have heard before our committee. She actually came to tears. She talked about her son, Patrick, who wanted to attend Lowell High School in San Francisco, but he was prevented from attending that public high school because of a racial quota set up under a Federal court consent decree in 1983. Under the consent decree, she said:

Hard work and good grades are not always enough. My son Patrick found out the hard way.

I am quoting again:

In 1994, Patrick applied to Lowell, with a test score of 58 out of a 69. That year, Lowell set the minimum score for Chinese students at 62. But then Lowell set the minimum scores for white students and other Asians at 58. Lowell set the minimum scores for blacks

and Hispanics lower than that. So Patrick could have gotten into Lowell if he were white, Japanese or black. He was rejected because he was Chinese American.

She went on:

Discipline, hard work, and academic achievement should be rewarded. Patrick studied hard, he got the grades, and he was rejected because he is of Chinese descent.

She went on:

The year Patrick was rejected, the San Francisco school district announced the opening of a new academic high school, Thurgood Marshall. I went to the school district to apply for Patrick. Right away, the person at the office asked me, "Is Patrick Chinese?" I said, "yes," and she said that the slots for the Chinese were already taken at Thurgood Marshall. I asked how could that be because the application period was not even over yet. She shrugged and said that that is just what the consent decree requires. Patrick also applied at three other high schools—Wallenberg, Washington, and Lincoln—and all three rejected him because they already had too many Chinese under the consent decree.

Those were her words. That is not the way, I submit, we ought to operate our Government today. She felt very strongly about that. And this is a Chinese-American testifying before our committee. In November, she said the Federal judge who approved the consent decree approved a payment by the State of California of over \$400,000 in legal fees to the NAACP, the legal defense fund, Bill Lee's unit, for opposing the lawsuit; in other words, the lawsuit that she had filed to try to get her son to be able to go to the school of her choice that he qualified to by objective standards.

A judge denied a motion to end the consent decree.

This is how she concluded her remarks.

Under the consent decree can you be denied admission to public school because of your race by treating people as members of racial groups rather than as individuals with the same rights before the law. The consent decree has dashed the hopes of children, denied my son and many others the right to opportunities they earned through hard work and diligence, condemned children to needless busing, prevented parents from being involved in their school and thereby holding school administrators accountable, and divided the people of San Francisco.

Divided the people of San Francisco.

This is the way things have been in San Francisco for the past 14 years.

Is Mrs. Loen against civil rights? I submit not. Is she against Chinese-Americans? No, she is not. She is a Chinese-American. Is she against women? No. Is she against minorities and civil rights? No.

Let me read this testimony before the Judiciary Committee's Subcommittee on the Constitution Federalism, and Property Rights chaired by Senator JOHN ASHCROFT. This is the statement of Senator MITCH MCCONNELL of Kentucky. He was talking about the "legally ordained" set-aside in Federal highway funding that mandated a certain percentage of the money be spent toward minority contractors.

This is what Senator MCCONNELL recounted:

Michael Cornelius recently spoke poignantly to this point before the Constitution Subcommittee in the House of Representatives. He explained that his firm [his business] was denied a Government contract under ISTEPA [a Federal program] even though his bid was \$3 million lower than his competitor's. Mr. Cornelius' bid was rejected because the Government felt that the bid "did not use enough minority- or women-owned subcontractors."

To comprehend the full extent of the Government's unconstitutional policy, you must understand that the Cornelius bid proposed to subcontract 26.5 percent of the work to firms owned by minorities and women, and, of course, the Government concluded that even that was inadequate.

This is the kind of matter that the *Adarand* decision dealt with, and the *Adarand* decision is a decision Mr. Lee says he believes is bad constitutional law. But that is the Supreme Court of the United States, which in the *Adarand* decision set forth standards that basically demonstrate that these kind of set-asides are not fair. They are in violation of the equal protection clause of the Constitution of the United States.

Mr. President, I would also like to quote one more witness who testified. This is Mrs. Sue Au Allen, a Chinese-American, the President of the United States-Pan American Chamber of Commerce, a national nonprofit organization representing Asian-American business men and women, and other professionals.

She is a very impressive lady, and was very direct in what she had to say about the Lee nomination. She said:

Mr. Lee's record gives me grave concern. Mr. Chairman. As a nation's top civil rights law enforcement official, he will advocate certain policies on race and gender issues that are contrary to constitutional guarantee of equal right and opportunity for all Americans and that will have a deleterious effect on racial and gender harmony in general and on the rights of many individuals in particular.

She went on to say:

When I look at the arguments he has made in the last 20 years to determine his understanding of what equal protection requires, I learned that he does not believe in civil rights for all. He believes in quotas, set-asides, and preferences based on race and gender. This is not my belief. The person who believes in civil rights for some based on race and gender is a wrong person for this job.

She continues:

And his organization's defense of continuing judicial control of the desegregation of Lowell High School in San Francisco for high admission standards required of students whose admissions are kept at 40 percent . . .

She particularly mentioned that. This was just a few weeks ago. It is the same comment made by Mrs. Loen that I read earlier about Lowell High School in San Francisco.

Mrs. Allen continues, describing the assault on Proposition 209, the California civil rights initiative. This is what she said:

To bolster the assault on 209, Mr. Lee's Legal Defense Fund recruited the Federal Government as his ally. First, he filed a complaint with the U.S. Department of Labor's Office of Federal Contract Compliance Program and said that the decline in minority admissions at the University of California violates affirmative action rules imposed on Federal contractors.

This is the university:

It argued that the lowered admissions reduced the number of minority graduate students that the university might hire in complying with Federal racial preference programs.

This pushes legal theory, I submit, beyond any reasonable standard. This was for Mr. Lee's use. He is a private attorney now. He gained the support of his allies in the Department of Labor.

Quoting Mrs. Allen:

Second, although no student had ever complained about discrimination because of Proposition 209 or the University of California regents' vote to end racial preferences in admissions, Mr. Lee's Legal Defense Fund filed a complaint with the United States Department of Education attributing to discrimination the decline in minority admissions and enrollment at select University of California campuses.

So, Mrs. Allen is making a significant point. What she was saying was that even though a private attorney, Mr. Lee has been adept at inducing the Federal Government to join with him in his legal theory.

If confirmed in this position, he will, in fact, be the Federal Government, and he will have 250 attorneys at his disposal to send out on whatever cause he might deem appropriate.

She goes on to say this:

A San Francisco school district has been under a consent decree since 1983 because the Legal Defense Fund brought a suit to desegregate the school.

That is, since 1983, they have had a Federal judge monitoring that school system, I submit Mr. President.

She continues:

Under that decree, Lowell High School, a magnet school, where competition for admission is fierce, operates with a 40-percent cap on Chinese students. In addition, the school sets higher admission standards for Chinese students than for any other race or ethnic group. Recently, several Chinese students and their parents challenged that consent decree. But the Legal Defense Fund . . .

Which I submit is Mr. Lee's organization which he headed in the west:

. . . the Legal Defense Fund has actively defended the continuing judicial control over the district in the name of desegregation, this despite the adverse impact on Chinese students who would otherwise be admitted to Lowell and against the strong opposition of their parents.

Chinese-American parents.

Mrs. Allen said:

When the Legal Defense attorney called the consent decree segregation by inclusion, to me it is desegregation by discrimination and exclusion. These examples raise a very important question. As head of civil rights enforcement, will Mr. Lee argue for continued forced busing?

This lady Sue Au Allen, president of the Pan American-Asian Chamber of Commerce—is she anti-Chinese? She is

of a Chinese descent. Is she antiwomen? Is she anticivil rights? Is she antiminority? I submit no.

Serious questions have been raised about this nominee. This use of scurrilous attacks has not been coming by those of us who are concerned about nominations. We are talking about real issues. We are talking about real cases. We are talking about the position of the U.S. Department of Justice and what kind of position it will be taking in these cases as the years go by.

Those who oppose him, however, have been intemperate at best in those remarks, and I hope and pray that they will evaluate that and be more responsive, be more respectful of their colleagues in the future.

Let me say this. Incivility is not acceptable. In my opinion, the Judiciary Committee over the past decade, over 20 years, 15 or 20 years, has gone through a series of confirmation battles that have not been healthy. They have not reflected well on the Senate, and they have not done well in analyzing whether or not people should be confirmed. I for one believe we ought to do better. I believe we ought to have a higher standard. I believe we ought to dig in seriously to the nominees and what they believe, their integrity, their ability and their legal philosophy. And I think we can do that and sometimes we are going to say no. We hate to. It is no fun to say no to a person who would like to have a position of prominence. But that is our position of responsibility and we must face up to it.

Let me just say this. Why is it that I am concerned with this nomination? There has been a lot of talk about the California civil rights initiative, Proposition 209, a very, very important event in American history.

Basically, what the people of California said is we do not believe in preferences. We, in effect, believe that in our State we want the law to be very similar and basically the same as what the 14th amendment to the Constitution of United States says. So they really encapsulated the 1964 Civil Rights Act, and the people of California passed that by a significant margin.

Mr. Lee's organization immediately joined in a challenge to that proposition and in fact filed a brief. It is one thing for him to oppose the proposition when the people are voting on it, to campaign about it, but he went further than that. His organization joined in the litigation to have Proposition 209, which says almost the same thing as the Constitution of the United States, declared unconstitutional, a perfectly legitimate referendum declared unconstitutional. And this is what the court of appeals, the Ninth Circuit Court of Appeals held when they considered Mr. Lee's opinion on Proposition 209.

They said this. This is a Federal court:

As a matter of conventional equal protection analysis —

Equal protection clause of the 14th amendment—

there is simply no doubt that Proposition 209 is constitutional.

Those are the words of the ninth circuit, the most liberal of the eleven circuits in this country. Everyone suggests that. That circuit flatly rejected Mr. Lee's position, saying there is no doubt about it. And what is troubling is here you have an attorney seeking to attack the will of the people by bringing in a challenge to the constitutionality of an act that had no basis.

The court continued to say:

After all, the goal of the 14th amendment, to which the Nation continues to aspire, is a political system in which race no longer matters. The 14th amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.

In other words, it does not require, the 14th amendment does not require preferences based on a person's race. It barely permits it. Only in the most extreme circumstances, only under the most strict scrutiny will a court ever approve an event in America in which we give a benefit to one person, thereby denying it to another simply because of their race.

So we have to be honest about this. It is time for us to talk about it seriously. We believe—I certainly do—in affirmative action, to go out and affirmatively solicit every person to apply, to seek out the best talent, to give people every chance to succeed, but we cannot tolerate quotas and set-asides and things of that nature.

Well, that is the important issue, Proposition 209, and Mr. Lee, when questioned about it, says it continues to be his position. And at the Civil Rights Division of the Department of Justice he would be prepared to file a brief on behalf of the United States of America in the Supreme Court to declare it unconstitutional. But he would not get that opportunity because the Supreme Court refused to even review the Ninth Circuit Court of Appeals ruling. The Supreme Court of the United States let it stand, denying certiorari, in effect saying this is a matter not even worth our time to consider because the law is so clear, agreeing totally with the ninth circuit's opinion.

Well, there is another matter of importance, and that is the Supreme Court decision, recent decision in the Adarand case. Adarand dealt with the set-asides in Federal law, that in effect tell Federal Government highway administrators that they must set aside a certain percentage of Federal contracts for minority contractors. I earlier read the comments of Mr. Cornelius who was the low bidder by \$3 million on one of those contracts and had an agreement to hire 25 percent of his subcontractors who would be minorities, and that was rejected because it was not generous enough. This is the kind of issue with which we are dealing.

Adarand said basically that that cannot continue. I would suggest that the Supreme Court is very seriously thinking about this issue, and I believe the

Supreme Court has looked down history in America and they have thought about it and they are saying we have got to stop, we have got to get out of this business of disbursing the goods and services of America based on what group you belong to. This is not the kind of principle upon which our country was founded, and that is what they meant by the Adarand decision, and that's why legal scholars consider it of thunderous importance, an extremely important decision.

OK. How does Mr. Lee feel about that? He opposed the Adarand decision. I asked him, does he still believe it is bad law? He says he believes it is bad law. He testified he does not agree with it. And he said something that is particularly troubling about it.

In his testimony, Mr. Lee stated that Adarand allowed affirmative action programs, which in this case means a kind of set-aside, in effect quotas. Sometimes affirmative action means affirmative outreach. Sometimes it means racial preferences and quotas. It just depends how it is used. But in this case we are talking about Adarand which had a set-aside in the law to favor some people. He said he thought they were legal under the Adarand decision if conducted in a limited and measured way.

That is not, Mr. President, what the Court in Adarand said. The Court in Adarand said that set-asides like this highway program are presumptively unconstitutional and can never be allowed except under the strictest of scrutiny. It is for the most significant of reasons that would justify these kinds of actions.

So what troubles me about that, and I know Senator HATCH raised it, is it suggests that as the top civil rights lawyer in this country he would not interpret Adarand the way the legal

scholars do but would interpret Adarand in a way that would justify him applying the resources of the 250 attorneys in the Department of Justice to undermine the Adarand decision the Supreme Court has rendered.

So let me ask, am I against civil rights to say that? Do I not believe in civil rights to say that I agree with the Supreme Court of the United States, I agree with the ninth circuit of the United States with regard to Proposition 209? I submit not. I believe in civil rights for everyone and I think most Americans do.

I wanted to quote from the words of Congressman Charles Canady who testified before the Subcommittee on Constitution, Federalism and Property Rights of the Judiciary Committee just a few days ago actually. And this is what he says, Congressman CANADY from Florida:

If we go back to 1961, when President KENNEDY promulgated the original Executive order on affirmative action, it was clear in that Executive order that steps were to be taken to reach out to all parts of the community to bring people into the pool of applicants for opportunities, but that people were to be treated without regard to their race. That specific language was used in the Executive order.

So I believe that Senator MCCONNELL's proposal encompassing a number of outreach elements is [what we should do].

Congressman CANADY continued:

Now, this system of set-asides [which was legally challenged in the Adarand decision] that is in place has been described as a remedial system. The problem with this system, however, is that it provides benefits to people who have not demonstrated that they are victims of any specific wrongdoing and it imposes cost on individuals who have been demonstrated to be guilty of no wrongdoing themselves.

Do we get that? It provides benefits to people who do not demonstrate that they have been harmed and it provides costs on those

who have not been demonstrated to have done anything wrong. Is it against civil rights to think such a policy is not good?

Congressman CANADY continued, I think saying it well:

I believe if we step back from this system [step back, like the Supreme Court is doing] which was put in place with the best of intentions [these set-asides and preferences and quotas] we have to conclude on the basis of our history as Americans that racial distinctions are inherently pernicious. It is fundamentally wrong [Congressman CANADY continued] for our country to divide this country into groups based on race and gender and then award benefits to some people because they belong to the right group and deny benefits to other people because they belong to the wrong group. That is inconsistent with our fundamental American values. It is inconsistent with the way our Government should treat its citizens.

He concluded:

I believe that the American people are becoming more and more weary of this failed system of race and gender preferences. They want to reaffirm the promise of America, that all Americans will be treated as individuals who are equal in the eyes of the law.

Well, I thought a good while about this. I think it was important to do so. I will just say this. We cannot end discrimination by practicing discrimination. That is fundamental. Make no mistake, when you benefit one person because of the color of his or her skin you are depriving another person because of the color of his or her skin. It is just that simple. It can be no other way. And the courts are agreeing with this. And Mr. Lee is outside the mainstream of judicial thought in America today. His opinion, opposing the most important Adarand decision, represents that he opposes the position of the Supreme Court of the United States. For that reason I feel compelled to vote "no" on his nomination.

I yield the floor.

## NOTICE

***Incomplete record of Senate proceedings. Except for concluding business which follows, today's Senate proceedings will be continued in the next issue of the Record.***

### ORDERS FOR MONDAY, NOVEMBER 10, 1997

Mr. SESSIONS. Mr. President, I ask unanimous consent that when the Senate completes its business today it stand in adjournment until the hour of 10 a.m. on Monday, November 10. I further ask that on Monday, immediately following the prayer, the routine requests through the morning hour be granted, and the Senate proceed to a period of morning business for not to extend beyond the hour of 10:30 a.m. with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

### PROGRAM

Mr. SESSIONS. Mr. President, tomorrow the Senate will be in a period of morning business until 10:30 a.m.

Following morning business, the Senate intends to consider and complete action on the following:

The fast-track bill, if passed by the House; additional motions, if necessary, with respect to the omnibus appropriations bills; and any Legislative or Executive Calendar items cleared for action.

Therefore, Members can anticipate rollcall votes during Monday's session of the Senate. However, I would not expect votes before 11 a.m.

Mr. FORD. Mr. President, as the acting leader laid out at the beginning, at 10:30, following morning business, what do you expect to go to next? Would

there be any time limitations on the fast-track? If it is here.

Mr. SESSIONS. I say to the distinguished Senator from Kentucky that, of course, it has to get here first.

Mr. FORD. I understand.

Mr. SESSIONS. If it does, this unanimous consent request says we will move to the fast-track bill, if passed by the House. Additional motions, if necessary, with respect to the omnibus appropriations bill, and any Legislative or Executive Calendar items cleared for action.

Mr. FORD. I am sure this has been agreed to. This has all been cleared.

Mr. SESSIONS. I thank the Senator from Kentucky.